

MODERN SLAVERY ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Protection of Victims

Section 45 and Schedule 4: Defence for slavery or trafficking victims who commit an offence

218. *Section 45* provides for a defence for slavery or trafficking victims. This is intended to provide further encouragement to victims to come forward and give evidence without fear of being convicted for offences connected to their slavery or trafficking situation. The defence will not apply in the case of certain serious offences. Currently, in cases where a slavery or trafficking victim may have committed an offence as a direct consequence of their trafficking or slavery situation, the Crown Prosecution Service apply specific guidance as to whether or not to bring a prosecution. There is a different test in the defence for persons aged 18 or over and those under the age of 18.
219. *Subsection (1)* provides that a person, aged 18 or over at the time of the act which constitutes an offence, is not guilty of that offence if they commit the offence because they are compelled to do so; they were compelled as a result of slavery or relevant exploitation; and a reasonable person with relevant characteristics in the same position as the person would have no realistic alternative to committing the offence.
220. *Subsection (2)* provides that a person may be compelled to commit an offence by another person or by the person's circumstances.
221. *Subsection (3)* explains that compulsion is only attributable to slavery or relevant exploitation if it is part of conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or it is a direct consequence of a person being, or having been, a victim of slavery or relevant exploitation.
222. *Subsection (4)* provides that a person under the age of 18 at the time of an act which constitutes an offence is not guilty of that offence if they commit the offence as a direct result of their being a victim of slavery or relevant exploitation, and a reasonable person in the same situation and having the person's relevant characteristics (including their age) would have committed the offence. The lack of the test of compulsion and the lower threshold for meeting the reasonable person test is in recognition of the unique vulnerabilities of children.
223. *Subsection (5)* provides that the relevant characteristics of the victim claiming the defence that will be considered for the purposes of the reasonable person test in *subsection (1)(d)* and *subsection (4)(c)* are age, sex, and any mental or physical illness or disability. *Subsection (5)* also sets out that 'relevant exploitation' is exploitation which is attributable to the person being or having been a victim of trafficking.
224. *Subsection (6)* provides that any reference to an act also includes an omission.
225. *Subsection (7)* introduces Schedule 4, which sets out those offences to which the defence (for both those under the age of 18 and those over the age of 18) will not

apply. The defence will not apply to certain serious offences, mainly serious sexual or violent offences, to avoid creating a legal loophole for serious criminals to escape justice. Where the defence does not apply because the offence is too serious, the Crown Prosecution Service will still be able to decide not to prosecute if it would not be in the public interest to do so.

226. *Subsection (8)* enables the Secretary of State to amend Schedule 4 through regulations.

Section 46: Special measures for witnesses in criminal proceedings

227. **Section 46** extends certain legislative provisions relating to special measures to victims of the section 1 and 2 offences. These include provisions whereby witnesses in certain cases are automatically treated as eligible for special measures (unless they tell the court they do not want to be eligible). Special measures apply to witnesses who are giving evidence in court and include screening the witness from the accused, giving evidence by live link, giving evidence in private, removal of wigs and gowns, video recorded evidence in chief and video recorded cross-examination or re-examination. Trafficking victims are currently already covered by the relevant provisions, so the effect in practice is to extend coverage to slavery victims too, so that (for example) all victims of slavery and trafficking are automatically eligible for special measures

Section 47: Civil legal aid for victims of slavery

228. Currently, victims of trafficking are able to apply for civil legal services for advice and representation in relation to certain immigration matters, damages claims and certain employment claims under paragraph 32 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Section 47 amends Part 1 of Schedule 1 to LASPO to extend the same provision to victims of slavery, servitude or forced or compulsory labour through inserted paragraph 32A.

Subsection (1) of inserted paragraph 32A extends the provision of civil legal services to an individual for whom there are reasonable grounds to believe, or a conclusive determination that, the individual is a victim of slavery, servitude or forced or compulsory labour and no conclusive determination that the individual is not a victim.

Subsections (2) and (3) of inserted paragraph 32A provide for victims of slavery, servitude or forced or compulsory labour (or their personal representatives where the victims are deceased) to be provided with civil legal services in relation to claims for damages, or under employment law, which arise from the conduct which made them such a victim.

Section 48: Independent child trafficking advocates

229. *Subsections (1) and (3)* provide the Secretary of State with a duty to make such arrangements as the Secretary of State considers reasonable so that specialist independent child trafficking advocates are available to support and represent children who there are reasonable grounds to believe may be victims of trafficking. These arrangements can include paying for such advocates. This duty is subject to the commencement provision set out in section 61, which provides that the provisions cannot be commenced until 9 months have passed from Royal Assent and resolutions to this effect have been passed by both Houses of Parliament. At the time of enactment independent child trafficking advocates are being trialled. The commencement provision allows the trial to finish and be evaluated, and the Secretary of State to report to Parliament (as required by *subsection (7)*), before Parliament takes a decision on whether this provision should be commenced.
230. *Subsection (2)* requires the Secretary of State to have regard to the principle that such advocates should, as far as practicable, be independent of those responsible for making decisions about the child.

231. *Subsection (4)* places a duty on any person appointed as a child's independent child trafficking advocate to promote the child's well-being and act in the child's best interests.
232. *Subsection (5)* gives a child's independent child trafficking advocate the power, where it is appropriate to do so, to assist the child to obtain legal, or other, advice, including (where necessary) to instruct legal representatives to act on the child's behalf.
233. *Subsection (6)* places a duty on the Secretary of State to make regulations about independent child trafficking advocates, which must include the circumstances and conditions under which a person may act as an independent child trafficking advocate, arrangements for the approval of the appointment of such advocates, the timing of appointment (as soon as reasonably practicable where there are reasonable grounds to believe a child may be a victim of trafficking – this can be before any referral into the UK's victim identification process) and the advocates' functions. These regulations must also include requirements on the public authorities that are taking decisions regarding, or providing services to, a child to recognise and pay due regard to the child's independent child trafficking advocate and to provide information regarding the child to the child's independent child trafficking advocate (subject to any restrictions on disclosure).
234. *Subsection (7)* provides that the Secretary of State is required to lay a report before Parliament on the steps that the Secretary of State proposes to take in relation to independent child trafficking advocates under this section. The Secretary of State is required to report back to Parliament within 9 months of Thursday 26 March 2015, the day on which this Act was passed.

Section 49: Guidance about identifying and supporting victims

235. **Section 49** requires guidance to be issued to public authorities and other persons as considered appropriate by the Secretary of State in relation to identifying and supporting victims. The guidance will cover the sorts of things which indicate that a person may be a victim of slavery or human trafficking; arrangements for the provision of assistance and support to persons where there are reasonable grounds to believe may be victims of slavery or human trafficking and any arrangements, including those made under section 50, for determining whether a person is to be treated as a victim of slavery or human trafficking. The purpose of the guidance is to further support effective identification of potential victims of slavery and human trafficking and to set out the assistance and support on offer to all slavery and trafficking victims, taking into account international requirements set out in the Convention on Action against Trafficking and the Directive on preventing and combating trafficking.

Section 50: Regulations about identifying and supporting victims

236. **Section 50** enables the Secretary of State to make regulations about identification of and support for victims. The UK currently meets its international obligations on victim identification and support on a non-statutory basis, using administrative powers. The Home Office intends to pilot significant changes to the current process as a result of the recent review of its operation. This enabling power allows for the future possibility of the UK's system regarding victim identification and support being set out in regulations. Under section 58(4)(g), the regulations would be subject to the affirmative procedure.

Section 51: Presumption about age

237. The purpose of this section is to reflect in this Act the presumption at Article 13(2) of the Directive on preventing and combating trafficking, that where the age of a person subject to trafficking in human beings is uncertain and there are reasonable grounds to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14

and 15. Convention on Action against Trafficking contains a similar provision at Article 10(3).

238. *Subsection (1)(a) and (b)* set out who the section applies to. *Subsection (2)* sets out the terms under which the presumption may be applied and allows for the presumption to be removed when the person's age has been determined by a lawfully compliant age assessment or other determination.
239. *Subsection (3)* defines 'relevant arrangements' in terms of the assistance and support provided by public authorities as set out in statutory guidance under section 49 and in any regulations made under section 50.
240. *Subsection (4)* defines "local authority".

Section 52: Duty to notify Secretary of State about suspected victims of slavery or human trafficking

241. *Subsection (1)* places a duty on specified public authorities to notify the Secretary of State, or if so provided by the Secretary of State in regulations, another public authority, where there are reasonable grounds to believe that a person may be a victim of slavery or human trafficking. There is a range of guidance already available to specified public authorities and wider front-line workers who may encounter potential victims of trafficking¹. In addition, section 49(1)(a) places a duty on the Secretary of State to issue guidance to public authorities and other persons whom the Secretary of State considers appropriate as to the sorts of things that indicate that a person may be a victim of human trafficking or slavery.
242. This new duty to notify will mean that adult potential victims of trafficking who do not wish to be referred, assessed and supported through the current administrative process for doing so may still be referred for data purposes by specified public authorities, and that additional information on victims of other forms of modern slavery will also be captured.
243. *Subsection (2)* enables the Secretary of State by regulations to prescribe the information that must be included in a notification under *subsection (1)*. It is envisaged that, as a general rule, such information will include the nationality of the victim, type of exploitation experienced and the location and dates it took place.
244. *Subsection (3)* provides that identifying information about an adult potential victim of slavery or trafficking should only be included in a notification where the individual concerned has given their consent. In the case of child potential victims, this information can be provided without their consent.
245. *Subsection (4)* ensures that regulations made by the Secretary of State may provide that a public authority which includes information in a notification in accordance with the regulations does not breach any obligations of confidence owed by the public authority in relation to that information. This also ensures that the regulations which determine the information to be included in any notification under the duty do not require or authorise the disclosure of information which contravenes any other restriction on the disclosure of information (however imposed). This would ensure that existing safeguards protecting the disclosure of information are respected, such as those in the Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000 and the Crime and Courts Act 2013.
246. *Subsection (5)* specifies those public authorities to whom this duty applies. This includes all those public authorities who have an existing role in identifying victims as designated first responders under the current process for identifying and supporting victims.

¹ <https://www.gov.uk/government/policies/reducing-and-preventing-crime--2/supporting-pages/human-trafficking>

247. *Subsection (6)* enables the Secretary of State to make regulations to add or remove public authorities subject to the duty, or amend an existing entry. Section 58(4)(h) provides that regulations removing a public authority for reasons other than the body ceasing to exist are subject to the affirmative resolution procedure. Regulations adding to the list of public authorities are subject to the negative resolution procedure.

Section 53: Overseas domestic workers

248. Visitors to the UK are able to bring their existing domestic staff with them when they visit the UK using an Overseas Domestic Workers visa; these arrangements also allow diplomats to bring foreign staff into the UK. *Subsections (1) to (4)* create a requirement that the Immigration Rules provide for a new type of leave to remain for those who have come to the UK on an Overseas Domestic Worker visa (an “Overseas Domestic Worker”) and are determined to be a victim of slavery or human trafficking. The leave would allow the victim to work as a domestic worker in a private household and to change employer; further conditions of such leave are to be set out in Immigration Rules. It is envisaged that the principal requirement of such leave will be a conclusive determination made by a public authority under regulations made under this Act or arrangements identified in Immigration Rules that the Overseas Domestic Worker is a victim of slavery or human trafficking. *Subsection (3)* provides that Immigration Rules may specify the maximum period for which a person may have leave to remain under this provision. *Subsection (3)* also provides that, if so specified, this period cannot be less than 6 months.
249. *Subsections (5) and (6)* require the Secretary of State to issue immigration guidance in relation to an Overseas Domestic Worker who may be a victim and to provide in such guidance that immigration enforcement action (removal and deportation) will not be taken during a specified period against an Overseas Domestic Worker for overstaying or breaching an employment-related condition of their leave where this resulted from matters relied on by the Overseas Domestic Worker as slavery or human trafficking. This means that if an Overseas Domestic Worker leaves their employer due to matters relating to the Overseas Domestic Worker’s slavery or human trafficking and comes forward, they can be confident that no immigration enforcement action will be taken for the period specified in the statutory guidance.