Legal Responses to Victims of Criminal Exploitation

Summary of proceedings from 'The Criminal Exploitation of Victims of Modern Slavery: Comparing the Scottish and English & Welsh Responses' workshop, University of Edinburgh

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Project partners

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Edinburgh Law School, University of Edinburgh provided the workshop venue, as well as vital research assistance in planning the event. For more than 300 years, Edinburgh Law School has been rooted in the open and interdisciplinary traditions of Scots law. It is a fully comprehensive law school that effects civic change both locally and globally.

The Wilberforce Institute is a research institute at the University of Hull, committed to studying slavery and exploitation in all its forms, from historical to contemporary. Their mission is to produce high quality and innovative research on slavery, regarding history as a lens through which to study contemporary issues.

BIOGRAPHICAL NOTES

This document reflects a joint effort of the participants of the 'Criminal Exploitation of Victims of Modern Slavery: Comparing the Scottish and English & Welsh Responses' roundtable workshop that took place at the University of Edinburgh on 19 May 2025. The participants who contributed to this summary of proceedings include researchers in law, criminology, human trafficking, and social work, and practitioners including police officers, solicitors, and prosecutors.

This document was written by Grant Barclay and Alicia Heys based on contributions from all the workshop participants.

ABBREVIATIONS

CG Decision – Conclusive grounds decision (of the Single Competent Authority or Immigration Enforcement Competent Authority).

CPS – Crown Prosecution Service (England & Wales).

COPFS – Crown Office and Procurator Fiscal Service (Scotland).

MSHT – Modern slavery and human trafficking.

NRM – National Referral Mechanism.

RG Decision – Reasonable grounds decision (of the Single Competent Authority or Immigration Enforcement Competent Authority).

s45 defence – Statutory defence for victims of modern slavery who commit offences in England & Wales, created by the Modern Slavery Act 2015.

SCA – Single Competent Authority.

VTMS – Victim(s) of trafficking and modern slavery.

Overview

The origins of the current modern slavery and human trafficking (MSHT) law in the UK can be found in the Council of Europe Convention on Action Against Trafficking in Human Beings of May 2005, known as the Warsaw Convention[1]. Article 26 imposes an obligation on signatories to provide the possibility for national authorities not to impose penalties on victims of trafficking or modern slavery (VTMS) for their involvement in unlawful activities to the extent that they have been compelled to do so. This principle of non-punishment was expanded when the Warsaw Convention was adopted into EU law by Directive 2011/36. Article 8 of the Directive requires member states to take "necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties" on VTMS for their involvement in criminal activities which they were "compelled to commit as a direct consequence" of being trafficked.

The Directive therefore creates a more general principle of non-criminalisation for VTMS compelled to offend as a direct consequence of their MSHT experience[2]. This has led to various national legislative reforms in the constituent jurisdictions of the UK which each in some way address this more general principle by intervening before the sentencing stage of the criminal justice process. Legislation in England & Wales has created a bespoke defence under section 45 of the Modern Slavery Act 2015 (s45 defence). This defence applies to adults who have been compelled to commit an offence, and children who have acted as a direct consequence of being victims of modern slavery or human trafficking. Schedule 4 of the Modern Slavery Act 2015 excludes various offences from the ambit of the s45 defence. Thus, for example, the defence is inapplicable to charges of murder or manslaughter.

In contrast, section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 creates an obligation on the Lord Advocate, as head of Crown Office and Procurator Fiscal Service (COPFS) in Scotland, to issue and publish instructions for prosecutors regarding the prosecution of victims of human trafficking or exploitation who are alleged to have committed criminal offences. The instructions include both factors to be taken into account and steps to be taken by prosecutors when deciding whether to prosecute an individual who is, or appears to be, a victim of trafficking, slavery, forced servitude, or compulsory labour[3].

Both the Lord Advocate's Instructions in Scotland and the s45 defence in England & Wales feature similar tests for determining whether adults and children committed offences due to trafficking or exploitation. If an adult is alleged to have been a victim of criminal exploitation, the test applied is whether the adult was compelled to commit the offences, and whether that compulsion is directly attributable to being a victim of trafficking (Scotland) slavery (England & Wales) or exploitation[4]. In contrast, children must only have committed the offence as a direct consequence of being a VTMS[5]. Both jurisdictions discharge these tests to the standard of the balance of probabilities.

In Scotland then, the test for non-criminalisation of VTMS is carried out at a preliminary stage by prosecutors as part of their overall prosecution decision. To that end, the Lord Advocate's Instructions include detailed guidance for prosecutors about the various ways in which trafficking and exploitation can affect individuals, and 'additional vulnerabilities' that must be factored into their overall decision. In England & Wales, as with Scotland, the non-criminalisation test forms part of prosecutorial decision-making[6], but it is also considered as a substantive criminal law defence at trial[7]. The Scottish approach thus focuses on a strong presumption against prosecution providing the necessary safeguarding, whereas the emphasis in England & Wales has been on ensuring that, in addition to prosecutorial decision making, VTMS have an appropriate defence when their cases do reach court.

1. See also Office of the High Commissioner for Human Rights (OHCHR) 'Recommended Principles and Guidelines on Human Rights and Human Trafficking', Principle 7, Guidelines 2.5 & 4.5.

2. The language of the Directive is somewhat vague, particularly given that the tests adopted into national law separate compulsion and direct consequence, depending on whether the VTMS was an adult (compulsion) or a child (committed the act as a direct consequence). On this, see: B Hoshi, "The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law" (2013) 1(2) Groningen Journal of International Law 54, at 60.

3. Northern Ireland has also opted to create a statutory defence under s22 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

4. Scotland continues to use the language of trafficking, whereas England has adopted the language of 'modern slavery', evidenced by the respective titles of the relevant legislation in each jurisdiction.

5. In Scotland the test set out in the guidelines is slightly more expansive, including actions undertaken 'in the course of being' a victim of human trafficking or exploitation.

These different emphases have strongly influenced the approach taken by criminal justice actors in their respective jurisdictions, in terms of the types of tests and procedure being carried out when each actor becomes involved and starting with discovery by police. Ten years on from the introduction of national human trafficking and modern slavery legislation in the UK, it is vital to evaluate the approach taken by each jurisdiction to the non-criminalisation principle, both for their merits and shortcomings. Identifying and appropriately handling trafficking and modern slavery continually poses problems for law enforcement and other criminal justice actors across the UK, and thus it is important that each approach is evaluated and scrutinised to determine best practice, and indeed to discover ways to improve practice on both sides of the border. Ultimately, it is important that we understand how the law can and does influence criminal justice actors such as police and solicitors in their approach to engaging with highly vulnerable suspects like VTMS.

With the above aims in mind, this document provides a summary of a workshop which took place at the University of Edinburgh in May 2025, co-hosted by the Wilberforce Institute and funded by SIPR. The workshop was attended by 10 researchers and practitioners from Scotland and England & Wales, all working on aspects of modern slavery and human rights relevant to different aspects of the non-criminalisation principle. This group included police from Scotland & England & Wales, an English defence solicitor, members of the policy and engagement and policy advisor teams of COPFS in Scotland and Crown Prosecution Service (CPS) in England & Wales respectively, researchers working on issues of human trafficking, and social workers. The remainder of this document outlines the key points of discussion highlighted by the participants in a discussion broadly centred around the relative benefits and drawbacks of each jurisdiction's legal approach to recognising the non-criminalisation principle.

The workshop was organised around a number of key discussion points including: examining the key differences between the combination of prosecutorial decision-making and the s45 defence in England & Wales and the Lord Advocate's instructions for non-prosecution of victims of human trafficking in Scotland, in terms of how they deal with victims who commit offences; the strengths and weaknesses of each approach; what kinds of offences are committed by VTMS; the implications for victim identification, charging decisions, and police/legal cooperation; the practical and legal considerations of the victim/offender overlap; and development of key recommendations for best practice and policy. The following sections outline the key themes that were drawn out in the discussions within the workshop in the following order: the impact on safeguarding of VTMS; how adversarial and investigative legal processes each affect treatment of VTMS; the challenges presented for victim identification and the victim/offender overlap; age-related problems of identification; how a lack of institutional knowledge can operate as a barrier to effective protection; and the importance of coordination and cooperation between multiple agencies.

6. For further detail, see the Code for Crown Prosecutors setting out how prosecutors make decisions (https://www.cps.gov.uk/publication/code-crown-prosecutors), and the guidance provided to assist prosecutors in their decision-making in relation to modern slavery cases (https://www.cps.gov.uk/legal-guidance/modern-slavery-and-human-trafficking-offences-and-defences-including-section-45).

7. That broader assessment includes a 'reasonable person' test, common in law, which requires the court to ask whether a reasonable person in a similar situation with the same characteristics would have done as the accused did.

Executive summary

The 'Criminal Exploitation of Victims of Modern Slavery: Comparing the Scottish and English & Welsh Responses' workshop considered how different constituent jurisdictions in the United Kingdom, namely Scotland and England & Wales, handled criminal exploitation in their respective criminal justice systems, with particular focus on the non-punishment and non-criminalisation principles which have emerged from the international instruments which place obligations on these jurisdictions to protect VTMS from further victimisation in the criminal justice process.

The following conclusions were drawn from the workshop:

- The point at which decisions are made about pursuing criminal liability against VTMS has important practical implications, with earlier decision-making providing a better means of safeguarding VTMS. Some participants noted a potential over-reliance on the s45 defence in England & Wales, resulting in VTMS being subjected to the criminal justice process, which is inherently adversarial and not conducive to safeguarding victims or indeed providing best evidence. As a result, vital information on victims and their traffickers may be lost by treating VTMS as accused persons who are unable to claim special measures that would otherwise be open to vulnerable witnesses giving evidence. This vulnerability is exacerbated where the VTMS is a child. Decision making at trial also introduces the possibility of VTMS being held on remand, another safeguarding issue.
- Scotland's focus on providing instructions for prosecutors when making decisions on whether to prosecute allows for the possibility that VTMS do not enter the criminal justice system as an accused person, sidestepping those safeguarding issues entirely. Problems may arise where the test in the Lord Advocate's Instructions is not met, or the public interest requires prosecution of the individual. Where such individuals go to trial, they must rely on common law defence of coercion and necessity, the requirements for which are extremely narrow. Nevertheless, participants were hesitant about introducing an equivalent s45 defence in Scotland, given the potential for a drift towards prosecution as the preferred method of determining criminal liability.
- Concerns were raised around the 'reasonable person' standard of testing the necessity of an accused's offending under the s45 defence in England & Wales where cases did go to trial. The reasonable person test asks the trier of fact to consider if they would have acted as the accused did, had they been in the same circumstances with the same relevant characteristics. These characteristics can include cognitive impairment and/or other mental health disorders, as well as traumatic life experiences. Some participants therefore thought it was unrealistic to expect jurors to be able to effectively carry out this task. Others considered this not to be an issue unique to the s45 defence, given that reasonable person standards are used throughout criminal law. In Scotland, VTMS are assumed to be vulnerable, and prosecutors must consider any 'additional vulnerabilities' that may affect individuals before making a decision on prosecution under the Lord Advocate's Instructions.
- The National Referral Mechanism (NRM) can be problematic in both jurisdictions as a result of the long waiting times for decisions, particularly conclusive grounds (CG) decisions. As prosecutors in both jurisdictions must wait for such decisions before pursuing prosecution, this can leave VTMS in limbo for long periods, potentially on remand. Despite having to wait for a CG decision, in certain circumstances prosecutors can disagree with a positive decision and choose to prosecute (although they must set out their reasons for departing from the decision[8]), limiting the value of these decisions despite their power to stay prosecutions in their absence.
- The victim/offender overlap is an issue which institutions and agencies in both jurisdictions are aware of, but implementation of policies in relation to this are often lagging behind. The presence of a list of excluded offences from the s45 defence under Schedule 4 of the Modern Slavery Act 2015 may be seen to exacerbate this problem by legally labelling a person as an accused in some circumstances, while they may be seen as a victim in others. Common to both jurisdictions is the fact that the public interest in prosecuting may outweigh victim status, meaning that while victim status may be recognised, serious offences will still warrant prosecution.

8. On this, see Lord Advocate's Instructions: non-prosecution of victims of human trafficking (first published 24 May 2016, last updated 15 January 2024), para.28 specifically for Scotland. Available at: https://www.copfs.gov.uk/publications/lord-advocate-s-instructions-non-prosecution-of-victims-of-human-trafficking/ [accessed 21 July 2025]. See also VCL & AN v the United Kingdom (applications nos.77587/12 and 74603/12), 16 February 2021.

- Age verification continues to cause problems for state agencies, and it is of practical significance given that the test for victim status is different for adults and children. There is a concern that the importance of age might be overinflated in the process of considering the context and factors which lead to victimisation and exploitation (which is a much broader spectrum), but the law has entrenched age as an important factor for determining the appropriate disposals and treatment of adult and child VTMS and so this continues to be an important issue where multi-agency cooperation and information sharing are vital.
- Knowledge gaps persist and can result in barriers to victim protection. The reasons for such gaps are threefold: there is a lack of data; a lack of data gathering; and a lack of information sharing between agencies, particularly civil and criminal practice. These knowledge gaps can create uneven experiences for VTMS who come into contact with the criminal justice system. More could be done to increase data collection, and this ought to be a priority for all agencies as part of improving the VTMS experience and appropriately addressing their non-criminalisation. In Scotland, it is understood that there is an emerging trend of defence solicitors encouraging their clients to refuse consent to NRM referral, but it is not known why this is the case.
- The effects of knowledge gaps are most prominent at an individual level, with agents of institutions such as police lacking sufficient bespoke training, and/or displaying potential negative biases towards VTMS owing to preconceived notions about what makes a person a victim. This can create uneven experiences, with individual treatment of VTMS being based on who is allocated the case, and what kind of training they have undergone (both to help with eliminating biases and aid in victim identification).
- A close working relationship between agencies is key to effectively handling complex specialist issues like MSHT. In particular, the relationship between police and prosecutors is vitally important for victim identification. The Scottish approach lends itself to this kind of multi-agency cooperation, with COPFS working closely with Police Scotland and their National Human Trafficking Unit operating as a unitary police force and having established close working ties with support groups like TARA and Migrant Help. Not all agencies in England & Wales have the same level of working relationship, in part as a result of the lack of a unified police force. In both jurisdictions, the efficacy of multi-agency cooperation ultimately comes down to allocation of resources, with greater support providing the possibility for greater cooperation and handling of MSHT cases.

Impact on safeguarding

In both jurisdictions prosecutors must consider the presence of MSHT in their decisions to prosecute. This is a key aspect of the safeguarding expected under the non-criminalisation principle. As aforementioned, in Scotland the Lord Advocate sets out instructions for COPFS to follow. The instructions stipulate that a broad approach should be taken when considering whether an adult[9] victim of trafficking and exploitation has been compelled to commit an offence, and that all the relevant circumstances should be considered when assessing compulsion[10]. Where the test is made out, this creates a strong presumption against prosecution, but must be weighed against the public interest in prosecution. In England & Wales, if CPS believes that someone might be a VTMS they apply a four-stage test: determining whether MSHT has taken place; considering whether there is a claim of duress;[11] considering whether there is a s45 defence; and finally deciding whether it is in the public interest to prosecute. [12]

9. There is no requirement of compulsion for those aged under 18.

10. COPFS, Lord Advocate's instructions for non-prosecution of victims of human trafficking (24 May 2016, last updated 15 January 2024), para 18. (Accessed 10 June 2025). Available at: https://www.copfs.gov.uk/publications/lord-advocate-s-instructions-non-prosecution-of-victims-of-human-trafficking/html/.

11. The common law defence of duress in England & Wales is narrowly construed and requires, among other things, that the actor committed an offence in order to avoid an immediate threat of death or serious injury. Because of these strict requirements, it is very uncommon for this common law defence to be successful in cases of MSHT.

12. For more details, see the Code for Crown Prosecutors setting out how prosecutors make decisions (https://www.cps.gov.uk/publication/code-crown-prosecutors), and the guidance provided to assist prosecutors in their decision-making in relation to modern slavery cases (https://www.cps.gov.uk/legal-guidance/modern-slavery-and-human-trafficking-offences-and-defences-including-section-45).

The majority of participants commented positively on the Scottish approach with regards to safeguarding, which is to make decisions about a perpetrator's trafficking status before prosecutions were carried out, and on the basis of NRM results where possible. It was noted that all criminal justice actors in Scotland are very much aware of the potential for trafficking, and are trained to be on the lookout for vulnerabilities that may be signs of trafficking. Notably, trafficking considerations can arise at any point throughout the trial process, and where they do COPFS can discontinue proceedings if the test set out in the Lord Advocate's Instructions is met. That being said, Scottish participants raised concerns about lack of sufficient experience and training for police officers gathering information as being a barrier to effective safeguarding under this framework, a point which will be returned to in more depth below.

While there is supposed to be a similar level of (institutional) awareness of trafficking in England & Wales, in the experience of some English participants that this was not always the case. Indeed, the four-stage test to prosecution begins with a consideration of whether there has been MSHT, suggesting a similar approach to Scotland could be taken. Nevertheless, one attendee gave an example of a child in London being arrested and appearing in court to be charged the following day, despite displaying key red flags of exploitation. It was thought by these participants that the legislative framework in the English & Welsh system seemed to be orientated towards achieving prosecutions, with safeguarding being a collateral cost. To this end, there was a feeling that the aim of the system is to determine if an offence has been made out, with less focus on the relevance of victim status to the commission of that offence. It was thought by these participants that this might be a consequence of the legal framework, and particularly the nature of the test for determination of criminalisation manifesting as a legal defence which envisages an eventual trial. This point is discussed further in the next section.

Participants noted that problems associated with trial are accentuated when the accused in question is a child. It can be particularly problematic if matters of MSHT only end up being discussed at trial (a real possibility, as some participants told us) as it takes children a long time to establish the necessary trust to speak to authorities, and this may be lost (or indeed never achieved) if they have to speak in the hostile setting of court in their own defence. As a result, one participant noted that such children would often rather plead guilty than have to give evidence in court, particularly when they are being held on remand in prison and therefore believe they are already being punished. Indeed, in some cases this could result in a faster resolution as they would be immediately released after factoring in time served on remand.

Being held on remand is itself a potential safeguarding issue, and thus it is preferable for criminalisation to be determined before remand becomes a consideration (i.e. before a decision to prosecute). Indeed, some participants felt that by only engaging with the question of whether a person was in fact compelled to commit offences at the trial stage,[13] the topic of victimisation would not be appropriately addressed, and it would be unlikely that the perpetrators of the MSHT would be identified. Opportunities, both in terms of identifying and prosecuting traffickers and safeguarding victims, were therefore being missed.

Key summary: *While criminal justice actors in both jurisdictions are aware of potential MSHT, there was a shared view that the type of legal process utilised influences how each jurisdiction considers matters of safeguarding, with the Scottish sole focus on non-criminalisation through prosecutorial decision-making, perhaps counter-intuitively, being preferred to the English & Welsh dual focus on non-criminalisation through prosecutorial decision-making, and non-punishment through the s45 defence in those cases that did reach trial. It was thought by some participants that this was because the presence of the s45 defence encouraged decision-makers to start from the narrow perspective of whether an offence has been made out, and that a defence envisages an eventual trial. Given the presence of extensive prosecutorial guidelines from CPS, this should not necessarily be the case. The s45 defence does feature certain requirements - such as a reasonable person standard - which would need to be considered by prosecutors making their decision that are not present in the Scottish test for compulsion/direct consequence, as set out in the Lord Advocate's Instructions. This might suggest a narrowing of the test's applicability in English & welsh prosecution assessments (which are otherwise very similar in both jurisdictions), but more research would need to be done to assess this claim.*

Problems of safeguarding are particularly acute where the accused in question is a child, with participants noting how difficult it can be for children to speak in the hostile setting of a trial where cases do proceed. It was felt by some that the trial setting may result in the loss of vital information which could help identify and prosecute traffickers. Resort to trial also creates the possibility that a VTMS will be held on remand, which itself could be a safeguarding issue.

13. Or did so as a direct consequence, in the case of child victims.

Procedural approaches: adversarial vs investigative

It was thus clear from the discussion that an investigative approach was clearly preferred, and indeed better practice, than one which was more adversarial in nature when considering safeguarding. It was suggested by some that the presence of a defence in England & Wales may be influencing the prosecutorial decision-making process and promoting adversarialism to questions of compulsion/direct consequence in offending, to the detriment of potential VTMS. This was an unintended consequence of what was, at the time of enactment, thought to be a positive step forward for protecting VTMS through both the criminal process in prosecutorial decision-making, and the substantive criminal law through a defence.

Rather, it was thought by some participants that the influence of the defence was to create a linear process where the most impactful discussion of victim status would occur in an adversarial context in court. The approach taken in Scotland was therefore viewed by participants as potentially providing greater protection for VTMS. It was viewed as more holistic, encouraging lines of enquiry at every stage of the process leading up to a final decision on prosecution. Indeed, the key question in Scotland is whether prosecution should happen at all (although cases can always be discontinued at a later stage where new information comes to light leading to the test in the Instructions being met). While this should also be the case in England & Wales, given that prosecutors will consider the availability of the s45 defence when making a charging decision, some participants suggested there was a greater tendency for cases to proceed to trial where the defence could provide an acquittal if properly made out. Other participants contested the adversarial emphasis being portrayed in England & Wales, highlighting that prosecution could and would discontinue prosecutions where there were clear signs of MSHT.

THE CRIMINAL TRIAL AS A BARRIER TO PROTECTION

One important point to highlight in terms of safeguarding is that proceeding to trial confers 'accused person' status on potential VTMS, which in turn removes access to certain special measures which might otherwise help them to give their best evidence and account of victimisation in their defence. Given the nature of MSHT offending, and indeed to make out a s45 defence, accused persons are often required to take the stand and give evidence in court to support their status as a VTMS. For practical reasons based on the adversarial nature of the trial, accused persons are not entitled to the same special measures that would be granted to other vulnerable witnesses, i.e. giving pre-recorded evidence,[14] which can make the experience of giving evidence particularly traumatic and undermines their status as a potential victim. There was therefore agreement among participants that avoiding trial where possible was the preferred outcome for VTMS.

PROBLEMS ASSOCIATED WITH THE 'REASONABLE PERSON' TEST

Some participants raised concerns about the structure and requirements of the s45 defence, in terms of the demands it placed on ordinary people in a jury to determine what a 'reasonable person in a similar situation and with the same characteristics' as a potential VTMS would have done in the circumstances. Expecting the court to be able to consider a person's mental health state, life experience, and/or any cognitive impairment, along with the factual circumstances to draw a conclusion on whether there was a reasonable alternative available to the accused was described as 'unrealistic'. A reasonable person can make judgements about evidence which is presented to say this group of people targeted this person for these reasons, but it is very different (and indeed difficult) to ask them to decide if they would have taken the same course of action as that individual with those relevant characteristics, and under those circumstances. Other participants countered that juries must regularly deal with complex legal terms in their decision-making, and suggested it was incumbent on counsel to explain the s45 defence to a sufficient standard. In other words, the view was taken that any issues stemmed from the law in practice, rather than the law in the books. Scotland does not feature any reasonable person test in relation to the Lord Advocate's Instructions for prosecution of VTMS. However, some of the relevant characteristics to be considered are regarded as 'additional vulnerabilities', under the recognition that any VTMS is vulnerable by nature.

14. Very generally, the adversarial process requires the prosecution to make their case first, and the defence then respond to that case. Pre-recorded evidence from the accused given ahead of time would therefore be unable to respond to the prosecution case as it emerges at trial, rendering it unusable.

PROBLEMS ASSOCIATED WITH THE NATIONAL REFERRAL MECHANISM

The nature and practical operation of NRM referrals also seems to have an impact on the relative efficacy of utilising an adversarial vs investigatory approach to the question of criminality under MSHT.[15] Participants from both jurisdictions noted the long waiting times for conclusive grounds (CG) decisions, often more than a year. In both jurisdictions prosecutors are expected to wait for CG decisions from NRM referrals before prosecuting. This is in accordance with European jurisprudence from VCL and AN v The United Kingdom (Applications nos. 77587/12 and 74603/12) requiring prosecutors to have good reasons for departing from positive CG decisions. Strikingly, one participant gave an account of courts in England & Wales failing to respect the obligation to wait placed on CPS by noting that while youth courts will wait for NRM decisions, some judges in the Crown Court are less inclined to vacate future trial dates for outstanding CG decisions, thereby creating an uneven experience for VTMS, depending on in which court their trial is heard.

In Scotland, where prosecutors are contemplating summary procedure (broadly speaking, trial before a single judge) they are generally required to wait until a CG decision has been issued before a decision is made on whether proceedings should be raised. Cases under solemn procedure (trial by jury) often require COPFS to serve an indictment to preserve their position given statutory time limitations, but adjournments should then be sought until the CG decision is available, with accused persons either released on bail or held on remand and COPFS inviting the defence to apply for bail where there are reasonable grounds to believe the accused is a VTMS. Prosecutors will not accept a plea nor commence a trial under either procedure until the CG decision has been received, considered, and a final decision is made (in terms of the Instructions). This means that VTMS who consent to NRM referral cannot plead until the CG decision has been returned.

One further related issue is the fact that NRM decisions do not guarantee prosecutorial outcomes. While prosecutors both sides of the border must wait for a CG decision before prosecuting, they can disagree with a positive finding provided there are clear reasons consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention, or where consideration of the public interest requires prosecution. They must set out these reasons for disagreement, but they are only bound to wait for the decision. This makes long processing times all the more problematic, particularly where potential VTMS are waiting on remand for serious crimes that are more likely to be prosecuted under public interest considerations. In addition, when considering the s45 defence at trial, the English & Welsh courts have previously determined that CG decisions are insufficiently robust to constitute expert testimony, rendering them inadmissible as evidence the defendant can rely upon in making their defence at trial.[16]

Participants across the border positively noted the steps that had been taken to reduce the long waiting times under the NRM, with more staff being hired to handle referrals, and that an improvement had been experienced in relation to receiving reasonable grounds (RG) decisions, which were now more often being made within the listed timeframes.

SHOULD SCOTLAND ADOPT A BESPOKE TRAFFICKING DEFENCE?

Finally, participants discussed whether Scotland might introduce its own statutory defence, akin to the s45 defence in England & Wales. This was met with some hesitation, with some English & Welsh participants suggesting that the presence of the defence had made CPS more inclined to proceed with prosecution, despite their prosecutorial guidelines. There was therefore a concern raised that Scotland might drift towards a more adversarial position with a presumption towards proceeding with a prosecution and allowing the statutory defence to determine whether or not the accused person had been compelled or acted as a direct consequence of MSHT. However, it was queried that a defence might be helpful in Scotland where certain red flags were missed, or perhaps more likely where it had been determined that the test in the Lord Advocate's Instructions had not been met. In those circumstances, an accused person in Scotland could only rely on the common law defences of necessity and coercion to explain their experience, which are unlikely to be met in most MSHT cases. [17]VTMS would struggle to rely on coercion and necessity because they require an accused person to have acted under an immediate threat of death or serious injury. In the absence of this requirement, such defences would be withdrawn from consideration in the case. It ought to be

15. The NRM is a framework introduced by the UK government for identifying VTMS and ensuring they receive appropriate support. The Single Competent Authority (SCA) is part of the Home Office and is responsible for making decisions about whether individuals referred through the NRM are potential VTMS. They will initially provide positive or negative reasonable grounds decisions on individuals, followed by a positive or negative conclusive grounds decision. These decisions are important as they limit the ability to prosecute in both jurisdictions until a conclusive grounds decision has been made.

16. R v Brecani [2021] EWCA Crim 731.

borne in mind that COPFS make the decision to prosecute on a balance of competing interests (which includes weighing the accused's status as VTMS against the public interest in prosecuting). They therefore do not only have regard to the interest of safeguarding VTMS when making prosecutorial decisions.

Ultimately, it was the unanimous belief among participants that making the VTMS assessment as early as possible was best practice. In other words, making decisions about the influence of MSHT on criminality before embarking on prosecution was the best approach in terms of safeguarding and preventing re-victimisation of VTMS. This would be true even if a defence were introduced into Scotland, and indeed might point away from the inclusion of such a defence in case it were to jeopardise the efficacy of the Lord Advocate's Instructions. Some English & Welsh participants noted that when the s45 defence was originally enacted, it seemed shocking and backwards that Scotland did not have an equivalent defence. Now, having heard about how practice has evolved in this area in Scotland, those same participants thought that the inclusion of such a defence would not work, or might serve to detract from what was otherwise good policy and practice.

Key summary: *Some participants claim that the introduction of the s45 defence in England & Wales has had the unintended consequence of creating a more adversarial environment for VTMS, where the compelled nature of their conduct was viewed more as a challenge to be proved than an investigation to be considered. By delaying considerations of compulsion/direct consequence on criminality to the trial, the process would confer 'accused person' status on potential VTMS which would remove access to certain special measures which might help them give their best evidence. Participants were wary of introducing an equivalent of the s45 defence in Scotland, lest its process drift towards a more adversarial approach like England & Wales, but they ultimately agreed the problem was with the timing of the criminality assessment (in terms of compulsion), not necessarily the mechanisms in place. Consideration of compulsion/acting as a direct consequence at the earliest possible point was regarded as best practice, as the criminal law could be a blunt instrument. Participants also raised concerns in relation to the presence of a 'reasonable person' standard in the requirements for the s45 defence. It was felt by some that expecting triers of fact to be able to consider whether they would have done the same as the accused had they the same characteristics (which can include poor mental health, cognitive impairment, and traumatic life experiences) was unrealistic and could thus create barriers to justice. The Lord Advocate's Instructions in Scotland do not include any reasonable person test, and instead prosecutors are told to consider any 'additional vulnerabilities' that may be affecting an individual, given their inherent vulnerability as a VTMS.*

Participants also raised several concerns related to the use of NRM referrals in relation to the criminal justice process, centred around the long waiting periods for decisions which could leave VTMS in limbo (and potentially on remand) and create crisis points where multi-agency cooperation would be crucial to safeguard VTMS from further (re)traumatisation. Positive steps had been taken to reduce the time for NRM referral decisions, but ultimately while both jurisdictions must wait for these decisions, prosecutors can ultimately disagree with positive decisions in some circumstances and proceed with prosecution.

17. To date there are no examples from reported case law of such a defence being successful. Van Phan v HM Advocate [2018] HCJAC 7 suggested that the coercion defence was available where it applied, but the strict requirements of the defence have never been made out in such cases.

Challenges for victim identification & the victim/offender overlap

All participants agreed that there is a recognised overlap between victim and offender status in MSHT cases where the non-criminalisation principle is employed, but they noted that certain institutions, particularly with regards to individual police forces in England & Wales, were not following through on that understanding in their practice. Thus, while some police forces in England & Wales were aware of the s45 defence and their duty to consider whether it might apply, they would not always do so in practice. Participants noted a resistance from some officers to conduct further investigations, even where they are seen as best placed to do so given their history with the case.

PARTIAL LEGAL RECOGNITION PERPETUATES THE VICTIM/OFFENDER OVERLAP

Participants also noted the controversial nature of Schedule 4 to the s45 defence in England & Wales, which excludes a list of offences from the scope of the defence. This list is controversial as many of the offences excluded are ones commonly associated with MSHT. For example, the offence of carrying a firearm is excluded under Schedule 4, and yet it is a very common occurrence in MSHT cases. Likewise, offences of MSHT are also excluded from Schedule 4, even though it is common for VTMS to become perpetrators by recruiting others. In this sense, the victim/offender overlap may be ignored to the detriment of VTMS who would be regarded as offenders with no legally recognised defence. Participants considered the merits of blanket defences for VTMS, such as that offered in Trinidad and Tobago. There was no clear view on the overall merits of a blanket defence, but participants noted that the exclusionary nature of Schedule 4 was unprincipled.

Participants noted that, in the context of MSHT, young adults and children will often be involved in drug supply offences. Organised gangs increasingly use children to commit phone thefts, robberies, and burglaries, but predominantly this demographic is involved in drug supply/county lines cases. Even when the necessary evidence is in place (e.g., a positive NRM referral, expert and psychological reports, and/or third-party material), sometimes broader prosecutorial policies based on public interest, e.g. around the carrying of knives, may take precedence and lead to prosecution. Indeed, it was thought that the criminal law's focus on the accused in the present for the purposes of ascribing liability could act as a barrier to safeguarding for past exploitation. One participant gave an example of a VTMS in England & Wales being considered for prosecution, who was now in charge of a drugs line: there was a real possibility that their previous exploitation and lack of remuneration would be under-valued with focus instead placed on the level of capacity and voluntariness in the instant charge.

This sort of attitude could also have practical ramifications for those potential VTMS who were on the cusp of turning 18, suggesting that acute knowledge and understanding was required of prosecutors. Participants believed that in England & Wales VTMS who carried out offences as part of criminal exploitation while a child but were arrested on their 18th birthday would be subject to the adult test and would therefore need to demonstrate compulsion. In contrast, the Lord Advocate's Instructions in Scotland would require prosecutors to consider the age of the accused at the time of offending, thus applying the more expansive test for children where an accused had since turned 18.

Perhaps because the issue of VTMS criminalisation had to be explored at the investigative stage in Scotland (i.e., before a decision on prosecution was made) it was felt by some participants that the victim/offender dichotomy was less prominent in Scotland, with the idea being that if a prosecution was brought against a person, it would be on the basis that they would already have first been considered a potential VTMS and had this status ruled out. Of course, this does not include situations where an individual was assessed to be a VTMS but public interest considerations nevertheless demand prosecution (because, e.g., the offence committed was particularly severe). Unlike the position in England & Wales, and in lieu of an equivalent to Schedule 4, in Scotland

VTMS status applies to all offences committed. However, it was noted that there could be situations where the factual nexus suggested some offending might be too far removed from the trafficking experience, and thus there could be scenarios where there was a decision not to take action in respect of some of the charges, but to take action in others. In addition, and as noted above, there is a strong presumption in Scotland against prosecuting where trafficking is involved, but this can always be rebutted with consideration to the public interest, and this was more likely to happen where serious (violent and sexual) offences had been committed.

DUTY TO NOTIFY AS A TOOL FOR VICTIM IDENTIFICATION

One other issue raised in relation to victim identification was the fact that in Scotland there is no equivalent of the duty to notify (DTN) in England & Wales for VTMS who do not consent to NRM referral. COPFS record every case that goes to the National Lead Prosecutor on Human Trafficking (irrespective of NRM referrals), but this figure is limited to those reported to COPFS. Some participants were sceptical about how effective DTN was in England, suggesting that it was unclear what actions would be triggered from the Home Office. In any case, more specific data on the number of individuals refusing consent to NRM referral might help provide a more holistic view of the extent to which the criminal justice system is engaged with trafficking, were it to be made publicly available. There was a shared sentiment by participants that lack of data was a huge problem in tackling this issue and having data on the reasons that individuals refused consent to referral could be hugely valuable to improving engagement with the NRM and linked support services.

Key summary: *While the criminal justice system is aware of the overlap between victim and offender status in cases of criminal exploitation, there seems to be a gap between this knowledge and implementation in some instances, including in relation to policing practices. The law on the books could also be seen to exacerbate this issue in England & Wales, where some of the excluded offences from the s45 defence under Schedule 4 of the Modern Slavery Act 2015 were actually very common types of offending for VTMS. This created a dichotomy where VTMS could be legally protected for some actions, but not others.*

It is common for young adults and children to be involved in drug supply offences, but organised gangs are increasingly using young adults and children to commit phone thefts, robberies and burglaries. A common theme is that in both jurisdictions the prosecutor's public interest test may take precedence and lead to prosecution.[18]

There are also concerns by some participants that prosecutors might fail to consider historical accounts of exploitation, focusing on present circumstances of offending which might suggest a greater degree of individual agency in a VTMS and therefore point towards prosecution. This problem can be exacerbated where the VTMS has recently become an adult in England & Wales – even if their offending largely occurred during their childhood they will still be subject to the stricter compulsion test.

18. For example, if a defendant has recruited other victims, but has only done so due to being a victim themselves over a preceding timeframe, they may be deemed to have more agency than is reflective of reality.

Age-related problems of identification

One particular issue in relation to victim identification highlighted by participants is determining the age of an individual suspected to be a VTMS. This is important given that the legal test in both jurisdictions is different for adults and children, the former category requiring to have been compelled to commit the offences. Participants noted that police on both sides of the border often struggle with this issue and have to take individuals as being the age presented until an age assessment can be made, often by social workers as part of a Merton assessment (outside of obvious cases where the individual is undeniably older than they claim).

This means treating the individual as a child in the interim if this is how they present, even if officers do not believe their claim. Waiting times for Merton assessments mean that individuals in Scotland can be held in police stations for long periods of time, as there is nowhere else for these individuals to go. In contrast, in England & Wales individuals presenting as children will be placed in children's homes, with the possibility of being extracted again if they are eventually assessed to be an adult.

Participants noted that age is just one factor in a matrix of context-specific factors, and that possibly too much emphasis is placed on age as a determinative factor. On this view, the group agreed that institutions should focus more on holistic assessments of individuals and their capacities, rather than using age as a determinative factor. This assessment potentially feeds into problematic ideas of trafficking being a problem for children and not adults (see next section). A fixation on age-related concerns may also prevent victim identification as where, for example, an individual has lied about their age but are otherwise a genuine VTMS.

In any case, participants noted that from a policing perspective age-related concerns do cause issues in practice, in part because victim age dictates which safeguarding (and other) disposals will be available. Indeed, it was also noted that individuals may present in different ways, depending on the organised criminal gangs involved and their nationalities. The example was given of Albanian nationals claiming to be children in order to avoid deportation, whereas Vietnamese nationals may claim to be adults in order to be held in asylum hotels rather than foster care where there is more supervision and control. It may therefore be difficult to properly assess, and there is a risk of erroneously assuming an individual's age based on experiential stereotyping.

Key summary: *There are problems associated with determining the age of VTMS, and this has practical implications for how the VTMS can be dealt with in the criminal justice system. This problem can be exacerbated where different agencies do not agree on the age of the VTMS, although ultimately it is for social workers to determine as part of a Merton assessment. There is a worry that the focus on age is in some ways arbitrary, serving to detract from the complete picture of exploitation and vulnerability experienced by the individual, and it ought to be considered as part of a broader factual nexus as far as possible. Nevertheless, age-related concerns continue to cause issues in practice and practitioners should be careful to make every assessment on an individual basis to avoid stereotyping.*

Knowledge gaps and barriers to protection

UNEVEN EXPERIENCES FOR VICTIMS GOING THROUGH THE SYSTEM

Participants noted that practitioners in England & Wales almost immediately encountered problems with the Modern Slavery Act 2015 once enacted, noting that it was unable to deal with the complexity of most MSHT cases.

Particular mention was made to gaps of knowledge and understanding between different legal practices, with civil practitioners involved in safeguarding being unfamiliar with the criminal justice processes and visa-versa. This was compounded by a lack of data gathering. In England & Wales there is no quantitative data on the number of s45 defences being lodged.[19] It was suggested that there ought to be a specialist court (particularly for children), analogous to family drug and alcohol courts which aim to provide solutions for trafficked persons at risk. This would help to position these persons as victims identifying their perpetrators, and not as accused persons giving evidence in their defence.

Limited data was available in Scotland, extending only to statistics that between 2016 and 2024, there were 484 cases involving potential victims of trafficking, with proceedings discontinued in 160 of those cases.[20] Participants were not aware of any other available data. Anecdotally, some participants in Scotland had been made aware by NGOs of a worrying trend that defence solicitors were advising adult clients to refuse consent for NRM referrals. It was unclear why this was the case, although there was some suggestion that refusing consent for a referral would avoid delays as COPFS are bound to wait for an CG decision, and thus refusing consent to referral might therefore be used in conjunction with a guilty plea to end the criminal process as soon as possible. In some cases, this would result in the individual walking free, after factoring in time served on remand in sentencing.

Potential issues were raised in England & Wales around the safeguarding of British nationals, as compared with foreign nationals, who are potential VTMS. British nationals are the responsibility of local authorities where an NRM is raised, but uneven resources and inconsistent approaches meant that victim experiences could be very different, compounded by the fact that were concerns over social care practitioners' understandings of what an NRM referral is. There is a perception that using the NRM is only helpful if you are trying to utilise the s45 defence. To that end, the NRM was viewed by some participants as a 'tick-box' exercise. Some participants spoke of previously believing that a referral would open the door to various support, but the reality being the opposite. Reference was made to potential VTMS being placed in asylum hotels with no other support, where the onus is often on the VTMS themselves to pursue additional help.

19. Some data on modern slavery offences is, however, available. In the full year ending December 2024, MoJ statistics note that 142 defendants were proceeded against, 47 were convicted, and 45 sentenced for modern slavery offences. The average custodial sentence for this time frame was 57 months: Ministry of Justice (2025) Criminal Justice System Statistics Quarterly: December 2024 Outcomes by Offence Data Tool. The CPS applies a modern slavery 'flag' to cases that involve modern slavery and may have been prosecuted under the MSA or other legislation. In the year ending December 2024, the CPS recorded 454 prosecutions for modern slavery-flagged crimes in England and Wales, of which 353 (78%) resulted in a conviction: Crown Prosecution Service (2025) ' Prosecution Crime Type Data Tables Q3 24-25' Data Table 5.1. Some of the differences between the CPS and MoJ statistics relate to the fact that the CPS statistics are of prosecutions where the case includes a flag for modern slavery but will not necessarily rely on the modern slavery legislation. Finally, as of June 2025, there were 1,661 investigations underway in UK policing that primarily tackled "criminal exploitation (county lines/cannabis cultivation/ fraud/ theft)": Modern Slavery and Organised Immigration Crime Unit (July 2025) 'Overview of Live Modern Slavery Investigations in UK Policing June 2025'. This represented 60% of all live police investigations into modern slavery and human trafficking. This published data is not disaggregated by the age of victims involved in each investigation. Many thanks to Dr Alicia Heys for providing this information from previous research.

20. G Barclay, "Compulsion and Human Trafficking in Scots Law" [2025] Crim LR 76, at 77, fn.9 and accompanying text.

SCEPTICAL BELIEFS OF VICTIMISATION

Some participants also noted the perception of scepticism that some in the criminal justice system had, with pre-determined views of what the 'perfect victim' of MSHT looked like, despite the contemporary view that perfect victimhood is a myth. These participants noted perceiving 'eyerolls' from certain institutional actors, as well as comments about the s45 defence being viewed as a 'get out of jail free card' attempt to avoid liability. One participant from England & Wales noted that they had witnessed a judge telling an accused they were 'too old' to be relying on the defence. Failure to identify VTMS leads to a lack of safeguarding – these vulnerable persons (and often young adults/children) must then give evidence in court defending themselves which can be particularly traumatic/re-traumatising.

POLICE TRAINING

Police Scotland only recently implemented training on MSHT for probationary officers. Training notwithstanding, even officers with several years of experience may simply not consider MSHT or NRM referral in many cases where it should be considered. It is therefore up to the officer processing suspects to ask the right questions. This is one of the core weaknesses at the investigatory stage of the process, and a potential barrier to effective protection. It is therefore vital that training continues to be implemented. It was noted that a potential strength of the Scottish approach, as compared with England & Wales, lies in Police Scotland's unitary nature – there are similar issues of knowledge gaps and lack of experience noted in England & Wales, but attempts to address this have been less effective given the fragmentation of police agencies.

Lack of training could result in NRM referrals made by police officers having almost no context or information, rendering them useless. Participants shared their experiences of police officers being unwilling to look through seized mobile phones for information, or even taking the view that a person could not be a VTMS because they had a smartphone. In a further example of this lack of institutional knowledge, it was suggested that defence solicitors in England & Wales may ask police to make an NRM referral at a later stage if this had not been done, but the police could refuse this request, requiring the defence to seek out another first responder to make the referral. CPS may be involved in these discussions, but some participants felt that ultimately the onus was on the defence for getting a referral in those cases where the police do not initially seek one.

IMPLEMENTATION OF INSTITUTIONAL KNOWLEDGE

Thus, while it seemed clear from participants in both jurisdictions that institutional knowledge is sufficient, and that there is a general awareness that all criminal justice actors must be responsible for identifying VTMS, the roll-out of this knowledge to individuals working directly with potential VTMS is possibly lagging behind. As the current legal regimes in both England & Wales and Scotland are now a decade old, there is clearly more to be done to ensure sufficient training of and knowledge sharing to more junior members of staff who lack the experience of their senior colleagues.

On a related note, participants noted that it was vitally important that relevant criminal justice actors were both knowledgeable and on the lookout for exploitation, because in many cases VTMS do not see themselves as being exploited, which further makes identifying victims difficult. Several participants noted that different cultural values made the 'victim' label one that many foreign nationals did not identify with. Given working and living conditions in their home country, many may not question long working hours or sharing a room with several other workers for living purposes. This could be particularly problematic for adult VTMS for which consent is required for NRM referrals. However, victim identification was perceived to be a problem that cut both ways, as it was noted by participants that the criminal justice system was in the unique position of essentially telling certain individuals that they were not victims (for legal purposes) and thus invalidating their experiences. For example, persons detained in police stations for long periods of time surrounded by people sceptical of their claims may be less likely to open up to others, such as defence lawyers, looking to help them. This suggests that a strong connection with victim support systems, even in cases where the legal tests are not met, is vital for proper safeguarding.

It was noted that the CPS Inspectorate (CPSI) had made recommendations in 2023[21] and recently issued a follow-up report in February 2025 which noted the changes made as a result, which improved the implementation of CPS prosecutorial guidelines for VTMS.[22] There are thus steps being taken to try and ensure that the legislation and guidelines are being followed properly by CPS.

21. HM Crown Prosecution Service Inspectorate, An Inspection of the Effectiveness of Crown Prosecution Service Policy and Guidance for the Handling of Cases Involving the National Referral Mechanism (HMCPSI, 25 July 2023). Available at: https://hmcpsi.justiceinspectorates.gov.uk/report/an-inspection-of-the-effectiveness-of-crown-prosecution-service-policy-and-guidance-for-the-handling-of-cases-involving-the-national-referral-mechanism/.

22. Available at: https://www.cps.gov.uk/publication/cps-response-hmcpsi-follow-inspection-recommendations-made-2023-inspection-cps-policy.

Key summary: *A lack of knowledge can result in barriers to victim protection. Reasons for gaps in knowledge are threefold: there is a lack of data; a lack of data gathering; and a lack of information sharing between civil and criminal practice. These issues all coalesce to create uneven experiences for VTMS, with outcomes very much dependent on which personnel and/or court is involved. We were told that there is no quantitative data on the number of s45 defences being lodged in England & Wales, data which would be very helpful to have. Limited data makes it difficult to understand trends in this area. For example, there are suggestions of a worrying trend emerging where defence solicitors in Scotland encourage their clients to refuse NRM referral, although the reasons for this are unclear. Some participants ultimately felt that a dedicated court for VTMS would help to smooth out the experience for VTMS.*

Ultimately, knowledge gaps were perceived by participants to be most prominent in the individuals who represent agencies and institutions, rather than those same agencies/ institutions and the policies themselves. Participants noted that some institutional actors could be sceptical to claims of victimisation from VTMS, with these actors displaying outdated beliefs about who could be a victim. Likewise, a lack of police training could result in NRM referrals which are lacking important information, or incomplete investigations which could fail to identify individuals as VTMS in the first place. Differing cultural values were one aspect highlighted as contributing to this issue, with VTMS being unable or unwilling to self-identity as victims because they perceive their situation as normal. Thus, sufficient training (on MSHT matters) continues to be a point of particular focus moving forward for effective safeguarding of VTMS.

Multi-agency coordination and collaboration

IMPORTANCE OF POLICE AND PROSECUTOR RELATIONSHIP IN INVESTIGATING TRAFFICKING

A theme that emerged from discussion was the value of having a close relationship between state institutions when dealing with specialist issues like MSHT. This was made possible in Scotland because of the constitutional makeup of Police Scotland as a singular entity which coordinated with COPFS to carry out investigations into potential VTMS.

In contrast, the connection between the individual police forces and CPS in England & Wales was weaker, leading to circumstances where potentially relevant evidence may not be discovered due to a lack of appropriate investigation. COPFS in Scotland instructs Police Scotland to carry out further investigation where necessary, and these instructions must be carried out. Likewise, and as aforementioned, knowledge gaps and bespoke training were identified as important ways of ensuring that police officers were sufficiently equipped to deal with MSHT matters in their work, as a matter of ensuring victim protection. In England & Wales, participants voiced frustration that officer training in MSHT could be uneven across policing divisions, with many officers being too 'outcome focussed' as a result of insufficient training or experience. Indeed, this focus on outcomes could lead to potential red flags being missed, with inexperienced officers expecting VTMS to explicitly state they were being exploited, rather than being able to read between the lines. Participants identified that the unitary nature of Police Scotland made efforts to combat this problem much easier than was the experience of their English counterparts. This is an area of strength for Scotland, and this particular advantage of having a unified force should be maximised in specialist areas like trafficking, to provide the best possible service. Ultimately, the ability to maximise this strength is resource dependent, but it seems that as a starting point sufficient funding should continue to be made available to ensure that there are enough 'Human Trafficking Champions' in each division who are able to help triage and ensure potential cases of MSHT are identified.

In both jurisdictions prosecutors are heavily reliant on the information received from police. COPFS and CPS can both come back to the police for further information and follow up investigation, though this appears to be a more common practice in Scotland, in part due to the fact that COPFS often work with police longer in assessing cases before a prosecution decision is made. Scottish participants also pointed out that COPFS can act as a safety net of sorts to help mitigate potentially uneven experiences: if Police Scotland fail to catch a potential case of MSHT, prosecutors in COPFS are under an obligation to continuously look for signs of MSHT in all cases, and to ask questions and follow up with Police Scotland if they feel a certain avenue of evidence gathering has not been sufficiently explored. It was noted that these follow up requests are often fruitful.

BROADER MULTI-AGENCY COOPERATION

Nevertheless, participants noted that it can be difficult to achieve or maintain multi-agency cooperation. For example, it could be difficult to get cooperation from relevant local authorities in disclosing the developmental background of an accused person. [23] If an NRM is raised this does trigger multi-agency discussion, but often agencies are working on parallel tracks, resulting in unnecessary duplication of work to the detriment of VTMS. This problem is not just one of effective safeguarding: for example, examining social care records can prompt questions about individuals a VTMS is engaged with, shedding light on potential MSHT perpetrators. For example, potential VTMS might have initial contact with the police while they wait the four or five days for a RG decision through the NRM. During this time they may not be ready to speak about their experiences (in depth). After the decision comes through, the VTMS is likely to be moved elsewhere, and at that point police involvement ends, with suspected perpetrators remaining unknown to the police. In both jurisdictions trafficking circumstances are supposed to lead to a dual investigation with best practice dictating that the same officer involved in the initial offending leading the investigation on the trafficking offence. While this policy seemed to operate as intended in Scotland where resources allowed, English participants indicated that the trafficking investigation was not often pursued in practice. This is an important policy and ought to be more rigorously adhered to in practice.

23. Further conversations which include representatives from local authorities would be illuminating here.

In Scotland, there is a memorandum of understanding in place to ensure, as far as possible, that potential VTMS released from custody do not fall back into the hands of traffickers. When a potential VTMS is due to be released, COPFS, with the consent of the potential victim, notifies NGOs TARA or Migrant Help, who will endeavour to provide a support package for these individuals, including transportation and support accommodation. Participants praised this partnership as a means of safeguarding potential VTMS. This was seen as an important way of ensuring crucial support for victims as they moved through the criminal justice system, and may help aid the identification and prosecution of traffickers by providing a safe environment for VTMS disclosure.

Key summary: *A close working relationship between prosecutor and police is essential for handling specialised cases like MSHT, given their complex nature. In both jurisdictions prosecutors are heavily reliant on the information received from police, and thus it is important that there are sufficient lines of communication open so that all relevant information is uncovered and handled appropriately. The constitutional makeup of Scotland's unitary police force lends itself to a closer working relationship with COPFS. The potential for incomplete investigations was therefore greater in England & Wales where this kind of cooperation was much harder to achieve. Nevertheless, in both jurisdictions the efficacy of this relationship is determined by how prominent knowledge gaps are, and to what extent there is bespoke training in MSHT issues. In Scotland, this would mean ensuring that the Human Trafficking Champions present in each division of Police Scotland were sufficiently supported in their work.*

The importance of multi-agency communication is a general one and extends to local authorities and their dealings with police and prosecution in respect of individuals who they have previously encountered. Participants noted that collaboration and cooperation here could be difficult, with the result that often these institutions could be working on parallel tracks, resulting in the unnecessary duplication of work to the detriment of VTMS. To this end, COPFS and Police Scotland's working relationship with TARA and Migrant Help were seen as a positive way of safeguarding potential VTMS. Relatedly, participants noted that it is vital for dual investigations to be opened with the same police officer where MSHT is thought to have occurred, so that information can be shared to appropriately identify victims and perpetrators alike. Ultimately, further conversations which include these other agencies would be very helpful for identifying best practices.

Concluding remarks

The discussion outlined in this paper raises several points for further consideration. First and foremost, it is clear that the perceptions of actors working in the criminal justice system can have a significant impact on VTMS and how they interact with the process. Regressive attitudes towards individuals who claim to be VTMS can signal a lack of belief in their story and thus encourage them to plead guilty and/or refuse help or services they are entitled to. These attitudes are often located in the erroneous belief that VTMS should have made better choices, or that an earlier choice (e.g. to illegally migrate) is determinative of all future exploitation they have subsequently experienced. Capacity and choice seem to be tied to maturity, with some criminal justice actors being (more) sceptical of adults claiming VTMS status. To that end, it is important that the criminal justice system does not become too reliant on any particular factor as being determinative of victimisation. One of the themes brought out by the roundtable discussion was the idea that age assessments may serve to cloud judgments about who is (or consequently is not) a VTMS. MSHT is an issue which can equally affect adults and children.

It was clear that a majority of participants were of the view that more notice should be paid to histories of MSHT and exploitation when determining criminal liability in cases where VTMS went on to commit particularly serious acts, such as recruiting others into exploitation. This view reflects the recognition that exploitation is subversive and aimed at moulding individuals to the traffickers' will. This reality may be particularly difficult to reconcile in the criminal justice system, which is traditionally aimed at individual offending and not traditionally engaged with broader safeguarding considerations in substantive criminal liability assessments. The current criminal liability paradigm struggles to appropriately deal with individuals who come to offending through a history of exploitation which may suggest the appropriate disposal is safeguarding measures, rather than punishment.

With the above in mind, it also seems apparent that the criminal justice system, and the resulting process, could do more to be mindful of the impact legal determinations (even precursor decisions, such as decisions to prosecute) can have on VTMS and their own perceptions of guilt and victimhood. The Scottish approach was clearly preferred among many roundtable participants for being perceived to do the most to safeguard and respect victimhood. Yet, where COPFS can find reasons to disagree with a CD decision, or alternatively the public interest requires prosecution of a VTMS, this individual enters trial proceedings with no proper recourse outside of common law defences which appear unfit for the MSHT purposes. Indeed, an issue present in both jurisdictions is that the criminal law and procedural framework risks communicating victim status in a binary fashion, such that a person is either a victim or they are not. In both jurisdictions it is clear that where public interest points towards prosecution VTMS status becomes minimised as the VTMS takes on the dominant status of perpetrator and accused.

Participants noted that a lack of quantitative data continues to pose problems with respect to responses to MSHT. Data helps to both allocate and prioritise funding where it is needed. Data may also help drive conversations, awareness, and help to eradicate certain myths while furthering understandings of the diverse modus operandi of various organised criminal gangs, as well as the nuance in victimology. It was a shared view among many participants that our current criminal justice processes are too reductive and binary, failing to capture the complexities of the situation. Training for police forces in particular may currently be too broad and thus hard to implement at the granular level of the different contexts in practice, particularly with regards to the differing approaches taken by organised crime groups.

Where police are made aware of a potential trafficking dimension to a crime they are investigating, this ought to automatically trigger a separate police investigation into the MSHT, preferably conducted by the same officer involved in the initial investigation. Barriers to enforcing this kind of policy seem to be based on a lack of sufficient resources. It was clear from the discussion that multi-agency collaboration is vital to providing sufficient safeguards and support to VTMS, but it is clear that further discussions which include these broader agencies (including NGOs and local authorities) would be necessary to gain a clearer understanding of the challenges in practice.

This workshop provided a valuable opportunity for cross-jurisdictional reflection on how legal frameworks shape the treatment of victims of criminal exploitation. While Scotland and England & Wales share a common commitment to the non-criminalisation and non-punishment principles, their divergent legal and procedural approaches offer important lessons about the consequences of early versus late-stage criminalisation determination. Participants agreed that safeguarding and justice are best served when systems prioritise early intervention, holistic safeguarding and multi-agency collaboration. As the legal landscape continues to evolve, ongoing dialogue between researchers, practitioners, and policymakers will be essential to ensure that victims are not further harmed by the very systems designed to protect them.