

# #03 Child Criminal Exploitation

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**This guide will assist criminal practitioners representing children who have been exploited and are charged with offences arising out of that exploitation.**

Children who have been the subject of criminal exploitation should be recognised as victims, not perpetrators. Practitioners must know how to identify when child suspects are potential victims of Child Criminal Exploitation (CCE) and know what steps to take next.

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CCE 'occurs where an individual or group takes advantage of an imbalance of power to coerce, control, manipulate or deceive a child ... The victim may have been criminally exploited even if the activity appears consensual. Child Criminal Exploitation does not always involve physical contact; it can also occur through the use of technology'.<sup>1</sup>

'Child trafficking' is defined as the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.<sup>2</sup> Therefore, victims of CCE can be also be defined as victims of trafficking (VoTs).

CCE often occurs within 'county lines' drug-dealing operations. 'County lines' is a term used to describe gangs involved in exporting illegal drugs within the UK, using dedicated mobile phone lines. They are likely to exploit children to move and store the drugs, and will often use coercion, intimidation and violence.<sup>3</sup>

- 1 'County Lines Exploitation: Practice guidance for Youth Offending Teams and frontline practitioners', Ministry of Justice, published 15 October 2019, updated 6 January 2020, p5, <https://bit.ly/2Hw2fuR>
- 2 Article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations (UN) Convention against Transnational Organized Crime. Note that ss2 and 3 MSA 2015 contain the relevant statutory definitions.
- 3 'Criminal Exploitation of Children and Vulnerable Adults: County Lines', Home Office, published 11 July 2017, updated 7 February 2020, <https://bit.ly/3kZGHnW>

# Introduction

This guide will:

- take you through the key stages in a case where child exploitation has arisen – from arrest through to trial, the guide will give practical advice on the work that needs to be done by the defence at each stage
- provide an overview of the outcomes available to children prosecuted for offences arising from their experience of criminal exploitation.

## The key systems

This guide provides an overview of the two systems that you will need to be aware of when preparing an exploited child's defence:

1. The National Referral Mechanism (NRM) – in which the Single Competent Authority (SCA), a division of the Home Office, determines whether a child has been the victim of modern slavery.<sup>4</sup> The NRM will issue either a negative or positive Conclusive Grounds (CG) decision as to whether a child is a victim of modern slavery.<sup>5</sup>
2. The criminal justice system – in which a child, prosecuted for crimes arising directly from CCE, may raise a defence relating to their experience of exploitation. These systems run alongside one-another. Please see page 6 of the guide as to the relevance of a CG decision to the prosecution of an exploited child.

The type of defence a child can run will depend on the type of offence that they have been charged with. There are two categories of offences:

- offences INCLUDED within the ambit of s45 of the Modern Slavery Act (MSA) 2015, where a s45(4) defence may be advanced
- offences EXCLUDED by Sch4 MSA 2015, which limits the defence to duress.

## Section 45 of the Modern Slavery Act 2015

Section 45(4) MSA 2015 states:

- (4) A person is not guilty of an offence if–
- (a) the person is under the age of 18 when the person does the act which constitutes the offence,
  - (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and
  - (c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

4 'Modern slavery' includes child trafficking which includes CCE. (See: Modern Slavery Act 2015 - Statutory Guidance for England and Wales', Home Office, version 2, January 2021, <https://bit.ly/3bfylx>)

5 'Modern Slavery Act 2015 - Statutory Guidance for England and Wales', Home Office, version 2, January 2021

# Overview of possible case outcomes

Outcomes in the table below may be pursued:

- even where a negative NRM determination has been made, or
- in circumstances where the child has not been referred through the NRM procedure.

However, in practice, a positive NRM determination will be very helpful for securing a better outcome.

## Possible Case Outcomes

### Out-of-court outcomes

- Police take No Further Action (NFA)
- Case not prosecuted on evidential and/or public interest grounds
- Youth Offending Service (YOS) offer an Out of Court Disposal (OCD)<sup>6</sup>

### Child charged and case prosecuted

Offence caught by s45 MSA 2015

- Application to stay proceedings as an abuse of process in extremely limited circumstances in the light of the decision in the case DS<sup>7</sup> (see page 15 below).

Offence excluded by Sch4 MSA 2015

- Application to stay proceedings as an abuse of process in extremely limited circumstances, bearing in mind:
  - many of the excluded offences are serious and s45 was deliberately made not to apply, and
  - in the light of the decision in the case DS<sup>8</sup> (see page 15 below).

### Judicial review of the decision to prosecute in exceptional circumstances

- Submission of no case to answer at the conclusion of the Crown's case
- s45(4) MSA 2015 defence advanced at trial
- Duress defence

### Guilty plea

(full facts or basis of plea, with evidence relating to exploitation advanced at sentence)

<sup>6</sup> An OCD may require an admission of guilt and therefore may not be appropriate if pursuing a defence.

<sup>7</sup> See R v DS [2020] EWCA Crim 285. The decision in DS leaves open only the conventional grounds for abuse as the earlier case law pre-dated the coming into force of a statutory defence under s45. The conventional grounds are (1) where a fair trial is not possible; or (2) where it would be wrong to try the defendant because of some misconduct or procedural impropriety by the state in bringing about the prosecution.

<sup>8</sup> R v DS [2020] EWCA Crim 285

# Early preparation of the defence

The defence of a child who offends through criminal exploitation is a front-loaded process.

## Practical advice: Prepare a defence involving criminal exploitation early.

- A NRM referral should be made in all cases of child exploitation, whether or not the s45(4) MSA 2015 defence applies.
- Raise the issue of CCE as early as possible.
- Be aware of any age dispute issues.
- Avoid re-traumatising child clients by requiring them to recount details of their exploitation if the information is available elsewhere.

Take the following steps at the earliest opportunity:

### 1. Take a full background statement.

- Be prepared to ask probing questions about a child's background (while being mindful of re-traumatisation).
- Be alert to hallmarks of exploitation, such as: a reluctance to engage; one-word answers to questions; physical injuries (including internal injuries from drug-plugging); signs of abuse; apparent psychological issues; or the appearance of a child having been groomed / coached to give a stock account, which can also lead to inconsistent accounts.
- Consider whether any of the other recognised signs, indicators and features of exploitation (see paragraph below) are present in a child's presentation/background.

## Practical advice: Consult the following lists of recognised indicators and signs of exploitation.

Recognised background features of criminal exploitation include:<sup>9</sup>

- prior experience of neglect, or physical or sexual abuse
- lack of safe/stable home
- economic vulnerability
- homelessness or insecure accommodation status
- connections with other people involved in gangs, for example through the local area
- having a physical or learning difficulty
- having mental health or substance misuse issues
- being in care
- being excluded from mainstream education and attending a Pupil Referral Unit

<sup>9</sup> 'Criminal Exploitation of Children and Vulnerable Adults: County Lines', Home Office, published 11 July 2017, updated 7 February 2020

Recognised signs of criminal exploitation include:<sup>10</sup>

- a child going missing from school or home and/or being found out-of-area
- unexplained acquisition of money, clothes or mobile phones
- excessive receipt of texts/phone calls, and/or having multiple handsets
- relationships with controlling/older individuals or groups
- leaving home/care without explanation
- unexplained injuries
- carrying weapons
- self-harm or significant changes in emotional well-being

Other features of exploitation include:

- sexual violence – this is a tool of exploitation used particularly against girls<sup>11</sup>
- antecedents for low-level offending such as theft and minor robbery – the process of grooming a child for participation in serious offending often begins with a child being corralled into or encouraged to commit low-level offending

## 2. Gather evidence of exploitation from the outset.

- Obtain the child's medical records, children's services file, and full YOS file.
- Liaise with any other representatives involved in the child's care. These might include immigration solicitors or the child's guardian (in family proceedings).
- If a NRM referral has already been made, obtain a record of the decision and full minute of the determination, for which a Subject Access Request (SAR) may be required.<sup>12</sup>
- Obtain statements from the child's family and any professionals involved in their care, such as the YOS or a trafficking support worker.

## 3. Consider instructing defence experts to provide:

- a mental health report addressing the child's vulnerability to exploitation, usually from a child and adolescent psychiatrist or psychologist
- a report addressing the child's exploitation from an independent child exploitation expert<sup>13</sup>
- an age assessment report.

## 4. Ensure a NRM referral is made (if one has not already been made).

- See page 6 for advice on the process of making a referral.

## Practical advice

Ask for the views of caregivers and professionals to be documented in writing. Ensure that this information is recorded formally so it can be used in the making of representations and for the court.

<sup>10</sup> 'Criminal Exploitation of Children and Vulnerable Adults: County Lines', Home Office, published 11 July 2017, updated 7 February 2020

<sup>11</sup> National Crime Agency National Briefing Report – 'County Lines Violence, Exploitation & Drug Supply 2017', NCA, November 2017, <https://bit.ly/375mSqw>

<sup>12</sup> Defence representatives may write directly to the SCA to request this information, with a signed consent from the child. Guidance for a Subject Access Request can be found here: <https://bit.ly/2HzE4vA>

<sup>13</sup> See a directory of human trafficking & modern slavery experts here: <https://bit.ly/3fvIYGr>

# National Referral Mechanism

The NRM is the process by which a division of the Home Office, the SCA, receives and investigates referrals where it is suspected that an individual is a VoT. The SCA is empowered to determine whether a child is a victim of modern slavery. There are two stages to the decision-making process:

- Stage 1: The Reasonable Grounds (RG) decision.<sup>14</sup> A positive RG decision indicates that the SCA suspect, but cannot prove, that the referred person is a VoT.

- Stage 2: The Conclusive Grounds (CG) decision. A final determination of the referral. A positive CG decision is a determination that, on the balance of probability, it is more likely than not that the child is a VoT.<sup>15</sup>

The procedure to be followed in the decision-making process and the time frames within which decisions should be made are set out in statutory guidance.<sup>16</sup>

## Relevance of a positive Conclusive Grounds decision

A positive CG decision has several advantages in the defence of an exploited child. As a determination by a statutory body, it:

- should have persuasive value when, for example, the police and/or Crown Prosecution Service (CPS) are deciding whether to take further action/prosecute
- is admissible in the defence of a child who is being prosecuted for crimes arising out of criminal exploitation<sup>17</sup>, and
- will bolster a s45(4) MSA 2015 or duress defence.

## The referral

A First Responder will make the referral: this is a statutory body or non-governmental organisation (NGO) empowered to make a NRM referral.

Making a referral in all potential CCE cases is essential, irrespective of whether a child is able to advance a defence pursuant to s45(4) MSA 2015.

Organisation	First Responder?	Duty
<b>Statutory body</b>		
YOS Police Children's social services	Yes	To refer via the NRM where they believe a child may be a VoT. <sup>18</sup> A child's consent is not required for a referral to be made.
CPS	No	CPS guidance states that CPS must: <ul style="list-style-type: none"> <li>• refer to the police for onward referral to NRM where it is believed the child is a victim of trafficking<sup>19</sup></li> <li>• review the decision to charge in the light of evidence of a child's status as a victim of exploitation<sup>20</sup></li> </ul> Practitioners should note that the CPS are generally reluctant to exercise their power to refer a case to the police, given that in doing so they would be assisting in identifying a possible defence.

14 The SCA has a target date of five working days from receipt of referral in which to make the RG decision

15 Following the RG decision, the SCA has 45 days to gather further information. Once it has done so, it goes on to make the CG decision

16 'Modern Slavery Act 2015 - Statutory Guidance for England and Wales', Home Office, version 2, January 2021

17 DPP v M [2020] EWHC 3422 (Admin)

18 s52 MSA 2015

19 CPS Legal Guidance – 'Human Trafficking, Smuggling and Slavery', CPS, updated 30 April 2020, <https://bit.ly/3pW9duu>

20 CPS Legal Guidance – 'Human Trafficking, Smuggling and Slavery', CPS, updated 30 April 2020

Organisation	First Responder?	Duty
<b>Other individual / organisation</b>		
Defence representative(s)	No	N/A
Specified NGO organisations: Salvation Army Migrant Help Medaille Trust Kalayaan Barnardo's Unseen Tara Project (Scotland) NSPCC (CTAC) <sup>21</sup> BAWSO (Wales) New Pathways Refugee Council	Yes	A NGO First Responder's responsibilities are to: <sup>22</sup> <ul style="list-style-type: none"> <li>• identify potential victims of modern slavery and recognise the indicators of modern slavery</li> <li>• gather information in order to understand what has happened to the child</li> <li>• refer victims to the NRM via the online process or via the archived paper referral form in exceptional cases</li> <li>• provide a point of contact for the SCA to assist with the Reasonable and Conclusive Grounds decisions and to request a reconsideration where a First Responder believes it is appropriate to do so</li> </ul>

## Practical considerations for the defence

1. If a NRM referral has not been made by a statutory agency, the defence will need to initiate the process by approaching a suitable First Responder (provided they have their client's authority).

- The First Responder should be provided with all relevant information. The child's consent is required for this information to be disclosed, and a signed authority should be obtained from the child.
- Once made, proactively chase the referral by liaising with the SCA. A signed authority from the child will be required to enable the defence to do this.

2. A child's consent is not required for a statutory agency to make a NRM referral, but is required for a referral initiated by the defence.

- Information provided by a client in the course of giving instructions is subject to Legal Professional Privilege (LPP). If the information is covered by LPP, you must not disclose it unless your client consents. No exceptions are permitted, even where it may seem that a greater public interest in disclosure outweighs it.<sup>23</sup>
- If consent is not given, you may wish to document their concerns about exploitation and advice regarding NRM referral/potential defences, as this material will be scrutinised should there be an appeal against conviction.

<sup>21</sup> National Society for the Prevention of Cruelty to Children (NSPCC) Child Trafficking Advice Centre (CTAC)

<sup>22</sup> 'National referral mechanism guidance: adult (England and Wales)', Home Office & UK Visas and Immigration, updated 16 November 2020, <https://bit.ly/2UYFQJL>

<sup>23</sup> Law Society Practice Note – 'Criminal prosecutions of victims of trafficking', Law Society, December 2019, <https://bit.ly/377MXoG>



### 3. Give careful thought to which First Responder is approached.

- The choice of which First Responder to approach will be case-specific.
- The police may not be the most appropriate First Responder for a number of reasons, including but not limited to the fact that:
  - the child may feel compromised in giving their account to the police, and/or
  - there is a risk that, if a child incriminates themselves in relation to other offences during the course of giving their account, the police may investigate and treat the incriminating statements as confession evidence.
- Most local authorities have a Multi-Agency Safeguarding Hub (MASH). A referral to the MASH can be made via the local authority website. This will alert Children's Services/ YOS (both First Responders) that the child may be at risk of harm through CCE, prompting them to undertake an assessment.
- YOS may be reluctant to act as a First Responder. The procedure will often involve the child giving an account of their exploitation and YOS will want to avoid a situation where they are at risk of being called as a witness should the child self-incriminate. However, it is possible for YOS to make a referral without taking an account from the child.

### 4. The referral should be supported by comprehensive evidence.

- See page 5 for a list of the evidence of exploitation that should be obtained by the defence.
- Providing as much information to the SCA as early as possible will assist them in coming to a comprehensive decision.

### 5. Proactively chase the NRM determination.

- The NRM referral, should one have been made, is a vital component in the preparation of a child's defence.
- Therefore, the duty is squarely on the defence to be proactive in chasing the determination.

### 6. Ask the Home Office to ensure that its written decision addresses all the elements of the trafficking definition / defence being advanced and the evidence in support of it.

- This is because the Court of Appeal has held that the CPS should respect the NRM decision unless there is good reason not to follow it.<sup>24</sup>
- The more comprehensive and detailed the decision, the more difficult it will be for the CPS to prosecute.

<sup>24</sup> See, for example, R v JXP [2019] EWCA Crim 1280

<sup>25</sup> 'Modern Slavery Act 2015 - Statutory Guidance for England and Wales', Home Office, version 2, January 2021, p140

<sup>26</sup> 'Support provider' means a body which is employed or engaged pursuant to the Victim Care Contract to provide care and coordination services for victims – see 'Modern Slavery Act 2015 – Statutory Guidance for England and Wales', Home Office, April 2020

<sup>27</sup> See 'Modern Slavery Act 2015 - Statutory Guidance for England and Wales', Home Office, version 2, January 2021

## Appealing a negative NRM decision

A negative RG or CG decision may be challenged in two ways:

- Reconsideration<sup>25</sup> – where a First Responder or support provider<sup>26</sup> asks the SCA to look at the decision again because they think the decision is not in line with guidance<sup>27</sup> or there is new evidence.
- Judicial review – where the exploited person asks the Administrative Court to review a decision by the SCA.

# Arrest and interview

## Achieving Best Evidence (ABE) interview<sup>28</sup>

If at the police station a child client discloses that they are a victim of exploitation:

- Take a signed endorsement from the child, authorising the defence to disclose concerns around exploitation to the police/CPS.
- Ask the Officer in the Case (OIC) to arrange an ABE interview:

- An interview under caution is not an appropriate medium for asking a child to explain how they have been exploited. The procedure is not designed to safeguard a child's welfare.
- Police guidance states that if a suitably trained First Responder becomes aware of a potential victim, they should make arrangements for a specialist interview and the child should be offered an ABE.<sup>29</sup>

## Interview under caution

In an interview under caution, a child can disclose their status as a victim of exploitation.

There are three options available to the child suspect. Two of these involve making admis-

sions of the criminality alleged. All the options are case-specific and careful thought will need to be given as to which is the most suitable.

### 1. 'No comment' interview

There are many reasons why a child might choose to exercise their right to silence in relation to the issue of exploitation (and other questions), including:

- on legal advice, for strategic reasons, such as lack of evidence or disclosure
- on legal advice, due to there being a question mark in relation to the issue of potential exploitation

- the fact that the child does not recognise themselves as a victim
- the fact that the child is in fear of making disclosure
- other factors, such as mental capacity and fitness to be interviewed

Bear in mind the possible adverse effects, including:

- impact on early identification of the issues
- possible adverse inference.

## Practical advice: addressing the adverse inference

If matters progress to trial and a s45(4) defence is advanced in which the child defendant gives evidence, the Crown may seek an adverse inference arising from the failure to disclose exploitation in interview.<sup>30</sup>

Nonetheless, there is recognition from a variety of sources that there are many genuine reasons which may account for the failure to disclose exploitation, including:

- Home Office and CPS guidance relating to child-specific indicators<sup>31</sup>
- Court of Appeal recognition that a victim of trafficking may not see themselves as such<sup>32</sup>

All of this material may be used as the basis for resisting an adverse inference being drawn.

28 'Achieving best evidence (ABE)' – the process by which a vulnerable victim or witness is interviewed in criminal proceedings – see 'Achieving Best Evidence in Criminal Proceedings', Ministry of Justice, 2011, at <https://bit.ly/2J2toWQ>

29 'First response and the national referral mechanism', College of Policing, published 28 July 2015, updated 9 June 2020, <https://bit.ly/35XsbJg>

30 s34 Criminal Justice and Public Order Act 1994

31 'Modern Slavery Act 2015 - Statutory Guidance for England and Wales', Home Office, version 2, January 2021, p74

32 R v S (G) [2018] EWCA Crim 1824

## 2. Prepared statement

A prepared statement should address the following matters:

- the language and specific elements of the defence to be advanced (ie s45(4) MSA 2015 or duress)

- the child's consent to the making of a NRM referral.

## 3. Raise defence in interview

## Post-arrest outcomes

Be alive to the following potential post-arrest outcomes:

- police decision to take NFA
- CPS exercise discretion not to prosecute
- Release Under Investigation (RUI) pending NRM determination/evidence of child exploitation
- release of the child on pre-charge bail (pending NRM determination/evidence of child exploitation)
- OOC
- prosecution commenced despite a pending NRM determination and/or evidence of child exploitation
- prosecution commenced despite a positive CG decision and/or evidence of child exploitation.

## Out of Court Disposals

Inviting the police/YOS to consider an OOC is an option available to the police/CPS, provided the criteria for the OOC envisaged are met.

This is a potentially controversial outcome, as it may involve accepting criminality despite the presence of a defence. Ultimately, it involves weighing principled and pragmatic considerations

and focussing on what is in the best interests of the child. Entertaining an OOC as a possibility is necessary in the light of the decision in DS,<sup>33</sup> which acts as a disincentive to the Crown discontinuing proceedings or offering no evidence, even with a positive CG decision.

Factors weighing against	Factors weighing in favour
The making of an OOC may require an admission of guilt.	Possibility (post-decision in the case of DS) that the Crown will proceed with the prosecution, notwithstanding a CG determination.
Likelihood of a decision not to prosecute/discontinue/offer no evidence in the light of a CG determination.	Sentence in the event of unsuccessful defence. If a child is convicted after trial, the sentence passed will have a far longer rehabilitation period associated with it.
Acquittal if successful at trial.	

# Defence representations

Defence representations are essential in advocating for any outcome that involves: (1) charges not being brought, (2) a prosecution not being pursued, or (3) a deferral of decision-making.

Representations:

- can be made at any stage, including to the custody sergeant at the police station

- should be made when cogent evidence of exploitation becomes available

Receipt of a RG or CG decision is not necessary for representations to be made. A positive determination can be used to bolster existing representations once received.

## Practical advice

Representations should set out a chronology of incidents indicating exploitation and the child suspect's characteristics which make them vulnerable to grooming:

- Refer to the National Crime Agency Report<sup>34</sup> for definitions/descriptions of what CCE looks like in practice.
- Refer to the National Crime Agency Intelligence Assessment<sup>35</sup> for examples of recognised indications of vulnerability.

Factors to consider when preparing representations:

- Children without a criminal footprint are often targeted by exploiters to reduce attention from law enforcement. Refer to the child's Police National Computer (PNC) record.
- Vulnerable drug runners are at the greatest risk of violence. Refer to any previous incidents of violence to which the child has been a victim.
- Highlight vulnerability factors including poverty, school exclusion, social isolation, Special Educational Needs and family breakdown. Link these traits in the client to the exploitation.
- Highlight the client's socio-economic situation and evidence that travel has been facilitated to a significant distance from home, to a place the client would not habitually travel, and that this could only be financed by others.

Representations should address the CPS four-stage test for the review of a prosecution involving a victim of trafficking.

### The CPS four stage test<sup>36</sup>

Prosecutors should adopt the following four-stage assessment when applying the Full Code Test in the Code for Crown Prosecutors:

1. Is there a reason to believe that the person is a victim of trafficking or slavery?  
If yes, move to Question 2.  
If not, you do not need to consider this assessment further.
2. Is there clear evidence of a credible common law defence of duress?  
If yes, then the case should not be charged or should be discontinued on evidential grounds.  
If not, move to Question 3.
3. Is there clear evidence of a statutory defence under Section 45 of the Modern Slavery Act 2015?  
If yes, then the case should not be charged or should be discontinued on evidential grounds.  
If not, move to Question 4.
4. Is it in the public interest to prosecute? This must be considered even where there is no clear evidence of duress and no clear evidence of a s45 defence or where s45 does not apply (because the offence is excluded under Schedule 4). Prosecutors should consider all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion arising from their trafficking situation; see *R v LM & Ors* [2010] EWCA Crim 2327.

34 National Crime Agency Report – 'County Lines Gang Violence, Exploitation & Drug Supply', 2017

35 National Crime Agency Intelligence Assessment – 'County Lines Drug Supply, Vulnerability and Harm 2018', NCA, January 2019, <https://bit.ly/3l1f4e4>

36 CPS Legal Guidance – 'Human Trafficking, Smuggling and Slavery', CPS, updated 30 April 2020

Key submissions will be:

- why the prosecution does not meet the evidential test (ie the likely success of a defence pursuant to s45(4) MSA 2015 or a duress defence), and
- why the prosecution is not in the public interest.

Public interest considerations:

- In considering whether a trafficking/modern slavery victim has been compelled to commit a crime, prosecutors should consider whether a suspect's criminality or culpability has been effectively extinguished or diminished to a point where it is not in the public interest to prosecute: *R v VSJ & Ors*;<sup>37</sup> see also *R v S (G)*.<sup>38</sup>

Where a positive CG determination forms the basis of the review, representations should address the cogency of the evidence on which the CG was based:

- A prosecuting authority should respect the NRM unless there is good reason not to follow it.<sup>39</sup>
- A 'good reason'<sup>40</sup> not to follow the decision would arise in circumstances where the CPS conclude that the evidence relied upon to reach that conclusion is unreliable or insufficient or inconsistent with such a determination.

Key principles that should be cited in representations include:

- principle of non-prosecution of victims of trafficking<sup>41</sup> (considered in the light of the decision in *DS*)<sup>42</sup>
- CPS guidance for the prosecution of children and young people.

The key objective of the representations is to encourage the CPS to adopt an approach that is consistent with guidance relating to the prosecution of children and victims of criminal exploitation.

Broadly, this guidance emphasises the following:

- the extent to which innocent children are frequently brought into criminal networks as a consequence of exploitation:<sup>43</sup>

'Offending through "County Lines" is a national issue involving the exploitation of vulnerable children and adults by violent gang members in order to move and sell crack and heroin across the country, often associated with city-based organised crime gangs.

The victims are often children, aged 14 to 17 years, who are groomed with money, gifts or through relationships and forced to carry out day to day dealing. Children as young as 11 years of age have been reported as being recruited'.<sup>44</sup>

- the principle of non-prosecution of exploited children:

'Where there may be consideration of charge and prosecution of vulnerable children or adults, prosecutors should consider applying the statutory defence or CPS policy on the non-prosecution of suspects who may be victims of trafficking'.<sup>45</sup>

- the principal objectives of the youth justice system, namely to protect a child's interests and welfare, and to prevent reoffending<sup>46</sup>
- the presumption in favour of diverting children from prosecution.<sup>47</sup>

Particular standards must be met by the Crown when they review the case of a victim of exploitation:

- any decision to proceed with the prosecution of a victim of exploitation must be positively justified
- reasons for a decision (to charge/proceed with a prosecution) must be disclosed
- a decision as to the prosecution of a child is amenable to judicial review if it can be demonstrated that the decision was made regardless of, or clearly contrary to, a settled policy of the Director of Public Prosecutions (DPP).<sup>48</sup>

37 [2017] EWCA Crim 36

38 [2018] EWCA Crim 1824

39 *R v S (G)* [2018] EWCA Crim 1824, para 76

40 *R v S (G)* [2018] EWCA Crim 1824

41 As stated in Article 8, European Union (EU) Directive 2011/36/EU, implemented in England & Wales by way of the CPS duty to review the prosecution of a VoT and the availability of the s45(4) MSA 2015 defence. The Court of Appeal, in *DS*, held that the availability of the statutory defence enables the state to discharge this obligation

42 [2020] EWCA Crim 285

43 CPS Legal Guidance – 'Human Trafficking, Smuggling and Slavery', CPS, updated 30 April 2020

44 CPS Legal Guidance – 'Human Trafficking, Smuggling and Slavery', CPS, updated 30 April 2020

45 CPS Legal Guidance – 'Human Trafficking, Smuggling and Slavery', CPS, updated 30 April 2020

46 s44 Children And Young Persons Act 1933, which requires the courts to have regard to the welfare of a young person; s37 Crime And Disorder Act 1998, which requires the principal aim of agencies involved in the youth justice system to be the prevention of offending by young persons; and 'The Code for Crown Prosecutors', which states that Crown Prosecutors must consider the interests of a youth, amongst other public interest factors, when deciding whether a prosecution is needed

47 CPS Legal Guidance – 'Youth Offenders', CPS, updated: 28 April 2020, <https://bit.ly/339raf5>

48 See *R v Chief Constable of Kent and Another ex p L*, *R v DPP ex p B* [1991] 93 Cr App R 416

# Protecting a child's welfare

Be alive to the measures that may be taken to protect a child's welfare and safety.

## Practical steps include:

- seeking bail accommodation outside of the area where the child has been exploited
- seeking a transfer of proceedings to a court outside the area where the exploitation has taken place
- ensuring that a child has access to statutory entitled support, including: appointment of a trafficking support worker and preparation of a Recovery Needs Assessment<sup>49</sup>
- seeking an Anonymity Order<sup>50</sup> (not necessary in the youth court).

In multi-handed cases, where a child is jointly charged alongside their adult exploiter, consider the following safeguards:

- at the mode of trial hearing, consider resisting allocation of the child to the Crown Court alongside the adult co-defendant and instead seek a separate trial in the youth court
- seeking severance of the indictment if they are being tried in the Crown Court
- seeking separate listings/production at court.

Consideration will need to be given to how the issue of exploitation may safely be raised in multi-handed cases.

Practitioners may wish to:

- delay making any applications until cogent evidence of exploitation is available, thereby increasing the likelihood that the measures in the two paragraphs above are granted
- consider raising the issue in a private note to the judge and asking for a separate listing when applications are being made.

49 'Recovery Needs Assessment', Home Office, August 2020, <https://bit.ly/3m2qmAa>

50 See R v L & N [2017] EWCA Crim 2129, [9]–[15], [33] & [52]

# Prosecution

It is not uncommon for a child to be prosecuted notwithstanding cogent evidence of their exploitation and/or before the issue has been determined by the NRM.

## Delay in NRM decision

There are often lengthy delays in the SCA reaching a CG determination. Practitioners should be aware of the following matters:

- The duty is on the defence to be proactive in chasing the NRM decision.<sup>51</sup>
  - Dialogue between defence representatives and the SCA is essential.<sup>52</sup>
  - The defence should consider asking the SCA to name the date by which they will review the referral.
- The SCA's failure to make a timely decision may be amenable to judicial review.
- A judge (youth court or Crown Court) may be prepared to state that a witness summons for the decision-maker's attendance at court (to explain any delay) will be issued unless a decision is made by a set date.

## Case management implications

In *R v HHD*<sup>53</sup> the Court of Appeal laid down the following guidance for the progression of cases where the SCA has not reached a CG decision:

1. It is important that, wherever possible, those who may be victims of trafficking are identified before any plea is taken at court [para 21].
2. Should the matter be raised at the first hearing, the judge will need to determine, as a matter of judgment on the facts of the individual case, whether a defendant is a potential credible victim of trafficking. If so determined, the case should be adjourned for a referral to be made. This should take 45 days but in practice may be considerably longer [para 23].
3. In such cases, the usual stage timetable for case progression under Better Case Management in the Crown Court and Transforming Summary Justice in the Magistrates' Court cannot apply and stage dates will need to be altered to accommodate the referral [para 24].

## Practical advice

The following practical guidance emerges from the decision in *R v HHD*:<sup>54</sup>

- If the case is likely to be allocated to the Crown Court, the Better Case Management form<sup>55</sup> should be completed to indicate to all parties that a s45 defence is being explored by way of a NRM referral.
- If the case is likely to be allocated to the youth court, a plea should not be entered until the NRM determination has been reached. The trial preparation form should identify the issue.
- In the Crown Court, Stage 2 (defence response) should not become due until a final NRM determination has been reached. This may necessitate several applications to extend it, which could be granted administratively.
- In the youth court, the standard case management directions should be adapted along similar lines.
- The time between receipt of the NRM decision and the date of arraignment/plea taken should be tailored to ensure that there is sufficient time to make representations as to the decision to prosecute.

51 See *R v L & Ors* [2013] EWCA Crim 991. The CPS is under an equivalent duty. They will be expected to proactively chase the NRM and typically will do so via the OIC

52 Defence representatives should take a signed authority from the child enabling them to communicate directly with the SCA

53 [2018] EWCA Crim 2995

54 [2018] EWCA Crim 2995

55 'Case sent to the Crown Court for trial – case management questionnaire' (cm025), available from <https://bit.ly/2HuiZm3>

## Abuse of process

Before February 2019, practitioners would routinely apply to stay prosecutions against exploited children as an abuse of process. The judgment of the Court of Appeal in DS<sup>56</sup> means that the issue is now 'unquestionably' for the jury to resolve.

In summary, the Court of Appeal (the Lord Chief Justice giving judgment) set down the following principles:

- The CPS four-stage test reflected the law as it applied to the review process which must be applied when considering whether to prosecute a VoT (exploited child).
- The CPS must take into account a positive CG decision by the SCA when applying the four-stage test, including when determining (a) whether a child has been exploited and (b) whether the offending has a close nexus with the exploitation present (para 41).

- Where there is no sound evidential basis for the CPS to challenge a positive SCA decision in front of the jury, a judge may consider any submission of 'no case to answer' by the defence (para 42).
- Obviously, the conventional grounds to stay proceedings as an abuse of process continue to apply, broadly summarised as those (a) where a fair trial is not possible; or (b) where it would be wrong to try the defendant because of some misconduct or procedural impropriety by the state in bringing about the prosecution (para 40).

The decision in DS<sup>57</sup> was approved in relation to an eighteen year old appellant in the case of A,<sup>58</sup> where the Court of Appeal rejected an argument that despite the decision in DS there remained scope for an abuse of process argument to be advanced, particularly in circumstances where the offence does not engage the s45 defence.

## The s45 MSA 2015 defence

This is not a comprehensive summary of the elements of the s45 defence. Rather, distilled below are key matters to be aware of.

### 1. For a child defendant, there is no need to prove compulsion.<sup>59</sup>

### 2. Admissibility of NRM decision:

- The facts of a positive Conclusive Grounds Decision and the SCA's reasons for it (formally known as the full minute of the decision) are admissible under the provisions relating to expert evidence.<sup>60</sup>
- The court has not disapproved the practice of this evidence being adduced through admissions/agreed facts.<sup>61</sup>

### 3. Submission of 'no case to answer':

- Observations made by the Lord Chief Justice in DS<sup>62</sup> suggest that a submission of no case to answer is an avenue open to the defence.
- The Lord Chief Justice's reasoning reflects the previous position taken in the Court of Appeal: 'Whether the concluded decision of the competent authority is favourable or adverse to the individual it will have been made by an authority vested with the responsibility for investigating these issues, and although the court is not bound by the decision, unless there is evidence to contradict it, or significant evidence that was not considered, it is likely that the criminal courts will abide by it.'<sup>63</sup>

<sup>56</sup> R v DS [2020] EWCA Crim 285

<sup>57</sup> R v DS [2020] EWCA Crim 285

<sup>58</sup> R v A [2020] EWCA Crim 1408

<sup>59</sup> s45(4) MSA 2015

<sup>60</sup> DPP v M [2020] EWHC 3422 (Admin)

<sup>61</sup> R v S(G) [2018] EWCA Crim 1828 & DPP v M [2020] EWHC 3422 (Admin)

<sup>62</sup> [2020] EWCA Crim 285

<sup>63</sup> R v L, HVN, THN & T [2013] EWCA Crim 991



- In practical terms, this may mean that if a prosecutor has no basis on which to undermine the CG determination in front of a jury, the submission may be successful.

## Duress

The common law defence of duress (a defence to all crimes except murder, attempted murder and treason) may be advanced where the offence is excluded by Sch4 MSA 2015.

The Court of Appeal has decided that 'it is not necessary' to adapt the law of duress so that it matches s45 MSA 2015 for those not entitled to its protection.<sup>64</sup>

The traditional elements of the duress defence therefore apply. There will need to be a:

- threat of death or grievous bodily harm, effective at the time when the crime is committed, to either the defendant or someone whose safety the defendant would reasonably regard themselves as responsible for, and
- the threat is sufficiently grave to cause a sober person of reasonable firmness, sharing the defendant's characteristics and placed in the same situation as the defendant, to act in the same way as the defendant (the 'objective test').<sup>65</sup>

As regards 'relevant characteristics', the following principles from *R v Bowen* apply:<sup>66</sup>

- 'The mere fact that the [defendant] is more pliable, vulnerable, timid or susceptible to threats than a normal person' is not relevant. [D166]
- 'The defendant may be in a category of persons who the jury may think less able to resist pressure than people not within that category.' Obvious examples are characteristics such as age, sex, pregnancy or serious physical disability, which may inhibit self-protection. Another important example is a recognised mental illness or psychiatric condition, such as post-traumatic stress disorder leading to learned helplessness. [E166]
- 'Characteristics due to self-induced abuse, such as alcohol, drugs or glue-sniffing, cannot be relevant.' [G166]
- 'Psychiatric evidence may be admissible to show that the accused is suffering from some mental illness, mental impairment or recognised psychiatric condition provided persons generally suffering from such condition may be more susceptible to pressure and threats ...' [G166 – A167]

## Practical advice

Expert psychiatric and psychological evidence, addressing any relevant characteristics, is likely to assist the court in understanding the nexus between the characteristic and the child's conduct.

## Sentence

In the event that an exploited child (a) insists on entering an informed guilty plea, or (b) has a defence relating to their exploitation rejected by a court or jury, the following principles emerge from the authorities:

1. A child's status as a victim of exploitation is a matter that reduces their culpability and therefore justifies a reduction – which can be substantial – in terms of sentence.<sup>67</sup>

2. A discount in sentence should be awarded, even in circumstances where the child's offending is (as far as the court is concerned) independent of the matter for which they are being sentenced. By way of example, in *LM*<sup>68</sup> the Court of Appeal reduced the appellant's sentence by half to reflect her previous VoT status, despite the exploitation being independent of her offending on the matter for which she was sentenced. The sentencing judge had accepted that the defendant was a VoT in the past, and the Court of Appeal concluded that 'fairness requires that she be dealt with on that basis'.

64 *R v VSJ* [2017] EWCA Crim 36

65 [17-107]–[17-110] Archbold Criminal Practice 2021

66 *R v Bowen* [1996] 2 CrAppR 157

67 See *R v N* [2019] EWCA Crim 984, para20; *R v LM* [2010] EWCA Crim 2327, para47; *R v L* [2013] EWCA Crim 991, paras 14, 63; *R v S (G)* [2018] EWCA Crim 1824, para 59

68 [2010] EWCA Crim 2327, para 47

# Appeal

Fresh evidence of exploitation provides the most common basis for appeals against conviction.

## Route of appeal

The route of appeal will be determined by the mode of trial and/or plea.

- Following conviction after trial in the youth court:
  - appeal against conviction to Crown Court based on fresh evidence,
- Following guilty plea in youth court:
  - referral to the Criminal Cases Review Commission (CCRC).

- Guilty plea or conviction after trial in Crown Court:

- Sole avenue of appeal is to the Court of Appeal.

Practitioners should also remember that a case can be referred to the CCRC where the conventional avenues of appeal have been exhausted.

Typically, a post-conviction CG decision will provide the fresh evidence on which appeals are brought.

## Appeal to Court of Appeal

The Court of Appeal has the power to quash a conviction as unsafe where identification of a child's exploitation occurs after conviction.<sup>69</sup>

In their analysis of whether a conviction is unsafe, the Court of Appeal will:

1. Assess the safety of the conviction in the light of clear CPS guidance to the effect that there must be proper inquiries and use of the NRM process before a plea is entered.

2. Assess whether the appellant could have or should have been advised as to the availability of a statutory defence in relation to their circumstances.

In practical terms this means that the Court of Appeal will scrutinise the following issues:

- Were there clear indicators of exploitation that were not identified by the defence representatives?
- Was the child advised on the availability of the statutory defence or duress? If not, why not?

<sup>69</sup> R v S (G) [2018] EWCA Crim 1824, para 59

3. Apply the CPS four-stage review test, including determining whether a s45 defence would have applied and/or whether it would have been in the public interest to prosecute.

4. In out-of-time appeals that pre-date the introduction of the statutory defence, the court will take a pre-DS<sup>70</sup> approach. This will involve considering whether the defendant's Article 26<sup>71</sup> and Article 8<sup>72</sup> rights were properly considered and advised upon, the impact of fresh evidence relating to exploitation and whether the indictment would have been stayed.<sup>73</sup>

70 [2020] EWCA Crim 285

71 Article 26 (non-punishment provision), Council of Europe Convention on Action against Trafficking in Human Beings, May 2005

72 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

73 See, for example, R v JXP [2019] EWCA Crim 1280

# Resources

## General

- National Crime Agency National Briefing Report – ‘County Lines Violence, Exploitation & Drug Supply 2017’, NCA, November 2017
- National Crime Agency Intelligence Assessment – ‘County Lines Drug Supply, Vulnerability and Harm 2018’, NCA, January 2019
- CPS Legal Guidance – ‘Human Trafficking, Smuggling and Slavery’, CPS, updated 30 April 2020
- Home Office Guidance – ‘Criminal Exploitation of Children and Vulnerable Adults: County Lines’, Home Office, published 11 July 2017, updated 7 February 2020
- ‘Modern Slavery Bill – Factsheet: Defence for victims (Clause 45)’, Home Office, November 2014
- ‘Modern Slavery Act 2015 – Statutory Guidance for England and Wales’, Home Office, version 1.01, April 2020
- ‘Human Trafficking: Practical Guidance’, Home Office, 2013 – for guidance on indicators of trafficking
- ‘Safeguarding Children and Young People from Sexual Exploitation: Supplementary guidance to Working Together to Safeguard Children’, HM Government, 2009
- Law Society’s Practice Note – ‘Criminal prosecutions of victims of trafficking’, Law Society, 2 December 2019
- ‘County Lines Exploitation: Practice guidance for Youth Offending Teams and frontline practitioners’, Ministry of Justice, published 15 October 2019, updated 6 January 2020
- ‘Human Trafficking Indicators’, United Nations Office on Drugs and Crime
- ‘Human Trafficking and Modern Slavery Law and Practice’, Southwell, Brewer & Douglas-Jones, Bloomsbury, 2020

## National Referral Mechanism referral

There is child-specific guidance and forms for making referrals:

- ‘Modern slavery victims: referral. Guidance on referring potential victims of modern slavery/human trafficking to the national referral mechanism’, Home Office and UK Visas and Immigration, published 5 August 2010, updated 16 November 2020, <https://bit.ly/39bJJ6g>
- ‘Recovery Needs Assessment (RNA)’, Home Office, version 2.0, August 2020
- ‘Victims of modern slavery – Competent Authority guidance’, Home Office, version 3.0, March 2016
- ‘National Referral Mechanism: guidance for child first responders’, Home Office, version 2.0, March 2016

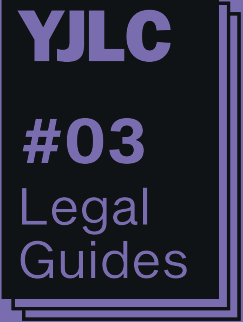
## Relevant international principles

- Article 4 (prohibition of slavery and forced labour) of the European Convention on Human Rights (ECHR)
- Article 26 (non-punishment provision) of the Council of Europe Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention)
- Article 8 (non-prosecution or non-application of penalties to the victim) of EU Anti-Trafficking Directive 2011/36/EU
- United Nations Convention on the Rights of the Child (UNCRC)

## #03

### Child Criminal Exploitation

Written by Claire Mawer and Rabah Kherbane (Doughty Street Chambers) in collaboration with Katya Moran and Laura Cooper at the Youth Justice Legal Centre. With thanks to Maya Sikand QC (Doughty Street Chambers) and Philippa Southwell (Southwell & Partners).



#01  
Turning 18

#02  
Intermediaries for  
child defendants

#03  
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#12  
Anonymity

#### Youth Justice Legal Centre [yjlc.uk](http://yjlc.uk)

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

#### Doughty Street Chambers [doughtystreet.co.uk](http://doughtystreet.co.uk)

Doughty Street Chambers offers extensive expertise across numerous child rights-related areas and has wide-ranging experience in bringing ground-breaking litigation for and concerning children in public law, extradition, immigration, mental health, community care, prison law, trafficking, education, criminal justice, clinical negligence and inquests. Many of our members specialise in complex and developing areas concerning the rights of children, including female genital cutting (FGC) and children, abortion rights for vulnerable teenagers, unaccompanied minors' rights, the education rights of children in custody, inclusive education for disabled children, children's effective participation in criminal trials, and the rights of LGBTQI children.

#### Just for Kids Law [justforkidslaw.org](http://justforkidslaw.org)

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

#### Paul Hastings [paulhastings.com](http://paulhastings.com)

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