The Modern Slavery Act 2015: World leading or a missed opportunity to enhance victim protection?

By

Sepideh Doostgharin

Child and Women Abuse Studies Unit

Faculty of Social Sciences and Humanities

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Abstract

This thesis examines the UK's supposed victim-centred approach in developing its latest national anti-trafficking legislation - the Modern Slavery Act (MSA) 2015. Offering an original contribution to the knowledge base, it considers whether the UK's national legal framework is sufficiently equipped to protect women who are trafficked for the purposes of sexual exploitation and whether it meets international human rights standards.

The thesis analyses the gradual development of international anti-trafficking law and policy, demonstrating the way in which this has influenced the UK's national resolve to address this complex phenomenon. It presents a critical legal analysis, comparing the MSA to the UN Palermo Protocol, the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), and EU instruments and policy positions. Original data, using mixed methods, has been collected from policy makers and lawyers, using surveys and in depth interviews. Key themes explored include the shift in language from human trafficking to modern slavery and its effect on legislative responses to human trafficking, and whether the MSA delivers sufficient protection to victims at the various stages of a case. The stages are victims' identification and the provision of long and short-term support, their protection as offenders and the protection of victims during their asylum applications and applications for discretionary leave to remain in the UK. Provisions for victim protection and support must be robust and clear in each stage of the legal process, if the protection offered by legislation is to be sufficient: a standard that this thesis suggests has not been met through development of the MSA.

The thesis concludes that the MSA is flawed in a number of crucial ways. It does not fully comply with international standards, nor does it substantially advance victim protection because it continues to focus disproportionately on crime control within a policy context pre-occupied with limiting irregular migration.

Chapter 1- Introduction

1.1. Introduction

Britain was the first country to legislate against slavery, passing a law to criminalise the transatlantic slave trade in 1807 (Murphy, 2019). Just over 200 years later, the British government developed a new piece of legislation, amalgamating and criminalising all acts of slavery, servitude and what is now known as human trafficking, under one piece of legislation. It named the new legislation the Modern Slavery Act 2015 (MSA).

This thesis is primarily concerned with the protection of women trafficked for sexual exploitation. Drawing on feminist critical legal theory and adopting a mixed methods approach, the study draws on surveys and in depth interviews with two groups of experts built out of a detailed analysis of the MSA's provisions. It critically examines the emergence of the "modern slavery" narrative and its significance as the core component in the title of the legislation. In doing so, it argues that blurring the boundaries between human trafficking and modern slavery limits the protection of trafficked women.

Focusing on sexual exploitation provides a framework for the collection and analysis of data that places women at the centre of the trafficking debates, seeking to return focus back to their experiences and needs. The specific victim-centred provisions within the MSA are presented and analysed, placing these within the context of the wider international anti-trafficking legal framework. This introductory chapter serves as a road map for the reader. It details the research question, setting out why it is significant within the context of existing anti-trafficking discourse and gaps in the knowledge base with respect to the UK's law and policy. It then outlines the approach taken in answering it and the structure of the thesis.

1.2. The research context

In 2012, the Home Office reviewed the UK's anti-trafficking legislation, noting that future policy focus would be on increasing both victim protection and international harmonisation (Home Office, 2012). The UK claimed to have taken a victim-centred approach in the development of its MSA. Yet, literature supporting or challenging this assertion remains limited, in particular whether the Act meets obligations under international law. The contemporary international anti-trafficking framework stems from the Palermo Protocol (see Chapter 4), which supplements, the UN Convention against Transnational Organised Crime (Southwell *et al.*, 2018). By adopting the Protocol, states, including the UK acknowledge that:

> *… effective action to prevent and combat human trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and to destination that includes a measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting the internationally recognised human rights* (United Nations Human Rights Office of the High Commissioner, 2000: 1)

Goodey (2008: 431) argues that adherence to these international obligations comprises four key strands in forming their national anti-trafficking legal and policy framework.

> *The migration approach - exemplified by the [International Organisation for Migration] (IOM); the law enforcement approach - exemplified by Europol; the human rights approach - exemplified by NGOs, which is essentially victim-centred; and the economic approach - which is close to the human rights approach, but which emphasizes the economic causes of trafficking and looks at alternative routes out of poverty for potential victims and those who have been trafficked.*

A victim-centred approach must, therefore, prioritise the protection of individuals' basic human rights (Amahazion, 2015). A significant body of literature advocates a human-rights approach to tackling human trafficking (see, for example, Choi-Fitzpatrick, 2017; Farrokhzad, 2017). International anti-trafficking instruments also place emphasis on the importance of individuals' human rights. The preamble to the 1949 Convention (see Chapter 4), for example, describes trafficking for the purposes of sexual exploitation as being 'incompatible with the dignity and worth of the human person' (United Nations Human Rights Office of the High Commissioner, 1949: 1). Similarly, the preamble to the Palermo Protocol emphasises the importance of victim protection, through 'protecting their internationally recognized human rights' (United Nations Human Rights Office of the High Commissioner, 2000: 1).

Article 4 of the European Convention on Human Rights (ECHR) also addresses the human rights of a potential victim of trafficking. Article 4 prohibits any act of slavery, servitude or forced labour. Whilst the Convention does not specifically name human trafficking, the European Court of Human Rights (ECtHR) found in the 2010 case of *Rastev vs. Cyprus and Russia*, that:

> *It [is] unnecessary to identify, in the specific context of human trafficking, whether the treatment about which an applicant complains constitutes slavery, servitude or forces and compulsory labour* (Council of Europe, 2020:6).

To date literature assessing the effectiveness of the MSA remains scarce (see Mellon, 2018; Broad and Turnbull, 2018 for exceptions), and that which has been done focuses mainly on labour exploitation. Women's sexual exploitation and victim protection more generally, remain under-explored. This thesis therefore expands upon existing literature in two main ways. First, it undertakes a critical legal analysis of the MSA in relation to international anti-trafficking law, considering whether it is in line with international legal rules and accepted norms. Next, through both literature review and empirical research, the thesis critically analyses the way in which legal systems have and continue to interpret and apply the MSA. Here the key question is whether the MSA has delivered the promised victim-centred approach.

The focus on victims and their human rights, especially in relation to the criminalisation of trafficking for the purposes of sexual exploitation (Agustin, 2008) has thus far, been primarily assessed through victims' own accounts. Whilst imperative in certain elements of human trafficking research, victims' accounts are insufficient in addressing anti-trafficking law and policy. Weber *et al.* (2014) note the importance of gaining practice-based knowledge in academic research. It is this, which sits behind the methodological approach of researching the knowledge and perspectives of policy makers and lawyers.

1.3. Key terms and concepts

In this thesis, a number of concepts are used interchangeably, as they have broadly the same meaning - save for as specified in each relevant case. For example, traffickers, criminals and perpetrators are used as alternatives, whilst lawyers include UK solicitors and barristers (unless specifically defined). Other terms and concepts are more complex and their significance is addressed in detail throughout this thesis. For example, for the reasons set out at Chapter 2, a conscious decision was made to use the terms prostitution and sexual exploitation, avoiding terms such as sex work, especially as the latter 'is associated with particular positions with respect to law and policy' (Kelly, Coy and Davenport, 2009: 7).

Here, I provide a brief commentary on the significance of the modern slavery paradigm within human trafficking discourse - a theme that recurs in many subsequent chapters. An advanced body of literature reflects on the trafficking-migration nexus (see, for example,

Väyrynen, 2003; O'Connell Davidson, 2013; Brunovskis and Surtees, 2019), and that of prostitution and sexual exploitation. However, less advanced threads consider the consequences of the collapsed boundaries between trafficking and slavery and its influence on the development of supposedly victim-centred, anti-trafficking laws.

Whilst most concepts are defined under international law, rhetoric relating to slavery and acts of enslavement is regularly interwoven with that of human trafficking (Siller, 2017). The term, modern slavery itself is not defined in international law. Yet, not only is it heavily referenced in contemporary anti-trafficking discourse, but it has now made its way into the title and overall structure of the UK's anti-trafficking legislation, namely the MSA. The question arises: why does this matter: is the conflation of human trafficking with slavery detrimental to victim support? This thesis considers this question in some detail at Chapter 5 within the context of the development of the MSA, and again as a central topic discussed with participants at Chapters 6 and 7. It presents two main arguments. Firstly, it suggests that conceptualisation of trafficking as a form of slavery invokes a criminal justice response, potentially, to the detriment of victim protection. Secondly, it suggests that the approach taken by the Government has a domino effect, provoking the merging of concepts in academic and political settings, thus potentially risking an increased level of definitional ambiguity. In line with O'Connell Davidson's (2010) notion of 'depoliticisation', this thesis seeks to demonstrate that integration of the trafficking paradigm with that of modern slavery has the adverse effect of allowing the Government to develop law and policy that increases victims' vulnerability to certain forms of exploitation, including sexual exploitation.

1.4. Why this research matters

McGough (2013) suggests that by narrowing the focus on particular aspects of human trafficking, for example human trafficking for sexual exploitation, researchers are able to identify the key gaps in anti-trafficking efforts of various criminal justice systems. He suggests that such focus brings to the attention of lawmakers, the need for new legislation, policies and modification of existing regimes. Some consider trafficking for sexual exploitation a recent issue associated with other forms of organised crime (Attwood, 2012). However, the Home Office received reports of British women being trafficked into prostitution as far back as 1880 (Attwood, 2012). The beginning of the twenty-first century saw particular attention being afforded to women's exploitation, making it, seemingly, a priority, not only for the UK, but also for the international community (Wijers, 2015).

Consequently, we witnessed the development of new legislation and policy frameworks, both at national and international levels (see Chapter 4).

Kelly and Regan's (2000) study of the trafficking of women into the UK for the purpose of prostitution, represents one of the first recent studies on the topic. Whilst other research has since been undertaken (see, for example, Lackzo and Gozdziak 2005; Bick *et al.*, 2017; Reed *et al.*, 2019), limited empirical research assesses the practical applications of anti-trafficking law and policy, as understood by legal and policy actors.

In addition, considering the recent scholarship in the UK, the emphasis has shifted to forced labour (see, for example, Chuang, 2014; Martlew, 2016; Kiss and Zimmerman, 2019): Bales, Hedwards and Silverman's (2019) note limited recent work on trafficking and sexual exploitation. This thesis seeks to pull focus back onto the trafficking of women for the purposes of sexual exploitation, which continues to be one of the dominant forms of trafficking in the UK (Office for National Statistics, 2020).

Some existing research considers the effects and inefficiencies of the UK's MSA; however, this thesis asks a more specific question: how has the development of new national law and policy affected policy actors' actions and how do these actions affect trafficked women? The original research for this thesis addresses this question and assesses the gaps that remain unaddressed by the MSA.

1.5. Structure of the thesis

This thesis comprises nine chapters. This introduction has set the wider context and the gaps in knowledge this thesis seeks to fill.

Chapter 2 reviews the wider literature on human trafficking and particularly trafficking for sexual exploitation in the UK. It considers the importance of definitional clarity, introducing the possible implications of the shift from human trafficking to the term modern slavery and the detrimental consequences of placing human trafficking within the context of border security concerns.

Chapter 3 presents the methodological approach, including the epistemological foundations in feminist critical legal theory. It explains the rationale behind the decision to choose a mixed methods approach and discusses the different data sets, presenting the analytical process for

each. It identifies the challenges faced during the research journey, especially focusing on ethical considerations that needed to be made.

Chapter 4 examines the adoption and implementation of international anti-trafficking responses into the UK's domestic legal framework. It first analyses the gradual development of human trafficking discourse within the international arena. Charting the development of anti-trafficking law and policy, not only facilitates a clearer understanding of its construction as an international problem, but it also 'provides a solid platform from which to analyse the data' (Broad, 2013:19). This is an important step in answering the main research question as it allows the thesis to question the UK's compliance with victim-centred international law and policy in the following chapters. It outlines the international influences of the League of Nations (LoN), the Council of Europe (CoE) and the European Union (EU). The current internationally accepted definitions of human trafficking and sexual exploitation as contained within the Palermo Protocol are considered, as this instrument is the baseline against which this thesis assesses the MSA.

Chapter 5 presents an original reflection on the MSA. The first section is a critical legal analysis of the Act, drawing on the development of the legislation, case law and international standards against which it has developed. The Act is therefore considered from two distinct angels: first, I consider whether the provisions of the Act, especially the definitions adopted in relation to human trafficking are sufficiently in line with international anti-trafficking standards and second, whether the provisions of the Act are sufficiently victim focused. To aid this analysis, I examine the potential and practical effects of the shift from human trafficking, to its contemporary counterpart, 'modern slavery'.

Chapters 6, 7 and 8 present the empirical findings. Chapter 6 discusses the findings of two surveys: one with lawyers, active (or previously active) in the field of human trafficking, and one with policy makers who lobbied around the MSA, or contributed towards it. The next two chapters rely on qualitative data, collected through semi-structured interviews, with Chapter 8 based on case studies from before and after the development of the MSA in relation to victim protection.

Chapter 9 summarises the key findings of the study and returns to the central question of whether the MSA has enhanced protection for victims of trafficking for sexual exploitation. It provides a number of recommendations for policy change as well as suggestions for future research.

Chapter 2- Literature Review

> *Virtually all countries in the world consider human trafficking. Why does that not solve the problem?* (Levit and Verchick, 2006: 228).

> *Human trafficking of women and girls for sexual exploitation is one of the most difficult issues to redress because it is related to deep-seated gender ideologies (e.g., prevalent notions that women are inferior to or dependent on men) that often tolerate, and in some instances encourage, victimization* (Eerz, 2010: 552).

> *Despite notable efforts, obstacles persist in ensuring the effective identification and protection of victims, and their access to justice and remedy* (Anti-slavery International, 2020:3).

2.1. Introduction

Literature on trafficking for sexual exploitation is currently more extensive and varied than ever before (see, for example Cockbain and Brewers, 2019; Wijkman and Kleemans, 2019; Jesperson *et al.*, 2019). The literature focuses on numerous aspects, including legislative responses to the issue (Munro, 2006); the conceptualisation of migrating women as offenders (Hales, 2017) and the issue of consent (Elliott, 2014; Meshkovska *et al.*, 2015). Some scholars have suggested that the UK's anti-trafficking legislation has and continues to be developed within a wider agenda of limiting irregular migration (see, for example, Goodey, 2008; Broad and Turnbull, 2018; Mellon, 2018) and others have suggested that it focuses too heavily on achieving criminal justice (see, for example, Broad and Turnbull, 2018). This has resulted in much criticism and doubt over the UK's overall promise of increased victim protection (Balch and Geddes, 2011).

It is now widely recognised that, non-governmental organisations (NGOs) play an important role in the identification of victims and ensuring that their experiences are considered when decisions are made for the provision of support (Broad and Turnbull, 2018). With that said, it has been recognised by the likes of O'Brien (2011) that often, the data collated by NGOs is influenced by particular political interests. Here, however, we find a common theme about the limitations, particularly in relation to the provision of long-term support (Ferrell-Schweppenstedde, 2016). The quotations at the beginning of this chapter, presented in chronological order, were selected to reflect significant concerns about the limitations, voiced over the last two decades. The first, from Levit and Verchick (2006), highlights an issue

addressed in this thesis - the extent to which the UK's anti-trafficking law reflects international standards on victim protection. The second quote highlights the importance of a continued focus on the trafficking of women for the purposes of sexual exploitation, another main focus of this thesis - and the final quote highlights the fact that still over 10,000 annual cases of modern slavery are reported in the UK (NBC News, 2020). It is important to ask: why do the numbers remain so high? Has the UK's recent anti-trafficking strategy developed provisions for advanced victim support or does it continue to be rooted in the notion of criminal justice to the detriment of victim support?

This chapter takes the first step in exploring these questions. It begins by considering the emergence of human trafficking as a multi-faceted concern. It discusses the importance of definitional clarity in the identification and protection of victims, assessing in particular, the significance of the prostitution/trafficking for sexual exploitation nexus. Section 2.4 considers the pathways into trafficking for sexual exploitation and Section 2.5 assesses the scale of sex-trafficking in the UK. Section 2.6 traces the emergence of the modern slavery narrative and considers the potential effects of the shift in terminology. Section 2.7 considers trafficking in the context of migration, before section 2.8 provides a brief summary of the key themes from the literature review.

2.2. Trafficking for sexual exploitation: an emergent, multi-faceted problem

The literature on human trafficking for sexual exploitation paints a picture of a 'precarious endeavour', as issues of a lack of definitional clarity and individuals' and governments' ethical outlooks often direct the debates (Wijkman and Kleemans, 2019: 54). The debate surrounding the difference between sex trafficking and voluntary, migrant sex work, for example, remains at the centre of discussions (Norfolk and Hallgrimsdottir, 2019) and these debates centre around 'a framework within which to discuss the sex industry and the viability of industry regulation' (Broad, 2013: 44).

Heightened security concerns surrounding organised transnational crime and anxiety surrounding irregular migration are some of the main factors that have brought the crime of human trafficking to international attention. This has led to human trafficking often being referred to as a new, emerging international problem, considered to be growing rapidly (McGough, 2013). Whilst factors such as globalisation, advances in technology (Hughes, 2014; Milivojevic, Moore and Segrave, 2020) and increased transnational migration, undeniably contribute to this growth, or perhaps more accurately, our increased knowledge of

it (Sarkar, 2015; Sweileh, 2018), most forms of trafficking are not, in fact, new issues: literature on human trafficking can be traced back at least a century (United Nations, 2014), when focus was placed primarily on the transportation of women for the purposes of prostitution.

The issue was formally recognised and addressed in 1895 at an international conference in Paris (Broad, 2013). Numerous treaties followed in 1904, 1910, 1921 and 1933, which can be seen as the gradual formation of an international legal regime against trafficking for sexual exploitation (Bonilla and Mo, 2019). These treaties were consequently amalgamated, forming the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (the 1949 Convention), which has now been superseded by the Palermo Protocol (see Chapter 3). The trafficking of women for sexual exploitation remains an issue that requires attention in the 21st century. This is particularly the case, given the enduring nature of modern, patriarchal societies (Campbell, 2015) and the normalisation of demand, which is considered to fuel the business of gendered human trafficking (Matthews, 2018).

Today, human trafficking continues to be driven by demand and profit (European Commission, 2016b; O'Connor and Yonkova, 2019) and although limited data is available on traffickers, due in some part to methodological constraints (Crane and LeBaron, 2019), a growing body of literature suggests that they are financially driven (Allain *et al.,* 2013; Clark and Poucki, 2018) and in search of higher profits at lower costs (Aronowitz and Koning, 2014). That said, those involved in trafficking chains are diverse: not all operate through complex networks and some are instead, small-scale, expedient criminals (Turner, 2014) and it is this group who are most likely to be identified and prosecuted. In a progress report on the EU strategy on eradicating human trafficking, the European Commission (2016b: 267) suggested that profits generated from sex trafficking create a 'complex interplay between supply and demand that must be addressed if the crime is to be eradicated'. A number of researchers argue that the trafficking of women is a form of criminal activity with the highest profit margin, whilst exposing traffickers to the lowest risk (see, for example, Wheaton, Schauer and Galli, 2010; Cooper *et al.*, 2017).

Yonkova and Keegan (2018: 44) suggest that: 'demand - in the context of trafficking in human beings for sexual exploitation - has come to be seen as a multifaceted phenomenon, driven by both actors and contexts'. Three main *actors* play a crucial part in creating demand: the end-users or buyers of sex (Hughes, 2004), those who profit from the trafficking, including all individuals along the chain of exploitation (Wheaton, Schauer and Galli, 2010;

Yonkova and Keegan, 2018), and 'the culture that has normalised the purchase of sex' through development of state policies and societal norms (Yonkova and Keegan, 2018: 44).

Matthews (2018) argues that approaches to law and policy on prostitution are part of the context around trafficking and his concept of *normalisation of demand* is demonstrated well by a study on men who pay for sex, where buying sex is compared by some participants to 'going to the supermarket' (Coy, Horvath and Kelly, 2007). When asked to comment on how they felt about purchasing sex, only half of the male respondents in this study reported to feel uneasy or nervous in doing so and only a small number (about 2%) reported to be concerned about criminal repercussions. In a similar study, Yonkova and Keegan (2018) found that the majority of male participants saw women in prostitution as consenting adults; they failed to consider the possibility of such women being victims of sex trafficking despite the fact that a large portion of the respondents admitted to having been involved with some form of exploitation, including engagement in sexual intercourse with a child and going through an agency or pimp.

In a similar study on the attitudes and behaviours associated with prostitution and sexual aggression among men who buy sex, Farley *et al.* (2015) found that paying for sex is also often coupled with violence against women. They suggest that violence against women can be supplemental to attitudes of entitlement to sexual access to women, men's sense of superiority over women and the subsequent 'dehumanizing' of women (Farley *et al.*, 2015: 3). Such findings are in line with the abolitionist, feminist view that prostitution is a form of sexual aggression rather than a form of voluntary labour.

Some researchers argue that reducing demand can only be achieved by identifying and addressing the root cause of sex trafficking through law and policy (Goliath, 2016) and others note: 'it is important to acknowledge the limits of a term [demand] that is not properly defined, is under-researched and is still subject to debate and confusion' (Gallagher, 2010: 97). What is clear is that human trafficking for the purposes of sexual exploitation continues to be a multi-dimensional transnational problem, the abolition of which is an ongoing struggle that requires a multifaceted response. To this end, adoption of migration or criminal led practices alone are considered insufficient in supporting and protecting victims and a wider focus on victims' rights remains central to any anti-trafficking strategy (O'Connell Davidson, 2010; Cherti, Pennington and Galos, 2012).

2.3. The prostitution/trafficking nexus

Reflecting on the prostitution/trafficking nexus allows for a 'gendered narrative', which places emphasis on the need to protect women, those most at risk of being trafficked for sexual exploitation (Broad, 2013: 79).

Whilst there is a clear link between prostitution and trafficking for sexual exploitation, as proposed by Giusta (2016), they are not synonymous and clarifying the distinction is necessary in order to identify a victim of trafficking. This is significant as identification of a woman as a victim of trafficking is crucial to her protection under both national and international laws. As O'Connor and Yonkova (2019) observe, there is an abundance of literature presenting evidence that experiencing trafficking for sexual exploitation has traumatic consequences for women. These include, gender specific physical and psychological harms such as sexually transmitted infections and HIV, dangerous, illegal abortions which result in on-going pain and psychological trauma leading to high rates of suicide and other mental health issues (Walby *et al.*,2016). O'Connor and Yonkova (2019: 49) suggest that:

> *The lack of synchronicity in planning human trafficking measures, migration regimes and strategies on violence against women, creates a disjointed national effort leaving those in need of support with limited provisions that are largely tokenistic in nature and benefit small numbers of individuals formally identified as 'victims'.*

The supposed distinction between 'voluntary prostitution' and the notion of 'force' or 'coercion' within the trafficking definition (see Chapter 4), has given rise to debates surrounding the concept of choice within discourse on prostitution, being a multi-layered term that is often blurred by overlapping issues of poverty and intersectional inequalities (Wilson and Butler, 2014; Gerassi, 2015). Given that consent is not relevant within the definition of human trafficking (see Chapter 4), the suggestion that a woman who consents to prostitution cannot categorically be considered a victim of traffickers, is precarious (Skrivanjova, 2010). Research data suggests that victims of trafficking for sexual exploitation are predominantly involved in prostitution (Sweile, 2018). Farley's (2003) study of trafficking in the United States shows 85-95% of interviewees were or had at some point been controlled by a trafficker. She therefore argues that, regardless of what we name it - trafficking or prostitution - it would be a 'clinical and statistical error' to believe that women choose to be used by men for their sexual gratification (Farley, 2003:65).

The relationship between prostitution and sex trafficking has been discussed through a number of competing perspectives. These debates have ultimately resulted in the development of current anti-trafficking legislation in the UK and several other countries including Australia, Holland, Sweden, the United States and New Zealand (O'Brien, 2011). One part of this debate is located within feminist perspectives, which regard all prostitution as a form of women's oppression (Malarek, 2011), that it is inherently exploitative (Farley *et al.*, 2015). Abolitionist feminists such as Barry (1995) and Jeffreys (1997) subscribe to this position, seeing prostitution as an institution rooted in male authority/female subordination, making it the 'cornerstone of all sexual exploitation' (Barry, 1995: 9). Consequently, proponents of the abolitionist perspective see little distinction between different types of prostitution (Farley *et al.*, 2015). This approach resonates with law enforcement responses to human trafficking, which tend to adopt an opposing outlook to the human rights perspective, regarding women who are exploited into the sex industry as entirely lacking in autonomy. Some scholars suggest that human trafficking estimates must concede the possibility of choice in women's actions (Broad and Turnbull, 2018). O'Brien (2011: 553) for example questions the estimates of human trafficking for sexual exploitation, suggesting that they should be viewed with caution and in light of particular feminist viewpoints through which they have been collected.

> *… [the] difference in estimates is most likely a result of abolitionists' refusal to distinguish between sex workers who have migrated, possibly illegally, from other countries, and women who have been transported…and forced into sex work through threats, intimidation and debt bondage.*

An alternative perspective is one that seeks to integrate prostitution into the formal economy of societies through conceptualising prostitution as 'sex work' (see, for example Delacoste and Alexander, 1988; Kantola and Squires, 2016). Sex workers' rights activists base their position on three underlying tenets, that: 'a) many women freely choose sex work, (b) sex work should be viewed and respected as legitimate work, and (c) it is a violation of a woman's civil rights to be denied the opportunity to work as a sex worker' (Sloan and Wahab, 2000: 467). Some go as far as to suggest that prostitution empowers a woman, by allowing her to be in charge and take advantage of men's sexual needs (Saeed, 2017). In this way, the position adopted by sex work activists seeks to challenge the norm of male privilege, by suggesting that women can assert their power within inherently patriarchal societies, by demanding payment for the sex they would otherwise give to men for free (Saeed, 2017). Saeed (2017) suggests, at the extreme end, activists such as Angela Bonavoglia suggest that women even enjoy sex work.

This position has been opposed on several robust grounds. Challenging the notion that prostitution is 'a job like any other', Kelly, Coy and Davenport (2009:47) for example suggest that:

> *The inherent difficulties in integrating prostitution into formal employment laws and structures is the strongest evidence that this is not a job like any other, and efforts to treat it as such reveal a host of contradictions which neither law nor policy can resolve. This in turn compromises the ambition to enhance women's status, rights and safety.*

Kelly, Coy and Davenport's 2009 study followed recent discussions in the Dutch Parliament, which concluded that prostitution could and should not be equated to a legitimate form of employment: 'to hold women to employment contracts would [not only] remove their right to sexual determination' (Kelly, Coy and Davenport, 2009: 25), but even when there is evidence of some terms and conditions for 'work', there is evidence of, at least, 'small exploitation' within regulated sectors (Kelly, Coy and Davenport, 2009: 49). It is therefore important to highlight that, whilst a trafficked victim may receive some remuneration in exchange for sex, the amount is often nominal, there is a lack of any legitimate employment benefits, the victims are exposed to wage theft (Stringer and Michailova, 2018) and are frequently entrapped into debt bondage, which is a recognised form of exploitation (Cooper *et al.*, 2017; Hales, 2017) and is a component of the Palermo Protocol's definition of human trafficking (Kelly, Coy and Davenport, 2009).

2.4. Pathways into trafficking for sexual exploitation

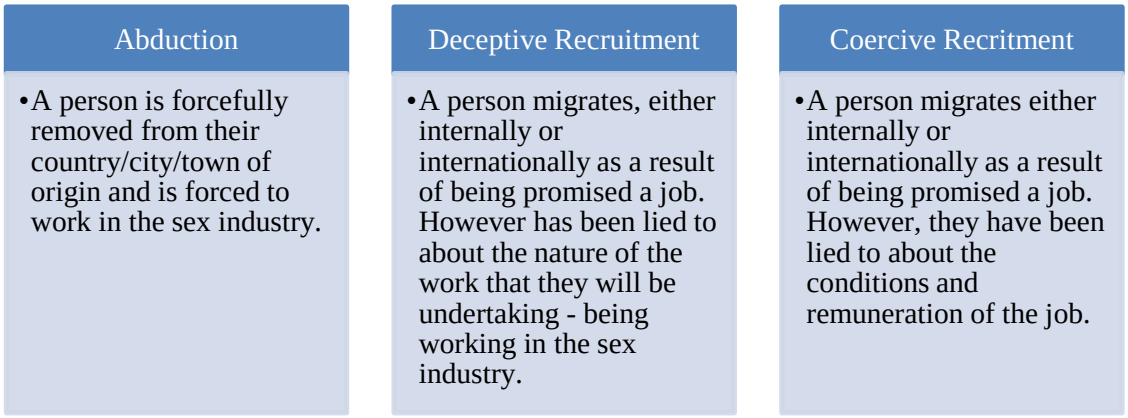
The United States' 2011 Trafficking in Persons Report (TIP) identifies three major pathways through which women are trafficked into the sex industry. These include abduction, deceptive recruitment and coercive recruitment (Connell, 2012). Understanding the practical way in which traffickers operate and the pathways they use can be a helpful tool in identifying whether laws developed to prevent their actions can be effective.

The main features of each pathway have been summarised in Figure 2.1. The absence of consent to migrate or work in the sex industry is a clear characteristic of the abduction pathway (Elliott, 2011). Whilst abduction still occurs (UNODC, 2018), the kidnapping of victims of human trafficking is relatively rare (Quirk, 2011; Aronowitz and Koning, 2014). This is mainly because the overt nature of kidnapping renders it the riskiest method of recruitment (Spruce, 2017). Deceptive and coercive forms of recruitment are therefore more

common - an understanding of how this occurs, places victims at the centre of the 'sociological realities of the trafficking experience' (Chuang, 2014: 640). Chuang (2014: 640) observes:

> *Contrary to the typical headline-grabbing cases, coercion does not always take the form of threats of physical harm. Coercion may take more subtle, nonviolent forms and may result from factors that create conditions under which workers cannot leave their jobs, regardless of how abusive the working conditions- for example, through insurmountable recruitment fees or control over immigration status.*

Figure 2.1- Sex trafficking pathways



Recruitment methods are therefore extensive. Evans (2019) argues that the most common method of engagement with women today is one that is the least risky, taking place often via online dating sites and other forms of social media. Once traffickers have established a relationship with their targets, presenting themselves as a boyfriend or guardian figure, they begin the 'seasoning' process (Smith, Vardaman and Snow, 2009). One part of this strategy is to isolate the young woman from other supportive relationships by convincing her that he is the only one she can trust (Toney-Butler and Mittel, 2020). This often even leads to a diminished level of trust with the woman's own family, her community and the police (Smith, Vardaman and Snow, 2009), further increasing the power and control of the trafficker (Weitzer, 2014; Gregoriou and Ras, 2018).

If women seek to migrate for better economic prospects, and there are few legitimate entry routes, they often resort to help from a 'middle man': a smuggler who may subsequently exploit her vulnerability (David, Bryant and Larsen, 2019). Debt bondage is an increasingly common method by which girls and women are trapped into controlling contracts and are

sexually exploited (Gadd and Broad, 2018). Traffickers routinely entrap women by offering jobs and benefits, enticing those who believe that they are entering into legitimate jobs, but become entrapped due to mounting debt. Along the transportation route, women are often taken through one or more transit countries where they become increasingly susceptible to exploitation. In his research on the migration of refugee women into Europe, Freedman (2016) notes that a large number of women face violence at the hands or their smugglers or traffickers. Women reported having experienced sexual violence and pressure from their smugglers to engage in sexual relations on their journey, in exchange for help in arriving at the destination. A fact sheet for the US Human Smuggling and Trafficking Centre provides further examples of situations where smuggling and trafficking overlap, but they seek to make distinctions.

> *The migrants were smuggled. The abuse and deprivation suffered in the safe house do not constitute human trafficking because the migrants were not forced to work or engage in commercial sex. The women were victims of sexual assault but not trafficking, as there was no commercial exchange. If the smuggler had charged his friends a fee for having sex with the women, at that point the women would have been subjected to commercial sex and become victims of trafficking* (Human Smuggling and Trafficking Centre, 2016: 5).

These processes reveal that the distinction between smuggling and trafficking is not always clear (Kelly, 2005; Carling, Gallagher and Horwood, 2015) and that there is often an overlap (Kuschminder and Triandafyllidou, 2020). As demonstrated in the above example, this can lead to the development of national laws that lack international uniformity, thus minimising the protections that are available to victims. Given the informal nature of the contracts between a smuggler and those being smuggled, it is often impossible to demonstrate the extent of the victim's awareness of what she has agreed to (Campana and Varese, 2015). As Chuang (2014: 647) suggests, some migrating women may have even recognised and accepted the potential risks as a 'temporary strategy', submitting to lack of autonomy and freedom, which Chuang categorises as 'self-exploitation'; a compromise made in hope of a better future.

Chaung's (2014) perspective however goes beyond a simplistic notion of a migrant woman's willingness to take risks - it highlights the importance of 'situational coercion' within the context of identifying a trafficked victim. This supports the perspective that irrespective of the risk a woman takes, she would not *consent* to being sexually exploited - a requirement that is

excluded from the Palermo Protocol's definition of human trafficking in any case (see Chapter 4). Even if consent was initially sought, that consent would be vitiated when exploitation takes place, especially as: 'what may begin as voluntary migration can result in trafficking and/or exploitation at a later stage' (O'Connor and Yonkova, 2019:40). Indeed, as demonstrated at Chapter 4, international law currently ensures that consent is not a legal defence for traffickers.

Whilst the Protocols attached to the UN Convention against Transnational Organised Crime attempt to make clear distinctions between smuggling and human trafficking (see Chapter 4), this fails to recognise the above overlaps that exist in real world contexts (Kelly, 2005). A number of scholars (see, for example, Kelly, 2013; Skrivankova, 2010; Strauss and McGrath, 2017) suggest that the concepts are better understood as existing along a 'continuum'. Smugglers and traffickers are frequently the same people and transitions from smuggling to trafficking often occur: 'with the movement almost always in the direction of increased exploitation' (Kelly, 2013: 87). This creates hurdles in the identification and therefore protection of trafficked women.

Once transported to a new territory as an illegal migrant, with little or no access to services, the threat of control and abuse increases (Hales, 2017). These are circumstances in which women find themselves with little choice other than involvement in the sex industry (McTavish, 2017; O'Connor and Yonkova, 2019). They are often trapped into debt bondage, where the agreed debt is commonly inflated, by applying inordinate interest, charging for accommodation and food, thus raising the number of hours/weeks the debtor must work (Stringer and Michailova, 2018). These are contexts where exploitation of the victim, whose debt is de facto hers to repay, is inevitable (Piper, Segrave and Napier-Moore, 2015).

The stigma associated with being the victim of trafficking for sexual exploitation renders many reticent when approached by authorities or even researchers, enquiring about details of their experiences (Dahal, Joshi and Swahnberg, 2015). According to Aghatise (2016), patriarchal societies such as Albania, which is considered to have one of the highest rates of human trafficking for sexual exploitation, consider women who have been trafficked, to have tarnished reputations, and they are thus not welcome back into the family. The patterns of recruitment and entrapment noted here are some of the barriers to victim identification and ultimately, victim protection.

2.5. The scale of sex trafficking

The scale and extent of trafficking has been extensively explored in literature, with key themes here being a lack of definitional clarity and flawed empirical methods (Broad and Turnbull, 2018). Some argue that the term human trafficking still lacks conceptual clarity and that this inevitably leads to different measurements (see, for example, Chuang, 2014; Broad and Turnbull, 2018). The contradictory figures and speculative estimates make assessing the scale accurately equivalent to 'looking for needles in haystacks' (Kelly and Regan, 2000:6).

In terms of official statistics, inconsistent definitions of trafficking, sexual exploitation, smuggling and now modern slavery are evident, which results in 'data incomparability' between agencies and nations (Connell, 2012: 23). It is, therefore, difficult to assess whether human trafficking is increasing or whether the reported increase is a result of amplified attention to the phenomenon and better reporting mechanisms.

> *Globally countries are detecting and reporting more victims, and are convicting more traffickers. This can be the result of increased capacity to identify victims and/or an increased number of trafficked victims* (UNODC, 2018: 7).

In terms of official statistics for the UK, the main source is the NRM. In the first quarter of 2020, 28% of referrals into it were females, over three-quarters of whom were potential victims of sexual exploitation (Home Office, 2020b). The increased number of reported victims may therefore be attributable to higher 'geographical coverage of data' and the better positioning of UK official bodies to report, not necessarily an increase in trafficking itself (UNODC, 2018: 21).

Many researchers and commentators consider estimates of the scale to be conservative (see, for example, De Vries and Dettmeijer-Vermeulen, 2015). A report commissioned by the European Commission in 2016 notes that: 'generally, statistical data provided to the Commission by all Member States is scarce with only a limited number of prosecutions and convictions communicated' (European Commission, 2016a: 6).

Additionally, available data is open to interpretation, with some arguing the purpose being ideological rather than accuracy (Goodey, 2008; Timoshkina, 2014; McDonald, 2016). Tyldum (2010) provides an example of this, suggesting that whilst one woman may, for example, fit into the criterion of a trafficking victim when assessed by certain NGOs, she may not fit into the same category when she makes a claim for asylum. He suggests that an NGO

is more likely to take a victim-centred approach, therefore identifying a larger number of women as victims, as its main objective is to support vulnerable women (Tyldum, 2010). The data on identified cases is therefore built on different thresholds, depending on where it is drawn from (Surtees, 2014).

The charge by McDonald (2016) goes further than this, however, suggesting that numbers are inflated to make the case for funding or political attention: 'different stakeholders and camps appear to overestimate or underestimate the magnitude of human trafficking to advance a particular political or ideological agenda at a certain point in time' (Timoshkina, 2014: 411). Guinn (2008) argues that the UK government has historically underestimated the number of trafficking victims in order to limit its obligations. Inflated figures that have included all forms of trafficking under the definition of modern slavery (see Chapter 5) have served to justify tighter border control under the guise of increased national security and suppression of transnational crime (Timoshkina, 2014).

Definitional clarity is important in estimating the scale of trafficking for sexual exploitation (Horzum, 2017) and in identification of victims. A lack of definitional clarity can lead to what Broad and Turnbull (2018:120) refer to as 'politicised policy responses', whereby definitional debates are marshalled to serve political agendas. Examining a 2007 report by the Global Alliance against Traffic in Women (GAATW), Mellon (2018) suggests that the repeated misapplication of the concept of human trafficking in what are otherwise national human rights issues, help further the UK government's political agendas, especially in relation to immigration controls.

At conference in University College London, Ella Cockbain presented an overview of limitations of data, noting that using robust statistical techniques and a close examination of data can reveal patterns lost in aggregates (Cockbain, 2018). She presented an analysis of datasets across gender, age and country of origin, which revealed that 63% of all identified victims were female. This figure is however misleading, if a closer examination of the data is not undertaken. For sexual exploitation, 97% of victims were female and only 3%, male or their gender was unknown. Cockbain (2018) argued that addressing complexities and connections opens up avenues for much more targeted interventions around disruption, prevention and early intervention. A stronger and deeper evidence base can contribute to better policy and practice.

The Office of National Statistics' latest modern slavery figures, published in March 2020, does not, for example differentiate between modern slavery and trafficking; this is relevant as

the former includes forms of exploitation that are not human trafficking. The figures report a considerable increase in the number of victims since the introduction of the MSA.

- *the Modern Slavery Helpline received a 68% increase in calls and submissions in the year ending December 2018, compared with the previous year*
- *there were 5,144 modern slavery offences recorded by the police in England and Wales in the year ending March 2019, an increase of 51% from the previous year*
- *the number of potential victims referred through the UK National Referral Mechanism (NRM) increased by 36% to 6,985 in the year ending December 2018*

(Office for National Statistics, 2020:2).

The report repeatedly refers to 'human trafficking and modern slavery' as if they are the same thing (Office for National Statistics, 2020: 28). This, arguably, is an example of the way in which an image is created of a legal and policy system that is working in protecting victims. In their most recent general recommendations on trafficking in women and girls in the context of global migration, the UN Committee on the Elimination of Discrimination against Women (CEDAW, 2020:20) remind us that disaggregation of 'data collected on both victims and perpetrators of trafficking on all parameters' is an indicator in the Sustainable Development Goals, something that the UK has committed itself to delivering (HM Government, 2019a).

2.6. The emergence and development of the concept of modern slavery

Modern slavery is now increasingly synonymised with human trafficking in both political and academic discourse in the UK (Broad and Turnbull, 2018). This thesis expands upon existing literature that questions this conceptual and definitional shift. Here, an overview of how the term modern slavery was merged into the UK's human trafficking discourse is explored.

The term modern slavery was suggested, but later rejected, as part of the title for a small UN group, which eventually became the Working Group on Contemporary Forms of Slavery in the 1970s. As Dottridge (2017) notes, the term was first adopted in the title of the NGO Committee for the Eradication of Modern Slavery (CCEM), developed to free enslaved domestic workers in France. The modern slavery narrative developed further within the UK, following Bales' (1999) influential contribution to the subject: he claimed that at least twenty-seven million people were enslaved, comparing the numbers to the entire populations of Canada and six times that of Israel.

Later, Bales (2012:7) draws parallels between traditional and 'contemporary' forms of slavery, suggesting that: 'the basic fact of one person totally controlling another, remains the same, however, slavery has changed in some crucial ways'. Rather than seeing human trafficking and slavery as two distinct, but connected concepts, he seeks to establish them as two sides of the same coin, through shared characteristics. He suggests that whilst several features of traditional slavery, for example the idea of *legal* ownership, are no longer possible in most jurisdictions, key features remain present in human trafficking. Figure 2.2 summarises his position, in which trafficking is analysed as a form of contemporary slavery.

Figure 2.2 - Bales' comparison of traditional and contemporary slavery

TRADITIONAL SLAVERY	CONTEMPORARY SLAVERY
Legal ownership documented	Legal ownership avoided
On-going costs/investment	Short-term costs
Low profit/personal use of slave	High, quick profits
Shortage of potential slaves, chosen in accordance with personal needs etc.	Large number of potential victims, made vulnerable by their circumstances
Long-term relationships	Short-term relationship/disposability

The definition of slavery itself is rooted in Article 1(1) of the 1926 Slavery Convention: 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. This definition relies heavily on the concept of complete and perpetual ownership of another individual and the development of long-term relationships, the maintenance of which would be considered a long-term investment (Allain, 2015). There is, however, a lack of clarity as to what constitutes ownership, and supporting guidance has failed to clarify how this is to be interpreted (Allain, 2015). This has arguably, allowed the term to be interpreted within the UK's modern day anti-trafficking legal and policy framework too freely (see Chapter 5).

In human trafficking discourse, there is now an increasing shift away from the idea of complete and perpetual ownership of another human being (Broad and Turnbull, 2018), replaced by notions of debt bondage, whereby the victim essentially remains at the mercy of the trafficker (UNODC, 2018). For example, in its Global Report of Trafficking in Persons,

the UNODC (2018) confirms that the majority of reported trafficking cases include elements of sexual exploitation, trafficked women are often controlled:

> *… by 'imposing large debts' when the victims have travelled to their place of exploitation, extracting 'fines' for a range of insignificant or invented misconduct, and/or obliging women engaging in commercial sex in the streets to pay a daily fee for the 'right' to occupy a particular location* (UNODC, 2018: 39).

In traditional slavery, establishing ownership of the slave was a critical part of the owner/slave relationship, whereas today, a trafficked person does not 'belong' to a master, but instead is exposed to a 'continuum of exploitation' (Skrivankova, 2010: 16). Trafficked victims have become disposable commodities.

> *Buying a slave is no longer a major investment, like buying a car or a house (as it was in the old slavery); it is more like buying an inexpensive bicycle or a cheap computer... the new disposability has dramatically increased the amount of profit to be made from a slave, decreased the length of time a person would normally be enslaved, and made the question of legal ownership less important… today slaves cost so little that it is not worth the hassle of securing permanent, "legal" ownership. Slaves are disposable* (Bales, 2012:14).

Despite some similarities, others argue that there are pitfalls in equating trafficking with slavery, questioning its impact on the efficacy of contemporary legal and policy responses (Bales, Hedwards, Silberman, 2019). Critical literature on the modern slavery narrative mainly focuses on the effects of this amalgamation within the context of crime prevention and the development of national laws. This thesis expands on the current literature by considering the potential effects of the UK's shift in terminology on victim protection (see Chapters 4 and 7).

2.6.1. The emotive effect

Bales (2012: 250) suggests that in order to end slavery: 'we have to take a very dispassionate look at slaves as a commodity'. This is perhaps rather ironic, as Bales is partly responsible, in presenting human trafficking as a form of modern day slavery, for introducing the emotive impact of the concept of slavery. When one visualises 'slavery', a certain image is evoked: often of men and women being shipped from Africa in ships with 'iron shackles and bolts, and running chains and collars - all adopted for the purposes of conveying slaves' (Allain,

2008: 350). The image might alternatively be of young girls being kidnapped from their home in the middle of the night to be sold in a market as 'sex slaves' - a version of human trafficking for sexual exploitation portrayed in the media (see, for example, Pierre Morel's 2008 film *Taken*).

Policy makers have been criticised for exploiting the highly emotive nature of slavery, to advance their political agendas within the anti-trafficking discourse (see, for example, O'Connell Davidson, 2010; Balch, 2015). The concept of slavery brings with it a "moral" concern, which requires immediate action - thus legitimatising policy interventions (Broad and Turnbull, 2018). At the same time, the associations between gender, ethnicity and other characteristics are deemphasised (Jobe, 2008). The UK Action Plan on Tackling Human Trafficking was issued in 2007, outlining government commitments to delivering a detailed approach to combating human trafficking in light of adoption of the Palermo Protocol (Hill, 2011). The then Labour government set out the practical steps to end human trafficking, which was already referred to as modern day slavery. The wording of the Action Plan was undoubtedly chosen judiciously, and is highly emotive. The executive summary exudes rhetorical power as it attempts to present trafficking for sexual exploitation as a new, emergent moral issue. It does this by suggesting that whilst the slave trade has long been abolished, modern forms of slavery constitute an evil, which must now be addressed.

> *This year marks the bicentenary of the legal abolition of the slave trade in the former British Empire. Whilst a number of events are taking place to commemorate this event, we are faced with another challenge 200 years after the slave trade was legally abolished - how we tackle trafficking in human beings and the misery that it causes. This modern form of slavery is an evil practice perpetrated for profit with no regard for the personal or societal consequences. We are committed to tackling this crime and addressing the harms caused* (Home Office and Scottish Executive, 2007: 4).

This account does not paint a true picture of the, arguably, failed abolition, process. Indeed, by dissociating itself from the 'former British Empire' there is an implication that slavery is no longer a British problem. As Hill (2011) notes, Britain failed to abolish slavery the first time around, with slavery and slavery-like practices remaining in its territories. Moreover, if human trafficking is equated with slavery, the UK's latest efforts at tackling the phenomenon is simply a 'moral imperative' (Hill, 2011:33) to fix something it had failed to address correctly to begin with. The danger here is that the use of the term slavery hinders the development of victim protection from 'a robust evidence base [rather than] being driven by

moral impetus' (Broad and Turnbull, 2018: 128). Broad and Turnbull (op cit) suggest the moral stance in modern slavery discourse shares common traits with the 'purity movements' of the early 19th century.

Whilst language evoking the most extreme form of human rights violation might appear to be conducive to the protection of victims, many argue that it risks raising the legal threshold needed for human trafficking to be established (Chuang, 2014; Mellon, 2018). Whilst concepts of trafficking, slavery and sexual exploitation are separately defined in national and international laws, the introduction of modern slavery into the UK's legal system has created a blurring of the lines between these concepts (Behnke, 2015; Mellon, 2018; Lazzarino, 2019), in line with the political agenda of the UK government at the time. Chuang (2013) goes as far as to suggest that the UK government's underlying political agendas are one reason why the term modern slavery, continues to lack a statutory definition and therefore conceptual clarity. The key issue here for this thesis is whether this was detrimental to the development of appropriate victim-focused, anti-trafficking strategies.

The development of national laws that include explicit references to slavery: 'risks backfiring against the population that it aspires to protect' (Chuang, 2014: 630). Conflating human trafficking with slavery may reduce recognition of its multi-layered aspects, including varying degrees and means of exploitation. For example, whilst slavery automatically brings with it a requirement for victims to have been removed from their home by force, the less extreme method of deception, to which Bales (2012) refers at Figure 2.2, are used by the majority of traffickers to entrap their victims.

Chuang (2014) tests this analysis by critically analysing the US case of *Tanedo vs. East Baton Rouge Parish School Board*. This case, concerning labour exploitation, demonstrates the application of a high threshold, relying on typical characteristics of 'slavery'. The case involved the alleged trafficking of a large number of teachers from the Philippines into the US, for the purposes of teaching in private schools. Chuang (2014) considers the case to possess clear characteristics of human trafficking, yet the jury failed to accept the trafficking claim on the basis that the exploitation failed to meet the standards of slavery or slavery-like practices. It simply was 'unfathomable' for the jury to identify trafficking when the victims had exercised agency and expressed enjoyment of teaching (Mellon, 2018: 180). Whilst an element of consent to migrate and indeed to teach is visible, it is also true 'that the vast majority of numerous trafficked persons' narratives begin with an act of agency - a desire to move or to search for a livelihood' (Chuang, 2014; 636). Chuang (2014) suggests that what

the jury failed to consider, was the coercion involved in keeping the teachers in work beyond the agreed years, and the exploitation achieved through threats of deportation and the collection of a percentage of the teachers' wages by the exploiters.

One of the complexities, arguably not considered in this case, is therefore the contextual aspect of consent. In other words, there is often no clear line to ascertain when and on what basis, a victim's consent has begun and when it has subsequently turned into coercion (Tsai, Lim and Nhanh, 2020).

> *In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution that does not mean that they consent to be subjected to abuse of all kinds… there is trafficking in human beings whether or not the victim consents to be exploited* (UNODC, 2014: 29).

Allain (2015:360, 354) provides a useful framework, which he describes as a 'continuum of coercion': even where consent is originally given by an individual, for example, to be smuggled across borders, with the purpose of entering into prostitution, the exploitation that later takes place vitiates the initial consent, as victims are in a position where they must *choose* between 'disagreeable alternatives'. In her study of mainly Eastern European women, Andrijasevic (2007) reports on the experiences of several women who, while being aware that they would be involved in prostitution, some even having written contracts, were unaware of the conditions under which they would be required to work. They were deceived about the number of clients, the immobilising control that would be put on them, and the violence to which they would be subjected. It is therefore important to question whether woman in such circumstances, can still be regarded as being smuggled, or in fact, once exploited, they are indeed trafficked.

Whilst a potential victim's level of awareness of what constitutes trafficking may differ, this does not mean that they would have expected and therefore consented to being exploited (Ioannou and Oostinga, 2015). What should have been considered in the case of *Tanedo*, is the position held in international law, under Article 4(b) of the Council of Europe Convention, that irrespective of a victim's consent, the offenders' criminal liability is not diminished. Correspondingly, according to Gallagher (2009), in order to establish whether consent remains present, the intentions of the trafficker must be considered - in the case of *Tanedo*, the intention appears to have been the eventual exploitation of the victims.

In line with Dottridge (2017), this thesis proposes that the term modern slavery broke the shared international framework that the Palermo Protocol established. While the Palermo Protocol is not without its faults (see Chapter 4), forming a universally accepted definition of human trafficking created a benchmark against which all national laws could be evaluated and potential victims identified and protected.

2.7. A focus on women's migration

In placing human trafficking within a 'modern slavery' narrative, a disconnect emerges between the UK's statutory responses to human trafficking and its desire to curb immigration (Chacón, 2010). Just as human trafficking and smuggling are often synonymised, human trafficking is regularly referred to as an immigration concern (Broad and Turnbull: 2018).

> *Contemporary international migration is both a manifestation and a consequence of globalization, and while many migrate safely, others find themselves subjected to trafficking abuses and other forms of exploitation* (Stanojoska and Blagojce, 2012: 3)

However, developing anti-trafficking law and policy through an immigration lens is not only 'over-simplistic' (Broad, 2013: 88), but also has the potential of endangering the victims it seeks or claims to protect. Kapur (2017), for example, suggests that an attempt to limit the migration of women who find no choice but to migrate for a better life, denies such women agency. This, then, has the knock-on effect of increasing reliance on illegal, dangerous migration, through which, if the woman survives, she may be exposed to trafficking (Bryant and Larsen, 2019).

Bowersox (2018) claims that the push and pull factors driving legitimate and illicit migration frequently mirror those of human trafficking. Specifically, the migration of females into the sex industry often results from the marginalisation of women in their counties of origin (Noyori-Corbett and Moxley, 2015; Barwick and Beaman, 2019). It is often through migration that women find themselves at the hand of smugglers, who in fact have no intention of assisting them in achieving a better life, but are instead, opportunists looking to make a profit. When women are trafficked into the UK, either as a result of consented migration at the hands of what was assumed to be a smuggler, or by force, the *purpose* of transporting each individual, remains the same up to a certain point: exploitation. However, the other root causes of the trafficking remain gendered as a result of such marginalisation of women, which prompts the migration in the first place. Whereas poverty and limited livelihood options are concerns relevant to all trafficking victims, particular issues relating to fundamental

inequalities within societies of origin contribute greatly to women's likelihood of becoming victims of trafficking (Levit and Verchick, 2006).

Feminisation of poverty and the marginalisation of women appear in the literature as parallel concepts (Levit and Verchick, 2006).

> *The term "feminisation of poverty" means that women have a higher incidence of poverty than men, that their poverty is more severe than that of men and that poverty among women is on the increase. Preventing and reducing women's poverty, if not eradicating it, is an important part of the fundamental principle of social solidarity to which the world is committed* (Council of Europe, 2007: 1).

This policy document suggests that tackling the problem is unswervingly a human rights issue.

When this complex and multifaceted phenomenon is examined through a gendered lens, clear links to sex discrimination within the labour market, in terms of availability of work and pay, access to resources, women's limited involvement in democratic processes and other general civil rights become apparent (Council of Europe, 2007). For women, migration is often considered an 'escape from oppressive or violent environments' (Ilkkaracan, 2012) or an escape from conventional gendered, role constraints (Russell, 2014). Rogan (2013) notes that female-headed families, which are on the rise in much of the global south and are often amongst the poorest households. There are usually more dependants within this type of family and therefore higher economic burdens: those within such household are likely to be employed in low paid jobs, suffer from health issues and be unable to escape this situation (Rogan, 2013). When relocating, the absence of a partner or other family member's support and added financial responsibility increases women's vulnerability to being trafficked.

Increased voluntary migration and globalisation go hand in hand and are both affected by gendered economic imbalances. Since gender-based discrimination is considered to have always hindered women's professional accomplishments, thus continuing to obstruct their upward social movement (Manzi, 2019): 'the movement of women within countries and across frontiers is usually a result of their unequal bargaining power and vulnerability to exploitation' (Elliott, 2014: 138).

Considering the intersections of migration and gender inequality makes tackling human trafficking becomes an even more challenging undertaking. With the exception of internal trafficking, the victim status of a trafficked person does not develop until after they have

crossed international borders, and been the subject of exploitation. In fact, most frequently, victims are only ever identified by authorities once they have been arrested for carrying out illegal work, such as prostitution, or even legal work whilst an illegal immigrant (Bowersox, 2018). In such cases, victims are often first treated as criminals in breach of immigration rules (Jocanovic, 2017).

Brennan and Plambech (2018:6) argue that efforts to reduce migration and tackle human trafficking concurrently 'creates a situation where the question of an "ideal life" after trafficking is rendered irrelevant, since the challenge for most trafficked persons is merely continued survival'. Thus, there is a disconnect between immigration-led and victim-centred approaches: Mellon (2018) considers this to be as a result of policy makers' incomprehension of factors that leave immigrants susceptible to exploitation. O'Connell Davidson (2006:10) on the other hand suggests that the immigration approach taken by states is intentionally in favour of criminal justice: it casts a wide enough net designed 'to catch immigration offenders and individuals involved in a specific set of criminal activities such as those associated with prostitution, drug running, and people smuggling/trafficking'. The entrapment of victims of trafficking within this widely cast net is considered merely collateral to the wider cause (Broad and Turnbull, 2018).

Whilst it would appear that tighter border control and stricter migration policies would restrict traffickers' ability to operate freely, there is some irony within an immigration-led approach. O'Connell Davidson (2010) comments that migration controls may serve the purpose of reducing net, *legal* migration, but what scholars such as Bales (2012) do not consider, is the adverse effect this is likely to have on those who are forced to risk their lives by exposing themselves to 'extraordinarily perilous sea journeys in flimsy wooden boats, often involving several days spent without adequate food or water, in blazing heat, on dangerous seas' (O'Connell Davidson, 2010: 254). Indeed, this still happens in the UK today, a most recent example being the death of 31 men and 8 women, found dead as a result of a lack of oxygen and overheating whilst travelling in a lorry to the UK (BBC News, 2020). O'Connell Davidson (2010) notes that the only way many migrants are able to maximise their chances of survival is to resort to illegal channels. She suggests, however, that those who do survive, 'are still at risk in the destination country, not only or always from the mafia thugs who feature in dominant discourse on 'trafficking', but also from the state actors who enforce immigration policy' (op cit: 254).

Whilst illegal migrants often foresee the possible hazards that await them (United Nations High Commissioner for Refugees, 2018), still, 'many people *want* to move,… [and] they *will* move' (Kenway, 2019). Law and policy designed to create what Teresa May framed as a 'hostile environment' (Yeo, 2018), coupled with tightening of prospects for lawful international migration (Milivojevic, Moore and Segrave, 2020) does little to prevent these processes. Rather it stimulates the growth and diversification of markets for covert smuggling services (Mellon, 2018), potentially increasing human trafficking and endangering more lives than it protects.

The immigration-led narrative is therefore considered to contribute to placing already vulnerable individuals into the hands of traffickers (Cherti, Pennington and Galos, 2012). Whilst government claims suggest that a focus on victims' needs is central to anti-trafficking strategies in the UK, the Anti-trafficking Monitoring Group (ATMG) reports on law and practices that prioritises immigration policy (Sereni and Baker, 2018). Quoting a barrister, Sereni and Baker (2018: 15) suggest that: 'developments in devolved administrations around protection, prevention and prosecution remain limited and restricted'.

In order for a victim of human trafficking to qualify for any state protection, they must first be identified as such by relevant authorities (United Nations, 2010). If victims remain within exploitative situations or, if when found, are characterised incorrectly as non-victims, this can result in the victim being identified as a 'normal' criminal (Horzum, 2017:130), or an illegal immigrant, with no legitimate grounds to remain in the UK (United Nations, 2010). The dangers that misidentification present are heightened for female victims of trafficking for sexual exploitation. Often, women who have been trafficked into the sex industry have most commonly been recruited through promises of paid work, free education, or permanent residency in the UK (Deshpande and Nour, 2013). On arrival she is then trapped into debt bondage, whereby she must sell sex to repay her inflated debt to the trafficker (Choi-Fitzpatrick, 2017). Even if women are not forced or coerced into prostitution, they can still experience sexual exploitation. Overseas domestic workers, for example, often report being sexually harassed or assaulted by their employers and held in conditions that can be described as servitude - however, it remains difficult for such women to achieve victim status (Mantouvalou, 2018).

2.8. Conclusion

This chapter considered human trafficking as a multi-layered, complex phenomenon - one that requires a multi-faceted response. It has located the protection of women trafficked for the purposes of sexual exploitation within the collapsed legal boundaries of slavery and human trafficking.

A number of interlaced themes have been identified, including that the complex nature of human trafficking invites a much broader approach than one simply based on immigration control. As Buckland (2008:43) suggests, by placing the focus on victim protection, rather than migration, states may be able to reverse the 'hierarchy of emphasis', which takes into account the complex reasons which result in migration. Locating human trafficking purely within the framework of immigration and security concerns, therefore risks reducing legal and policy interventions from robust, evidence based strategies, to simplistic ones located in a different space to trafficking (Broad and Turnbull, 2018:125) which lead to the criminalisation of victims (Hales, 2017).

The chapter also demonstrated the ways in which women have and continue to fall victim to enduring patriarchal practices and how these fuel the normalisation of demand for paid sex. It recognised women's sexual exploitation as a fruitful crime with a high profit to low risk ratio, thus making it a multifaceted concern, needing a multifaceted national response. Further, it highlighted that the relationship between prostitution and sex trafficking are at the centre of contemporary feminist debates, some of which have been highly influential in the development of the UK's national law and policy, including development of the MSA.

These themes, together with the UK's continued focus on crime control, to the detriment of victim protection are taken up in later chapters. The insufficient integration of international anti-trafficking normative standards will also be addressed, particularly within the context of the UK's MSA.

Chapter 3- Methodology

3.1. Introduction

Research on human trafficking has repeatedly been described as challenging (see, for example, Kelly, 2005; Tyldum, 2010). As noted in Chapter 2, human trafficking data is often criticised for a lack of methodological rigour and transparency, which makes assessment of the quality of the research difficult (Kelly, 2005). Thus, it is essential to ensure that the methodological approach taken in this thesis is made clear and is as robust as possible. The preceding chapters provided a foundation for my methodological approach, designed to address multiple, complex, themes. This chapter outlines the research process, the methods of data collection, how the data was analysed and ethical issues. The limitations of the study are also explored.

As a context to research centred on the trafficking of women for the purposes of sexual exploitation, Section 3.2 begins with a discussion of the feminist lens through which the research has been viewed and how this perspective has influenced the methodology. Section 3.3 addresses the chosen methodology, noting, in particular, the research questions and the use of mixed methods. Section 3.4 then discusses the initial research stage, specifically the literature review and the analysis of national and international anti-trafficking legal frameworks. This stage not only helped establish the overall theoretical framework, but it also established the research tools, which were then developed. Section 3.5 addresses the ethical considerations and 3.6 notes the sampling and recruitment techniques for the empirical aspects of the study. Section 3.7 focuses on the surveys, followed by in depth interviews at 3.8. Section 3.9 explores the analytic approach, that the critical legal analysis of legal frameworks is part of the contribution of this thesis, alongside the original data, and that they are drawn on throughout the thesis in conjunction with one another. Section 3.10 details the way in which the analysis is presented while 3.11considers a number of limitations that were encountered during the research.

3.2. Adopting a feminist perspective

This thesis is primarily concerned with victim protection in the UK's anti-trafficking legal framework, and has therefore drawn on feminist critical legal theory and approaches to trafficking. Researchers locate some of the factors that increase women's vulnerability to human trafficking within structural gendered inequalities, also reflected within legal systems

(Weare, 2017). Feminism is primarily concerned with challenging such inequalities and is considered by many 'an influential legal force' in most modern judicial systems (Levit and Verchick, 2006: 1). Levit and Verchick (2006: 1-2) suggest that in order for the much heralded concepts of equality and human rights to be of any real value in women's everyday lives, feminist ideas must be 'incorporated into law and made enforceable by the government'.

Feminist researchers on trafficking and other forms of sexual violence have focused on the inequalities faced by women (see, for example Coy, Lovett and Kelly, 2008; Levit, Verchick and Minow, 2016; Kelly, 2016). Such focus is not arbitrary, or made without basis. Gender discrimination has and continues to affect women globally. Most relevant to human trafficking is the inequity in employment opportunities, a push factor that is known to increase women's vulnerability to trafficking (Manzi, 2019). Unequal pay affects women not only in countries of origin, but also in destination countries such as the UK, thus potentially exposing women to internal trafficking. This inequity, positions women at a critical disadvantage, both in terms of status and economic resources - two factors known to increase women's exposure to exploitation (Levanon and Grusky, 2016).

According to Levit and Verchick (2006: 11): 'all feminist legal theories are mindful of power differences between the sexes and they all work to make such differences visible to citizens and policy makers'. There are, however, some divergences between the schools of feminist legal theory, the main disagreement being in relation to the equal treatment theory. Levit and Verchick (2006) describe the equal treatment theory as one seeking the equal treatment through the law of women and men irrespective of their physical or mental attributes. Whilst this theory is certainly a robust way to afford equality, it fails to consider the everyday threats faced by women. It does not consider the exposure of women disproportionately to a range of forms of abuse and exploitation, sexual exploitation being one. Therefore, the school of thought most relevant to this thesis is that of critical feminist legal theory, which examines the negative impact a flawed legal system may have on women's lives (Edwards, 2010). Wacks (2013: 92) summarises critical legal theory well. He explains that:

> *Critical legal theory examines how critical thought repudiates what is taken to be the natural order of things, being patriarchy (in the case of feminist jurisprudence… the myth of determinacy is a significant component of the critical assault on law.*

This thesis focuses on women's positions within the legal framework of sex trafficking, considering gender as 'socially constructed, relative, dependent on experiences, and mutable over time and according to situations' (Levit and Verchick, 2006: 11). Drawing on this branch of feminist theory therefore allows one to explore if and why legal frameworks neglect women or even contribute to their suffering (Buzawa, 2012). This thesis considers the current legal response to human trafficking in the UK and the violence against women within the context of trafficking, while also cross-referring to international legal instruments, which claim to be victim focused. It seeks to demonstrate that, in the most part, the law remains inherently weak, uncertain, ambiguous, and unstable (Wacks, 2013: 92). It argues that development of new laws can serve to reproduce political and economic power, and at the extreme end, sees the promise of enhanced protections offered by the law to women as one that is hollow.

Snyder (2014) suggests that laws are formulated to reflect the interests and cater to the needs of those in power. Thus, in a patriarchal society they will explicitly or implicitly support male dominance. Some feminist legal theorists see gender as 'built into the very norms of law' (Naffine, 1990 cited by Conoghan, 2013: 228). Feminism is concerned with ending violence against women, an ambition adopted by the UN in its setting the global goal as *elimination* in the Declaration on the Elimination of Violence against Women (UN, 1993). The trafficking of women into the sex industry is a clear form of gender discrimination, routinely resulting in violence against the victims. Taking such an approach allows gender to be established as a necessary criterion in the critical analysis of trafficking laws (Van Niekerk, 2019). Feminist research also gives value to lived experiences (Jenkins, Narayanaswamy and Sweetman, 2019) and according to Hesse-Biber (2012), seeks to place women at the centre of social inquiry, policy development and practice. This thesis adopts these principles of feminist epistemology.

3.3. Building a methodology

Research methodology describes both the process and the theoretical principles underpinning research (Jackson, 2013). It must therefore be tailored to the aims of a research project, chosen to address the specific questions. In building the methodology, I considered two main questions proposed by Tracy (2019: 6), the answers to which are considered below.

1) What type of methods are best suited for the goals of your research project;

2) Which methodologies are you most equipped to use or are most attracted to.

3.3.1. Use of mixed methods

In relation to the first question, mixed methods were chosen to address the main research question and the theoretical principles highlighted in my literature review (Tashakkori and Teddlie, 2010; McKim, 2017). The use of mixed methods has received support from many authors in different fields (see, for example, Lopez-Fernandez and Molina-Azorin, 2011; McKim, 2017; Morales-Sánchez *et al.*, 2020), with some suggesting that 'the strongest research programs are built upon multiple methods of data collection' (Tracy, 2019: 5). Tracy (2019) refers, for example, to Kim's (2018) analysis of gradual changes in habits relating to social media. She found, having considered and used each method in turn, that ultimately, using a combination of secondary and primary, qualitative data, including in-depth interviews was essential to address her research question. It has been suggested that linking methods 'combines the strengths of each methodology and minimises the weaknesses' (McKim, 2017: 213). In addition, using mixed methods, in her research, Yvonne Feilzer (2010) found that a constant comparison of information from more than one dataset helps inform and enhance the themes that emerge in others. Denscombe (2008: 272) suggests that a mixed methods approach helps 'produce a more complete picture by combining information from complementary kinds of data or sources'. In this way, mixed methods are able to add value to the thesis and assist in answering the research question (Johnson, Russo and Schoonenboom, 2019) 'by increasing validity in the findings' (McKim, 2017: 203).

Triangulation is considered to enhance the validity and credibility of data (Abdalla *et al.*, 2018): through the use of more than one data source to explicate different characteristics of a research topic (Noble and Heale, 2019). It is a term with deep rooted history, used by scholars as early as Campbell and Fiske in 1959 to describe the gathering and interpretation of data from multiple viewpoints (Brown, 2014). Neither the use of mixed methods, nor the process of triangulation, however, guarantee the quality of research or the validity of data collected (Broad, 2013; Brown, 2014). Brown (2014) argues that a lack of careful planning in the use of mixed methods can increase the risk of errors. A researcher must be able to find themes, or identify the absence of themes both within individual data sets and across them:. Referring to the findings of Fielding and Schreier (2001), Broad (2013: 121) considers this to be 'a more realistic view of the value of mixed methods; not to guarantee the accuracy of conclusions but to allow a more critical, even sceptical stance towards… data'.

Whilst a combination of qualitative and quantitative research methods has been utilised in this thesis, qualitative data has proven to be the most useful in addressing the main research question. Having established the main focus of the research, ascertaining the key concepts underpinning the study, the collection of qualitative data allowed me to explore, in practical terms, the socio-legal realities of human trafficking for sexual exploitation in the UK. Qualitative research allows for complexities to be explored and the particular understandings of situations and therefore experiences, to be revealed - something that cannot be quantified into statistics (Creswell *et al.*, 2016). Numerical data alone would not have enabled me to answer my research questions, as they cannot encompass the manner in which law and policy is interpreted by policy and legal actors.

My mixed methods thus comprise the critical legal analysis of the MSA in relation to international law, carrying out two surveys, and in-depth interviews with two groups of expert participants (see 3.6 below).

3.3.2. Being equipped to use the chosen methods

> *Different settings allow or inhibit the ability of the research participants to position each other in terms of class, social and personal differences, and commonalities, adding contextual and interpretive information to the interview* (Manderson, Bennett and Andajani-Sutjahjo, 2006: 1318).

This assertion may be applied to one's profession, both at the initial recruitment stage and the stage of data collection. Being a lawyer, I felt confident in approaching other lawyers for assistance with my research, as I expected there to be a certain level of trust and shared knowledge. I felt similarly in relation to policy makers as I found, through research, that some were either practicing or retired solicitors, barristers or judges. Being some of the key actors affected by national law and policies on trafficking, those practicing in the field must interpret and apply such these in specific cases. I therefore expected that some lawyers and policy makers, being active in the field, would see this research as a platform to be heard, as this lawyer interviewee recognised.

> *Sometimes when I take part in these things, some of the things and ideas I kind of come up with happen… if I have an idea and write an article about it and publish it, it would take 10 years for somebody to say oh yeah, there's an article let's do something about that, whereas if you have a project like yours something might happen quicker* (Interviewee 6).

Peters, Jackson and Rudge (2008) suggest that taking part in research may give participants a sense of being valued, that they are making a contribution. I was mindful of this, and the language used in emails to recruit participants was carefully chosen to include the objectives of the research and how I wish to add to current knowledge (see Appendix 1). The recruitment and sampling process is discussed further at 3.6 below.

3.3.3. Research questions

The research questions this thesis seeks to answer are:

> 1. Does the UK's current anti-trafficking legal framework adopt a sufficiently victim-centred approach?
>
> 2. How do legal professionals understand the changes in legislation over the last decade and the protections that are now available?
>
> 3. Do legal professionals and policy makers believe that the Modern Slavery Act provides added protection to victims of trafficking for sexual exploitation?
>
> 4. Were the aims of policy makers addressed and fulfilled in the MSA? What gaps remain to be filled by future legislation on trafficking for sexual exploitation?

In addressing these questions, the thesis draws on two sets of data: secondary documentary data and original data from surveys and interviews from experts and legal practitioners. Before proceeding with the collection of the empirical data, the literature review was undertaken (see Chapter 2) followed by critical legal analysis of international law and the MSA (see Chapters 4 and 5). These steps informed the surveys and interview guides.

Table 3.1 below presents the eight stages of the research undertaking. It provides a road map for the research journey.

Table 3.1. - The research journey

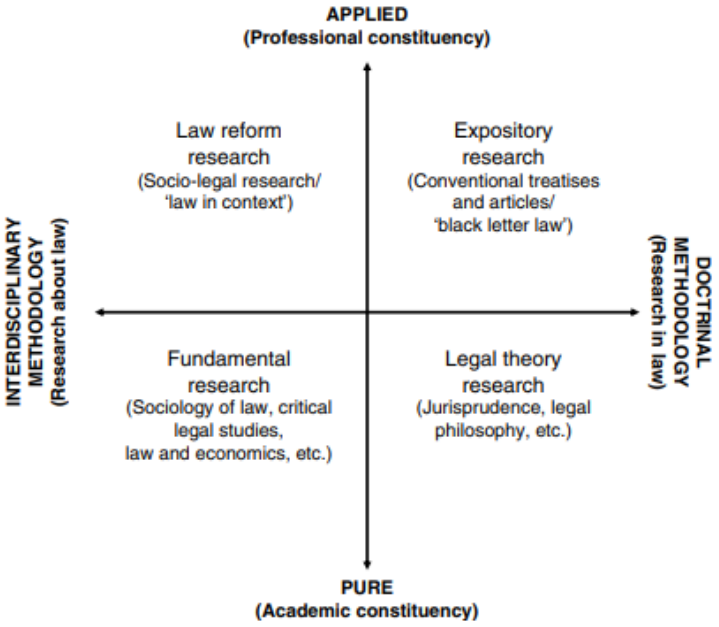
Stage	Activity	Purpose
1	Literature review	To identify what is already known and identify the gaps in knowledge that need to be filled by my research- ultimately justifying the need for my research
2	Critical legal analysis of the MSA international law and the MSA	To establish the extent to which the MSA meets international standards for victim protection
3	Developing the survey and interview guides	To gather data to answer the main research question
4	Pilot of the survey	To ensure clarity and flow, and adapt where necessary
5	Administering surveys	To collect both quantitative and qualitative data, showing the wider legal/political community's views on the MSA and victim protection
6	Finalising interview guide	Using survey responses to build on key themes; refine interview guides so that they address the main research question
7	Conducting face to face and telephone interviews	To collect qualitative data, including case studies

3.4. Literature review and an assessment of the law

A literature review is intended to identify what is already known (Cheng and Phillips, 2014). The ability to access resources online was crucial, especially since the last year of my PhD, and amid the Covid19 pandemic, access to hard copies of documents became rather difficult. A large amount of information was gathered online, mainly by carrying out a word or phrase search exercise, which ultimately led to discovery of literature, relevant to my topic. The key terms I searched for were 'modern slavery', 'human trafficking', 'sexual exploitation', 'definitions of consent', 'feminist legal theory' 'victimhood' and 'history of prostitution in the UK'.

Legal research involves an examination of the manner in which legal doctrine has developed and been applied. A feminist critique of current legal developments demonstrates the way in which the conceptualisation of trafficked women as lacking agency has helped develop different anti-trafficking legal frameworks (see Chapters 2 and 4). This study began from the position that 'traditional notions of legal objectivity and legal neutrality simply do not exist' (Bano, 2013:157), that there is a direct relationship between law and the particular social situation it seeks to address (Schiff, 1976). The library-based stage of my research played an important part in setting the foundations of the study, as it considers the fundamental question of 'what is the law?' It would not be possible to assess the law's practical affects without diving deeper into its formation. In this respect, reports and recommendations by lobbying groups, in particular the Joint Parliamentary Group and the Frank Field reviews were important resources. In a report on the benefits of legal education, Arthurs (1983) suggests a useful catalogue of legal research styles. This influenced the approach I took in my legal research. Figure 3.1 below presents Arthurs' research styles along vertical and horizontal axes (Chynoweth, 2008: 29).

Figure 3.1: Arthurs' research styles along vertical and horizontal axes.



Arthurs (1983) places academic research, undertaken mainly to achieve a *yes* or *no* answer, at one end of the vertical diagram and the everyday role of practitioners, such as lawyers and policy makers at the other. In the context of my research on the law surrounding human trafficking and modern slavery, such an approach is insufficient. The interdisciplinary

research type referred to on Arthurs' horizontal axes of the diagram is possibly the most pertinent. I would argue that for any doctrinal research to be sufficiently comprehensive, application of alternative methods is required. For example, an ambiguous or indefinite court decision or the application of a new law can be interpreted more easily when placed into both its historic and applied day-to-day setting. Given this, my research starts at the far right of Arthurs' horizontal axis in Figure 3.1 and swiftly moves left into the realm of interdisciplinary research. At this point, the epistemology of my research develops from an *inwards* analysis of 'what the law is' to that of an *outward* analysis of the law as a social construct. By moving towards the interdisciplinary axis, my research has greater fit with the epistemologies and methodologies employed by the social sciences.

3.5. Ethical considerations

After carrying out an extensive literature review and before any empirical data could be collected, I considered the ethical and practical implications of carrying out the research. A researcher is better equipped to adhere to the necessary ethical framework if they have a sufficient grounding in ethical considerations involved in the research topic. As confirmed by Surtees and Brunovskis (2016:1): 'central to any ethical research is the principle of *do no harm*, that when conducting research we do no harm to the persons we are researching and whose experiences we are seeking to explore and understand'. I reviewed professional guidelines of the British Education Research Association and the Social Research Association, which outline principles aimed at safeguarding all research participants (Downes, Kelly and Westmarland, 2014) and sought to apply these principles to my research.

Ethical guidelines are not legally binding - they operate on a self-regulatory basis (Smyth and Williamson, 2004) and are guided by ethics committees who consider each research proposal on its specific merits. Ethical approval was obtained from the ethics committee at London Metropolitan University and consent was obtained prior to any online surveys being sent out or interviews being conducted; the participants were briefed on the purpose of the study and were given assurance about anonymity.

The trafficking of women for sexual exploitation is undoubtedly a sensitive topic, however, as my research does not include direct contact with victims, I did not consider there to be any significant potential for harm (Downes, Kelly and Westmarland, 2014). During the initial stages of the research, ethical considerations and other potential practical difficulties in interviewing survivors were considered. Asking survivors to retell their stories, while

potentially empowering (Kelly, 1988; DePrince and Chu, 2008), or ever cathartic (East *et al*., 2010) for the trafficked woman, leading to positive research outcomes in many cases, was not a necessary source of data in this thesis. Victims were unlikely to have sufficient legal grounding or knowledge of relevant law and policy, hence the decision to focus on legal professionals and policy makers. Robjant, Roberts, and Katona (2017) remind us that the trauma of human trafficking for sexual exploitation does not end when the victim is removed from the threatening environment - it is only ethical, therefore, to invite them into research if the questions cannot be answered without their accounts - which in this case, it could.

In a review of the enhanced scrutiny implemented by research ethics committees, Downes, Kelly and Westmarland (2014) consider Cromer and Newman's (2011) research on ethical considerations in research relating to abuse and violence. They note that 'all research with human participants share a burden of protecting the rights, welfare, and dignity of the participants' (Cromer and Newman, 2011: 1537). Whilst making this observation, they also add that focusing too heavily on trauma and the 'fragile' state of participants, could result in an unbalanced constraint on such research. This approach is closely shared with the Kantian principles, whereby any moral decision made by a researcher must be one practiced universally (Clark and Walker, 2011). In light of the two participant groups I have chosen, I did not consider it necessary to apply a higher standard of ethical consideration to the research.

3.5.1. Risk of distress

I considered there to be little or no risk to me as the researcher, save for possible emotional distress of discussing sensitive topics of violence and abuse (Bahn and Weatherhill, 2012), albeit mediated through a third party. I am accustomed to speaking with peers and clients in an interview setting regularly and am well versed in speaking to clients to get to the bottom of a legal issue. I am able to detach myself, somewhat, from the retelling.

Prior to the interview, I considered any potential distress that my participants might become exposed to as a result of having to retell the survivors 'stories. The two groups of participants were expected to see the process of being a part of a study, on issues they deal with as professionals on a regular basis. Nonetheless, I considered that there might still be some risk of distress, caused through the retelling of their clients' stories. Participants were reassured both beforehand and during the interview process that no pressure would be applied on the

participants to answer questions they do not feel comfortable answering. Participants were also free to take as many breaks as they needed.

3.5.2. Confidentiality and consent

To ensure confidentiality and anonymity, the interviews were conducted either in a secure and familiar location chosen by the participants or carried out over the telephone. Both groups of participants were considered likely to be concerned about their identities being revealed, particularly where they were critical of current policy and practice. Participants were reassured at each stage of the research that their identities would be hidden and they would only be named in accordance with their positions as lawyers or policy makers. In the thesis, participants are given numbers and identified as 'Interviewee 1 (lawyer)', and 'Interviewee 2 (policy maker)'. There is no read across from surveys to interviews. Survey participants' relevant quotations have also been given numbers and are identified as 'Q1 (lawyer)' and 'Q2 (policy maker)'. Where pronouns are required, I have chosen *they* and *their* to ensure further anonymity. There may be other ways in which participants may be identified and to mitigate this, where specific details might identify someone, for example, where a participant has given specific details of their involvement in lobbying, these have been carefully edited, while making sure that the meaning of the response is not altered.

Turner (2014) suggests that criminal cases are often linked and prosecutions under one case may be linked to ongoing investigations concerning a seemingly separate matter. She points out that victims, who are often witnesses, may still be held in detention centres or under protective care at the time of the research. It is clear, therefore that keeping the identities of both lawyers and the victims for whom they act is of great importance as not doing so may inadvertently jeopardise continuing processes. In this study, participants held first-hand information about trafficking victims. They therefore continue to owe a duty of care to their clients and so, in view of this, as a researcher, I was conscious of the level of sensitivity that came with being granted access to the lived experiences of victims. Lawyers were specifically asked not to disclose their client's (victims and offenders) names. Seeking information about abuse and sexual violence against women, asking even apparently harmless questions may cause harm to victims, if the information is traceable to the individual. There is a strict code of conduct, set by the Law Society and the Solicitors' Regulation Authority that sensitive information, including details of clients must not be disclosed to any third party without their consent. In the case of human trafficking victims, the rule would be even more closely

followed, both by the researcher and by the participants, who have a similar duty of care. I had confidence in their judgment and in my own, to respect these standards.

3.5.3. Provision of information and informed consent

In order to gain the consent of the participants, a researcher must be able to provide sufficient, relevant information, which allows informed decisions about participation to be made. Competing trains of thought can found in debates about this issue. For example, Scraton (2004) suggests that information relating to the researcher's views on the topic and the method of funding the project must also be disclosed to the researcher. In contrast, Iphofen (2013) highlights the importance of not overwhelming the respondents with unnecessary information. In order to achieve an appropriate balance, I prepared an information sheet, detailing the nature and purpose of the research and appended it to the first page of the survey (see Appendix 2). Participants were unable to progress with the survey until they confirmed their understanding and consent to take part in the study.

At the interview stage, each participant was asked to sign and return a consent form (see Appendix 3). Whilst some consent forms were returned, a number of respondents chose instead, to provide confirmation in the form of an email, stating that they consented. I considered this form of consent sufficient for the purposes of my research, particularly as consent could be assumed by virtue of the participants taking part in one of two stages of my research. Both sets of consent forms included information already provided in the information sheet, further explaining, in the case of an interview, that the interviewee could request the interview to be stopped at any point and any responses may be excluded from the final analysis at the request of the participant.

3.6. Sampling and recruitment

Two sample groups were identified for the two surveys. 1) Lawyers, active (or previously active) in the field of human trafficking and 2) policy makers who lobbied around the MSA or contributed towards it.

A combination of recruitment strategies including emails, direct messages through LinkedIn and other social media were used to mitigate 'coverage error' (Dillman, Smyth, and Christian, 2014). The language used in the recruitment email was informal, yet succinct, to capture the receiver's attention. The email for example, acknowledged that the respondents are busy individuals and that the researcher is a fellow lawyer, drafted in a sympathetic tone. The

email included a link to my firm's website, which was considered to add an element of trust and demonstrate genuineness to the respondents.

Emails alone were not sufficient as not all participants necessarily have uninterrupted access to the internet or a computer; some respondents were on annual leave, sabbaticals or on maternity leave (as noted within their out of office responses). Once online invitations were sent, an appropriate timeframe for follow up emails/messages to non-responders was identified (Ponto, 2015). A one-month gap was left between the initial stage of sending out surveys and sending reminders. This resulted in an increased uptake, with nine respondents completing the survey in the week following the reminders.

Participants for in-depth interviews were selected from those who had indicated their willingness to take part in interviews in their survey response. Dorussen, Lenz and Blavoukos (2005) consider the advantages of utilising expert interviews. They suggest that experts are better equipped to provide reliable and intelligible responses to more salient topics; to this end 'the validity of the information collected by means of expert interviews crucially depends on the quality of the experts' (Blavoukos, 2005: 333). All of my chosen participants had some involvement with cases of human trafficking, had been in the field for at least five years and were active in law and policy making in the field.

A purposive sampling strategy was used, since the target groups were those who had some level of familiarity with the MSA and were all based in the UK. Crossman (2020:1) defines purposive sampling as: 'a non-probability sample that is selected based on characteristics of a population and the objective of the study'. She outlines seven possible categories: maximum variation/heterogeneous; homogeneous; typical case; extreme/deviant case, critical case; total copulation and expert sampling. The sampling strategy in this study falls into two categories: the homogeneous, 'selected for having a shared characteristic or set of characteristics' - lawyers or policy makers, and expert-whose 'knowledge is rooted in a particular form of expertise', that is engagement with the development of the MSA (Crossman, 2020: 2).

Ilieva, Baron and Healey (2002) note the importance of identifying the right person to be approached and avoiding gatekeepers. They considered the results of an independent survey carried out by the Central Bank, covering 150 countries. They noted that the survey resulted in a 100% response rate from bankers who were specifically identified and approached by personal email, in comparison to no responses at all when enquires were sent to the general department email. In my research, it is important to note that participants, especially policy

makers, due to the sensitivity of their roles, did not allow their personal email addresses to be visible to the public. I, therefore, had to find alternative routes. Ilieva, Baron and Healey (2002) suggest that multiple approaches such as online and mail approaches can be used.

Potential lawyer participants were identified through personal contact, through the Law Society's *Find a Solicitor* website and individual lawyers' websites. The online platform *LinkedIn* was also used to identify lawyers, but proved less helpful when applied to policy makers. Social platforms such as LinkedIn do not allow instant messaging with members, unless a request for contact has been made, and the recipient has accepted that request. I found that policy makers were much less willing to engage with someone they did not know. Lawyers, on the other hand, perhaps due to my own status as a lawyer, were more receptive, with most willing to provide their personal email addresses for me to make contact.

Policy makers were mainly identified through online research and review of historical debates surrounding the development of the MSA. Potential participants from various professional backgrounds within the human trafficking arena, ranging from charities, NGOs and government officials were also approached at conferences on human trafficking and the MSA attended during the course of my PhD. Further, a number of participants were identified through articles and other publications they had authored.

Forty three lawyers and twenty seven policy makers were identified and invited to take part in the surveys. The numbers increased, albeit marginally, as a result a snowballing when the surveys went live. Snowballing is generally considered an effective form of purposive sampling (Griffith, Morris and Thakar, 2016), and was certainly more effective in recruitment of participants for my interviews. Johnson (2014: 1) highlights the snowballing process as being a 'non-probability method' of recruiting participants from the hidden populations. This method provides a cost and time effective means of gaining responses from participants who would not have otherwise been identified. A question in the survey invited participants to provide details of those who they thought fit the recruitment criteria. Snowballing meant that invitations were sent to a total of fifty eight lawyers and thirty policy makers. In the end, I received a total of twenty two responses to surveys from lawyers and eight responses from policy makers. In contrast, at the interview stage, all additional participants were suggested by interviewees with no prompting by me as the researcher. I interviewed twelve lawyers and five policy makers.

3.7. Surveys

Surveys are frequently used in quantitative research to test a hypothesis or to collect statistical information. In this thesis, the surveys helped gather information about the respondents: it asked participants to confirm for whom they act in their professional capacity, whether they have any experience of dealing with cases involving sexual trafficking and whether they had any experience within the field of human trafficking before 2015. This information helped gather insight into participants' specific expertise in the field and whether they would be appropriate candidates for the later stage of the research, i.e. interviews.

Surveys can also assist in gathering qualitative data, through the use of open-ended questions, and many are a combination of the two (Ponto, 2015). Online surveys are both cost and time effective, which is likely to increase engagement from exceptionally busy professionals (Ponto, 2015). Using online surveys also meant that the results were more likely to produce a geographical spread of participants from across the UK, as well as the further advantage of avoiding costs associated with meeting participants face to face. Hence, despite the limitations of surveys (see section 5.10 below), this was considered to be the most effective approach to initial data collection.

A pilot of the survey was undertaken, with a small group of individuals, to maximise the clarity, relevance and logic in the instruments (Marshall and Rossman, 2014). Five participants were selected who had limited knowledge of the thesis' subject area, the responses were not considered for the purposes of analysis. Instead, the pilot served to identify any practical issues with the survey layout and procedure, allowing these to be corrected prior to the official invitations for participation being sent out (Malmqvist *et al.*, 2019). Several issues were identified by the pilot group and subsequently addressed. For example, the order of the questions was altered, to assist flow. Additionally, some of the questions were shortened as lengthy and complex wording can often result in respondents becoming disinterested, thus paying little attention to the meaning of the item (Saleh and Bista, 2017).

I also undertook the survey myself. In addition to the feedback received from my pilot group, I noted that some of the questions were leading, prompting or encouraging a specific answer, thus potentially resulting in confirmation bias. Confirmation bias is a researcher's inclination to search for information that backs their previously held views (Nardi, 2018). I, therefore, re-

worded some questions, converted some to multiple choice options with text boxes underneath for open-ended comments, giving participants more flexibility in their responses.

The survey data was collected using Survey Monkey, an online tool that allows data to be easily transferred into statistical analysis software. I was able to export all responses and store these for analysis. The exported data was accessible only by me and was kept on a password protected computer.

3.8. In-depth interviews

The next stage of my research took the form of semi-structured interviews with experts identified through the surveys. Semi-structured interviews were considered the most suitable form of data collection, as I was able to organise the questions within the thesis's theoretical framework (Creswell, 2013), while maintaining some flexibility. A discursive platform was offered to the respondents, allowing the complexities of the law surrounding human trafficking to be explored through critical engagement.

Following initial data collection through the surveys, I was able to identify themes that required further exploration within the interviews. The themes that emerged were wide-ranging, due in part to the fact that lawyers who had agreed to take part in interviews came from various disciplinary backgrounds and were not all involved purely with cases of human trafficking. On the plus side, this provided me with the advantage of hearing the views of lawyers who deal, not only with victims of trafficking directly, but also those who work with the police, the Home Office's immigration departments and the CPS.

Willig and Rogers (2017: 263) suggest that a 'morally responsible' attitude must be taken when carrying out interviews in social science: this includes gaining as much information as possible about matters affecting the responses given by participants. Understanding a participant's background, accords with Oakley's (2016) feminist stance that a researcher must avoid a textbook interviewing approach. In this respect, and after I had chosen my sample, I was mindful to acquire some background information on each individual respondent, so that I could get a feel for their career progression and knowledge of the field. This included asking questions such as why they decided to practice in the trafficking arena and what improvements they had hoped to see in the UK's anti-trafficking response. The second question was mostly relevant to policy makers, as I was keen to assess whether the suggestions put forward by lobbying groups had developed into law, and if not, why this was.

3.8.1. Interview guides

Two interview guides were developed (see Appendices 4 and 5). The guide for lawyers included nineteen questions and the guide for policy makers, nine. The questions were predominantly open-ended, which allowed for flexibility and opinions to be shared with no restrictions (Farrell, 2016). According to Galletta and Cross (2013), semi-structured interviews invite respondents to express their opinions honestly. They also allow the researcher room to ask for clarity and to further investigate areas through follow-up questions (Martlew, 2016). The interview guides provided a guideline, as the flow of questions was often altered and adapted in accordance with each respondent's train of thought (Becker, *et al.*, 2012). This required me as the researcher to be alert to the answers that were being given, assessing how to keep the flow of the interview, increasing the interactive dynamic of the process.

The interview guide was therefore not rigidly followed and adaptions were made during most interviews. Sections that were not relevant to a participant were purposely avoided. For example, where participants confirmed that they had no experience of dealing with cases involving sexual exploitation, I avoided particular questions and focused on those designed to address more general provisions of the MSA, focused on victim protection. This is in line with Kahn and Cannell's (1957: 16) interpretation of an interview as: 'a specialised pattern of verbal interaction – initiated for a specific purpose, and focused on some specific content areas, with consequent elimination of extraneous material'. Further, Galletta and Cross (2013) identifies that once interviews have begun, adjustments will often need to take place to make the interview guides more effective. That said, it was important to remain conscious that: 'interviews should not be conceived as informal chats with interviewees; instead they are data-collection instruments which can be used to penetrate a number of research questions' (McGrath, Palmgren and Liljedahl, 2019: 1002). I therefore ensured that all relevant questions were answered within the freedom given to my interviewees, bringing focus back to the topic when there was too much deviation from the question.

3.8.2. Telephone interviews

One of the practical challenges in qualitative research is the geographic location of the interviewer and their participants, thus rendering face to face interviews more difficult to arrange (Oltmann, 2016). As my participants were recruited from across the UK, there was widespread reluctance from participants to take part in face to face interviews. I therefore

arranged for a number of interviews to be carried out over the telephone or by video chat. The option to carry out interviews in this way allowed a greater and more varied sample to be attained.

Many researchers have regarded use of telephone interviews in research as a practical mode of data collection (Konneh, 2017; Cachia and Millward, 2011). Data is collected speedily, while one-to-one contact is maintained with the participants. The quality of the collected data may be questioned, as participants' body language is often considered crucial in research on human trafficking (Krsmanovic, 2016; Toney-Butler and Mittel, 2020). The difference here is that, unlike the studies carried out by Krsmanovic (2016) and Toney-Butler and Mittel (2020), my interviews were not carried out with victims of trafficking. I considered that an assessment of expert respondents' body language would not necessarily add value to the research, at least not enough to counter the benefits of telephone interviews.

According to Oltmann (2016), face to face interviews may be perceived as intrusive by participants. Telephone interviews create a feeling of distance, thus reducing any potential pressure a respondent might feel. For example, rather than having to wait for me to leave their place of work or other chosen space, the participants were able to end the interview immediately by terminating the call, thus allowing them to get on with the rest of their working day in a usual manner. Telephone interviews can also be beneficial for the researcher, not only by saving on travel time and costs, but also by placing the researcher in a familiar space, which would otherwise be the participant's personal space or a public area.

3.8.3. Transcription

All participants were informed that their responses were being recorded and would later be transcribed. Consent for this was received from all participants at the beginning of each interview. The interviews were recorded using a digital device and later transcribed, verbatim, onto my personal, password-protected laptop. As noted by Becker, *et al*. (2012: 292), it is crucial to keep a 'comprehensive record' of an interview for the purposes of analysis in research. Accordingly, rather than waiting until the interviewing process was completed, I chose to transcribe each interview expeditiously, as soon as they had finished. The decision to carry out the transcriptions promptly was two-fold. Firstly, I wanted to ensure that the quality of the words during the conversion process was preserved (Hennink and Weber, 2013). Secondly, I found it useful to draw upon experience from my earlier interviews and the data collected to adapt my interviewing techniques with future participants.

The transcripts included all: ‘errors in the spoken words of both the researcher and participant - such as incomplete sentences, word choice mistakes, or sentence structure problems’ (Clark *et al.*, 2017: 4). The transcripts were prepared and checked over a number of times and then the recordings were deleted from my personal computer. Often, the process of transcription is overlooked as an important part of the research, and some researchers choose to outsource this element of their research to either a professional or, say, a family member (Clark *et al.*, 2017). I briefly considered this option, but decided that, carrying out the transcription process myself would assist with understanding the meanings of the spoken words (Davidson, 2009), thus informing the emerging themes, as I was required to re-listen to the audio recordings a number of times.

3.8.4. Case Studies

The first part of the interview with lawyer participants addressed, in more general terms, their experiences of dealing with cases of human trafficking. The second required participants to considered two case studies involving the trafficking of women for sexual exploitation, one prior to development of the MSA and one after. The purpose here was to identify key ways in which the development of law has affected victim protection. Heale and Twycross (2018: 7) describe case studies as ‘an intensive, systematic investigation of a single individual, group, community or some other unit in which the researcher examines in-depth data relating to several variables’. In this research, the case study method was used to provide specific focus on human trafficking for sexual exploitation through accessing lawyers’ experiences of handling individual cases before and after the development of the MSA.

Case study methodology is considered to have been: ‘around as long as recorded history’ (Flyvbjerg, 2011: 302). Hammersley, Foster and Gomm (2000) consider the use of case studies as a distinctive form of enquiry, capable of answering a particular question (see, also, Wikfeldt, 2016). Research by Flyvbjerg (2011) and Yin (2018) show that the use of case studies is now much more refined and is therefore considered an effective form of investigation when exploring complex issues surrounding human behaviour and social interactions. There is, however, an argument that due to their exclusive nature, case studies are unable to portray the general position in society and may, therefore, be unreliable (Merriam and Merriam, 2009; Mills and Birks, 2014). I took the approach that using case studies would assist with the process of triangulation, explained in more detail at 3.3.1, helping to paint a more holistic picture, creating a broader understanding of the context within which law is applied to each case (Creswell, 2014).

3.9. Analysis

3.9.1. Critical Legal Analysis

Chapters 4 and 5 analysed international and UK national anti-trafficking law and practice respectively. Critiques of both legal frameworks were made, especially in relation to each instrument's ability to protect victims. The analyses demonstrate the way in which cultural norms and certain assumptions about gender have, and continue to play, a role in law making. This analysis set the foundations for the empirical chapters that follow.

3.9.2. Analysis of original data

The data collected throughout the fieldwork forms the basis of the three empirical chapters of this thesis - Chapters 6, 7 and 8. The methodology was chosen as the best pairing for a thematic analysis. It is important to acknowledge the small but important difference between thematic analysis and grounded theory, which do not necessarily contradict one another. Being the opposite of positivism and constructivism, whereby quantitative methodologies adopt a positivist ontology, developed through already developed hypotheses (Broad, 2013): 'grounded theory sets out to discover or construct theory from data, systematically obtained and analysed using comparative analysis' (Chun Tie, Birks and Francis, 2019). According to Braun and Clarke (2006), the approach taken in both is very similar; however, the former exists with no commitment to building theory.

Combining the different data sets in order to answer the main research question allowed a more critical lens to be placed on data, not only within the data sets themselves but also as a comparison exercise across the data sets. Triangulation therefore allowed one data set to establish the validity and reliability of another (Abdalla *et al.*, 2018). As Mason suggested in 1994, achieving integration of data does not require similar questions to have been asked within data sets, nor does it require the balance of empirical data relied upon in each data set to be equal; what it does require is for the questions asked to be able to address the topic from different angles (Mason, 1994). As noted at Chapter 6, the balance of empirical data relied upon for Chapters 6, 7 and 8 are unequal - this does not, however, limit or otherwise adversely affect the quality of the data presented.

3.9.3. Surveys and interviews

As the surveys were a starting point for the remaining empirical chapters, the questions, and therefore replies given, were mainly quantitative. Thematic analysis was applied to the qualitative data, a process aimed at finding and interpreting key themes within data sets (Matthews and Ross, 2010) and are presented in Chapter 6.

Braun and Clarke (2006) distinguish between a 'theoretical thematic approach'- where collected data sets are considered with respect to a pre-established theoretical framework and one based on 'inductive reasoning' which begins with an analysis of the data and ends with the generation of theories. As Broad (2013: 113) suggests, the 'key to thematic analysis is that the theoretical framework is made explicit and the data is approached in relation to the theoretical framework and the research questions'. In identifying emerging themes, it was therefore important to constantly refer back to my initial research questions. Ultimately, the result was analysis that is both theory and data driven (Howitt, 2010). For example, I was mindful of discourses critiquing the UK's predominantly immigration-led approach to anti-trafficking. There was an expectation, therefore, that the MSA would sit within this approach. While carrying out my coding, I was looking for themes reflected the ideas already uncovered in my literature review and analysis of the MSA. In addition, new codes developed during analysis, which shaped the basis for the themes presented in my empirical chapters.

The analytic method used to identify the main themes in a larger pool of data is to apply constant comparison analysis (Leech and Onwuegbuzie, 2007). Azarian (2011:113) describes comparison as a scientific method, noting that it:

> *… refers to the research approach in which two or more cases are explicitly contrasted to each other regards to a specific phenomenon or along a certain dimension, in order to explore parallels and differences among the cases.*

I commenced analysis of the interviews by reading each transcript carefully more than once, making notes and noting relevant passages. See Appendix 8 for an example of note-taking and analytical work. I then began the coding process: grouping sections of text with suitable labels (Rosala, 2019). Once codes had been assigned to segments of data, it becomes easier to identify themes that had emerged (see Appendices 9 and 10). Similarly, being able to classify all of the data allows it to 'be compared systematically with other parts of the data set' (Gale

et al., 2013:4) and therefore 'represents the first step in the conceptualisation of the data' (Broad, 2013: 115).

Going through the data systematically, I looked for groupings, developing themes, and points of agreement or divergences within each group and across my two groups of participants. Due to the relatively small size of responses, I chose not to use coding software and instead, undertook the coding of data manually. In following a technique suggested by Neuman (2006), I first carried out an open coding process to shrink the information into primary groupings, and then applied a more selective criterion, set against the first chosen themes. Axial coding was then utilised to help identify emerging interactions between the themes, and to make sure that all the critical components of the data are identified (Konneh, 2017). Where I have deviated from the detailed coding approach, is in responses, which covered topics wholly irrelevant to sex trafficking or victim protection in the UK. For example, one respondent spoke at length about their cases involving the labour exploitation of males and another spoke about their upcoming travels to Australia as part of a general chat. Coding these parts of the text would not have added any value to my data.

3.10. Presenting the analysis

As my data was collected utilising a number of data sources, I needed to make a decision on how to effectively present the findings. Numerous presentation designs were considered, such as, arranging the results according to respondents or by emerging themes and assimilating all data sources within one chapter. However, eventually, I made the decision, to present the findings of each data source in separate chapters, although there are some overlaps between Chapters 6 and 7 whereby responses from interview participants have been presented at Chapter 6 to aid the development of key themes. The overlap, has, however, been kept to a minimum. The analysis is presented using thematic headings in all three empirical chapters. The headings have been chosen by assessing, not only the prevalence of the themes, but also their 'keyness' (Braun and Clarke, 2006) to the subject area. As Braun and Clarke (2006:10) suggest, the keyness of an identified theme in less about quantifiable measures and more 'whether it captures something important in relation to the overall research question'. Headings, therefore, reflect the research focus on victim protection, linked to the legal framework. Whilst there is some repetition of common themes: 'displaying the findings in this way allows the reader to observe the evidence of reoccurrence' (Broad, 2013: 125).

3.11. Methodological limitations

All research has limitations. These are either matters that are beyond a researcher's control (Brutus, Aguinis and Wassmer, 2013) or matters that a researcher must mitigate before they undertake the research. In the first two years of my PhD, literature on the implications of the MSA was scarce. In fact, the Act did not come into force until eight months into my PhD, and I had started my research only on an assumption that the Bill would become law. Information about the application of the law in practical terms was therefore scarce. This lack of knowledge was the main drive, guiding my research design.

At the point of conducting my interviews, a lot more knowledge was available and court decisions had started to become available. In the recruitment process, however, I still found that a number of lawyers turned down the invitation to be interviewed, principally because they had little experience of assisting clients in cases that focused mainly on human trafficking. Any experience they did have in cases involving human trafficking was on smaller aspects of larger cases. Furthermore, given the newness of the legislation and therefore few cases that had relied on its provisions, there were few lawyers that regularly worked on such cases. These elements resulted in a narrow pool of experts to carry out research with. Ultimately, I interviewed five solicitors and seven barristers. The limited number of interviews was disappointing but was in line with expectations having received feedback through the surveys. This led me to consider the position noted by Letherby (2003: 109) that: 'silences are as important as noise in research and the interpretation of silence is as important as the interpretation of what is being said'. The small number of interviews can be attributed to the fact that there are still very few specialists in the area and it does not indicate an error in the sample collection technique. The scarcity of knowledge reaffirmed the need for filling a gap in the knowledge base.

Similarly, during my fieldwork, I noted that very few respondents were experienced in trafficking for sexual exploitation, with only six lawyers confirming that they had experience in the specific area. Several, indeed most participants, including lawyers and policy makers who were identified through snowballing, declined to take part in interviews, commenting that they lacked the necessary expertise. Many lawyers were keen to talk about trafficking for the purposes of labour exploitation, which whilst interesting, was not the topic of this study.

Whilst online surveys are more cost and time effective, response rates are often low, raising questions about the representativeness of the sample. Case and Given (2016) argue that

technological advances have led to online surveys being an overused method, with recipients paying little attention to links received from unknown senders. Similarly, participant 'personalisation', as described by Schaefer and Dillman (1998), is contingent on the researcher having easy access to the potential participant's contact details. The latter was evident during my recruitment stage, particularly in relation to policy makers and a number of lawyers who are leaders in the field. Few barristers allow for direct access and contact would need to have been requested through their clerks. This added a further human barrier. Not all barristers responded to my enquiry and it is possible that my request was filtered into the "non-urgent" work that never got noticed.

The response rate for policy makers was even lower, with only five of the individuals who responded to my survey agreeing to take part in an interview. This does not necessarily indicate a lower level of interest in the subject, but may be a reflection of the sensitive nature of the matter for potential participant. Both lawyers and policy makers fall within a category of professional individuals who are wary of what they divulge.

3.12. Conclusion and reflections

This chapter has set out the methodology adopted in this study. It clarified the rationale for using a mixed methods approach, setting out how the different data sets have been analysed in conjunction to one another and within the broader theoretical framework. The chapter acts as a road map for the reader, demonstrating the actions that have been taken to investigate the main research question, setting out the justification for choosing particular techniques and the challenges faced. A combination of doctrinal and critical legal analysis of legislation, as well as empirical data from experts in the field has provided the best formula for this thesis to achieve triangulation and answer the main research question.

Reflecting on the entire research journey, a lengthy and at times, difficult endeavour, I am able to make the following observations: use of multiple methods of recruitment was vital to my research undertaking. In the absence of surveys, for example, I was very unlikely, first, to acquire the background knowledge needed to devise my interview guides and second, to be able to recruit interview participants. In addition, being open to adapting the interview guides as more interviews were carried out, allowed me to tease out themes that had started to develop. Whilst the number of participants remained relatively low, the use of multiple data sources meant that the data is rich and relevant to the research questions.

Chapter 4 - An international focus on victim protection

4.1. Introduction

This chapter, together with the one which follows, analyses two phases in the UK's response to human trafficking. The first phase is the adoption and implementation of international anti-trafficking frameworks into its domestic legal framework. This chapter focuses on the intended victim-centred components of these international instruments, as the first step to analysing the UK's statutory contribution to the protection of victims of human trafficking. It examines the way in which human trafficking has been interpreted and developed internationally, and the extent to which this was reflected in UK law. It engages critically with the assumptions and inferences made by the international community about who constitutes a victim, what constitutes exploitation and therefore who is deserving of assistance and protection.

Chapter 5 presents an analysis of the development and application of the MSA and how this legislation incorporates the standards for victim protection established by the international community. It is consequently important in this chapter to identify those standards. This chapter is therefore a critical engagement with international law and policy, to which, the UK has, and continues to be a party. It is important to note here, that in accordance with Sections 2, 3 and 4 respectively of the European Union (Withdrawal) Act 2018, all 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day', all 'direct EU legislation', being EU regulations, decisions and tertiary legislation, and all other 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' will continue to have effect in the UK's domestic law after Brexit[1]. A detailed analysis of the Act is outside the scope of this thesis. In summary, while the Act provides for the retention of existing EU laws within the UK's national legislation, it has set out its own procedure for their operation, has not retained or has restricted numerous remedies aimed at giving full effect to existing EU laws, and it has restricted the application of EU laws as at the date of exit. This means that any future developments of EU laws will not bind the UK (Segan, 2020). As a consequence of the above, courts will now be required to interpret EU laws in accordance with the provisions of the new European Union (Withdrawal) Act 2018, arguably making it even more

[1] Brexit is an abbreviation for "British exit", referring to the U.K.'s decision on 23 June 2016, via a referendum to leave the Union European Union (EU). "Exit day" is defined as 29 March 2019 at 11pm (Section 20(1)).

difficult to decide on the victim status of trafficked women and the protections that they are entitled to. As the real effects of Brexit become more apparent in the UK's anti-trafficking framework, it will be for future researchers to assess the practical impacts of this substantial change.

This chapter seeks to determine whether the development of law and policy, as well as the definition of human trafficking, especially trafficking for the purposes of sexual exploitation, can be considered a story of gradual progression towards a more victim-centred approach.

4.2. International normative standards

Development of anti-trafficking policies involves international coordination, owing to numerous parties needing to agree uniform approaches (Broad, 2013: 19), including, but not limited to the United Nations, the European Union, and the Council of Europe. As for the UK, its anti-trafficking legal framework includes policies developed nationally, but it also includes those established and enforced by these international bodies.

According to Aitken (2013:18), development and implementation of law and policy requires engagement with the 'regional and global context' within which normative standards and best practices are developed. Such engagement is a useful tool in identifying legal norms and, adapting such legal models to the specific socio-legal problem (Aitken, 2013). In his study of why states comply with international law, Pickering (2014: 1) highlights that: 'states in the contemporary world, including great powers, are compelled to justify their behaviour according to legal rules and accepted norms'. He notes the influence of major historical events and landmark instruments such as the Treaty of Westphalia, comprising a number of treaties signed between May and October 1648, on the integration of state laws with one another. In the contemporary world, due to advancements in technology, modes of transportation and globalisation, Gottfried and Reese (2004: 31) refer to this as 'the internationalization of the world', which heralds widespread global, legal uniformity. As a self-proclaimed world leader in the fight against human trafficking (Austin and Farrell, 2017), the UK falls into the group of states that seek to justify their national anti-trafficking laws by claiming to have incorporated international legal rules and accepted norms (Pickering, 2014).

In order for national laws to be sufficiently in line with international normative standards, they must address the concerns that the international laws have sought to eliminate (Aitken, 2013). Xanthaki (2008:3) suggest that: 'as long as the transplant can serve the social need to

be addressed, the transplant can work well in the new legal ground'. As already identified within the context of the modern slavery narrative at Chapter 2, any divergence from internationally accepted definitions and guidance within the human trafficking framework may render it difficult, if not impossible, to reach consensus on whether human trafficking has taken place, thus posing a hindrance to both prosecutions and victim identification.

At Section 4.3, this chapter considers the contributions made by international bodies, both before and after the development of an internationally accepted definition of human trafficking within the Palermo Protocol, comparing the components of the most significant international legal frameworks on human trafficking, with a victim-centred approach. Progressive contributions by the League of Nations (LoN) as replaced by the United Nations (UN) after the Second World War, the Council of Europe (CoE) and the European Union (EU) are critically examined, assessing how each have influenced the UK government's interpretation of, and responses to, human trafficking. There is a comparatively larger focus on the UN Palermo Protocol because this instrument contains the current internationally agreed definition of human trafficking and sexual exploitation, and is the standard against which this thesis assesses the MSA in the next chapter. Section 4.5 specifically considers two regional instruments to which the UK is a signatory, the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and Directive 2011/36/EU of the European Parliament and of the Council.

Presenting a historical account of national and international policy developments on human trafficking, involves tracing the various ways in which the concept of trafficking has been incorporated into the UK's national legal system, establishing parallels with and deviations from its legal obligations under the United Nations and European legal frameworks. A close examination of the language used has therefore been carried out, critically assessing the practical implications of definitions on victim protection. An examination of Conventions relating specifically to forced labour has been excluded in this thesis, as has the examination of all instruments developed before the 1900s.

4.3. An emerging international, anti-trafficking framework

4.3.1. The League of Nations

Trafficking, in the early twentieth century, was largely seen as the international, forced procurement of women 'for immoral purposes' (Articles 1 and 2 of the 1910 Convention). The definition was informed by assumptions about what constituted suitable, ladylike

behaviour and the construct of an 'appropriate female' (Gallagher-Cohoon, 2013: 39). Moreover, women were not only considered weak, therefore seemingly in need of being protected by their male counterparts, but they were also the victims of male-centred laws (Attwood, 2012).

As Attwood's (2012) study of white slavery suggests, the UK's legal framework at that time, was centred on a patriarchal moral authority. For example, it allowed for British girls as young as 13 to be sold into prostitution, as long as this took place outside of UK borders. The sale of women's bodies within prostitution was seen as a natural 'outlet' (Mellon, 2018:60) for heterosexual men serving in the military. A 'masculinised gender ideology' (op cit) in Europe led to the acceptance of sex being a necessity for single men and those away from their wives for long periods of time. Women selling sex was legitimised, as other sexual outlets, such as self-pleasing and engagement in homosexuality were considered to be 'physically and morally deleterious' (op cit).

Whilst the early focus on white slavery concentrated mainly on the transnational trafficking of women to and from neighbouring European countries, as well as the colonies, the League of Nations sought to take a more comprehensive approach. As Gorman (2008) explains, in 1927, a group of experts interviewed large numbers of traffickers and their victims over a four-year period: their findings demonstrated a clear route through which white women were being trafficked from Europe to North Africa and the United States. The findings resulted in the League's committee members putting forward significant proposals for the universal eradication of prostitution as a form of trafficking. It therefore introduced two treaties after World War I - the 1921 and the 1933 Conventions. A comparison of both Conventions, with their predecessor in 1904, shows a gradual move away from trafficking being considered merely the prostitution of women from the West. In fact, the concept of 'white slavery' disappears altogether over this period. Despite the change in language, Johnstone (2017) suggests that trafficking was fundamentally constructed in a similar way. There is little indication of either Convention seeking to address the specific needs of victims and what remained in place was a focus on the prosecution of offenders. There was also a continued emphasis on cross border travel, thus excluding domestic trafficking, and therefore limiting the parameters of who qualifies as a victim of trafficking.

Some argue the legacies of the white slavery narrative are evident in contemporary anti-trafficking efforts. For example, Johnstone (2017) suggests, there are parallels between human trafficking as defined by the white slavery movement and the internationally accepted

definition existing today in the Palermo Protocol (see 4.4). Considering the International Convention for the Suppression of the White Slave Traffic (1910), for example, the three elements of 'leading away', 'by various means', and for 'immoral purposes' as contained in Articles 1 and 2 of the Convention are extraordinarily alike to the tripartite nature of Palermo Protocol's definition. Whilst the definition contained within the 1910 Convention covers a much narrower set of behaviours than the Palermo Protocol, especially in relation to the definition of exploitation, which is now understood to be much broader than simply for 'immoral purposes'

4.3.2. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (The 1949 Convention)

The League of Nations devised a new draft Convention in 1937, which sought to broaden the purview of its previous instruments[2]. Using the draft Convention of 1937, and embodying the substance of further suggested amendments, the 1949 Convention was eventually adopted, under the auspices of the United Nations.

Under the recently adopted UN human rights framework, the 1949 Convention promoted human dignity, and arguably set the foundations for the development of a victim-centred approach to human trafficking. The preamble to the Convention defines prostitution as the exploitation of others, and as being 'incompatible with the dignity and worth of the human person', thus encompassing a human rights approach. The Convention establishes a principle that no one should profit from the prostitution of another - a pioneering step in defining sexual exploitation. Morehouse (2009: 31) considers the Convention to have been a global 'turning point' in asking governments to recognise the connection between gender and human trafficking. Markovich (2009) further suggests that by placing prostitution at the centre of the trafficking debate, the Convention was able, to some extent, to lift the burden of proof from victims, placing it instead on the traffickers.

This certainly appears to be a plausible assertion, especially when we consider the language adopted by the Convention. Following the direction set by the 1933 Convention, Article 1 established that those who 'procure', 'entice' or 'lead' a person into prostitution should be penalised. Article 2 suggests criminalisation of the actions of anyone who 'keeps or manages,

[2] The International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic and International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children.

or knowingly finances or takes part in the financing of a brothel' or 'knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others'. The Convention explicitly uses the phrase 'even with the consent of that person', thus eliminating the possibility of a 'consent defence' for traffickers (Article 1, Clauses 1 and 2) the importance of which has been carried through in international law (see the Palermo Protocol's definition of human trafficking at 4.4.2 below). The Convention appears therefore to be in line with the feminist perspective that, whilst a person may choose to enter into prostitution, exploitation may be inherent in that situation, and that consent to being exploited is not something that should be legally protected (Kissil and Davey, 2010).

The 1949 Convention was the first to explicitly address the need for the safety and rehabilitation of victims. Article 16, requires parties to provide for the 'rehabilitation and social adjustment for the victims of prostitution'. Similarly, Article 19 requires destitute victims of international trafficking to be provided with temporary care, with the costs of repatriation being payable by the state in the event that a victim is unable to pay for their return home. The 1949 Convention was however, not without its faults and its practical implications are contestable. Whilst, according to Article 2(1) of the UN Charter, the autonomy of each state must not be hindered, the language used in the Convention, left too much to domestic interpretation, thus weakening any strictly victim-centred weight it would otherwise have had. Wording such as 'in accordance with the conditions laid down by domestic law' or 'so far as possible' in Article 9, leave much space for variation and inconsistency. Such wording allows for significant national discretion and arguably dilutes the minimum requirements in national laws. Further, while addressing the need for victim assistance in their return back home, the 1949 Convention appears to lack any practical guideline on how to assist survivors with reintegration back into their societies, and importantly, avoiding re-trafficking.

Article 18 of the 1949 Convention requires there to be 'declarations taken from aliens who are prostitutes, in order to establish their identity and civil status and to discover who has caused them to leave their state'. Whilst this could potentially be a robust, victim focused instruction, there are two main issues with Clause 18. First, by referring to aliens who are prostitutes, the victim status of women is undermined, and second, is the lack of guidance within Article 18 or indeed the rest of the Convention on how states might identify prostitutes/victims to begin with.

The Convention also provides no incentives for victims to cooperate with the authorities. The Convention's focus on victim protection is, therefore, limited. It did not contain a clear definition of trafficking, and in practice, it only addressed exploitation in the context of prostitution. Article 16 of the Convention refers to trafficked women as 'victims of prostitution' - to the exclusion of other forms of trafficking, including other forms of trafficking for sexual exploitation. Whilst focus on the needs of vulnerable women was welcomed, some argue the predominantly abolitionist stance of the Convention focused too heavily on the elimination of prostitution rather than victim protection (Roth, 2011; Provost, 2016). Some go as far as to suggest that the 1949 Convention did not seek to address trafficking at all, only prostitution (Peters, 2010). Peters (2010) suggests that the motivation behind the Convention was simply the closure of brothels, rather than to provide protection to victims. The 1949 Convention therefore arguably did very little to assist the identification and ultimately, the protection of victims.

Almost 50 years after the introduction of the 1949 Convention, and following a period where little consensus existed around the definition of human trafficking (Peters, 2010), the United Nations Convention Against Transnational Organized Crime (UN, 2000) included supplementary protocols on trafficking and smuggling: The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN, 2000); and the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition- collectively known as the Palermo Protocols (United Nations Convention against Transnational Organized Crime (UNODC, 2018) - were introduced as the successor to the 1949 Convention

4.4. The Palermo Protocol

4.4.1. Introduction

As discussed in Chapter 2, adopting a human rights-based approach should lend itself to one that is victim-centred. This section considers the extent to which the contents of the Palermo Protocol can be said to be a victim-centred approach.

In framing the definition of human trafficking (see 4.4.2), the Palermo Protocol sought to paint a more accurate picture of the trafficking victim (Shoaps, 2013). It succeeded in doing so, to some extent, by extending the boundaries of what constitutes a victim. For example, it

removed the exclusive emphasis placed on the protection of 'women and children', in previous treaties, and in other international discourse, replacing it with the term 'person', but still, with an emphasis on women and children as the group of individuals most vulnerable to sexual exploitation. Whilst this thesis is centrally concerned with the trafficking of women, I would propose, here, that the Palermo Protocol was the first to truly be gender-conscious. Whilst it does not specifically stipulate, or indeed even intend to cater for individuals who are gender fluid or identify as not falling into a specific gender, the use of the gender neutral term 'person' goes some way to recognising the breadth of human trafficking.

At Articles 10 to 13, the Palermo Protocol puts an obligation on border control to take relevant steps in identifying victims of human trafficking, a shift later considered to aid the over emphasises on the travel element of the crime (see Chapter 5). Article 6 then provides for the physical safety of victims when they are within a State Party territory and advises on the adoption of a compensation regime to assist with victim rehabilitation both physically and psychologically. Article 7 calls for states to adopt 'legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases', while Article 8 seeks to ease the process of return to their country of origin.

Given the above additions, it is clear that the Palermo Protocol goes a long way in setting out what protection should be afforded to victims of human trafficking, far more comprehensively than the 1949 Convention or any others before it. The attention to human rights issues is also evident in the preamble to the Smuggling Protocol, which considers the needs of migrants, specifying that state parties must ensure that they 'provide migrants with humane treatment and full protection of their rights'. In addition, Article 14 provides for Member States to provide expert training to immigration control officials to ensure that migrants are treated in a humane way, while Article 16 notes that the human rights of those smuggled, 'in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment' are to be protected. Implementation of such within national laws and policies should at least ensure that those individuals are treated with dignity, with regard to their individual human rights.

A substantial element that appears to remain missing within the Protocol, however, is a clear direction on how a victim of human trafficking is to be identified. It is left to state parties to interpret the Protocol's recommendation and ensure that their national laws and guidelines are sufficiently equipped to identify victims (Shoaps, 2013). Even though it is typical for

international treaties to allow parties autonomy, a lack of clear guidelines, arguably leaves too much to discretion (Seideman, 2015). Similarly, some of the language used within the Protocol is problematic. For example, Article 8 requires the prompt return of a victim to a country 'which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence'. This, however, clearly excludes any victim who has no permanent residence in their country of origin. In addition, it does not cater for trafficking, which occurs across multiple borders and over a long period of time. In such a case, victims may not have permanent residence in any one country. The return of a victim to their country of origin also exposes them to an increased risk of being re-trafficked into a system they were seeking to escape in the first place.

Christensen (2011:3) further questions the language adopted by the Protocol on four grounds. She argues that, not only does 'the confusion that surrounds the respective definitions of trafficking and smuggling, as well as the overlap that exist between the two' make affording protection to victims more difficult, but she further states that*:*

> *the time and resource intensive nature of the investigation process required to determine whether a person has been trafficked, as well as the incentive for immigration officials to identify individuals as smuggled migrants rather than as trafficking victims, in view of the weaker responsibilities of states towards the former group.*

The protection of those who may otherwise have been classed as victims of trafficking is therefore compromised as a result of the relevant authoritative bodies' want for a cheaper and quicker determination of a case. Whilst it would be simple to deport an illegal immigrant, considering her an accomplice of crime or an illegal alien, with no legal immigration status, recognition of her victim status would require state protection and resourcing.

The loose language of the Protocol is further made clear by comparing the provisions related to the prosecution of traffickers and those intended to protect victims. Article 5 of the Protocol reads: '[e]ach State Party shall adopt measures'. In contrast, when addressing the protection of victims, as Gallagher (2001: 990) suggests, 'protection of the trafficked person, contains very little in the way of hard obligation'. The wording at Article 6 allows clear flexibly for exercise of responsibilities by stating that '[e]ach State Party shall consider implementing measures'. Similarly, parties are required to 'take into account, in applying the provisions of this article, the age, gender and special needs of victims'. The use of phrases

such as ‘consider,’ ‘take into account’ and ‘endeavour to provide’ for protection of victims are weak when compared to the injunction that states ‘shall’ take an approach to prosecution. The voluntary nature of the obligation placed by the Protocol to provide protection to victims has been repeated criticised. Referring to the Inter-Agency Group’s joint submission on the Protocol, Gallagher (2001: 990) highlights the limitations of optional nature in the victim-focused provisions.

> *[Un]necessarily restrictive and not in accordance with international human rights law which clearly provides that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies. At a minimum, States Parties should be obliged to provide information to trafficking victims on the possibility of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and to render assistance to such victims.*

Furthermore, a number of critics question the Protocol’s focus on the protection of victims, suggesting that crime-control took priority over victim protection (see, for example Chuang, 2014; Mellon, 2018). This has been attributed to the fact that the Protocol was ‘negotiated under the purview of the UN Office on Drugs and Crime’, meaning that those who drafted its provision were engaged in law enforcement and therefore interested less on individuals’ human rights and more on adopting provisions that meshed with the focus on organised crime (Chuang, 2014: 615). Instead of increasing rights and protections available to victims of human trafficking, this approach: ‘reflects a preoccupation with illegal immigration as part and parcel of a supposed security threat of transnational organised crime’ (O’Connell Davidson, 2006: 9).

Some have argued that advocates of a more holistic human rights-based approach to the drafting process were less vocal around that time. For example, considering the contributions made by the then UN Commission on Human Rights in debates leading up to the final draft of the Protocol, and then the UN General Assembly’s resolution, there is little evidence of victims’ human rights being considered - instead the drafters advocated the need for ratification of provisions centred on crime control (Chuang, 2014). Luckily, the anti-trafficking community has since started to look more closely at human rights violations associated with non-victim focused responses to human trafficking (Gallagher, 2015). As Gallagher (2015:9) explains, ‘within the UN’s human rights system…the Special Rapporteur on trafficking in persons, especially women and children, has made this a constant theme of

her work'. The UN Special Rapporteur was appointed in accordance with the UN Commission on Human Rights' decision 2004/110. Developed specifically to consider the human rights of trafficked victims, the Special Rapporteur is tasked with taking action where there is evidence of a failure by states to protect a trafficked victim's human rights, doing so often by visiting particular countries that are flagged as being in such violations. The Special Rapporteur submits yearly reports to the UN Human Rights Council and the General Assembly, making recommendations for change (United Nations Human Rights Office of The High Commissioner, 2021). These recommendations aid international understandings of state obligations in this area and create a framework within which states must operate.

4.4.2. Defining human trafficking

As already noted, the most significant contribution made by the Palermo Protocol is its introduction of the now, internationally accepted definition of human trafficking (Goździak and Vogel, 2020). The definition of trafficking in persons presented in Article 3 of Protocol is cited in full below.

> *(a) Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;*
>
> *(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*
>
> *(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;*
>
> *(d) "Child" shall mean any person under eighteen years of age.*
>
> (United Nations Human Rights Office of the High Commissioner, 2000: 2)

The definition broadens the scope of that contained within the 1949 Convention (van Pinxteren, 2015). It offers a clearer characterisation of trafficking than its predecessors: that it may occur both within and across national borders; that the victims may be of either gender and of any age; and that exploitation of another person occurs for personal gain in some way. This definition of set an international standard, which, in theory, 'should insulate national legislation from the vagaries of political expediency' (Parkes, 2015: 150 - 155). As Elliott (2015) recognises, its tripartite structure, including the essential elements of 'action' 'means' and 'purpose' stems from the definitions used to address the slave trade, which have now been expanded specifically to deal with human trafficking.

The act of trafficking includes the recruitment, transportation, transfer and harbouring of victims as well as their receipt (Southwell *et al.*, 2018: 4). The means used within the definition refers to the way in which an individual has been coerced, deceived or forced into an exploitative situation. The purpose of trafficking must always, then, be exploitation - although to fall into the definition of trafficking, the exploitation needs not to have taken place, rather an intention is sufficient (Southwell *et al.*, 2018: 8).

In the interest of reaching common ground and progressing with the drafting process, a number of key aspects were left intentionally vague (Chuang, 2014). As Goździak and Vogel (2020) note, the Protocol does not, for example, expressly define exploitation; and it specifically does not define sexual exploitation. It does, however, include a non-exhaustive list of acts considered to be exploitative, which allows for new forms of exploitation to fall within the definition as they emerge. Similarly, according to Hauck and Peterke (2016), the same approach was taken when incorporating the different forms of prostitution into the meaning of trafficking. This was considered throughout the drafting process, the result of which was the creation of a definition, which allowed for domestic readings and resolutions, notwithstanding the interpretations made by other Member States.

In light of this, Bassiouni *et al.* (2010: 455) remark specifically on the Protocol's lack of engagement with various forms of sexual exploitation.

> *'…the treaty was developed from a law enforcement perspective, not a human rights perspective, and did not provide adequate protection for victims of trafficking…it also does not address internal trafficking within a state, and it leaves open the issue of consent to the entry into prostitution irrespective of whether or not it leads to sexual bondage…the Protocol ignores the fact that a person may be "smuggled" to*

then find herself involved in sexual bondage, a technicality which results in the non-applicability of the Protocol.

The UNODC Model Law against Trafficking in Persons, reflects the above position; in the accompanying commentary, the definition of exploitation within prostitution is also said to be 'left undefined in the Protocol in order to allow all states, independent of their domestic policies on prostitution, to ratify the Protocol' (UNODC, 2009: 13). Such focus on the aspects of legality, therefore, operates in tandem with the Protocol's aim to increase ratification, as the Model Law seeks to accommodate countries in which prostitution is legalised.

The Model Law against Trafficking in Persons was developed by the UNODC in 2009, at the request of the Secretary-General of the UN (Vijeyarasa, 2019). The document aimed to: 'promote and assist the efforts of Member States to become party to and implement the UN Convention against Transnational Crime and the protocols thereto' (UNODC, 2009:1). The commentary to Article 5 of the Model Law specifies that, to the extent possible, definitions adopted into national laws must be in line with international standards. It further advises that definitions to be in line with those already existing in national laws and provides supplementary definitions itself; for example, for 'abuse of a position of vulnerability', 'accompanying dependants', 'deception' and 'debt bondage'.

Scholars such as Kelly (2005: 243) consider whether a 'narrow' - needing distinctive characteristics such as force - or a 'wider' reading of the Protocol definition of trafficking in persons should be applied. The former creates a requirement of 'clear forcible recruitment and an unbroken chain of connected individuals in the entire process, while the latter takes into account 'the wider contexts in which human beings are treated as commodities' (op cit: 243). This is an important distinction when considering trafficking for sexual exploitation, where the existence of force is not always discernible. Methods of trafficking are complex; strict legal requirements of consent and duress are unable to address such complexities (Gearon, 2019). A balance must therefore be reached in applying interpretations of the definition, as both over-inclusive and under-inclusive definitions often disadvantage victims, minimising the support they receive and, ultimately, services they are able to access (Kelly, 2003). By incorporating a definition of trafficking, which deviates from that contained within the Protocol, signatories do not necessarily place victims in a worse position than that offered by the Protocol. In fact, by incorporating wider behaviours that constitute trafficking into national law, potentially a wider pool of victims may be identified and protected. This,

however, rarely occurs and definitions adopted by State Parties are usually much narrower (Dempsey, Hoyle and Bosworth, 2012) than that of Palermo.

As Seideman (2015) suggests, the broad nature of the Palermo Protocol's definition of human trafficking has resulted in a number of its signatories deviating from the definition within their national legislations. Specifically, in relation to the definition of trafficking for sexual exploitation, substantial inconsistencies persist between definitions adopted by state parties and that within the Palermo Protocol. These divergences potentially undermine the status of international uniformity concerning the nature of sex trafficking, undermining efforts to create a harmonised system of victim protection.

Studies have suggested that even when a State Party is considered mostly compliant with the provisions and definitions set out by the Palermo Protocol, they are not always successful in effecting change through their national legislation (Seideman, 2015). Considering the UK's position prior to the year 2015, for example, the UK was unsuccessful in its efforts to abolish, or as a minimum reduce the rate of trafficking for sexual exploitation. This was demonstrated in Mandel's (2012) comparative study of the underutilised prosecution of sex trafficking in the UK and Israel. Mandel (2012) suggests that part of the reason for this was the UK's lack of robust and all-inclusive legislation, designed to address sexual exploitation and the protection of its victims. She notes that, instead, the UK's anti-trafficking framework consisted of distinct pieces of legislation, which each addressed separate aspects of the crime.

This assertion is correct as prior to the MSA the UK's anti-trafficking law existed in three separate pieces of legislation: the Sexual Offences Act 2003 (SOA), the Asylum and Immigration (Treatment of Claimant etc.) Act 2004 and the Coroners and Justice Act 2009. The SOA made specific provisions relating to trafficking for sexual exploitation (Sections 57-59), it criminalised the *intention* to exploit another human being, even if that exploitation does not take place, and it specially set out fifty offences that constitute sexual exploitation. As the name suggests the Asylum and Immigration Act 2004 mostly focused on the immigration status of a victim, an approach which is considered to be 'limited in scope' (Broad and Turnbull, 2018: 123). Finally, Section 71 of the Coroners and Justice Act (2009) (CJA) focused on the need, mainly, for offences to be considered in line with Article 4 of the ECHR. It criminalised slavery, servitude and forced labour and was an attempt at ensuring that the UK's legal framework aligned with that required and demonstrated by the European Court of Human Rights' (ECtHR) in its 2005 judgment of *Siliadin vs. France*. In this case, the ECtHR held the French government accountable for allowing the enslavement of minor from Togo by

a couple. If Mandel's (2012) proposition regarding the lack of one, robust, piece of legislation were correct, it would follow that an amalgamation of offences under one piece of legislation would make is easier for trafficking to be addressed in the round. Arguable, therefore, consolidating UK law into the MSA addressed this critique. The next chapter assesses this, paying particular attention to victim identification and victim protection.

Ultimately, the Palermo Protocol achieved more than any of its predecessors in establishing international consensus. The definition has crystallised a phenomenon that remained poorly defined for a century, allowing it, potentially, to be transposed into the UK's national law. The UK ratified the Palermo Protocol in 2006. The Palermo Protocol, however, represents just one component in the UK's anti-trafficking strategy and in developing its national law; it must also comply with other international frameworks. To this end, the Protocol cannot be considered in isolation, rather: 'as a key component of a unified approach to trafficking, just as the various treaties and conventions on trafficking, women's rights, workers' rights, for example, overlap and 'cooperate' with each other' (Parkes, 2015). The shortcomings of the Protocol have drawn attention to the need for further strengthening of regional apparatus. Palermo, supplementing the UN Convention against Transnational Organised Crime (CTOC), when ratified by all European Union (EU) Member States, has led to the emergence of subsequent EU Directives, including EU Directive 2011/36 and the Council of Europe Convention on Action against Trafficking, each addressing the need for Member States to unite in the fight against human trafficking.

Though these regional instruments have been largely influenced by the Palermo Protocol, there are some additional provisions, especially with regard to their ability to strengthen victim focus. These instruments are considered further below.

4.5. Regional European instruments

There are two main regional instruments to which the UK is a party.

> The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). This was signed on 23 March 2008 and ratified by the UK on 17 December 2008.
>
> 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

(the EU Trafficking Directive). Directive 2011/36/EU replaces the earlier Council Framework Decision 2002/629/JHA.

4.5.1. The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT)

The UK ratified the Council of Europe Convention on 17 December 2008 and its provisions came into force on 1 April 2009 (Council of Europe, 2020). The UK was hesitant to ratify the Convention initially, but came under intense scrutiny from Amnesty International and the ILO, leading it to reconsider its position (Balch and Geddes, 2011). Some consider the ECAT: 'the most comprehensive European anti-trafficking instrument…which contains detailed provisions on the assistance, protection, and support to be provided to trafficking victims' (Chaudary, 2011:83). The language adopted within the Convention suggests that it seeks to strengthen the provisions of the Palermo Protocol and also addresses some of the limitations associated with CTOC on a regional level**.** Article 2 for example lifts the emphasis that the Palermo Protocol had placed on human trafficking involving organised crime. In addition, the Convention, unlike the Palermo Protocol, creates compulsory provisions for the protection and support for victims, ensuring that these provisions go beyond the compromised principles in that Protocol (Turner, 2014). According to Articles 10 to 15 of the Convention, Member States *must* adopt into their national laws, strategies for victim identification. This strategy must include a minimum 30 day reflection period during which a potential victim is given the chance to escape the controlling environment, leave the national territory and/or decide whether they wish to cooperate with a prosecution (ECAT, Article 13 (1)). In accordance with Article 12, during this 'reflection period', potential victims of trafficking must have access to protective measures, which must include, at minimum:

- standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
- access to emergency medical treatment;
- translation and interpretation services, when appropriate;
- counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

a. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
b. access to education for children.

In line with this requirement, the UK's NRM was introduced to give effect to the UK's commitments under ECAT. The NRM adopts the requirement to provide a recovery and reflection period, and it, arguably exceeds the minimum standards put forward by the Council of Europe, as it allows for 45 days of reflection and recovery, instead of the minimum 30. The NRM is now one of the most important tools in terms of victim protection. It is a 'framework for identifying and referring potential victims of modern slavery and ensuring they receive the appropriate support' (HM Government, 2020). Following a referral from a First Responder, being an entity with authority to refer potential victims into the NRM, the Single Competent Authority (SCA) is required to make a *reasonable grounds* decision within five working days. The SCA makes this decision only when it has reasonable grounds to believe that the referred person is a potential victim of trafficking (now modern slavery). In this case, a test of 'I suspect but cannot prove' (Crown Prosecution Service, 2020) is applied. The potential victim will be eligible for government funded support, such as counselling, accommodation, legal advice and medical treatment, during the 45 day recovery and reflection period (Home Office, 2020b). The SCA then gathers further information, which is used to make a conclusive grounds decision, assessing whether, on the balance of probabilities, it is more likely than not that the individual is a victim of trafficking.

In addition to support during the 45 day recovery and reflection period, victims who have received a positive conclusive grounds decision will also receive move-on support for a further 45 days. Support is not guaranteed beyond that period, nor is there any substantial support available to a potential victim whose conclusive grounds decision is negative. Other than in exceptional circumstances, a person with a negative decision will only be entitled to nine days of move-on support (Home Office, 2020b).

A major concern with the NRM is its lack of attention to the quality of support that is available to victims, especially, on their journeys beyond a safe house (Ellis, Cooper, and Roe, 2017). At present, the UK government has a contract with the Salvation Army (Mellon, 2018), requiring them to provide support and assistance to victims of human trafficking during the limited recovery and reflection period. In accordance with its Victim Care Contract with the Government, emergency accommodation must be provided to potential victims. This is the case when: 'an individual is destitute or at risk of becoming destitute, is not eligible for Local Authority support, or where the available Local Authority support is not suitable' (Home Office, 2020b: 135). This support, however, also does not extend beyond the 45 day period and there is no legal obligation on the Salvation Army to monitor victims' location and

wellbeing beyond that period (Beddoe, Bundock and Jardan, 2015). This was made clear in a parliamentary debate in 2014, where the Secretary of State for Justice made the following comment.

> *Since 1 July 2011 the Salvation Army has been contracted to provide support and assistance to adult victims of human trafficking for a minimum of 45 days or until a victim receives a 'Conclusive Grounds' decision. Under the terms of their contract with the Ministry of Justice, the Salvation Army is not required to maintain contact nor to record information on the location of victims once they have exited contract services* (cited in Beddoe, Bundock and Jardan, 2015: 3).

The UK's current legislation (including the MSA, considered at Chapter 5), still does not provide for quality control - it remains the case that no legal or policy interventions have been made to inspect or regulate the standard of care provided by the Salvation Army (House of Commons Committee of Public Accounts, 2018). In practical terms, this means that potentially, not only does the support provided to victims stop after 45 days, but there is also a stark lack of any robust oversight to ensure a high quality of care within the safe house itself. The Government's contract with the Salvation Army expired in 2020, meaning that there is an opportunity for the new contract - awarded to the Salvation Army on 29 June 2020 - to include more robust provisions for client care. It was proposed that the new contract would be drafted in accordance with the Human Trafficking Foundation's 2014 survivor care standards (House of Commons Committee of Public Accounts, 2018). The House of Commons Committee members, however, raised some concerns about the implementation of these standards, particularly in relation to an inspection regime - they confirmed that the Home Office: 'is currently working with stakeholders to identify what the standards should be and how they should be' (House of Commons Committee of Public Accounts, 2018: 14). The committee expressed its concern that, even with the implementation of high standards of care, a lack of an inspection regime will render any provision for support meaningless, especially in relation to long-term support. The new contract is not live at the time of writing, but will go live later this year, following a period of transition from the current service (Home Office, 2020b). This is an area that will need to be kept under review.

Notwithstanding a number of recent reforms, the NRM therefore continues to be flawed in the most crucial area of victim support (Anti-slavery International, 2020). Despite a clear rise of 36% in the number of referrals (Office for National Statistics, 2020), the low number of positive conclusive grounds decisions, remains problematic. As the UK government's 2019

Annual Report on Modern Slavery demonstrates, of those who had been referred into the NRM in 2018: 'only 24% received a positive reasonable grounds decision followed by a positive conclusive grounds decision' (Anti-Slavery International, 2020). In contrast, almost double that percentage, at '44%, were still awaiting a conclusive grounds decision', following receipt of a reasonable grounds one (Anti-Slavery International, 2020). In addition, as Vernon Coaker suggested during a debate on the Modern Slavery Act 2015 in the House of Commons, on 28th October 2017, even once identified as victims, more often than not, the practical delays bring investigative times up to 95 days, and therefore outside of the NRM timeframe. This illustrates that, whilst the NRM makes provisions for victim support beyond that recommended by the Council of Europe Convention, in reality, a large number of human trafficking victims are left in a state of limbo for weeks and months. This is crucial as, the long delays result in a subsequent 'lack of statutory support' during this time, which 'leaves victims facing homelessness, destitution, and vulnerability to further exploitation' (Anti-slavery International, 2020:7). According to the British Red Cross (2018:15), such uncertainty also: 'acts as a barrier to the ability of a support services to work with a trafficked person on longer term plans for greater independence and integration until these legal issues are resolved'.

Moreover, in their analysis of data from the NRM, Walby *et al.* (2016) found that indirect, racial discrimination may play a part in (not) determining a potential victim's trafficked status, and therefore the protection to which they are entitled. Referring to the work of Stepnitz (2012), Walby *et al.* (2016) present the argument that potential victims from third countries (i.e. non EU) are much less likely to receive a conclusive grounds decision.

> *Positive decisions for non-EU nationals are significantly lower than that of EU and UK nationals. The average positive reasonable grounds decision rate for UK and EU nationals is 89.4%, compared to 61% for non-EU nationals. In relation to final determinations of trafficking status, the comparison is even starker with an average of 82.8% of UK and EU nationals conclusively accepted to be victims while the average for non-EU nationals is only 45.9%.* (Stepnitz, 2012: 114).

It is therefore not surprising that, according to Anti-Slavery International (2020: 7) 'victims are still opting out of entering the NRM because they cannot see how to do so would be in their best interest'. They attribute this to: 'fears about the involvement of immigration services, being unable to work in the NRM, the delays, uncertainty around what support is available, relocation away from any existing support networks and the lack of outcomes from

the NRM in terms of immigration status' (Anti-Slavery International, 2020: 7). As previously mentioned, these factors have the effect of deterring victims from seeking justice, often resulting in them being placed back into the exploitative situation.

It is worth noting here, that the UK's obligation to create a referral mechanism is also embodied in other regional instruments (Southwell, *et al.,* 2018). Article 35 of the United Nations Office on Drugs and Crime Model Law for example, requires signatories to create a national referral mechanism that would ensure the provision of adequate assistance to victims. The Home Office was convinced of its compliance with the ECAT, prior to the development of the NRM (UK Parliament, 2008). Where it lacked compliance, however, were the, arguably most crucial elements of victim protection, recovery and an appropriate reflection time. The NRM was therefore created in line with this requirement and later expanded in scope, after the implementation of the MSA in 2015, to include, not only victims of human trafficking, but also victims of slavery and servitude.

4.5.2. The European Union

The European Union (EU) has made substantial contributions to tackling human trafficking. In fact, as human trafficking: 'is related to a wide number of issues over which the EU has jurisdiction', it is able to address cross border crime more freely (Grundell, 2015: 4).
The EU's first legal contribution was the introduction of a Joint Action to Combat Trafficking in Human Beings and the Sexual Exploitation of Children in 1997 (Orbie and Tortell, 2009). This Joint Action sought to increase Member States' cooperation in criminalising human trafficking but it made clear in its title that the aim was primarily to continue the fight against illegal migration and an improved criminal justice system. The Joint Action therefore did not provide a clear definition of human trafficking nor did it contain explicit requirements for victim protection.

In contrast, the EU's major policy instruments appear to have placed victims' human rights at the centre of their objectives. Developed in 1996 and 1997 respectively, programs such as STOP and Daphne grew as a result of active contributions by feminist anti-trafficking groups (Grundell, 2015). Through such policy contributions, and given that Joint Actions simply put forward non-binding recommendations to Member States, the Council Framework Decision 2002/629/JHA (2002) was introduced, replacing the Join Action (Eastern Partnership, 2006). This too focused mainly on the need to prosecute traffickers, with only one Article, Article 7, addressing 'protection of and assistance to victims'. As Grundell (2015: 98) makes clear, this

focus on victim protection 'remained solely in the context of criminal proceedings'. For example, Article 7(2) specifies that an investigation or prosecution does not need to be accompanied by a statement from the victim. It also recognises children as being particularly vulnerable, thus protecting them from giving evidence in court. In addition, the definition of human trafficking, as contained in the 2002 Framework Decision was restrictive, only serving to address trafficking for labour and sexual exploitation, with particular emphasis on prostitution and pornography. This was narrower than the definition in the Palermo Protocol, which sought to include a wider range of exploitative behaviours. Scarpa (2008) criticises the 2002 Framework Decision on the grounds that whilst it recognised human trafficking as a serious violation of fundamental human rights and dignity, in reality it provided minimal protection to those victims who did not 'co-operate with competent authorities'.

The EU Action Plan, issued by the European Commission, soon followed in 2005, identifying the fight against human trafficking and money laundering as matters requiring urgent attention. The Action Plan focused more on victim protection, requiring Member States to 'ensure that appropriate referral mechanisms are in place', as well as 'establishing policies reinforcing the criminalization of human trafficking including the protection of [...] potential victims at national, regional, EU and at a wider international level' (European Union, 2005: 1). On April 15, 2011, Directive 2011/36/EU, being the latest directive to address human trafficking at the EU level was introduced, replacing the 2002 Framework Decision.

One notable achievement of the 2011 Directive is that it materially expands the scope of human trafficking as contained the Palermo Protocol. It seeks to implement an all-inclusive, unified approach that addresses issues of human rights violations. Article (1) 9 of the 2011 Directive stresses the importance of coordination between international bodies which have competence. It acknowledges the strengths of, and therefore refers to a need for, the Palermo Protocol and the Council of Europe Conventions to be taken into account in parallel with the Directive. There are also new investigative provisions included in to Article 9, aimed at strengthening the ability of Member States to prosecute offenders by ensuring that legal proceedings are no longer: 'dependent on reporting or accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement'. This provides for cases where victims rescind their statements, due to fear of reprisals for example, and ensures that a victim's inability or unwillingness to proceed, for whatever reason, does not present a barrier to the prosecution of offenders. Further, Article 12 focuses on victim protection, ensuring physical and emotional support is easily accessible to the

victims, while also making clear that victims of human trafficking should be entitled to the same compensation as all victims of violent crimes. The Directive recognises that victims' individual vulnerabilities must be taken into account when providing support. Article 1 (12) of the 2011 Directive affords importance to 'gender, pregnancy, state of health and disability'. Scherrer and Werner (2016: 64) therefore see the Directive as adopting a 'holistic approach to [human trafficking] with a strong gender focus'.

In accordance with its obligations under international law, as a result of having ratified the Lisbon Treaty, the UK must incorporate EU law and policy into its national law (Cowie, 2019). As Cowie (2019) explains, this is due to the fact that the UK is a 'dualist state'. This status means that international treaties are not automatically transposed into the UK's national law. If, then, an EU treaty is not incorporated into the UK's domestic law, courts would not be obliged, or indeed allowed to rely on its provisions. However, as demonstrated in the 1972 case of *McWhirter vs. Attorney General*, 'once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament' (Cowie, 2019: 6).

To this end, the UK opted in to the EU Directive in April 2011 and in complying with its obligation to incorporate its provisions into national law, it revised some principal anti-trafficking legislation, including the Asylum and Immigration Act 2004. The next chapter considers whether, along with other international standards considered in this chapter, the provisions of the EU's 2011 Directive have been effectively incorporated into the MSA, specifically considering those that are intended to be victim centred.

4.6. Conclusion

The progress made in the anti-trafficking law and policy framework can be demonstrated by assessing developing frameworks at both national and international levels (Broad, 2013). This chapter has presented the first phase in responses to human trafficking in the UK, offering a diachronic account of how human trafficking, a concept that emerged as a result of, arguably, a hyperbolised moral panic, built on patriarchal authority, was developed to address victim protection.

This chapter has shown that there has been progressive change in international legislation. The continuities have been made clear in this chapter. The 1949 Convention paved the way for the introduction of laws that placed the needs of victims at their core. Whilst a good starting point, this Convention, too, focused exclusively on prostitution as the only form of human trafficking, whilst lacking any substantive protective measure for victims.

The chapter considered the definition of human trafficking as presented by the Palermo Protocol, one that is now widely accepted as the legally binding definition internationally, which demonstrated a progressive change in international law. It also suggested that, justifiably, the Palermo Protocol has received criticism on several grounds. One of the main criticisms informing the stance taken in this thesis is the Protocol's focus on crime prevention rather than protection of victims.

The chapter then presented the CoE Convention as central in the UK's anti-trafficking strategy prior to the MSA and the EU Trafficking Directive as an instrument, which has been successful in expanding the scope of human trafficking. The CoE went further than preceding international instruments in requiring the UK to engage in issues relating to the assistance, protection, and support of trafficking victims (Articles 10, 12, 13 and 14). It did so, placing emphasis on the need for the adoption of a human rights perspective and focus on victim protection. Crucially, the Council of Europe Convention 2005 placed an obligation on State Parties to incorporate into their national laws, a mechanism designed to better identify and support victims. The Convention set out minimum protective measures that each state must adopt, thus setting a benchmark against which states' compliance could be measured. This led to the formation of the UK's NRM, which, whilst the subject of critique, has created a platform through which victims may be identified and supported, at least, in the initial stages of being identified.

The ECHR, the Palermo Protocol, and the Council of Europe each place positive obligations on Member States to develop national laws that are sufficiently equipped to protect potential victims of trafficking. The importance of the UK's adherence to these positive obligations becomes apparent in a number of stages of a potential trafficking victim's ordeal. Not only does a positive obligation on the state to identify a potential trafficking victim become paramount at the initial identification stage, but it is also imperative when the victim seeks to challenge decisions by the courts. For example, as demonstrated at Chapter 5, an individual's victim status is central to any claim to challenge their deportation from the UK; it is significant when a potential victim has been compelled to commit a crime or when the individual possesses certain special needs, including a need to protection from deportation. The next chapter will now consider the extent to which the victim-focused elements of international law the UK is a party to and explored in this chapter, are reflected in the MSA.

Chapter 5 - The Modern Slavery Act (MSA) and International law

5.1. Introduction

This chapter explores the second phase in the UK's response to human trafficking and increasing victim protection - the introduction of the MSA.

This chapter uses critical legal analysis, drawing on the development of legislation, case law and international standards. The Act's ability to afford increased victim protection is considered from two separate, but connected angles. First, I present an overview of why and how the Act, a largely reactive response to scrutiny from many groups, including the Centre for Social Justice (CSJ), came to exist in its current format. I briefly consider the political motivation behind the development of the Act; in particular, considering the recommendations put forward by the CSJ and later reports during the drafting process. Debates surrounding the definitions of human trafficking, modern slavery and sexual exploitation are critically examined, evaluating the extent to which the UK government ultimately adopted these definitions into its national law. The intention is to assess the role that the Act has played in effecting international legal harmonisation (Baffi and Santella, 2010), and how international influences are reflected in the victim-focused provisions in the Act.

Next, is an analysis of specific provisions within the Act that are, at least on paper, intended to be victim-focused. In this section, I consider the functionality of, and the amendments to the NRM, which as demonstrated at Chapter 4, is 'the gateway to all support for potential victims of trafficking' (Mellon, 2018: 232). Section 5.2 analyses three main stages of the MSA's drafting process, focusing in particular on the UK government's victim-centred rhetoric. It briefly examines a report prepared in 2013 by the Centre for Social Justice (CSJ), an independent think-tank established in 2004, with an aim; 'to put social justice at the heart of British politics and make policy recommendations to tackle the root causes of poverty' (CSJ, 2020). This was one of the many pre-legislative stages, but was an important one, as it created a benchmark against which the Modern Slavery Bill (MSB) would be drafted and developed. Next, a report of the Modern Slavery Bill Evidence Review, prepared following an announcement that a new MSB would be put forward, is examined. Finally, the section includes an overview of the pre-legislative scrutiny committee's analysis of the draft Bill, before it could be presented to Parliament.

These three stages have been specifically chosen as they demonstrate some of the most significant responses given by the UK government to recommendations put forward by policy makers. I suggest that the UK government embraced certain elements of the CSJ's report and other recommendations put forward by the review Committee, but did so in a way that required little commitment to actual change. In making 'gestures' of seemingly developing a robust anti-trafficking piece of legislation, it drew focus away from the fact that it did not take on a number of crucial recommendations, that would have been more victim- focused.

Section 5.3 then considers the provisions of the Act. It builds on the previously addressed blurring of concepts of trafficking and modern slavery, challenging the divergence from an internationally accepted construct of human trafficking, and instead, placing it under the term 'modern slavery'- a 'catch-all' concept undefined in international law (Allain and Schwarz, 2020). It then assesses some key provisions, including the continued lack of a statutory footing for the NRM, the protection of offending victims and access to compensation. The chapter concludes that ultimately, the MSA, whilst a move in the right direction, remains limited in its ability to provide long-term protection to victims.

5.2. Development of the MSA

The MSA must, like any other legislation, provide a practical solution - in the form of specific provisions in clauses - to an identified problem. It has, however, been suggested that in developing its anti-trafficking strategy, the UK government has resorted to 'problem-structuring' rather than 'problem solving' (Broad and Turnbull, 2018). Broad and Turnbull (2018: 121) attribute this to the complex nature of the phenomenon, suggesting that legal frameworks often develop as: 'partial solutions, incremental advances and government compromise'. Others suggest that a number of potentially robust victim-focused provisions were either left out of or altered within the final version of the MSA, reflecting government agendas at the time. Mellon (2018: 242), for example, suggests that: 'a lack of security offered to non-British/EEA victims of exploitation highlights the tensions between contemporary anti-slavery/trafficking policy and legislation and immigration policy'.

This can be seen in the debates leading up to the incorporation of the Act. At a Conservative Party conference in October 2013, Theresa May stated that the government's intention was to create a piece of legislation that would limit the: 'confusing' nature of the various trafficking offences by amalgamating them under one piece of legislation (UKPOL, 2015). Whilst the speech indicated May's desire to curb human trafficking, there was an extensive focus on the

position of the Conservative Party on immigration. The speech also laid down the foundations for the introduction of an immigration bill, which, May suggested, would 'make it easier to get rid of people with no right to be here' (UKPOL, 2015). The overall tone of the speech played into an anti-immigration framing, as illustrated by these extracts.

> *But it's ridiculous that the British government should have to go to such lengths to get rid of dangerous foreigners. That's why the next Conservative manifesto will promise to scrap the Human Rights Act.*
>
> *Those are issues for the general election, when Labour and the Lib Dems will have to explain why they value the rights of terrorists and criminals more than the rights of the rest of us. In the meantime, we need to do all we can now to limit the damage* (UKPOL, 2015).

This speech illustrates how wider political agendas were conflated and influenced the development of the anti-trafficking framework. The MSA was sandwiched between the 2014 and 2016 Immigration Acts (Gadd and Broad, 2018). This timing can be interpreted as a conscious deed of problem structuring, rather than problem solving, as it resulted in the: 'merging of modern slavery and immigration forces, while the state gained powers to imprison foreign nationals who work illegally' (Gadd and Broad, 2018: 1452). O'Connell Davidson (2010: 244) suggests that the government made exaggerated claims about keeping traffickers out, whilst doing very little to practically address issues such as: 'the feminization of poverty and its relation to women's migration; the criminalization of sex workers; immigration controls, indebtedness, welfare regulation and the impoverishment of those denied citizenship'.

5.2.1. The immigration paradigm

The anti-immigration background of the MSA was raised at very early stages: during a parliamentary debate on 17 November 2014, Baroness Lawrence of Clarendon questioned the level of support the draft bill could offer victims.

> *The Bill currently has our values and leadership a distant second to political expediency. Some say that because of potential public confusion about victims of trafficking and immigrants, the Bill has pulled its punches in terms of victim*

> *protection and support… the Bill is politically strong for the Conservatives on immigration, but it is weak on compassion and human rights* (Lawrence, 2014).

Much like the MSA, the Immigration Act (2016) was sold to the general public as a landmark piece of legislation, which, as Yeo (2018) notes, the government vowed would help create a 'hostile environment' for any illegal immigrants. During the Syrian refugee crisis, the UK notably allowed a very limited number of refugees into its borders - only 3.1% of all those taken in by the European Union (Gadd and Broad, 2018). David Cameron, the prime minister and leader of the Conservative Party at the time, justified this low number by suggesting that allowing refugees into the UK would only serve to promote illegal migration and therefore increase human trafficking (Mason and Kingsley, 2016). This rhetoric also served to justify the political decision to reduce the financial support available to refugees, who, due to their immigration status would be unable to work legally (Gadd and Broad, 2018). Researchers have repeatedly demonstrated the way in which restrictive immigration policies adversely affect vulnerable migrants (see, for example, Pope-Weidemann, 2017; Kotiswaran, 2019). As Pope-Weidemann (2017) suggests, tightening border controls simply leaves vulnerable foreign nationals with little choice but to seek survival through illegal routes, thus increasing their vulnerabilities to trafficking and exploitation.

This was also the case leading up to the 2015 general election, with the increase in the UK Independence Party's popularity, encouraging a more stringent approach to immigration (Mellon, 2018). Scholars have speculated about the introduction of the MSA in this context, suggesting that the Act was 'rushed through shortly before the 2015 general election' (Djinn, 2016). This arguably allowed for the expansion of the *positive* and *negative* migration narrative, creating a framework within which only some will be deemed *deserving of assistance*. Directly affecting the immigration status of European citizens in the UK, this sentiment also applies to Brexit. Arguably, by pushing its anti-migration stance through Brexit, the UK government has merely aggravated conducive contexts for trafficking.

The following section considers these speculations in more detail through the pre-legislative debates. Broad and Turnbull's (2018) 'problem-structuring' rather than 'problem solving' framing is explored, especially in relation to victim-centred provisions.

5.2.2. The Centre for Social Justice - It Happens Here

In 2013, the CSJ produced a report entitled *It Happens Here: Equipping the UK to Fight Modern Slavery* (hereafter, It Happens Here). The report was influential during the succeeding parliamentary debates, where the issue of human trafficking was described as a crime involving the most extreme forms of abuse and humiliation (Pritchard, 2014). The report advocated the need for, and led to, the introduction of the MSA: representing a 'turning point in the bargaining process' (LeBaron and Rühmkorf, 2019: 730). During the legislative process, the UK government made extensive reference to the report, claiming that it initiated a: 'step change in how the Government was looking at the issue of modern slavery' (cited in LeBaron and Rühmkorf, 2019: 730). Many of the concerns raised in it had been voiced previously by NGO and academics, but the CSJ report was more influential (Mellon, 2018). This may be attributed, at least in part, to the position of its founder: whilst claiming to be an independent think tank, the CSJ was founded by Iain Duncan Smith, the Secretary of State from 2010 to 2016 and a previous leader of the Conservative Party. Smith was an influential cabinet member during the Coalition government and was, therefore, able to bring extensive media attention to the report.

It Happens Here was highly critical of the UK's anti-trafficking framework, especially the limited provisions for victim protection (Johnstone, 2017). It recommended the reconceptualisation of human trafficking, stating that it is: 'first and foremost a crime and not immigration issue' (CSJ, 2013: 18). It proposed using the term modern slavery as an umbrella term encompassing human trafficking, slavery, servitude and forced labour. The CSJ report therefore concluded that: 'treating a potential victim of modern slavery as an illegal immigrant is utterly counter to a victim-centred approach' (CSJ, 2013: 84).

Around the same time, scholars such as Cherti, Pennington and Galos (2012) presented similar ideas. They suggested that whilst there had been several progressive changes in the UK's legal framework, the largely immigration-led approach prevented lawmakers from establishing ways to curb and eliminate the demand for a sex trade, and other forms of exploitation. The authors drew on the Anti-Trafficking Monitoring Group's findings of an analysis of 390 cases reported to the NRM in 2010. They concluded that the UK's legal system, at that time, continued to be concerned with the immigration status of potential victims of trafficking, rather than their status as victims. Victim identification was considered to be weak.

It Happens Here focuses on victim protection in three of its seven chapters, covering identification and support. It also made recommendations for: the consolidation of all offences relating to human trafficking and modern slavery under one umbrella; law enforcement; the role of business in the wider anti-trafficking arena and the need for an independent Anti-Slavery Commissioner. These issues were covered in single, comparatively shorter, chapters. In line with its victim-centred approach, the report made specific provisions for active investigation of potential cases of human trafficking and identification of victims. It recommended that the best way to develop a framework that obliges states to take an active approach to victim identification would be to incorporate the obligation into statute. This way, the state is prompted to investigate the 'circumstances of their victimisation' and take appropriate action (CSJ, 2013: 155).

The report therefore placed emphasis on the human rights of victims. This approach is in line with the UK's obligation under Article 2.2 of the EU Directive (2011). Article 2.2 considers vulnerability as 'a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved'. Whilst acknowledging the demanding nature of this recommendation, the CSJ (2013: 155) suggested that identification of victims is simply: 'a clarification of the obligations to which the UK is already subject through the European Convention on Human Rights (ECHR) and its associated case law'. The report refers to the 2010 case of *Rastev vs. Russia and Cyprus*, whereby it was decided that, according to Article 4 of ECHR all states are under 'a procedural obligation to investigate situations of potential trafficking'. This case involved a Russian woman who had travelled to Cyprus to work at a nightclub. She travelled to Cyprus holding an *artiste* visa, known to have been used by many traffickers around that time (Chaudary, 2011), which she had obtained through her 'employer', the owner of the nightclub. After experiencing exploitation, the victim eventually escaped the club, only to be taken by her traffickers, to the police station for deportation. After some investigation, the police returned the victim to her exploiters. Shortly after, her dead body was found on a pavement close to the trafficker's home. The victim's father presented the case that, in violation of Article 4 of ECHR, the Cypriot government had failed to identify his daughter as a victim, and ultimately failed to protect her. As Chaudary (2011:87) notes:

> *The Court made substantive findings on the relationship between trafficking and ECHR Article 4, relying heavily on the provisions of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the*

Palermo Protocol) and the Trafficking Convention, both to define trafficking and to bring it within the realm of Article 4.

This ruling plays an important role in the UK's anti-trafficking framework, and as considered at 5.3.2 below, has led to the explicit mention of the ECHR in the MSA. The judgement has since been relied upon in a number of British cases, including the 2016 case of *R (on the application of H) vs. Secretary of State for the Home Department.*

It Happens Here advocated for the non-prosecution of victims in the new legislation. It sought to incorporate this into the UK's national legislation in accordance with international instruments, namely Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (2005) and Article 8 of the EU directive (see Table 5.1 below). Prior to the report, guidance existed, directing police officers not to prosecute victims of human trafficking (see Crown Prosecution Service, 2011). The CSJ were concerned, however, about the lack of familiarity with this guidance and its application to all cases of human trafficking. The inclusion of a statutory obligation not to prosecute victims was considered a way to apply the protection 'equally to all parts of the criminal justice system' (CSJ, 2013: 97).

The report also made specific reference to sexual exploitation. It sought to refute the 'myth or common misunderstanding' (CSJ, 2013: 33) that prostitution is synonymous with human trafficking. Acknowledging that discussions surrounding the connection between prostitution and modern slavery are multifaceted, it sought to emphasise that women trafficked into sexual exploitation do not have a choice. It noted that, in line with international law, particularly the Palermo Protocol, consent of the victim is irrelevant. The report did not provide more substantive information than this, nor did it make any practical recommendations for trafficking for sexual exploitation to be afforded a separate section in the Act. It did, however, arguably seek to draw the Government's attention to the fact that definitions of sexual exploitation and prostitution needed to be re-considered in light of their overlapping characteristics (see 5.3.2 below).

5.2.3. Report of the Modern Slavery Bill Evidence Review

As a result of recommendations put forward by the CSJ and subsequent media coverage, an independent modern slavery evidence review was commissioned by the then Home Secretary, in 2013. This review represents the initial stage of the legislative process.

In preparation for the review, the committee members - including Baroness Butler-Sloss, Sir John Randall and chair, Frank Field, gathered evidence over two months from NGOs, campaigners, frontline professionals, international experts and, victims of modern slavery themselves (Butler-Sloss, Field and Randall, 2013). They aimed to use the evidence to inform draft clauses that could be incorporated into the Bill. Whilst the review intended to support the development of the draft Bill (Butler-Sloss, Field and Randall, 2013), the report was published by the government on the same day as the draft bill itself. Whilst it is plausible that this decision was made in light of tight parliamentary deadlines, it could have had a different intent. By aligning publications, the government could sidestep the review's recommendations that did not coincide with its own position.

The significance of this speculation is made clear by considering the legislative process. Clauses that are incorporated into a draft Bill must be openly discussed, and will be the subject of scrutiny and change. What does not make it into the Bill is more likely to fall away from discussions, as it is not to subject of parliamentary scrutiny. This included the enhanced victim protection provisions suggested by the review. Indeed, whilst much resistance came from activists during the legislative process, as the remainder of this chapter will show, the government was mostly successful in keeping the legislation in line with its own agenda - becoming world leaders in victim protection - whilst making limited change, by keeping certain topics out of the bill (Johnstone, 2017).

The review made recommendations similar to those presented earlier by the CSJ and was highly critical of the existing framework. It welcomed the use of the term modern slavery to cover all acts of human trafficking and servitude. The Panel suggested that modern slavery includes, but is not limited to the following acts.

> *… forced labour, bonded labour, involuntary domestic servitude, child slavery and sexual slavery and sex trafficking. Human trafficking, the transport of any person from one area to another for the purpose of forcing them into slavery conditions, is often, but not always, an element of the crime of modern slavery* (Butler-Sloss, Field and Randall, 2013:19).

The second part of this definition suggests that the review was supportive of the CSJ's position in relation to a focus on travel. It, therefore, challenged the supposition that human trafficking was predominantly, or wholly associated, with immigration. It therefore

emphasized the need to provide support: 'to all victims of modern slavery regardless of nationality or immigration status' (Butler-Sloss, Field and Randall, 2013:27). In line with this, the review identified a potential conflict of interest between the UK Visas and Immigration's (UKVI) responsibility to regulate immigration and their duty to identify and support victims of human trafficking. The review therefore recommended: 'removal of the NRM Competent Authority function from the remit of the [UKVI]' (Butler-Sloss, Field and Randall, 2013:15). It suggested that this would increase trust in the NRM by victims and those who refer them, aiding both identification and support.

The report went further and made recommendations for an expansion of who could be a designated first responder - those permitted to refer potential victim of modern slavery into the NRM. It also recommended that the reflection period be extended and temporary work visas to be issued to all individuals identified as trafficking victims. These proposals suggest that the Review took a similar victim-centred stance to the CSJ Report. It did, however, place a greater emphasis on enhancing prosecution of traffickers and exploiters.

5.2.4. The Joint Select Committee (JSC)

Chaired by Frank Field, the JSC 'was formed to scrutinise the Government's draft Modern Slavery Bill and make recommendations for its improvement' (Frankfield, 2020). The Committee was largely supportive of the CSJ's recommendations and those put forward in the independent review, and were, therefore, critical of a number of provisions within the draft Bill. Baroness Lawrence suggested that it sacrificed the provisions relating to victim support for 'symbolic efficiency' (Lawrence, 2014). Despite calls for increased focus on victim protection, the Bill focused heavily on law enforcement, and in the view of the committee lacked substance to revise existing policy. The committee further raised the concern that the Bill 'did not address either the identification or protection of victims' (Joint Committee on the Draft Modern Slavery Bill, 2014: 55). The JSC Report advocated for assistance to victims, even if they had made the decision not to go through the NRM. The government did not accept this, possibly because this would have removed the need for there to be a *deserving victim* and the burden of proof would have been lowered to one based on the *benefit of doubt*. Johnstone (2017) suggests, in practice, this would reduce the government's authority and power, as it would require decision makers to mostly trust the claims made by victims. Rejecting the recommendation would mean that the state could retain control of who it classifies a victim and through this as deserving of support.

A further substantial contribution of the report was a critique of the offences at Sections 1 and 2 of the Bill. It recommended replacing these with six alternatives. The new offences included general slavery, but mostly focused on the position of children. The Committee also voiced their concern around the definitions of slavery, servitude, forced or compulsory labour and trafficking within Part 1 of the draft Bill, concluding that these offences were: 'not as broad as the Government believes them to be, nor as broad as international definitions such as those in the Palermo Protocol, and as a result fail to capture current or potential future forms of modern slavery' (Joint Committee on the Draft Modern Slavery Bill, 2014: 47). They were of the opinion that the definition of trafficking would fail to capture all variations of the crime and, in particular, lacked elements of harbouring or receiving of a victim, in violation of Article 3 of Palermo.

The Committee suggestions were, ultimately, rejected by the government, including that exploitation should apply to both section 1 and 2. The proposed offences were considered 'too broad in scope and uncertain' (HM Government, 2014b: 3), with concerns that they would 'criminalise [less serious] behaviour that clearly should not be criminalised' (HM Government, 2014b: 3), whilst lessening focus on more serious forms of exploitation. The introduction of six distinct offences was therefore rejected, mainly on the grounds that it would likely cause confusion amongst judges and juries. The government disagreed with the Committee's proposition that definitional gaps remained within the law: as a compromise, some amendments to the draft bill were agreed: 'although the Government does not believe that a complete re-write of the offences is needed, we agree with the Committee that they could benefit from further clarity and simplicity' (HM Government, 2014b: 6).

The amendments were not substantial, limited to amending Clause 1 to bring the court's attention to the vulnerability and other characteristics and circumstances of the victim. The changes were, however, used to suggest that enough was being done to ensure that the definition did not restrict broadness - they did nothing for example to define slavery itself. The focus on more severe forms of exploitation can be interpreted as reflecting is a reflection of an intent to paint 'modern slavery' as a heinous, new crime, which the UK is a pioneer in addressing.

Finally, the JSC supported the view that victims of human trafficking must not be prosecuted, if they commit a crime within the context of exploitation. The JSC report went further than

both the CSJ and the evidence review in recommending a statutory defence to be included within the Bill, granting further protection to victims.

5.3. The Modern Slavery Act 2015

The Act received royal assent and became law on 26 March 2015. It comprised most provisions set out in the draft bill, amended marginally in light of the above recommendations, but with an addition of a number of new provisions. These included provisions relating to the confiscation of assets (Section 7), a statutory defence for offending victims (Section 45), a provision for civil legal aid (Section 47), child specific provisions (Section 48), and a duty for companies to report on the steps they have taken to ensure that modern slavery does not take place in their supply chains (Section 54). Other amendments and additions to existing law were mostly minor. The lack of adherence to some of the recommendations in the final bill left many actors engaged in the drafting process with mixed feelings, the main dissatisfaction being with the continued lack of 'minimum standards of protection put on statute' (Skrivankova, 2015).

In this section, I reflect on some of the main components of the Act, considering how their incorporation or lack of, into the UK's national law has or has not enhanced victim protection. I present this analysis whilst simultaneously considering whether each provision complies with international standards. Table 5.1 is a summary of this analysis. It presents the various duties for the protection of adult victims of human trafficking placed on states by the three international instruments discussed earlier in this chapter: the UN Palermo Protocol; the ECAT; and EU Directive 2011/36/EU. The table includes the duties, obligations, or recommendations within each instrument, cross-referred with the MSA. The identified gaps in the current law are explored further in the next sections.

Table 5.1- National and International provisions for victim support

Provisions for victims	UN Palermo Protocol	The Council of Europe Convention	EU Directive	The Modern Slavery Act
Measures for identification, protection and support of victims	No specific provisions for identification. Articles 6-8 contain provisions for the protection of victims.	Article 10 requires each Party to 'provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims'. It further specifies that 'each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations'. Article 12 further requires each Party to 'adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery'.	Articles 11 (1) and (4) require Member States to 'take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time…Directive' and 'to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations'.	Section 49 states that the Secretary of State must issue guidance relating to the following: 'a. the sorts of things which indicate a person may be a victim b. arrangement for providing support and assistance'. No statutory basis for victim identification, protection and support.
Minimum duration of support	Not included.	Article 13 provides that 'each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim'.	Paragraph 18 sets out that 'a person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness'. There is no set minimum duration of support.	Not included.
Minimum standards of support	Not included.	Article 12 provides that 'each Party shall adopt such legislative or	Paragraph 18 sets out that 'the assistance and support provided	Not included.

		other measures as may be necessary to assist victims in their physical, psychological and social recovery'. Such assistance shall include at least the following: - standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance; - access to emergency medical treatment; - translation and interpretation services, when appropriate; - counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; - assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; - access to education for children.	should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers'.	
Ensuring victims are not criminalised	Not included.	Article 26 states that 'each Party shall…provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'.	Article 8 states that 'Member States shall… ensure that competent national authorities are entitled not to prosecute or impose penalties on victims'	Section 45 and Schedule 4: Statutory defence for slavery or trafficking victims who commit an offence.

Compensation and access to justice	Not included.	Article 15 states that 'each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims…, for the right of victims to compensation from the perpetrators…measures as may be necessary to guarantee compensation for victims'.	Article 17 states that 'Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent'.	Section 7 provides for an asset recovery regime whilst ss14-29 provide for slavery and trafficking prevention and risk orders. Section 47 provides for civil legal aid for victims of slavery.
Consideration of victims' human rights	Article 2 (b) places an obligation on Parties 'to protect and assist the victims of such trafficking, with full respect for their human rights'. Articles 14 and 16 require migrants to be treated in a humane way.	Article 1 states that 'the purposes of this Convention are...to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution'.	Paragraph 7 states that the Directive 'adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings'.	Section 1 (2) states that 'the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention'.

5.3.1. Defining human trafficking and modern slavery

Chapter 2 briefly explored the incorporation of the word 'modern slavery' into the UK's anti-trafficking legal framework and the connotations associated with this shift away from human trafficking. This chapter builds upon this, looking specifically at the wording contained within the first two sections of the MSA.

As established in the previous chapter, the duty for the UK to create appropriate anti-trafficking legislation stems from various international sources, but fundamentally, originates from the internationally accepted definition of trafficking within the Palermo Protocol (Goździak and Vogel, 2020). The UK also has an obligation under Article 18 of the Council of Europe Trafficking and Article 2 of the EU Trafficking Directive to create appropriate anti-trafficking offences within its legislation. Whilst international law does not require the UK to necessarily have the offences in one place, it does require the legislation to be effective and

accessible. In her analysis of the MSA and the framing of the term modern slavery, Mellon (2018: 1) suggests that:

> *…development of the concept of 'modern slavery' and the subsequent collapse of the legal boundaries between human trafficking and slavery has a potential threefold effect, which limits the utility of current anti- slavery/trafficking legal and policy responses.*

Of particular interest to this thesis, is the third effect in Mellon's argument, which is the depoliticising of the concept of 'modern slavery'. She argues that the Act's emphasis on human trafficking, to the detriment of other forms of modern day slavery, invites a criminal-justice legal response, taking the focus away from victim support and protection. Whilst I concur that an emphasis on a criminal justice de-emphasises victim protection, I would argue that placing the offences within legislation where the title does not include human trafficking at all, limits the forms of exploitation captured by the Act. The concept of 'human trafficking', once itself an umbrella term under which all relevant exploitative offences fell, now falls under a larger umbrella, one that was intentionally focused on the most severe forms of exploitation. In addition, the 'modern slavery' narrative can also be located as another vehicle to strengthen immigration policies and the desire for tighter border control.

5.3.2. Offences under the Act

In accordance with the recommendation put forward by the CSJ in *It Happens Here*, existing anti-trafficking offences were consolidated within sections 1 and 2 of the MSA. The government initially disputed this recommendation - submitting that, whilst placing all offences relating to human trafficking under one piece of legislation would be 'administratively neater', it would not be feasible to prosecute all individuals who 'seek to exploit others' (HM Government, 2012: 11). It concentrated, instead, on the need for the judiciary to be trained in utilising existing legislation, arguing that guidance already existed to assist the CPS. A lack of awareness about the existence of such guidance was later addressed by the CSJ, but this led to a proposal for much bigger change (see 4.2.1 above), most of which would later be rejected. The Government, therefore, reluctantly accepted the suggestion for the amalgamation of offences, arguably as a strategy to sidestep bigger proposed changes, whilst maintaining space to claim the legislation as major legal reform.

Section 1 (2) of the Act proposes that: 'in subsection 1 the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention'. A positive step in the direction of victim support, this provision acknowledges that individuals' human rights remain central in any crime, including slavery-like behaviour. On this premise, 'bringing trafficking within the ambit of ECHR Article 4 will therefore also provide victims with its absolute protection in a number of crucial ways' (Chaudary, 2011: 84), including ensuring that they are not exposed to further acts of exploitation. However, this potentially does not apply to 'sex slavery', as this category is not explicitly named under Section 1, nor does it include acts of human trafficking as Article 4 does not appear at Section 2 of the Act. This makes for rather confusing provisions. Parliament sought to keep the offences of slavery and servitude separate from human trafficking, whilst placing them under the *modern slavery* umbrella - it then neglected to give equal consideration to each offence in the drafting process, seemingly giving less weight to human trafficking. This further advanced the portrayal of modern forms of slavery as a new evil needing to be addressed through a 'ground breaking' new law.

As regards the definition of human trafficking at Section 2, even though there is express mention of sexual exploitation (see 4.3.2.1 below**)**, there remains a larger issue: the continued focus on travel. This had been highlighted as a problem, both by the CSJ and the Modern Slavery Bill Evidence Review, both of which the government appears to have ignored. Considering the definition of trafficking within the Palermo Protocol, despite the contention that 'to extend to situations not involving movement is likely contrary to what the drafters intended' (Chuang, 2014: 629), there is nonetheless some room to interpret the definition as not requiring travel to be present at all. The UNODC Model Law (see Chapter 4) makes suggestions in relation to a number of Articles contained in the Palermo Protocol, seeking to provide further clarity and aid implementation into national laws. For example, while Article 4 of the Protocol appears specifically to relate to offences which are 'transnational in nature and involve an organized criminal group', the commentary to the Model Law makes clear that the contents of the Protocol are to 'apply to all forms of trafficking in persons, whether national or transnational and whether or not connected with organized crime' (UNODC, 2009: 7).

The Palermo Protocol's definition includes a number of acts including: recruitment, transportation, transfer, harbouring or receipt of persons (Article 3(a)). However, Section 2

(1) of the MSA makes it perfectly clear that 'a person commits an offence if the person arranges or facilitates the *travel* of another person ("V") with a view to V being exploited'. The definition of trafficking within the MSA therefore covers *act* elements of the crime that are substantially narrower than those set out by the Palermo Protocol, ignoring acts that are frequently involved in this crime, placing undue emphasis on the need for a victim to have been transported. Thus, if a potential victim themself or the prosecution is unable to show evidence proving that cross-border (s 2 (5) (b)) or intra-border (s 2 (5) (c)) transportation has taken place, the victim status of the trafficked person cannot be establish nor will the offender be punished (Dempsey, Hoyle and Bosworth, 2012). Not only is this a clear divergence from the Palermo Protocol's definition, arguably whilst in line with the UK's anti-migration agenda, but it can also be considered a contravention of ECHR Article 4 and therefore a major hindrance to victim protection.

In addition to the *act* element of the crime, the language used to define exploitation at Section 3 (considered further below), makes substantial deviations away from the *means* foreseen by Article 2(1) of the EU Trafficking Directive, and Article 4 of ECAT. Southwell, *et al*. (2018: 108) observe that:

> …whereas the language of the EU Trafficking Directive, Art 2(1) and ECAT, Art 4 envisages that the 'means' by which exploitation is committed can apply across *all* forms of exploitation, the MSA 2015, s 3(4)-(6) suggests that different means apply depending on what the form of exploitation is.

They suggest that the language of Section 3 of the MSA: 'is completely at odds with the approach of the regional and international instruments defining trafficking and thus non-compliant with ECAT, Art 4 or the EU trafficking Directive' (Southwell, *et al*., 2018: 109). A parliamentary evaluation of the Act was carried out in 2019 (HM Government, 2019b) which contained a number of recommendations. The report raised concerns about, amongst other things, the scope of the trafficking offence. It envisaged difficulties with courts interpreting the current definition too narrowly, thus limiting both its prosecution and victim-protective capabilities. It confirmed that the MSA's definition of trafficking currently deviates from both Palermo and the EU Directive definitions, which do not emphasise travel. The review, however, fell short of making any practical recommendations in respect of victim protection mechanisms.

> *… while we too are concerned that the Act does not mirror the Palermo Protocol and the EU Directive in its structure, the definition of human trafficking has not yet proved an issue and it is too early to determine if this is causing issues in securing prosecutions* (HM Government, 2019b: 17).

The report simply suggests that the Independent Antislavery Commissioner should monitor all prosecutions and appeals in order to ensure that courts are making appropriately wide interpretations of what constitutes human trafficking. The suggestion that the definition has not yet proved an issue must be considered with caution as the report itself recognises the harms that the current definition may cause to victims: 'despite this acknowledgement, [it] fails to recommend the legislation be amended and updated' (Kenway, 2019) in any substantial way.

5.3.3. Exploitation

The MSA is the UK's first national legislation to expressly define exploitation (Turner, 2014). It also defines sexual exploitation at Section 3 (3). In this way, it can be argued, that the UK has, in fact, gone beyond the minimum standard provided by the Palermo Protocol, which did not do this. What remains problematic, however, is the fact that despite the recommendation put forward by the Joint Committee, the Act does not provide for a stand-alone offence of exploitation. Instead, at Section 3, it defines exploitation, as a necessary element of human trafficking under Section 2. Section 3 (3) includes 'commission of an offence under Section 1, sexual exploitation to include commission of an offence under Section 1(1) (a) of the Protection of Children Act 1978 (indecent photographs of children), or Part 1 of the Sexual Offences Act 2003 (sexual offences)'. As Djinn (2016) comments: 'the definition of the sexual exploitation part goes back and forth between the Modern Slavery Act and the Sexual Offences Act 2003, making it horrendously complicated and hard to understand'. She calls attention to the fact that the other forms of exploitation within the Act are set out much more clearly than that of sexual exploitation, thus remarking that the drafters of the Act: 'never had any intention of making it an effective tool for tackling sex trafficking or for meeting our actual obligations under the Palermo Protocol and the Council of Europe Convention' (Djinn, 2016).

Making the definition of exploitation a necessary element of human trafficking, rather than a separate offence means that, whilst Section 3 of the Act potentially allows for a wide range of behaviours to be caught under the definition of exploitation, some of the behaviours are

unlikely to carry the appropriate maximum penalties (Southwell *et al.*, 2018). As Section 2 of the MSA is not an equal substitution for any previous provision, but a combination of the SOA 2003 and the Asylum and Immigration 2004, courts are likely to consider identified factors in proceeding cases involving sexual exploitation, thus relying on similar sentencing structures. Under the SOA 2003, a conviction for sexual exploitation carries a maximum sentence of 14 years in prison. Similarly, sentences committed under the Human Tissue Act, for example, can only ever go up to a maximum of three years' in prison. These lengths of sentence may not adequately reflect the gravity of the pain inflicted, or indeed the intent of parliament to increase sentences, an issue that could have been avoided by creating a separate exploitation offence.

The 2019 review made enquiries into the effectiveness of the definition of exploitation in Section 3 of the MSA (HM Government, 2019b). It considered whether the definition would be broad enough to cover all future forms of exploitation. The result of this enquiry was a recommendation that the definition of exploitation should not be amended under the Act, as it has sufficient flexibly to cover emerging exploitative behaviours. Instead, the report made recommendations for further guidance to be made available for the purposes of interpreting the Act, ultimately adding to the Home Office's current typology, which sets out the recognised forms of *modern slavery* in the UK (Cooper *et al.*, 2017). At the time of writing, there are 17 named forms of modern slavery (see Appendix 7).

5.3.4. Identification and support: an on-going concern for victim protection

Identification of a potential trafficked victim is perhaps the most crucial element of protection. As demonstrated by the case of *Ranstev vs. Cyprus and Russia*, the obligation is enshrined in international law, under Art 4 of the ECHR, whereby states are obliged to proactively identify situations of potential trafficking. This was further clarified in the 2017 case of *J vs. Australia* where the ECtHR decision made clear that a duty to identify potential victims falls first and foremost onto the police as first responders. The latest instrument to note the importance of identifying victims is guidance prepared by the Home Office (2020b) itself. The guidance recognises the importance of identifying victims as a first step to providing them with protection. It sees this step as critical to the implementation of the directions set by ECAT, which, as previously noted, led to the introduction of the NRM.

It has been suggested that parliamentary debates on the Modern Slavery Bill were the ideal platform through which the NRM could finally have been placed on a statutory basis,

occasioning its reform (Mellon, 2018). Anti-Slavery International, for example, provided evidence to suggest that a lack of statutory basis had led to a lack of a structured application process, which in turn denied potential victims a right to appeal against arbitrary decisions (Butler-Sloss, Field and Randall, 2013). In practical terms, this reduces potential victims' rights to support and protection, by allowing their status to be denied by the NRM; it would also allow courts to deviate away from NRM decisions, to which they did not consider themselves bound (Butler-Sloss, Field and Randall, 2013).

Despite these assertions, the MSA failed to set the NRM within a statutory framework. In its response to suggestions put forth by the JSC, the government acknowledged the committee's concern that not doing so would revoke any statutory right of appeal for victims, but it rejected any amendment to the draft Bill on the basis that there was little evidence to suggest that the system did not work without the inclusion (HM Government, 2014b). It remains then that, if a negative decision is made, there is no formal appeal route available to victims, save for judicial review in the Administrative Court (Elliot and Garbers, 2016). In incorporating a flawed version of a referral system that does not sufficiently protect trafficked victims, the UK has therefore, arguably, failed to comply fully with its obligations under ECAT.

The Government commissioned an evidence-based review of the NRM in 2014, which aimed at establishing whether the mechanism continued to provide 'the best framework to achieve [the Committee's suggested aims] and whether it can, or should, cover all victims of modern slavery' (HM Government, 2014b: 18). A number of recommendations were made, including replacement of a first responder's role with an anti-slavery lead, removal of the UKVI and NCA's decision making roles and replacing them with multi-disciplinary panels (HM Government, 2014b). This resulted in a number of pilots, all of which were deemed unsuccessful, mainly due to funding issues (Mellon, 2018). Following criticism from the all-party Parliamentary Group on Human Trafficking and Modern Slavery, the government announced its intention to effect substantial changes to the NRM's decision-making process, including the restructuring of the two-stage system, creating a 'a single, expert unit' to make trafficking related decisions, selection of 'an independent panel of experts to review all negative decisions' and a new digital system to support the NRM process (Newton, 2017).

The UK's Single Competent Authority (SCA) is now tasked with both decision-making on whether an individual is a potential trafficking victim and if so, whether they are entitled to discretionary leave to remain in the UK (Home Office, 2020b). The new measures, arguably still fall short on victim protection standards, particularly as they do not sufficiently address

previously raised concerns about the Home Office's potentially conflicting roles as immigration enforcer and identifier of trafficked victims. Whilst the development of a single competent authority is administratively more appealing, the SCA remains part of the Home Office.

Prior to the development of the MSA, the UK Human Trafficking Centre, an organisation which was a part of the National Crime Agency, had sole responsibility for determining the victim status of potentially trafficked EU nationals (the UK Border Force was responsible for non-EU nationals). Whilst this arrangement was not without its limitations (see, for example, Annison and Anti Trafficking Monitoring Group, 2013), it left decision making about victims' fate out of the Government's own restrictive, immigration-tainted remit. It brings back into view Broad and Turnbull's (2018) interpretation that the MSA simply restructured the protections available to victims rather than enhancing them.

The fact that the NRM has now reformed from a paper based process, to one that allows referrals to be made online, is a positive step in ensuring the speedy identification of victims, however: 'the Home Office's NRM reform programme, is still very much underway and needs to make wider changes to the overall system of support for trafficked persons' (Turner, 2019).

A further threat to victims' right to protection is the strict rule that a potential victim only has three months to challenge a negative conclusive grounds decision (Southwell *et al.,* 2018). So, what would the position be if the victim goes missing? A potential victim of trafficking for the purposes of sexual exploitation who goes missing is very likely to have been re-trafficked, often showing up months later in a brothel (Simon, Setter and Holmes, 2016). Placing time-restrictions on such an individual is not only impractical, but arguably in contradiction of the victim's fundamental human rights.

As noted in Chapter 4, Article 12 (1) of ECAT sets out necessary measures that must be adopted by states as are 'necessary to assist victims in their physical, psychological and social recovery' (see Table 5.1). Unlike Scotland and Northern Ireland where specific support provisions exist on a statutory basis - in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015; and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Scotland) 2015 respectively - the MSA does not place victim support on a statutory basis. Instead, it provides at Section 49,

that the Secretary of State must promptly issue appropriate guidance to public authorities and other appropriate persons, setting out best practices in identifying and supporting victims.

Other than the problems associated with not placing key provisions on a statutory footing, already identified in relation to the NRM, Section 49 itself has not been sufficiently complied with. The drafting and eventual delivery of the guidance has been a slow and highly problematic process (Anti-slavery International, 2020): it has taken almost 5 years for guidance to be published, whilst still lacking sufficient transparency. The delay was addressed in the 2018 case of *R (on the application of K and Anor) vs. Secretary of State for the Home Department* (2018 at Paragraph 8), whereby the High Court reminded the Home Secretary that it is their: 'absolute duty immediately to issue the guidance that Parliament has required of him'. Eventually, the Government complied with its obligation and published the requisite guidance in April 2020[3].

The first thing to note is that the guidance states: 'the landscape for support is constantly evolving as we continue to review the processes for identifying, supporting and making decisions about victims of modern slavery' (Home Office, 2020b: 7). This means that the guidance is accurate only at the time of writing.

Given its recent publication, it is difficult to predict what, if any, practical help this guidance provides to those it intends to benefit. Given that it mainly serves as a replacement for earlier, already available guidance, it could be argued that the government has simply carried out a tick-box-exercise, which on paper, satisfies its obligation under Section 49 of the MSA and under Article 12 (1) of ECAT. What remains clear, however, it that irrespective of the contents of this guidance, there remain significant gaps in victim support and protection that remain unaddressed by statute. The next section highlights some of the gaps within the context of protecting victims from prosecution, support through compensation and in relation to the rights of trafficked victims seeking to claim asylum.

[3] The guidance supersedes a number of guidance, including Guidance: 'Duty to Notify the Home Office of potential victims of modern slavery; Victims of modern slavery; Frontline staff guidance; Victims of modern slavery: competent authority guidance; Multi-Agency Assurance Panels Guidance and Duty to Notify Guidance' (Home Office, 2020b:7)

5.3.5. Protection of victims from prosecution

Section 45 of the MSA contains a statutory defence for victims who commit an offence as a result of their victimisation/exploitation. The MSA is the first legislation to put the protection of offending victims on a statutory footing, theoretically crystallising the protections available to those who are held accountable for crimes they could not have otherwise avoided.

Prior to the Act, trafficked victims were left vulnerable to prosecution, the common law defence of duress being the only route available to them. The protection available under the law of duress itself is however limited and problematic, even though it is intended to provide trafficked victims with protections under common law (Southwell *et al.*, 2018).

Lord Bingham considered the scope of the duress in the case of *R vs. Hasan* (2005 at Paragraph 21), commenting on the narrow application of the defence:

> *I find it unsurprising that the law in this and other jurisdictions should have been developed so as to confine the defence of duress within narrowly defined limits.*

In instances where a defendant was unable to rely on duress as a defence, the judiciary would refer to common law, and the prosecution would be left to exercise their discretion in how to give effect to the international Conventions (Wake, 2017). Considering the position before the introduction of the MSA, Jovanovic (2017: 42) remarks that: 'a large number of trafficking victims end up detained, prosecuted, convicted, and summarily deported without being given due consideration to their victim status'. The fear of being detained and/or deported strongly deters victims of human trafficking from cooperating with authorities, a powerful tool utilised by traffickers to keep their victims entrapped in exploitative situations (Jovanovic, 2017). Victims' lack of cooperation not only hinders their protection, but it also means that such crimes, committed as a result of human trafficking, often remain concealed.

Principle 7 of the Recommended Principles and Guidelines of Human Rights and Human Trafficking (as supplemented by Guideline 2.5) makes clear that a trafficked individual must not be prosecuted for an offence they have committed during the course of their trafficking ordeal. Guideline 2.5 specifies that a trafficked victim needs to be identified as quickly and accurately as possible, specifically dictating that they must not be: 'prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons' (UN, 2010: 131). The non-prosecution obligation is also

enshrined in ECAT and the EU Trafficking Directive, but not in the Palermo Protocol (see Table 5.1)[4].

Article 26 of ECAT requires states to consider the: 'possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so'. Requiring states only to consider the 'possibility' of not imposing penalties means that states are not obliged to grant trafficked victims with complete immunity from prosecution (Piotrowicz and Sorrentino, 2016); rather, according to Wake (2017), it obliges them to seek alternative responses where duress is not apparent and where the exclusions apply. This means that where the Section 45 defence is not clearly applicable, according to Lord Thomas CJ in the 2017 case of *R vs. Joseph*, the UK courts must meet their international obligation by continuing to rely on the common law principle of duress; thus allowing courts much more discretion than would otherwise be allowed by statute.

The non-prosecution obligation is echoed in Article 8 of the EU Trafficking Directive (see Table 5.1), which states that: 'competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2'. Whilst the provisions of both instruments appear to be similar, the intended protection against punishment in each differs, mainly due to the key words used. The ECAT suggests that states must consider the 'possibility' of allowing victims protection from prosecution, while the EU Trafficking Directive grants states an 'entitlement not to prosecute'. Of most importance, however, is perhaps that the instruments refer to different activities that fall within the scope for defence. The ECAT provision refers to 'unlawful activities', while the EU Trafficking Directive includes only victims who have had some 'involvement in criminal activities'. This seemingly small difference has the potential effect of discounting from the scope of the latter, any activities that are illegal but not specifically covered by criminal law - these include, for example, activities in contravention of administrative and immigration laws (Jovanovic, 2017).

The inclusion of a Section 45 defence within the MSA is a positive step towards increased victim protection. The crime needs to have taken place as a result of the defendant being a

[4] A background paper prepared by the working group on trafficking in persons entitled 'non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking' (Working Group on Trafficking in Persons, 2010), highlights this requirement as being implied by the Palermo Protocol.

victim of slavery or exploitation; and a reasonable person in the same situation, having the person's relevant characteristics, would have no realistic alternative than to commit the offence (MSA, Section 45). Jovanovic (2017: 58) describes the introduction of the Section 45 defence as 'novel' but, sees the qualifying criteria, especially the third, relating to the *reasonableness test* as being 'problematic'. For Jovanovic (2017), the construction of protective measures aimed especially at victims of trafficking appears meaningless, if a victim's actions are assessed against all other offenders and the same protective mechanisms apply to all.

> *By placing the non-punishment principle in the context of existing protective mechanisms (i.e. prosecutorial discretion or a criminal defence such as duress) two sets of criteria begin to play a role. Thus, the criteria that apply to the existing general protective mechanisms are supplemented by the specific criteria that apply to the non-punishment principle alone, which makes the threshold for protection very high* (Jovanovic, 2017:58).

Consequently, whilst the new defence is a welcome advance, concerns regarding the scope of protection it provides remain. Cases such as *R vs. LM and Others*, decided in 2010, make clear that the international, non-punishment rule must extend to *any* offence committed by a trafficked victim as a result of compulsion (Elliott, 2015). In this case, the court held that for a trafficked victim, the concept of being *compelled* to commit a crime 'was not limited to the circumstances in which the English common law defence of duress and necessity apply' (Southwell *et al*., 2018: 117). The protection offered by the MSA, however, falls significantly below this threshold, owing in some part to the nature of Schedule 4 of the Act. Schedule 4 comprises a long list of offenses to which the Section 45 defence does not apply; these include, robbery, kidnapping, causing bodily injury by explosives and more. In fact, this list goes substantially beyond the exceptions applied to the rule of duress, which include 'murder, attempted murder, and treason involving the death of the sovereign' (Sereni and Fernández, 2020: 114). The Modern Slavery Bill Fact sheet on the defence for victims stated that:

> *Where an offence is not covered by the defence, the CPS should still consider whether it is in the public interest to prosecute or not… in serious cases (such as rape or where someone had been killed), it is essential that prosecutors can look at all the circumstances of the case and consider both the victim of the offence and position*

> *of the modern slavery victim when determining whether it is in the interests of justice, that a prosecution should proceed* (Home Office and Bradley, 2014: 19).

The guidance put forward by the fact sheet is helpful, however, only in the most severe cases. In a report produced by the Equality and Human Rights Commissioner (2014:3) in its second reading of the Bill in the House of Lords in that same year, it was suggested that:

> *… the defence is overly complex for consideration by a jury and risks some victims not being able to benefit from the defence, for example those who have been recruited or transported but not yet exploited, such as those who are compelled to commit immigration offences whilst being transported.*

Given the number of trafficked victims who remain unable to rely on the Section 45 defence (Jovanovic, 2017), it appears that far too many exclusions have been added into Schedule 4 of the MSA. Not including offences that fall under, for example, the Theft Act, the Immigration Act and even offences under the MSA itself, such as trafficking of another human being, indicates a further failure to consider the reality of trafficked victims' experiences. It is unsurprising, therefore that the exclusions have been heavily criticised (see, for example, Laird, 2016; Wake, 2017), mainly because victims of human trafficking are much more vulnerable to being coerced into committing many of the excluded offences. Victims are often coerced into situations which amount to trafficking as a result of a 'cycle of abuse' (Jovanovic, 2017: 65), a reality recognised and discussed in the 2010 case of *R vs. LM and Others*.

As described by Peter Carter, a leading QC, specializing in high profile cases of human trafficking and a special adviser to the Joint Parliamentary Pre-Legislative Scrutiny Committee on the Modern Slavery Bill in 2014 (Doughty Street Chambers, 2020), a number of substantial divergences exist between the draft MSB and the final Act in 2015. In a Criminal Appeals Bulletin for Doughty Street Chambers, Carter (2017) suggests that these divergences, including a suggestion for the 'widening [of] the law of duress to allow a lower threshold to apply to cases of modern slavery' were mainly overlooked, leaving doubts about whether the Act 'meets even the state's existing international obligations'. Carter (2017) suggests that: 'where there are gaps, for example in dealing with pre-Act conduct, it is for the courts to develop a process which satisfies the state's obligations'. He suggests that in creating the MSA, the Government ignored many suggestions put forward by the Scrutiny Committee, resulting in the Section 45 defence being very limited in scope (Carter, 2017).

5.3.6. The burden and standard of proof under Section 45

The wording of Section 45 of the MSA does not expressly address the issue of where the burden of proof lies in a case involving a potential victim offender. The 2018 case of *R vs. MK* addressed the important question of whether, when seeking to rely on the Section 45 defence, the legal and/or evidential burden of proof should be placed on the CPS or the defendant (victim). This case is a significant advancement in this area as before it, the defendant was required to demonstrate not only that they were a victim of trafficking, but also that they were compelled to commit the offence. They also needed to prove that on a balance of probabilities, a person with the same characteristics, when placed in a similar position would have no realistic option but to commit the offence. It would then be a job for the prosecution to prove to a jury that the defendant had not been compelled to commit the offence (Carter, 2017).

Prior to input from the Court of Appeal in *R vs. MK*, in two Crown Court rulings of *R vs. Danciu (also known as Kreka)* and *R vs. Maione* (together now known as *MK, as in R vs. MK, 2018*), juries were directed to consider in their judgment, that such a reverse burden applies. This resulted in both defendants being convicted. The Court of Appeal case of *R vs. MK* appears to have rectified this position to some extent. Setting a strong precedent for future cases, the Court set out that a defendant seeking to rely on the defence continues to bear an evidential burden, which means that they must provide evidence in support of their claim, however, they do not bear a legal burden, which would otherwise require the individual to prove 'beyond reasonable doubt'. The latter burden has now been clarified to fall on the CPS. This case signifies the challenges that, wrongful interpretation of the statutory defence, may have on victims. An updated version of the CPS guidelines has since been prepared (updated: 30 April 2020), albeit with a two year delay, which now sets out the legal framework in accordance with the decision reached in *R vs. MK* [2018].

While the updated CPS guidance and the application of a reverse burden is likely to improve the use of the defence by potential victims, the case of *MK* is a valuable reminder of how important language used within each piece of legislation may be on its interpretation. Whilst welcomed generally (see, for example, MacDonald, 2018; Carter, 2018), some comments made by the Court of Appeal remain worrying. The court for example stated that: 'the niceties of the legal burden of proof could [not] have made any difference' to the case (*R vs. MK* [2018] at Paragraph 74). It is perhaps quite unsettling that in a case that otherwise creates a promising progression in terms of victim protection, the lessening of a burden of proof would

be considered a 'nicety' by the court. As MacDonald (2018), a criminal defence barrister, suggests: 'anyone who defends will know, it is often the greatest weapon in a limited arsenal'.

5.3.7. A lack of awareness of the statutory defence and a lack of a recording mechanism

One of the earliest cases involving the prosecution of a victim of human trafficking is that of *R vs. Vilma Kizlaite and Anor*, decided in 2006. Johnstone (2017) observes that in this case, certain tests, such as whether it would be in the public interest to prosecute or whether there was an element of duress, were omitted. In this case, the Court considered the accused's trafficked status as a mitigating factor, but, ultimately decided that the initial decision to impose a severe sentence was reasonable. Johnstone (2017: 240) attributes this sort of decision making to the 'very early stage of the policy apparatus' meaning that there was very little by way of a definition of the 'trafficked victim' at the time.

Public and specialist knowledge on the subject appears to have increased following the signature of ECAT and the EU Trafficking Convention. The application of Article 26 was, for example, discussed at length in the 2010 case of *R vs. LM*. In this case, the Court held that 'Article 26 does not require blanket immunity from prosecution for trafficked victims…the application of Article 26 is fact-sensitive'. The 2013 case of *L and Ors vs*. The Children's Commissioner for England and Anor further addressed the international obligation placed on states not to prosecute victims, but this time, considering the position under the EU Trafficking Directive.

> *The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age… but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals* (Muraszkiewicz, 2018: 56).

Despite this increase in knowledge, especially as the obligation is now embedded in national statute, concerns remain about how much awareness exists in relation to the non-prosecution obligation (Gadd and Broad, 2018), thus challenging its effectiveness in protecting victims. Gadd and Broad (2018:1453) identify that: 'few investigators are aware of the Section 45 defence'. They attribute this to the 'binary between innocent victim and evil offender' (op cit), where a victim of trafficking is arrested for committing a crime whilst trying to escape exploitation or where they have found themself in a role reversal, taking a trafficker's position in a chain of command. This has the potential consequence of confusing the

trafficker/trafficking victim relationships that the human trafficking paradigm assumes. As Jovanovic (2017: 42) suggests: 'a trafficking victim… simultaneously occupies conflicting legal positions, which prompts the question of the relationship between these statuses, both on a conceptual level and in practice'.

A report prepared by Her Majesties Inspectorate of Constabulary and Fire and Rescue Services, *Stolen Freedom* (2017) noted that a lack of awareness about the availability of a statutory defence for trafficked victims often results in officers investigating a crime by taking evidence, only for the prosecution of the offender, thus not sufficiently looking for evidence that the crime may be committed as a result of compulsion. This lack of awareness means that victims may be left without protections that would be available to them under the MSA; instead, they are treated uniquely as alleged offenders.

Along with the Section 45 defence, the MSA now includes special measures for the protection of witnesses in criminal trials (Section 46). Section 46 amends the Youth Justice and Criminal Evidence Act 1999 (YJCEA), permitting victims of trafficking the chance to present evidence through less intimidating means than at court, such as via video recordings. In accordance with Sections 17(2) (a)–(c) of the YJCEA, the level of support provided will depend on a number of specific factors, including the circumstances of the case, the age, culture and social background of the victim and more. It may be suggested that the dual measures at Section 45 and then at Section 46 were developed, less with the intention of protecting trafficked victims, and more with the view to facilitate and increase successful prosecutions. This reiterates the position held before in this chapter that victim protection policies have been progressed only in so far as they aid criminal justice.

The 2019 independent review of the Act (HM Government, 2019b) notes that there is currently no set mechanism through which data on the use of the Section 45 defence can be accessed or recorded. It was suggestion to the panel that reliance on the defence has increased gradually from the introduction of the MSA; however, with no clear quantifiable data, there is a lack of evidence to support this claim. This absence of data renders it impossible to determine how frequently the defence is used, or indeed misused by defendants. Filling such gaps was considered a priority by the report, suggesting that all government bodies must report on how the defence is being used. The report urges authorities to identify 'cases where the defence has been appropriately deployed, where it has been claimed and subsequently disproved, and instances where rate, arguably, ought to have been deployed earlier on' (HM Government, 2019b: 72). At the time of writing, a recording mechanism is still lacking.

5.3.8. Compensation and access to justice

There is an international obligation on the UK to incorporate, into its national law, a working mechanism designed to compensate victims of human trafficking. This obligation is enshrined in Article 15 of ECAT as well as Article 17 of the 2011 Directive. The UK recognised this obligation and the importance of compensation for victims in its 2014 Modern Slavery Strategy.

> *We know that compensation for victims is very important in the process of recovery and also in preventing possible re-trafficking. It can improve the chances of a victim's psychological recovery and eventual reintegration into society and can also offer economic empowerment and protection from being re-trafficked* (HM Government, 2014a: 67).

Despite this acknowledgement, during early debates in the House of Commons, the government overruled a proposal to 'enhance civil remedies by creating new torts equivalent to the offences to be created in Sections 1, 2 and 4' (Bates, 2015). The remedy was considered excessive and already available to victims of trafficking. The government reasoned that torts including those designed to deal with acts of intimidation and false imprisonment would allow sufficient access to compensation, rendering the introduction of a new, single tort of trafficking and slavery under the MSA as unnecessary.

This approach is ironic and puzzling for two reasons. Firstly, considering the government's own position that the consolidation of human trafficking and slavery offences under one umbrella (the MSA) is beneficial in ensuring effective law enforcement, the reason for its reluctance to create one, all-encompassing tort of human trafficking and modern slavery is unclear. In addition, as Mantouvalou (2018) suggests, there was clear recognition of the severe moral wrong of human exploitation, hence the legislation. This sits in tension with rejecting 'civil remedy that would mirror the gravity of the particular crime in the area of victims' compensation', opting instead, to 'refer to remedies available for other wrongs, that do not fit the same circumstances as modern slavery' (Butler-Sloss, Field and Randall, 2013: 16).

Trafficked victims remain unable to bring a civil claim against their traffickers, unless they can successfully argue that the crimes 'fit' into the previously available torts (Martin, 2016). Even if a victim is able to make such a claim successfully, as demonstrated by the 2015 case

of *Taiwo vs. Olaigbe* and another: ‘remedies under the law of contract or tort do not provide compensation for the humiliation, fear and severe distress which such mistreatment can cause’ (*Taiwo vs. Olaigbe and another* at Paragraph 1). The case of *Taiwo vs. Olaigbe* and another presents an example of compensation being claimed when labour exploitation has taken place. Women trafficked for the purposes of sexual exploitation are unlikely to fall into the category of an employee (see Chapter 2) and will therefore have no formal employment contract, therefore lacking any rights to sue the trafficker. The creation of a bespoke tort addressing all forms of human trafficking and modern day slavery would arguably have enhanced victim protection, not only by placing all civil remedies available to victims under one umbrella, making it easier for lawyers and the court to refer to the legislation, but it would also allow divergences to be made from, and exceptions allowed to the general rules of civil law for the benefit of trafficked victims.

In addition, unlike the MSA’s new Slavery and Trafficking Reparation Orders (see 5.3.9), a civil claim may be brought by a victim herself and there is no need for there to have been a prosecution of an offender. However, in accordance with Sections 2, 4A, 5 and 9 of the Limitations Act 1980, there is a six year time limit for a civil claim to be brought by an applicant. This is reduced to three years for personal injury claims (Limitations Act 1980, Section 11) and one year for those involving violations of human rights (Human Rights Act 1998, Section 7(5)). Whilst there are limited circumstances in which the statute of limitations can be extended by a court (Falconer and Widmann, 2017), this creates an excessive burden on trafficked victims to bring claims within a set timeframe, a problem that could have been avoided with a single tort of human trafficking, tailored to the specific needs of trafficked victims, including vulnerable women. It may be suggested that, in this way, the Government sought to restrict compensation for victims (Barrenechea, 2016), concentrating on provisions for prosecution instead, ultimately creating a diluted version of compensation provisions.

5.3.9. Slavery and Trafficking Orders

Whilst no general *tort* of trafficking has been provided under the MSA, Section 8 of the Act gives new powers to courts to make Slavery and Trafficking Reparation Orders against a trafficker who has been subjected to a Confiscation of Assets Order under Section 7.This means that once a person has been convicted for an offence under Section 1, 2 or 4 of the MSA, the assets that are recoverable from them may be used to provide compensation to victims, with an aim to ensure that they are properly compensated for their pain (The Crown Prosecution Service, 2020:1). To enable the courts to make effective Reparation Orders,

Section 7 of the MSA adds slavery, servitude and forced labour to the lifestyle offences and to the Proceeds of Crime Act 2002 (POCA, 2002). This, in theory, not only provides financial support for victims, but is also a further deterrent for traffickers: 'shifting the cost-benefit balance, making human trafficking a riskier, less profitable crime' (Barrenechea, 2016: 1). The MSA provides authoritative wording, suggesting that Reparation Orders, for example, must be considered, even if not requested. The powers of the courts are further bolstered by the Act through provisions such as Section 23, which allows for Slavery and Trafficking Risk Orders to be issued. The Magistrates Court can make such an order against a defendant if it believes that they are likely to commit a human trafficking or slavery offence, and in doing so, may cause another person physical or psychological harm (Sections 23 and 24).

Despite the availability of a range of potential remedies within the Act, and the claim that victims may be *properly compensated*, in reality, available data confirms that, even when traffickers are prosecuted, orders are rarely, if ever awarded (HM Government, 2019b). The 2019 independent review reported that up until the end of 2017, no Slavery and Trafficking Reparation Orders had been granted (Butler-Sloss, Miller and Field, 2019), and only two such orders were granted between 2017 and 2019. This low utilisation is reflected at the European level, where according to statistics produced by Eurostat, only 8.5% of those found to be guilty of a violent crime, including human trafficking, are ever fined (Aebi, 2014). As suggested by Butler-Sloss, Miller and Field, (2019), sentencing guidelines should be updated in a way that would prompt judges to be more alert to the availability of Reparation Orders in all appropriate cases, regardless of whether an application is made by acting lawyers.

In its new EU victims' rights strategy 2020-2025, the European Commission identifies that: 'even after a very long and challenging process leading to the judgment imposing the obligation on the perpetrator to compensate, the victim is often not compensated (or fully compensated)' (Milquet, 2019: 24). This is due to factors including the trafficker's lack of financial means or ownership of any assets, practical difficulties in enforcing the decision, and a lack of statuary deals that would allow traffickers to compensate their victims in lieu of imprisonment (Milquet, 2019: 24). As Butler-Sloss, Miller and Field (2019) comment, the government's first priority must be an investigation into the perpetrator's assets and the seizure of those proceeds - this is to ensure that the offenders have limited opportunity to disperse these assets. Once the assets have been identified, swift action must be taken to ensure that the assets are secured and recoverable for the victim. Southwell *et al.* (2018) consider the 2017 case of *R (on the application of Turkey) vs. Director of Legal Aid*

Casework, which is a worrying example of the way in which traffickers avoid paying any compensation to their victims. In this case, the claimant was trafficked from India to the UK by a couple for the purposes of labour exploitation. Once she had managed to escape the trafficking situation, she brought a claim for damages against the couple in an employment tribunal. The tribunal awarded the claimant a substantial award, but due to factors including delays by the court, the couple were able to dissipate all of their assets before the claimant's solicitor could apply for a charging order on them. Exercising its statutory rights under Section 25 of the LASPOA 2012, the Legal Aid Agency recovered their costs in the trial, which was taken out of the relatively minimal amount that was recovered. In the end, the claimant was left with nothing. Even though, the claimant sought a judicial review of the judgement, seeking to rely on the protections afforded by the EU Charter of Fundamental rights, the ECAT and the ECHR, her claim was dismissed on every ground.

5.4. Conclusion

By examining the CSJ's report, *It Happens Here*, it becomes clear that anti-trafficking advocates sought to disrupt: 'what was a period of comparative equilibrium in the history of the policy apparatus' (Johnstone, 2017: 225). The CSJ's report, as well as those that followed or complemented it, were successful in demonstrating a need for more protection to be afforded to victims of trafficking. The government acknowledged the evidence but arguably less with the victim in mind and more with a view to advance the political agenda of curbing migration, whilst portraying an image of world leaders in the fight against human trafficking. As this chapter has demonstrated, the development of the MSA was mostly a symbolic way for the UK to give the impression of an active government that has claimed ownership of the issue of modern slavery and human trafficking, without having to introduce any, real, substantive amendments to its legal framework. The chapter has demonstrated that this was a form of problem structuring, rather than problem solving (Broad and Turnbull, 2018).

An examination of specific provisions within the Act reveals a combination of criminal and civil remedies aimed at tackling the crime of human trafficking. However, whilst Part 5 of the MSA makes specific provisions for victim protection, this chapter argues that an inordinate focus on crime control has been to the detriment of victim protection. As Chapter 4 demonstrated, this, rather ironically, accords with the crime control stance taken by the Palermo Protocol, an instrument drafted by: 'law enforcement officials unversed in human rights standards and interested in them only in so far as they served crime-control goals' (Chuang, 2014: 615). The Act therefore offers limited protection and support to trafficked

victims; provisions such as those set out in Sections 45, 48 and 49 of the Act cannot be considered genuine or determined efforts to enhance victim protection and support.
This chapter established the importance of compensation in the rehabilitation of victims. The persistently low number of prosecutions means that the current compensatory regime is unlikely to be accessible or adequate for many victims of trafficking, leaving practitioners such as lawyers to find other, imaginative solutions to close the gaps identified in the system (Southwell, *et al.*, 2018). Similarly, whilst measures for protecting victims who offend have been formally enhanced, this too is not sufficient. The absence of a bespoke tort of human trafficking and the restrictive context of Schedule 7 of the MSA are further examples of the way in which the MSA is strong on intent, but weak in delivery. These specific gaps, as well as others addressed in this chapter are examples of the way in which the UK remains in contravention of its obligations under international law.

Referring back to the international obligations outlined in Chapter 4, this chapter considered the extent to which the UK can be said to be complaint. Whilst the Palermo Protocol is not without its faults, I would agree with Dottridge (2017) when he suggests that by moving away from the internationally accepted definition of human trafficking, we risk limiting the scope of the support available to victims. The Protocol: 'provides a clear set of objectives to work toward and enables the global response to trafficking to be efficient, concise and unified' (Parkes, 2015: 155). This chapter, together with Chapter 2, has demonstrated that conceptualisation of human trafficking as 'modern slavery' negatively impacts legislative responses to sexual exploitation through equating human trafficking with slavery; by emphasising extreme forms of human rights violations, less extreme forms including debt bondage and bonded prostitution are no longer in focus. The narrative has also resulted in the definition of human trafficking in the MSA deviating from that established within the Palermo Protocol, the result of which is likely to be that fewer potential victims fall into the trafficked victim category, and are thus less likely to receive the protection and support they need.

The next chapter revisits some of the themes identified in this chapter by drawing on data from experts in the field. It considers the wider, everyday effects of the MSA's provisions on victim protection.

Chapter 6 - Survey results

6.1. Introduction

Previous chapters focused on the way in which the provisions of national and international anti-trafficking instruments, including the MSA, address the protection of trafficked women. This chapter, with the next two, assesses the practical effects of the MSA on victim protection, drawing on data from experts in the field. Chapters 6, 7 and 8 present the findings from my empirical research: they draw on and add to relevant literature and the themes identified through the critical analysis of the MSA. Together they offer new insights into the workings of law and policy. I return to themes identified through the literature review and critical legal analysis, to ensure the data can be cross-validated and different dimensions of the same issue are explored. The analysis also establishes a number of issues that remain unaddressed in current law and policy.

All three empirical chapters advance discourse on human trafficking by addressing the effectiveness of the UK's law and policy on victim protection. This chapter focuses on the quantitative data from the surveys, presented in the form of tables (all percentages have been rounded to the nearest whole number), accompanied by short narratives and some relevant material from the interviews. Chapters 8 and 9 rely wholly on qualitative data, collected through semi-structured interviews. Data from interviews is naturally lengthier, both due to the incorporation of direct quotations from participants and because they require deeper engagement with the data (Edwards and Holland, 2013).

The responses provided by the participants, whilst arising from each individual's familiarity and experience in the field, are nevertheless their individual interpretations of law based on 'ethical and legal readings' (Cranmer, 2016: 1). Cranmer distinguishes the two types of interpretation. He explains that in interpreting legislation, 'a legal reading sets out what the Act requires of parties, including firms, as a matter of law' (op cit). In contrast, 'an ethical reading considers the ethical claims in the Act' (op cit), such as its victim-centred focus. In the case of the latter, an understanding of the context within which the law makes such claims, for example, in relation to the special treatment of particularly vulnerable individuals, is essential.

Participants offered a mixture of both readings within their responses. Some are perceptibly based on ethical considerations, whilst others referred to provisions within the MSA itself. The following two quotations demonstrate both forms of reading found in the data, the first being ethical and the second, legal.

> *We are ahead of the curve but I am worried that we may be stagnating having achieved so much and I would hate to see that happen. For example, the transformation fund is coming to an end when actually sex trafficking and exploitation are not going to go away* (Interviewee 3, lawyer)[5].

> *[The MSA] consolidated trafficking crimes into one [legislation], making it easier to identify victims* (Q1, policy maker).

This chapter provides some background into those who took part in the research, their areas of expertise, their utilisation (or lack of) of the MSA, and if a lawyer, who they usually act for in human trafficking cases. It also documents a noticeable shift away from the protection of victims of trafficking for sexual exploitation to an increased focus on labour exploitation.

6.2. The respondents

I received a total of twenty two responses to surveys from lawyers and eight responses from policy makers. The following section describes the characteristics of survey participants; however, whilst lawyers' characteristics are presented more transparently, those of policy makers are offered with much more caution to ensure anonymity, especially as some responses contained respondents' specific positions in government and in their law and policy-making capacity.

When asked about their experiences of dealing with cases involving human trafficking since the introduction of the MSA, twenty-one lawyer participants confirmed that they had some experience in this area. Of those who answered positively, 77% (n=17) confirmed that they usually act for the victims in trafficking cases, 14% (n=3) for the CPS and 9% (n=2) for all or some of the categories provided, or for defendants. Of lawyer participants, 27% (n=6) specialised in criminal law, 27% (n=6) in immigration and 45% (n=10) in human rights.

[5] Note- in the thesis, participants are given numbers and identified as 'Interviewee 1 (lawyer)', and 'Interviewee 2 (policy maker)'. There is no read across from surveys to interviews. Survey participants' relevant quotations have also been given numbers and are identified as 'Q1 (lawyer)' and 'Q2 (policy maker)'.

As noted in Chapter 2, patterns are often lost in aggregates (Cockbain, 2018). It is therefore important to consider what the data is not telling us as well as what it is. For example, in asking this question, only single fields were provided as options to participants. This means that those who, for example, confirmed that they worked in, mainly a criminal law setting, were also likely to be engaged in other fields such as human rights or even immigration. This became more apparent during interviews. Some respondents reported that they were active in more than one field. In fact, some of the fields were not considered by me, as the researcher to be areas to focus on at all. For example, one participant confirmed that they were also involved in civil litigation, acting solely for victims in civil claims against their traffickers, whilst another mentioned that they have been instructed in their capacity as a family lawyer when a sham marriage had fallen apart and statements were taken by the woman, who then confirmed that she had been trafficked into the UK. This illustrates the myriad of areas within which lawyers are active in the field of trafficking supporting the view that human trafficking has multiple dimensions in victims' lives (Southwell *et al*., 2018).

6.3. A shifting focus to labour exploitation

Lawyer participants were asked whether they had any experience of dealing with cases of human trafficking for sexual exploitation. For policy makers, the question asked whether they had any particular expertise or interest in the area. The purpose of this question was twofold. Firstly, it helped identify potential interview participants, and secondly, it helped establish experts' levels of engagement with sexual exploitation as opposed to other forms of trafficking. 82% (n=18) of lawyers had such expertise, whereas 18% (n=4) had not. This is not to suggest that participants who replied positively solely deal with sex trafficking cases; in a follow up question, almost half of those who responded (45%, n=5) reported that they mainly dealt with cases of labour exploitation and their involvement with sex trafficking cases was limited. Finally, 75% (n=6) of policy makers responded positively to this question and 25% (n=2) negatively.

The prominence of engagement in trafficking for labour exploitation was clear in both surveys and interviews. This chimes with the findings of Bales, Hedwards and Silverman's (2019) research, which shows a decline in scholarly research on sexual exploitation, with current literature focusing primarily on labour exploitation (see Chapter 2). This is also reflected in the latest Home Office statistics, which show that the majority of those referred into the NRM were potential victims of labour exploitation (Home Office, 2020c). There is a caveat to the data within the report: 'it is important to note that this does not reflect changes in

exploitation type in real terms, rather the change in the way in which exploitation types are recorded' (Home Office, 2020c:4). The reasons for this shift in focus were discussed with participants during interviews, the results of which are presented and analysed in the next chapter.

6.4. Involvement with the MSA

Of lawyers who responded to the survey, the vast majority (95 %, n=21) confirmed that they had engaged with and relied upon the provisions of the MSA in cases involving human trafficking. It is worth noting that, in fact, 23% (n=5) had also been involved in lobbying around the bill. They were therefore experts, both in terms of the day to day application of the law and also in their understanding of how the law took the shape it had.

Both sets of participants were asked to assess how effective they believed the MSA to have been in improving the UK justice system responses to human trafficking. Only one lawyer was of the opinion that the legislation is very effective and that it fulfils its intended purpose. A slightly higher percentage (14%, n=3) thought that the Act had made no improvement on previous legislation, with 27% (n=6) thinking that it fulfils some of its intended purposes, but there is a room for improvements; and over half (54%, n=12) considered that there were gaps that need to be filled and faults to be corrected.

A free text box invited participants to provide more detail on their option choice to this question. A common theme to emerge here was insufficient extraterritoriality in the Act, especially in relation to Section 1, which covers offences of modern slavery. This is an important observation as: 'such a provision would allow prosecutions of British citizens to be brought regardless of where in the world they commit a modern slavery offence' (Q2, lawyer). Chapter 5 demonstrated the potential negative impact of an over focus on travel. Participants made a similar observation, adding that the wording within Sections 2 (6) and (7) of the Act should have been extended to offences committed under Section 1. Sections 2 (6) and (7) define trafficking as having occurred irrespective of where it occurs.

> *A person who is a UK national commits an offence under this section regardless of-*
>
> *(a) where the arranging or facilitating takes place, or*
>
> *(b) where the travel takes place.*
>
> *(7) A person who is not a UK national commits an offence under this section if-*

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

(b) the travel consists of arrival in or entry into, departure from, or travel within, the United Kingdom (MSA, Sections 2 (6) and (7)).

This means that, today, defendants are prevented from claiming that the UK does not have jurisdiction to deal with trafficking offences that take place outside of the UK, by its nationals. As identified by participants, the non-inclusion of this provision within Section 1, limits the Act's ability to protect victims from traffickers whose exploitation only fits within the parameters of Section 1 and not Section 2 of the Act. This defect is surprising, since the Sexual Offences Act 2003, which is supposed to be directly transposed into the MSA incorporated this well. As suggested in Chapter 5, if trafficking for the purposes of sexual exploitation is to be considered a form of modern day slavery, not only must specific reference to this form of exploitation have been made in Section 1 of the Act, but it also follows that all forms of exploitation, regardless of where they occur, by a British citizen must be punishable by UK courts. One survey participant suggested that this was simply 'a fluke' in the drafting process (Q3, lawyer), whilst another argued that this was: 'a way for pressure to be taken off of the UK and put on their neighbouring countries. This way we are forcing others to create stronger laws, which match ours' (Q4, lawyer).

The responses provided by policy makers to this question were similar, with 75% (n=6) suggesting that the legislation is somewhat effective, while the remaining 25% (n=2) consider it to be fairly effective, with room for improvement.

These findings were not surprising, given the number of proposals for change being put forward by policy makers at the Bill stage, and therefore the attention surrounding amendments to the Act, especially those relating to the supply chain provisions at Section 54. These included a review by the Public Accounts Committee on 2 May 2018 and the Home Office's independent review of the MSA, published on 22 May 2019, both of which policy makers referred to in their responses.

Lawyers were asked to select one of four options in relation to whether the MSA had increased victim protection. Of those who responded, 14% (n=3) believed the legislation to be very effective, 45% (n=10) that it had been somewhat effective, 36% (n=8) were of the opinion that the legislation is not so effective in protecting victims and one respondent thought that the MSA was not effective at all. Policy makers were asked the same question.

Of those who responded, the majority (87%, n=7) believed the legislation to be somewhat effective and the remaining 12% (n=1) fairly effective at increasing victim protection.

None of the experts responding to the surveys thought the MSA was extremely effective and only a minority of lawyers thought that it was very effective. This tells a different story to the claims made by the government for the legislation. Unsurprisingly, these assessments affected responses to a question about the need for reform of the MSA.

Of those who responded, close to two thirds (62%, n=5) of policy makers expected or hoped to see changes in the MSA in the near future: whilst all agreed that victim protection was insufficient, their main focus was on the need for enhanced prevention and deterrence of labour exploitation. One speculated that the regulations governing the Act are likely to change, but the primary legislation will remain the same, referring to consultations underway at the time, especially in relation to amendments to the transparency in supply chains provisions contained within Section 54. No suggestions were made about any amendments that would specifically address trafficking for sexual exploitation or that would increase victim protection per se. This further demonstrates the significance placed by policy makers, not only on criminal justice responses, but also that labour exploitation is the primary focus, to the detriment of other forms of trafficking, including sexual exploitation.

Lawyers provided similar perspectives, being that they expect imminent changes in relation to supply chain provisions within the Act. They also speculated that the NRM would be strengthened further, but they too, did not specifically address trafficking for sexual exploitation or offer insights into how victim protection can be increased.

6.5. Compatibility with international law

Participants were asked to consider the extent to which they believe the MSA meets obligations under international law. A free text box provided space for explanations of their chosen responses. 41% (n=9) of lawyers thought that the MSA is mostly in line with international standards, with 45% (n=10) suggesting that it is somewhat in line with the normative standards outlined in Chapter 4. Only two respondents chose the option that the MSA is wholly compliant with international standards and one respondent that it is not compliant at all.

The majority considered the legislation to partially meet current international human rights standards. Participants for example commented that: ‘the orders in place and the Section 45

defence go further than was demanded by the ECHR' (Q5, lawyer) and the Act '…complements and advances EU treaties and other international instruments' (Q6, lawyer).

Participants did, however, identify a number of gaps that remain unaddressed by the MSA, especially that it falls short on victim protection.

> *It is more focused on prosecuting traffickers. It fails to meet the Trafficking Convention that also focuses on protecting the victims and the prevention of slavery. The Act in this respect remains weak* (Q7, lawyer).

> *The key elements of the Act incorporate the UNHCR (specifically Article 4). However, the UNHCR itself adopts a very Western set of standards that are not always compatible with safeguarding children and vulnerable adults in a number of Eastern jurisdictions* (Q8, lawyer).

Whilst similar to the lawyers, responses from policy makers are slightly more optimistic. 75% (n=6) of policy makers believed that the Act is somewhat in line with international standards and 25% (n=2) that it is mostly in line with those standards.

Less specific explanations were offered: one policy maker considered the MSA to represent 'a move towards international soft law becoming crystallised into national hard law' (Q9, policy maker). In contrast, another policy maker expressed concerns, especially in relation to the NRM.

> *Survivors need further provisions to assist them with civil damages claimed against traffickers and for NRM support being provided whilst criminal investigations [are] on-going, so that witnesses don't disappear/get re-trafficked/become destitute* (Q10, policy maker).

Another simply commented that 'there are still many gaps' (Q11, policy maker), whilst another suggested that 'the law has not been tested enough to ensure it meets *all* international human rights standards' (Q12, policy maker).

6.6. Prosecution vs. victim protection

Participants were asked whether the MSA focuses more on prosecuting offenders than protecting victims. The majority of lawyers (59%, n=13) concurred with this statement.

> *The substantive duties in the Act work well for the investigation and prosecution of trafficking related offences. However, in terms of identifying potential victims and providing support, the Act does not particularly assist (Q13, lawyer).*

Just under a third (27%, n=6) thought that the Act addresses both prosecution and victim protection equally, with only one choosing the option that the Act is primarily victim-focused.

Responses given by policy makers to this question were more varied. There was a three-way split between victim protection, prosecution of offenders and both. One policy maker thought that the Act was primarily victim-focused, 37.5 % (n=3) thought that the Act addresses both prosecution and victim protection equally and 37.5 % (n=3) thought that the Act focuses on the prosecution of offenders.

These themes are considered in more depth in the following chapter. One key issue requires brief exploration here. Respondents raised concerns with the lack of protection for victims who are coerced into committing crimes, referring to live or recent cases with which they had been involved: 77% (n=17) of lawyer respondents reported that they had acted for a trafficking victim who had committed an offence.

One lawyer commented that 'there is a lack of provisions for victims' safety and protection and a lack of recognition of some being coerced into criminality' (Q14, lawyer), while another commented that 'if you have entered the UK unlawfully you are automatically subject to criminal law - despite refugee convention saying that it does not matter' (Q15, lawyer). When asked to provide an overview of case outcomes for their clients, lawyer respondents offered the following scenarios.

> *In one case, the prosecution eventually dropped the case once they received further disclosure. They wanted to rely on laws in place at the time of offending, but that meant that my client spent months in prison awaiting trial. In a separate case, the prosecution dragged their feet with referring the defendant through the NRM such that the defendant spent over 6 months in custody awaiting trial. This was as long as the she would have been sentenced for if she had been convicted. As the custody time limits expired during that period and the defendant was released on bail, the Crown reviewed the case and decided it was no longer in the public interest* (Q16, lawyer).

> *My client was prosecuted for the offence and subject to deportation proceedings as well as a negative CG [conclusive grounds] decision* (Q17, lawyer).

> *Cases are still on-going, however, they are extremely challenging as the victims are often given incorrect advice by criminal solicitors who ask them to plead guilty. This often has terrible consequences for the client who may be subject to a deportation order for a crime that was committed under duress* (Q18, lawyer).

Chapter 5 provided a critical analysis of Section 45 of the MSA. It considered whether the MSA is sufficiently compliant with the non-prosecution obligations under Article 26 of ECAT and Article 8 of the EU Trafficking Directive. The examples offered by participants provide new perspectives on this issue. By way of context, when facing a legal hearing, either as a defendant within a criminal case or as an individual who has been the subject of exploitation, a potential victim of sex trafficking must be treated as a victim, regardless of other factors (Southwell *et al.*, 2018). It would be expected that a victim's status should be established quickly to enable any protection to become available to them. The examples show that this is not happening in practice.

Other than provisions designed to 'validate activities which have no statutory basis, or to correct practices which have been found to be illegal' (Equality and Human Rights Commission, 2013:2), laws cannot be applied retrospectively. In theory, it makes sense that this should be no different for the MSA, as a retrospective application of the Act would fly in the face of the conventional rule of law principles (Mejía, 2020). However, whilst the introduction of the NRM in 2009 has meant that competent authorities are able to determine the victim status of claimants more systematically, as noted by the Joint Civil Society report on Trafficking and Modern Slavery (Anti-Slavery International, 2020), long delays continue to result in trafficking victims being identified by the competent authority long after their convictions. This issue was highlighted by a lawyer in the first example quoted above. This suggests that allowing Section 45 of the MSA to apply retrospectively would further the Act's ability to protect victims of trafficking, especially those who have not, but should have been identified as victims to begin with. The High Court set out in the 2013 case of *R (on the application of Atamewan) vs. Secretary of State for the Home Department* that in situations where a victim has been subjected to trafficking, significantly prior to their arrival in the UK, the NRM must be used as a tool for identification of such victims and also to provide the protections available under it (Southwell *et al.*, 2018). The MSA, introduced two years later,

however, does not provide for such retrospective protection when the individuals' victim status is eventually determined.

As regards the other examples, these demonstrate the importance of guidance as well as appropriate training for lawyers, judges and other frontline professions. The protections afforded by any law, including the MSA will only be effective if those interpreting and applying it are sufficiently equipped to do so.

6.7. Conclusions

This chapter provides a foundation for the empirical findings in this thesis. It presented the characteristics of both groups of survey participants, demonstrating the variety of backgrounds and expertise from which the data has been collected. The following key themes emerged from the survey data.

- Focus has now substantially shifted away from trafficking for the purposes of sexual exploitation and towards labour exploitation. Policy makers especially, lobbied extensively for the strengthening of provisions relating to transparency within supply chains. Respondents attribute this shift in focus, in part to the complicated nature of the prostitution/trafficking nexus and in part, to a historic lack of focus on labour exploitation.
- Few participants were satisfied with the victim protection offered by the MSA. Most hoped to see major amendments to policy in the future to bring the UK in line with its international obligations.
- Provisions for civil claims and compensation are limited in practice.
- There is insufficient protection available to trafficked victims who have been arrested in connection with a crime. Delays in determining victims' status render any protection available under Section 45 of the MSA hypothetical.
- There remains a lack of guidance and training on the application of the MSA, especially in relation to establishing an individuals' victim status and the provision of short and long-term support.

Chapter 7- The MSA in practice: Interviews with lawyers and policy makers

7.1. Introduction

This chapter analyses the interview data from policy makers and lawyers involved with the development and implementation of the legal framework on trafficking. It draws on interviews with twelve lawyers and five policy makers. The chapter expands on some of the themes that have already been identified, especially assessing the practical effects that gaps in law and policy have on victim protection, alongside introducing new themes. Respondents offered case examples, which are used extensively in the analysis. Longer case studies provided by lawyers, which offered room for comparison, are the foundation for Chapter 8.

The literature review (see Chapter 2) and the critical analysis of the current legal framework (see Chapter 4) informed the interview guides. The questions were focused on victim protection focused on three main stages where victim protection is most needed. First was identification and the provision of fundamental protections, including safe accommodation and basic necessities and support. This section revisits the previously explored theme of shifts in terminology, including the emergence of the modern slavery narrative and the potential effects on the identification and protection of victims. Second is the protection of victims as offenders; and third, the protection of victims during their applications for asylum and discretionary leave to remain in the UK. The chapter revisits the MSA's ability to provide victims with access to legal support and compensation, further exposing the limitation of the Act in this area (see Chapter 5).

7.2. Victim identification and support- an ongoing concern

The need for more to be done to aid the identification and protection of victims is an anticipated theme running within this chapter. During a debate in the House of Lords in 2014, Lord Luke (2014) commented that the MSB had gone 'a long way towards bringing attention and legal redress' to human trafficking. Policy makers shared this sentiment. Interviewee 13, for example commented that their main aim during the drafting process was for: 'the reality of modern slavery [to be] more widely known…that certainly has happened, without any doubt'. Another policy maker made a similar observation: 'it has reminded us that trafficking and exploitation, and sex trafficking are national threats and therefore, there is more attention drawn to the issue' (Interviewee 14). When asked to comment on whether this increased focus enhances victim protection, they suggested that *theoretically*, this provides for: 'better

education, better understanding and better funding' (Interviewee 14). Interviewee 17 added to this point. They suggested that the MSA has brought with it:

> *... greater awareness and greater understanding and greater empathy; and charities have a more powerful voice when they are dealing with complainants/victims and the NRM is focused on the fact that victims, now when they come forward, are made aware, because they were not previously made aware, that the NRM is available for them to take advantage of* (Interviewee 17).

As argued at Chapter 5, the MSA's failure to place the NRM on a statutory footing has the potential to adversely affect the identification of trafficked victims, therefore rendering any protection it offers as 'merely hypothetical and misleading' (Interviewee 1, lawyer). This is a contravention of international law and will 'result in a denial of [victims'] fundamental rights' (Southwell *et al.*, 2018: 16). Lawyers agreed that the NRM should have been placed on a statutory footing.

> *Unlike a policy statement or a law, it is harder to hold the state to account against rules and procedures set out in guidance, especially as the guidance is difficult to access and is frequently changed. I think the NRM should be put on a statutory footing* (Interviewee 9).

The initial stage of identifying and protecting victims remained an ongoing concern for some lawyers, who find it difficult to prove their client's victim status in the courtroom. Whilst lawyers also welcomed the increased attention to human trafficking that the MSA has instigated, they largely believed the Act to have made very little practical contribution in advancing the identification process. They attributed this to two main shortcomings: first is the inaptness of the Act's definition of human trafficking and second the flawed function of the NRM.

Both lawyers and policy makers questioned the suitability of the definition of human trafficking, particularly in relation to its continued focus on travel.

> *... for a victim to receive any support, there first needs to be a strong enough identification process and in that regard, absolutely nothing has changed at all... the definition of human trafficking is far from inclusive because it requires an individual*

> *to have been transported across a country or countries… and the guidance isn't clear* (Interviewee 8, lawyer).

> *… it simply does not represent the international standards because Section 2(1) starts off with having as an essential requirement of the act of trafficking, travel, so arranging the travel of the victim. That is one of the ingredients of trafficking under Palermo as you know, but it isn't an essential one… and it simply ought not to be there and it could have been so much simpler if they had simply incorporated something like Palermo's definition instead* (Interviewee 13, policy maker).

Policy makers expressed their frustration that their suggestions for incorporation of the Palermo Protocol's trafficking definition had been ignored in the drafting process. One commented that, whilst they were pleased to note the amalgamation of all anti-trafficking legislation, they remained concerned that the MSA's definition of human trafficking is now much narrower than that intended by them and by international instruments.

> *The definition of human trafficking is so much wider and to alter it in this way, it reduces it in scope and I know it doesn't deal with things like is it a direct result of human trafficking, or a nexus with human trafficking, and all those sorts of wider issues that you need to think about. Human trafficking doesn't necessarily have to be like slavery; it can include lesser forms of exploitation - don't call it modern slavery, which of course we wanted, then do half a job* (Interviewee 14, policy maker).

Another policy maker considered the MSA a missed opportunity to simplify previously complicated legislation; this was despite their recommendations for change in the language, during the drafting process.

> *I think what we should have done is simplified things considerably. The old statutes were complex. The language of the Modern Slavery Act is over complicated, frankly difficult to interpret in places* (Interviewee 13, policy maker).

Similarly, Interviewee 4 (lawyer) questioned the interpretations by courts of the definition of human trafficking in identifying victims. They commented on one particular case, stressing the importance of definitional clarity.

> *Sometimes you haven't met one part of the definition. I mean, one case I'm really, really kind of upset about is a sexual exploitation case, it was accepted that we met the first two parts of the trafficking definition but not 'for the purposes of exploitation' and the factual matrix was terrible. You know, this was a woman who was working as a prostitute 22 hours a day, for like very little money, sleeping on the floor, you know, no access to her passport and I'm like how is that not for the purposes of exploitation?...the High Court didn't agree with me and was like, it's just a dispute on the facts, disagreement of the facts.*

These reflections highlight that definitional clarity plays a crucial role in the protection of victims. Chapter 2 suggested that the term human trafficking still lacks conceptual clarity (Chuang, 2013; Broad and Turnbull, 2018), a position that has been reaffirmed by participants in this thesis. If definitions set out in the MSA remain unclear, or if they are not interpreted correctly, victims are at risk of never being identified, or if they are, they may never be classified as a victim through the NRM. As noted by Interviewee 1 (lawyer), development of 'new laws that are hard to interpret do nothing to benefit victims'.

Interviewees commonly referred to the NRM's flawed functionality. In order to be introduced into the NRM, victims, most often distressed and having experienced betrayal at the hands of their traffickers, are required to trust and agree to government intervention: if they refuse, they face being left with little to no support. As discussed at Chapters 2 and 5, this is one of the principle obstacles to victim protection. The reluctance of potential victims to come forward is reflected in a case handled by one lawyer interviewee. They described an instance where police raided a London brothel, suspected of being involved with the trafficking of women for sexual expectation. During the raid, a number of women were found, all of whom denied being involved in prostitution, thus declining any assistance to the police. In this case, the traffickers were arrested in relation to another group of women being forced into prostitution. It was at this point that the participant's client was referred into the NRM, following which she reluctantly gave up information about her "boss" to the police.

Lawyer participants recognised raids on brothels as one of the main techniques for the identification of female victims of human trafficking for sexual exploitation. Within this, they suggested that, in reality, raids primarily seek to identify illegal migrants and the potential protection and support of victims becomes a secondary concern. Often women disappear after an unsuccessful raid as they are not enabled to give accounts which explore the possibility that they could be victims.

> *The women are mostly not willing to talk to the police, but there is little follow up from the police as well. If you consider the number of raids that are carried out and the number of women who end up going missing, I'm sure you will find alarming statistics… the motivation behind the raids are not clear, but from my experience, it's not always about helping the women, because after most raids, bang, the women are deported or they just disappear* (Interviewee 3).

Being referred into the NRM potentially increases the protections available to victims. It also creates a space within which victims can speak and their accounts can be heard. The victim in this case felt more at ease, knowing that the trafficker had been arrested and would be less likely to harm them in the future. That said, participants highlighted the limited confidence amongst potential victims in the legal system.

Interviewee 9, a lawyer, described a case where two women had been kidnapped in Nigeria and were transported to the UK. One made the decision to volunteer information and co-operate with the police, resulting in her being referred into the NRM. Her friend, on the other hand, refused to give any information to the police when questioned in hospital, following a violent attack by a "customer". The fate of this woman is unknown. This, and similar stories told by lawyers interviewed, are a clear indication that, even when certain reassurances are given by the police or where the law provides for non-punishment provisions (MSA, Section 45), victims, who are in vulnerable positions, often lack trust in the authorities (Aronowitz, 2010). In the case of the second Nigerian woman, this lack of trust is likely to stem from, amongst other things, lived experience, if they come from a country that has a high level of corruption within its legal systems (Enweremadu, 2019). Levels of corruption and the lack of stringent national policies pose a major threat to combatting human trafficking: Beyrer (2001) identifies for example that Burmese Shan women, trafficked for sexual exploitation are subsequently criminalised by their own country, further abused physically and sexually and are imprisoned within detention centres and are even in some cases forced to enter prostitution by the police.

These realties have led some to suggest that confidence building processes must be created to enable potential victims to report crimes against them (Alrabe, *et al.,* 2017). Interviewee 2 (lawyer) made a similar observation, suggesting that victims could greatly benefit from mediated interactions between lawyers, the police and NGOs, with the NGO as a conduit through which their stories can be told. They suggested that the police could, for example,

work with NGOs to collate the required evidence.

> *I think co-operation between the police and other organisations such as NGOs is important because, you know, women who are fearing their life are less likely to talk to the police, but are probably more comfortable talking to a member of the charity who can assure them that they will not then proceed to arresting them because they have committed a crime. It is then for the organisation to come up with a strategy whereby they can refer the victim into the NRM, through the police, without putting the woman in more danger* (Interviewee 2, lawyer).

It is, however, ultimately only first responders, including the police and a small number of NGOs that are able to refer potential victims into the NRM (Home Office, 2020). Crucially, medical and legal professionals as well as prison officers are currently missing from this list (Southwell *et al.,* 2018).

> *…the cooperation between professionals may be strengthened, and more victims protected by extending the role of first responders to lawyers, who are often given valuable information during their client interviews…quite often when I was a solicitor, I came across situations that screamed out human trafficking and I would encourage people to participate in police investigations. They mostly didn't because they worried about being prosecuted, and like, I didn't ever push them into it, but they did often take my advice* (Interviewee 4, lawyer).

Within such co-operation, care must be taken to ensure that potential victims are not placed in any further harm: the objectives of particular organisations, be it a lawyer's positive track record or an NGO's need to secure funding, do not supplant victim protection (Johnstone, 2017). Interviewee 6 (lawyer) acknowledged the efficacy of information provided by victims to lawyers, but compared this to the duty of care placed on lawyers to protect their vulnerable clients. They stated, for example, that they would be willing to allow a police officer or a member of an NGO, to attended client meetings, but that access would need to be mediated through the lawyer, and it would be conditional upon the client's authorisation.

Lawyers raised further concerns about the level of training that is available to front-line professionals tasked with identifying victims: even when the police encounter victims, and their statements are taken, they are not always sufficiently trained to deal with individual situations, especially in relation to internal trafficking. This is a particularly significant

observation, as according to the Home Office's latest NRM Statistics (Home Office, 2020: 1), of the 2,871 potential victims referred into the NRM in the first quarter of 2020, the majority: '61% (1,737) claimed to have been exploited in the UK only, whilst a quarter (755) claimed the exploitation took place overseas only' (Home Office, 2020: 1).

Interviewee 10 (lawyer) explained that victims often initially provide inaccurate versions of their ordeal, due to either fears about reprisals by traffickers, or in some cases an enduring loyalty towards them. In a report commissioned by the Home Secretary in 2017, Her Majesties Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) examined the way in which the UK police handle the identification of potential trafficked victims. It concluded that: 'the identification of victims is inconsistent, sometimes ineffective, and in need of urgent and significant improvement' (HMICFRS, Stolen Freedom, 2017: 5). The report recognised both the danger of taking victims' initial accounts of their ordeals at face value and the dangers associated with the insufficient training of police officers. The report mirrors the accounts of some interviewees: 'victims who come into contact with the police are not always recognised as such and therefore remain in the hands of those who are exploiting them. Others are arrested as offenders or illegal immigrants. While law enforcement has a duty to refer individuals to immigration and enforcement, the vulnerability of victims must be considered in parallel' (HMICFRS, 2017:5).

In contrast to the position taken by lawyers, policy makers mostly praised the work of frontline professionals: they suggested an increase, not only in awareness amongst the police about the nature of human trafficking, but also an increase in the number of operations carried out by them.

> *… increased awareness as I mentioned, particularly by the police. There are some fantastic operations being conducted by the police, but the trouble is its fragmentary and there is no consistency in different police areas. It depends upon the priority that is imposed either by the chief constable or by the commissioners as to what kinds of crimes are targeted most by the local police. Shortage of resources, so you've got the National Crime Agency who have their own anti trafficking unit which is really impressive and you've got one or two police forces which again are really effective in identifying and combating trafficking* (Interviewee 13, policy maker).

Whilst painting a more positive picture there is recognition here that more needs to be done to improve their effectiveness on victim identification and protection and for consistency in

responses across the UK.

As regards issue of a loyalty or bond with traffickers which Interviewee 10 (lawyer) refers, this has been described as: *'*trauma bond[ing]…dysfunctional attachments that occur in the presence of danger, shame or exploitation' (Carnes, 2018:67). In the case of trafficking for sexual exploitation, an attachment may be formed between the woman and her trafficker, often because she sees no way out. In such cases, victims minimise the harms that are being inflicted on them, including through referring to their trafficker as their 'daddy' or 'boyfriend' (Kiss and Zimmerman, 2019; Reap, 2019; Metcalf and Selous, 2020). Similarly, in conditions of sexual exploitation, the feeling of shame or guilt can become overpowering, especially as the perpetrator becomes an authority figure, controlling the most critical aspects of a woman's life (Evans, 2019).

These processes interfere with the identification process as, even when victims are actively identified they are frequently reluctant to expose their traffickers. Evans (2019) suggests that the loyalty a victim feels may result in confusing emotions and may consequently affect the accounts they give to law enforcement and in court. If a victim is unwilling to come forward and tell their story, this limits their chances of being referred into the NRM and being accorded victim status.

Interviewees supported critiques already noted in Chapters 4 and 5, especially that the NRM fails to provide sufficient long-term protection to victims, since once a final decision is made, regardless of whether it is negative or positive, the support provided under the mechanism ceases. This means that, for example, in an asylum matter, if the potential victim has a right to remain in the UK, they are free to leave, but are left to their own devices with no ongoing protection; and if they are deemed an illegal immigrant through a negative conclusive grounds decision, they are likely to be returned to their country of origin, where they face higher risks of re-trafficking (Brunovskis and Surtees, 2013). There is currently no distinct category of leave to remain specifically for victims of human trafficking and irrespective of their status, standard immigration measures will apply.

> *Other than in relation to overseas domestic workers at Section 53, the MSA also makes no specific provisions for trafficking victims' right to remain in the UK and this is not considered under the NRM provisions* (Interviewee 4, lawyer).

As soon as a conclusive grounds decision has been reached, therefore, the support stops abruptly and individuals are required to vacate accommodation: within two days for a negative conclusive grounds decision; or two weeks for a positive conclusive grounds decision.

> *I think what is also difficult is when people get a positive grounds decision and then suddenly the support stops and they are meant to kind of move onto something else… A victim of trafficking is unlikely to have much knowledge of what, if any, kind of help is available to her and if the lawyer doesn't help them at least find out some information, they are left alone to figure it out for themselves. There are certainly gaps that mean that people aren't being covered for long enough. I think there are also issues around, you know, people being released from detention and then not going into safe accommodation. Even when they do, the accommodation is regularly not safe at all* (Interviewee 5, lawyer*).*

Delays often bring NRM investigative times up to 95 days and therefore outside of the mechanism's own timeframe (Coaker, 2017). Interviewee 4, a lawyer, raised the point, that even when a victim can access safe accommodation, following a positive conclusive grounds decision, their individual circumstances are often overlooked. They illustrated this through a case where, after receiving a positive conclusive grounds decision, a victim of sexual exploitation was sent to what was considered to be safe accommodation. What the decision maker had failed to consider was that this was very close to the area in which the exploitation had taken place. Concerns were raised by the solicitor involved after the allocation had taken place, however, by the time anything substantial could be done to provide the victim with alternative accommodation, they had disappeared. Interviewee 7, also a lawyer, made a similar observation.

> *Their favourite one is that they can just move down the road, to a different town and everything will be like Butlin's… even when they have a positive conclusive grounds decision, victims are still super vulnerable to re-trafficking and so extra care should be taken when choosing safe houses and maybe even considering the type of neighbourhoods these women are placed into… I think the NRM is in itself a massive issue. The NRM is supposed to give effect to the Council of Europe Convention but I think it is dreadful. It is not working. It is completely outside of its own time frame. It does not pick people up properly, it does not treat them properly, the decision making process is incredibly slow and because it wasn't placed on a statutory footing, it does*

> *not apply the correct legal standards. So until that changes, I don't think we are going to be able to give effect to international instruments that we're supposedly bound by or incorporated otherwise* (Interviewee 7, lawyer).

The lawyers interviewed concurred with the view that: 'definitely more needs to be done around victim support to ensure that post-decision care is given and women are not just being returned to the terrifying situation from which they escaped*'* (Interviewee 5, lawyer). The crucial need for long-term victim support and the MSA's inadequacy in this regard has been highlighted by previous research (see, for example, Cockbain, Bowers and Dimitrova, 2018, Gadd and Broad, 2018). A 2016 report by the Human Trafficking Foundation found that at least one in four victims of human trafficking disappeared post identification (Roberts, 2018). The report suggested that it makes no sense for the state to spend millions of pounds on identifying victims, only to: 'abandon them, back into a place of vulnerability, with all the same risks that led to them being trafficked in the first place' (Ferrell-Schweppenstedde, 2016: 2).

Policy makers were much less critical of the MSA. While acknowledging that more needs to be done, one suggested that victim identification had significantly improved.

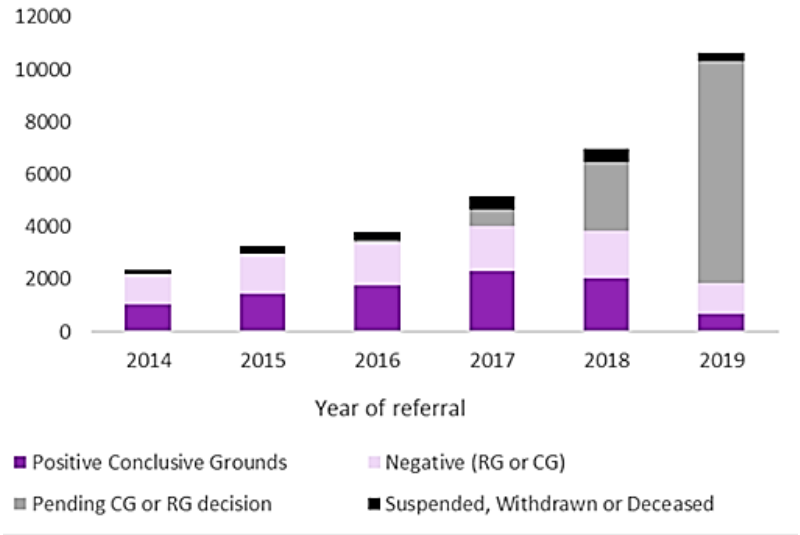
> *The Modern Slavery Act has improved on previous legislation to a considerable extent but again not as much as it should have… the first problem about modern slavery, be it labour exploitation or sex trafficking was that victims were not being identified as victims. They were either regarded as people who were involved in petty crime for example soliciting, begging or shoplifting or things like that or they were regarded as illegal immigrants and then sent back to the place from which they were trafficked in the first place and disregarded as being victims of serious crime. Now the identification of victims has enormously increased. That is partly because of the Act and largely because of the education programmes that the police and local authorities have engaged upon as a consequence of the Act* (Interviewee 13).

Whilst this participant attributed the increased level of victim identification, in part, to the introduction of the MSA, when probed, they did not make any reference to specific provisions within the Act. Instead, they attributed the perceived improvement of victim identification to an increased level of awareness following the reconceptualisation of human trafficking and other forms of exploitation as modern slavery.

The optimism of policy makers may be connected to their investment in being part of the development of the MSA. One commented that: 'like any person fighting for their cause, I think we are significantly ahead of many jurisdictions - we've led the way' (Interviewee 13). The practical realities, linked to actual cases, in the interviews with lawyers tell a different story. They suggest that the provisions in the Act are insufficient to identify victims speedily and effectively. As shown in earlier chapters and demonstrated in this chapter, reliance on the provisions of the MSA too often fails to provide short or long-term protections for victims. Chapter 4, for example, demonstrated that the number of positive conclusive grounds decisions remains low: even where victims are initially identified as having been trafficked, over half are then denied that status when a conclusive grounds decision is made (Home Office, 2020).

Figure 7.1 below, shows that, once in receipt of a reasonable grounds decision, over twice as many potential victims receive negative conclusive grounds decisions (Home Office, 2020c: 6).

Figure 7.1- NRM decisions 2014-2019



The positive impact that some policy makers attributed to the reconceptualisation of human trafficking as modern slavery is not reflected in this data.

7.2.1. The linguistic shift and its effect on identification and protection

Chapters 2 and 5 raised questions about how the reconceptualisation of human trafficking as modern slavery might impact victim protection. This section revisits this issue, drawing on the practice-based knowledge (Weber *et al.*, 2014) of interviewees. It also considers the definition of exploitation within the Act.

Participants' views here were varied, ranging from seeing the shift in terminology as 'tiny' (Interviewee 1, lawyer), 'marginal' (Interviewee 5, lawyer), or 'no substantial' changes (Interviewee 8, lawyer), to 'an enormous shift in the way people think' (Interviewee 15, policy maker). Policy makers were more likely to consider the change a positive one, especially in bringing the topic to the top of the political agenda.

> *I think it makes a big difference because the problem before the Modern Slavery Act was that we had a series of statutes, which dealt with different aspects of what we now call modern slavery… the difficulty was they all consisted of different ingredients and for prosecutors to identify what was the intention of the end result by those who were involved in enslaving and moving people and exploiting people was very difficult because, for example, the persons who organise trafficking of the victims of trafficking who are intended to be exploited, often the traffickers don't care what kind of exploitation it's going to be. That kind of technical difficulty has disappeared under the Modern Slavery Act* (Interviewee 13, policy maker).

> *It has done what we wanted it to do. It has accumulated them all [criminal acts involving movements of goods and people], which hadn't been done before, such that we were dealing with all kind of Acts, the Immigration Act and the Sexual Offences Act- they now are gathered in one place and what it has done is focused the mind on the effects, I think* (Interviewee 17, policy maker).

The responses from lawyers were less consistent, with some stating that this shift has had no real effect, one passed on answering the question on the premise that they did not have enough information on the topic, three argued that more awareness was brought about as a result of a change in the terminology. When prompted to comment on whether they believed that the shift in terminology had any impact on victim identification and protection, Interviewee 6 offered the following.

> *Oh, yes, as you will know, the definition of human trafficking is so much wider than slavery and to give it this label we are reducing it in scope. If a victim's status can't be established because the crime doesn't fall into the restrictive definitions of the Act, they won't be entitled to any protections, will they?*

Interviewee 14, who is a policy maker and, according to them, one of few to lobby against the use of the term 'modern slavery' within the MSA's title, articulated their frustration towards its eventual use by the Government.

> *There is nothing modern about it… it's the same old same old that's been going on for centuries and it does largely affect women and girls and people from other cultures and heritage. All you are doing is placing a bigger burden on the victim and the lawyers to prove that what was done to the victim is serious enough to be considered slavery. But, actually, it is very rarely the case that victims get identified when they haven't been transported across borders and it is only when they are illegal immigrants that their traumatic experience is worth looking into.*

These critiques reflect earlier propositions in this thesis that: conceptualisation of human trafficking as a form of modern slavery leads primarily to a criminal justice response, coupled with one seeking to restrict illegal migration, to the detriment of victim protection.
Some lawyers were similarly critical, reflecting the engagement of academics with this issue (see Chapter 5).

> *I think the term modern slavery raises the threshold; calling something slavery has the effect of making it a very serious crime, whereas human trafficking could have been something like not being paid a fair wage. Now the person needs to prove that they are in fact a slave, which itself has created a sort of linguistic confusion about what people are talking about and that test is a much more difficult one to meet* (Interviewee 7, lawyer).

Participants also reflected on the definition of exploitation: whilst the MSA expressly defines both exploitation and sexual exploitation (see Chapter 5), a number of lawyers questioned the adequacy of the definition, which has resulted in inconsistency in the way that courts interpret this part of the law.

> *The legislation is mostly adequate, save for the definition of exploitation. I don't think enough attention has been given to it during its drafting, as it doesn't quite capture what Palermo and ECHR and instruments were trying to do. You don't have to have been transported to be exploited, nor do you actually need to have been exploited to be a victim… [judges] still tend to expect that the client has been exposed to an act or means and not exploitation. Often a real misunderstanding as to exploitation in that they expect that the client has to have been exploited as opposed to that the purpose was for exploitation* (Interviewee 8, lawyer).

This participant reveals an ongoing lack of understanding about what constitutes human trafficking, and especially what exploitation entails, a significant hindrance to the identification and subsequent protection of victims. There appears to have been a missed opportunity in the drafting process to clarify what 'with a view to "V" being exploited in Section 2 (1) of the MSA actually means. This clarification could potentially have assisted judges and other decision makers.

7.2.2. The reasons for a shift in focus to labour exploitation

Lawyers suggested that due to the complicated nature of the prostitution/trafficking nexus, it is often much more difficult to establish a woman's victim status. This means that identification of sexual exploitation is pursued less by law enforcement. They reported that often, women are also required by their traffickers to carry out domestic duties to pay off smuggling and migration-related debts. In such instances, it is more likely for traffickers to be arrested in connection with women's labour exploitation rather than their sexual exploitation. One lawyer explained that cleaning companies are, for example, targeted by law enforcement regularly as they often receive 'tip offs' about the company having 'illegal workers' in their employment (Interviewee 11, lawyer).

The reduction in explicit focus on sex trafficking was not considered detrimental to victim protection by any of the policy makers. One suggested: 'I wouldn't say this is much of a problem because the laws have and continue to cover sexual exploitation, almost by default (Interviewee 13, policy maker)'. They went on to comment that:

> *I think the focus is shifted more towards labour exploitation because there are so many ways in which individuals' labour can be exploited…supply chains are now being targeted more because governments are realising that the majority of exploitation occurs behind the scenes of what otherwise seems to be a legitimate*

> *business…sexual exploitation is way easier to identify because it normally involves forced prostitution* (Interviewee 13, policy maker).

The first part of the above quote reflects the shift in research and policy attention: Sereni and Baker (2018) highlight that the British Academy has, for example, begun carrying out funded research, which focuses chiefly on Sustainable Development Goal 8.7, which focuses mainly on the eradication of forced labour. Considering sexual exploitation to be 'way easier to identify', is however highly problematic, and neglects the overlaps of labour and sexual exploitation (Oram *et al.*, 2016). The reference to 'forced prostitution' is also worth noting, since this is much narrower.

Chapters 2 and 5 suggested that the conceptualisation of human trafficking as a form of modern slavery has negatively influenced the UK's responses to trafficking for the purposes of sexual exploitation. The conflation of the concepts emphases on the most extreme forms of exploitation, thus reducing focus on debt bondage and bonded prostitution. It suggests that force and complete control of a person's liberty is necessary for trafficking to have occurred, making the other forms of control documented in relation to exploitation (Deshpande and Nour, 2013) less visible. The reference to 'forced prostitution is troubling, since Section 3(2) of the MSA simply incorporates the UK's previous legislation, namely Part 1 of the SOA 2003. Part 1 of the SOA 2003 presents a long list of behaviours considered to be sexual offences, with prostitution only one possibility.

One lawyer suggested that for a long time, due to the nature of the crime, labour exploitation had been harder to track. They attributed this to the difficulties associated with specific cultural norms, in countries of origin, for example, traffickers' corrupt relationships with authorities. This meant that addressing trafficking through the supply chain (MSA, Section 54) has been a positive step in that it makes UK companies accountable for where their products come from and how they have been produced. There was a shared concern, that whilst all corporations are legally obliged to uphold national laws, regardless of their size or structure, little corporate accountability actually exists in relation to human trafficking for smaller companies with a turnover of less than £36 million. The accountability for larger corporations was also questioned. Considering the human rights aspect of this issue, it is clear that the problem is partially rooted in the fact that a mandate for businesses to uphold human rights laws is relatively new. This requirement only entered the UK's legal framework in the late 1990s, before which no instructions about corporations' human rights responsibilities existed (Freudmann, 2015).

Traces of corporate accountability are now noticeable within UK law firms. For instance, I discussed the requirement for anti-trafficking training with office managers at two solicitor's firms I have been employed at during my research. I was told that firms have started to incorporate the statements (in accordance with Section 54 of the MSA) into their terms of business and have created mandatory training on modern slavery for their staff. This is a positive step towards increased corporate accountability as a result of the guidelines set by the Modern Slavery Act. This being the case, not all companies have put such statements in place, and there is very limited enforceability, thus the 'substance of the due diligence obligation is weak' (Interviewee 2, lawyer).

Policy makers made similar observations.

> *The problem with the Modern Slavery Act 2015 from a corporate perspective then was, they really limited it to certain levels of corporations and businesses…is almost created that culture of 'well that doesn't really apply to us', which may not have happened if we'd only stuck with policy or if we'd had rather stronger legislation. The argument as I understood it at the time was that well it is a significant burden for companies and therefore we've got to effectively target the ones that can afford it and also target and the ones that work transnationally. But I think what we learned was that those - I'll call them businesses - and those businesses who could afford it worked transnationally and tended to use it for reputation purposes* (Interviewee 14, policy maker).

Section 54 of the Act does not currently impose any penalties for non-compliance; rather, it invites businesses to: 'rely on moral and consumer drivers for corporate change' (Broad and Turnbull, 2018). Consequently, this section of the Act has been considered effective in theory, but lacking any teeth in the real-world contexts (Haynes, 2016; LeBaron and Rühmkorf, 2019). Lawyers and policy makers' main criticism of the Section 54 offence reflects this: 'the lack of teeth in relation to corporate accountability in the supply chains' (Interviewee 1, lawyer), inconsistencies with policies endorsing self-regulation of businesses (Haynes, 2016) and more broadly within a framework of holding corporations accountable for assisting in crime prevention (Lord and Broad, 2018) - therefore lacking any victim-focus.

7.2.3. Assessing victim credibility

Article 10(1) of ECAT places an obligation on states, through the single competent authority (SCA) to place trained and qualified persons at the frontlines to identify victims of trafficking (see Table 5.1). Whilst the SCA is required to take material facts, such as whether the person is coherent and their narrative consistent with written or verbal evidence previously provided (Home Office, 2020), into account, the over emphasis on credibility and certain assumptions embedded in the court system, disrupts victim protection (Southwell *et al.,* 2018). This is particularly the case, as the context within which the crime has taken place, i.e. the individual facts of the case are ignored, which is a violation of Article 10. A number of participants commented on the difficulties faced by victims whose story did not 'fit' with jury preconceptions of what trafficking entails. They suggested that trafficked victims, especially those who have committed a crime as a result of their victim status, do not present well to a jury. In situations where someone shows hostility and as suggested by Interviewee 10 'have their defences up', a jury or a judge are less likely to believe their stories. Lawyers were of the opinion that judges still regularly overlook mitigating circumstances that may have led to inconsistent or delayed disclosures, thus demonstrating poor understanding of the realities of trafficking. There was widespread support for judges being well versed on each individual case and receiving additional training.

The requirement for training does not stop with judges. Law enforcement officials, as well as lawyers, are regularly required to adapt their practices to keep up with emerging law and policy (Turner, 2017). Crane (2013) suggested that training within the police service, CPS, and social care can be an effective way to increase victim protection. Interviewee 3 (lawyer) adds to this commenting that: 'a lack of training may result in vagueness, poor adherence to guidelines and a lack of accountability'.

In order to improve the interpretation, and application of the MSA, there was a proposal for training, especially the interpretation of definitions.

> *The police, across the CPS, across social services, all the frontline organisations that are going to be coming into contact with victims of trafficking… and I practice in family as well as immigration, the knowledge is just immense and completely terrifying as well, and I think that is a real difficulty. There is so much left to our interpretation and this could have been avoided to some extent by making sure that definitions at least match those of international standards* (Interviewee 5, lawyer).

In its 2020 Handbook *Legislating Against Human Trafficking*, the Commonwealth Parliamentary Association UK (CPAUK) notes that: 'across the UK, many people are unable to properly explain what modern slavery is or spot the related issues' (CPAUK, 2020: 60). The handbook points out that; '1 in 10 people believe they may have come across a victim of this heinous crime - yet half of these wouldn't know what action to take if they did' (CPAUK, 2020: 60). This assertion, together with the data from participants suggests that training and expertise is required if the experiences of victims are to be understood and appropriately evaluated.

7.3. Protection of victims as offenders

One of the main concerns raised by both sets of participants was the way in which the term 'trafficked victim' is understood and applied, especially when an individual is accused of criminal activity, including acts, which are associated with being a 'trafficker'.
In establishing a potential victim's status, the NRM, or a court as the case may be, seeks to determine whether or not the individual has committed an offence, whether they were coerced into an exploitative situation, within which they remained and committed an offence, and their level of agency in committing the crime. There remains, however, particularly amongst criminal defence lawyers, a limited knowledge of the Section 45 defence (see Chapter 5). Participants welcomed the introduction of a defence for victims of trafficking who have been compelled or forced to carry out a crime.

> *From a criminal perspective, we now have the statutory instrument in law, which obviously is a step in the right direction. Before we only relied on the obligations under the Council of Europe's non-punishment provisions. So, the fact that we have a statutory change is great* (Interviewee 12, lawyer).

This participant was concerned that, in practice: 'there are issues with the implementation of it and whether or not it is being misapplied and in many cases missed as well' (Interviewee 12, lawyer). In addition, once the probability of human trafficking has been identified, the victim may be kept under arrest and subjected to extended periods of remand, where, other than basic necessities such as food, they have no recourse to any protections offered by the MSA or any other legislation. This is because while there is a lack of adequate evidence to support the accused's Section 45 defence, the victim, often not a UK national, is considered a 'flight risk' (Interviewee 6, lawyer). If a trafficked victim is subsequently charged, the

decision about the criminal matter is put on hold, pending a decision by the NRM about the individual's status, which could take months.

Whilst some participants saw the placing of the UK's international obligation not to prosecute on a statutory footing as a 'step in the right direction' (Interviewee 3, lawyer), others saw the UK as only being 'halfway to being compliant with international protections' (Interviewee 14, policy maker). The critical responses provided by both participant groups support the contention that the MSA's crime control focus outweighs that of victim protection. One lawyer made the point that, whilst the Act supposedly allows victims the freedom to cooperate with authorities without the danger of being prosecuted, the Section 45 defence only really applies to those whose victim status is established.

> *… in a criminal context, you are then asking them to confess with no protection whatsoever, so you've got to tell them to confess to an offence, and that is not a protected confession at all. It could then be used against them in criminal proceedings if the investigator doesn't believe that they are a victim, so why are they going to confess?* (Interviewee 6, lawyer).

Interviewee 13, a policy maker, noted that this was not the intention during the drafting process and expressed frustration with this blatant gap in the law.

> *We said at the time that in the referral mechanism, there must be a way of saying well this is a protected confession, so if it turns out to be accurate, it cannot be used against you in criminal proceedings and I mean, my instinct is you, anything you say, should be confidential and then you would be entitled to your right of silence, pending that investigation in the criminal proceedings. So, this business about failing to answer questions, would all go* (Interviewee 13, policy maker).

Policy makers further noted that via Sections 45 and 46 of the MSA, the Government is: 'looking at these people as potential witnesses, they created a defence for quite a small selection of the criminal population' (Interviewee 14, policy maker). This converting of victims into witnesses was considered a 'major problem', which focuses on the prosecution of offenders, to the detriment of the victims.

> *Actually, if you say no that's a complete defence, you are not a criminal you have no responsibility and we are going to give you the agency to be a witness to this global problem, then you doubly victimise them by then putting caveats in that most people*

> *will not be able to avoid, which is the one that really annoys me* (Interviewee 14, policy maker).

Interviewee 6, a lawyer, argued that this is a 'significant lacuna' and 'a real lack of understanding of criminal law'. Referring to the crimes that are excluded from the Section 45 defence at Schedule 4 (see, also, Chapter 5); they argued that the MSA places undue restriction on who may bring a human trafficking defence.

> *For example, let's think about murder, which is the one where everyone thinks oh you can't possibly have human trafficking in murder. We can still see cases where you have principal offenders and accessories. Now an accessory to murder could easily be a human trafficking victim. Hiding a gun, disposing of whatever has been used in the crime or even being present at the time that the crime occurs and really having no agency to withdraw. Very, very easily you can see how an accessory could be a victim of human trafficking of any offence, and yet, they are excluded from the opportunity of running a human trafficking offence. So, it's an unjust way of dealing with a lack of criminal responsibility* (Interviewee 6, lawyer).

This sentiment was shared across most interviewees. When asked to comment on whether the MSA meets international standards, participants offered similar responses.

> *No, no, I mean where I think there is direct conflict is the Schedule 4 exclusion offence, Section 45 offence. I think it's arguable but it's not compatible with our non-punishment obligations* (Interviewee 12, lawyer).

> *It is really difficult, I mean to be critical, at least we have the defence in our statute. Yes, there are errors, there are parts that are not working such as the exclusions in Schedule 4 of the Act and there is still a long way to go but I think we are more advanced than a lot of countries in many aspects of the legal framework* (Interviewee 15, policy maker).

One interviewee suggested that being able to change the way in which society views offending trafficked victims is 'a tall order… a lot of it is a mind-set you can start with lawyers and then get to the rest of society, but you do need solid and safe structures that people can trust in order to confess… no protection is going to work unless you ally it to the right of silence and you protect their right to silence much more' (Interviewee 6, lawyer).

A further point raised, this time by a policy maker, was in relation to the inadequacy of sentencing council guidelines. They draw attention to the fact that there is currently no single category of human trafficking, and this causes problems when seeking to reduce or discharge a potential victim's sentence. They consider this a flaw with the policy that accompanies the MSA, suggesting that it should have been catered for during the drafting process.

> *In every single guideline, you simply say: if there is evidence of human trafficking, cut this sentence by half or to a quarter or an absolute discharge. So, you actually say it straight away - evidence of human trafficking and this person will not be punished or they will be punished to 50% or 20%, whatever, and that doesn't exist* (Interviewee 14, policy maker).

The interview data raises serious questions about the extent to which the MSA complies with the non-punishment obligations under international law. Chapter 5 showed the non-prosecution obligation is enshrined in Article 26 of ECAT and echoed in Article 8 of the EU Trafficking Directive. Both instruments require the relevant crime to have taken place as a result of the defendant's status as a victim of human trafficking and there must have been no realistic alternative for the individual other than to commit the offence. Whilst Section 45 of the MSA includes provisions relevant to this obligation, participants' practice-based knowledge suggests that it remains problematic in practice, especially due to the application of the reasonable test. Use of the defence, therefore, remains limited, meaning that the potential protection it offers is rarely forthcoming.

7.4. The tainted asylum process

According to Mellon (2018: 245), for trafficked survivors: 'the first step to security and starting a new life would be acquiring legal status in the UK'. However, the MSA does not contain specific provisions for grant of leave to remain in the UK for victims of human trafficking or modern slavery. This also remains the case in the Immigration Rules (Home Office, 2016). In order to be eligible to stay in the UK, trafficked women will need to rely, either on the 1951 Geneva Convention Relating to the Status of Refugees, the ECHR or the European Union Asylum Qualification Directive**.** There are also a limited number of grounds for the grant of discretionary leave. The 2015 case of *R (on the Application of K) vs. Secretary of State for the Home Department* played an important role in establishing the then position regarding discretionary leave to remain. The Court explained that no blanket grant of discretionary leave would apply to victims of modern slavery and human trafficking, even

after they have received a positive conclusive grounds decision. Any leave would only be available if: 'either: leave is necessary owing to personal circumstances [in accordance with the UK's obligation under Article 14 of ECAT]; leave is necessary to pursue compensation; or [for] victims who are helping police with their enquiries' (Home Office, 2016).

The 2018 case of *PK (Ghana) vs. Secretary of State for the Home Department* appealed the decision made in R. The Court of Appeal found the discretionary leave policy to be in breach of obligations under ECAT. In particular, the Court found the policy to be in contravention of Article 14, which requires states to grant adequate, renewable, residence permits, depending on the victim's circumstances. The Court clarified the position, stating that the Article 14 provision was not intended to grant unlimited discretion to states, but rather, was intended to urge states to consider trafficked victims' circumstances in furthering their protection and assistance, by allowing them to remain in the UK. It concluded that the policy 'does not reflect the requirements of Article 14(1) (a) and is unlawful' *(PK (Ghana) vs. Secretary of State for the Home Department at Paragraph 51).*

The decision made *in PK (Ghana)* has a potential to increased victims' chance of being granted discretionary leave, thus limiting their likelihood of being deported and exposed to further exploitation. That said, lawyer participants were sceptical, expressing a number of continued faults with the policy governing discretionary leave. They explained the technical difficulties of dealing with a situation where decisions are placed on hold pending a decision on a victim's asylum or humanitarian protection application - this is in accordance with the Home Office's guidance entitled 'discretionary leave considerations for victims of modern slavery' (Home Office, 2018).

> *[The Home Office] now is saying that we will not grant discretionary leave on grounds of sexual trafficking until their asylum claim is concluded. I think that's causing problems, because even if people are in theory getting support, it's not the same as leave because you know, people are subject to reporting conditions, until, or they can be subject to reporting conditions until their grant of leave to remain. They can still be on bail until their grant of leave to remain, they won't have permission to work until their grant of leave to remain* (Interviewee 4, lawyer).

This participant went on to explain an ongoing case they were involved with at the time, involving a client whose status as a victim of human trafficking had been established and they had received a positive conclusive grounds decision. The solicitors had put in an application

for asylum, however, the result of this application was outstanding. The solicitors then made an application for discretionary leave to remain but this could not be considered, notwithstanding the positive grounds decision, until a decision had been made on their asylum claim. The solicitor was successful in securing immigration bail, but this remained subject to reporting conditions and the victim had no permission to work to provide for themselves, placing them in a state of limbo. As a result of extensive pre-action correspondence, the Home Office eventually granted the victim permission to work, however restricted this to jobs in the shortage of occupation category. The numbers of jobs in this category are limited and they generally require specialist skills and knowledge. For example, the positions include: biological and physical scientist, mechanical and electrical engineer, web design and welding trades (Home Office (2020a). Not being qualified to meet the requirements of any of the positions, the victim struggled to find any work.

> *He's still like subject to immigration control notwithstanding the fact that he's like a recognised victim of human trafficking and very vulnerable. And there is evidence in terms of frontline professionals involved with him about why he needs to be able to work, why he needs, you know all the supports he is currently not getting. The guidance just needs to be re-written, this time more carefully* (Interviewee 4, lawyer).

This suggests that the decision made in PK (Ghana) is not making the difference it should have done: discretionary leave to remain would allow victims to 'integrate into society and live a normal life, and just recover' (Interviewee 2, lawyer). The current decision making places some already vulnerable victims in harm's way, especially as it leaves them with an insecure migration status, often for years. This invites back the suggestion (see Chapter 5) that the UK's anti-trafficking narrative has been used to serve a position on immigration control rather than secure the protection of victims. The MSA does not provide trafficked victims with specific leave to remain in the UK (see 7.2 above), nor does it seem to acknowledge the risk of re-trafficking.

> *So, the way the whole system is put together is really complicated also it really pisses me off that this whole concept of risk of re-trafficking is not fully understood… even by solicitors. I just find it baffling that people will be running asylum claims for victims of human trafficking but not on a risk of re-trafficking basis. And that is the whole point… often people do have other asylum claims as well and that's fair enough and of course that should be run as well, but in combination with like the re-trafficking risk arguments and I just find it baffling that people still don't get it. And*

> *judges still don't get it. 'Oh well, there's no risk from the original trafficker'. And I'm like, that is not the point. Yeah, I mean I'm not running it that there is a risk from the original trafficker, I'm running it that this whole experience renders the person more vulnerable (*Interviewee 4, lawyer).

This echoes earlier discussions on the lack of long-term support for victims (see Chapter 5). As the case described by Interviewee 4 highlights, even where a positive conclusive grounds decision has been reached, the UK's current system is, to some extent 'meaningless without accompanying leave to remain' (Human Trafficking Foundation, 2016: 17). The danger of not being guaranteed long-term leave is multi-fold. It limits victims' ability to find legitimate employment, thus exposing them to the risk of destitution. It also places them in a state of limbo whereby there is no guarantee that their leave will be extended; they risk being deported and placed back into a dangerous situation. As indicated earlier in the thesis, this makes integration into normal life much more difficult for already vulnerable victims.

> *There is a relatively low amount of support in terms of what happens when a victim is finally and conclusively identified. I mean, that is unfortunately, completely down to decision-makers and largely what I see from the Home Office in that regard, is that even when they make positive identification decisions, that actually that doesn't come with any benefits to the client. They rarely grant them any leave and it's that what they really need to feel supported and to recover from the situation. I think there is a real misunderstanding of that by decision-makers* (Interviewee 8, lawyer).

A solution suggested by Interviewee 4 (lawyer) is that there must be: 'a massive reinvestment in funding for victims of trafficking who are either between the two stages of the NRM but also after the conclusive grounds decision'. They observed the extent to which support falls away at both stages is troubling, as there is a heightened risk of re-trafficking.

Under the Home Office's 2016 guidance, in circumstances where a suspected victim of human trafficking is referred to the NRM, if the individual is also claiming asylum, the NRM process must be completed first in order to ensure the victims are correctly identified (Wake, 2017). In accordance with this guidance, there would, therefore, be no need for the asylum claim to have been concluded before the trafficking victim is identified as such. Lawyers, however, reported that asylum interviews often do take place before a proper conclusion to the identification process. The reason is the Home Office often considers the standard processes carried out during an asylum interview to be valuable in gathering evidence that is also

pertinent to the NRM's verdict. Whilst this would on paper, appear to be a practical approach, lawyers were of the opinion that interviewing victims of human trafficking before they have taken advantage of the recovery period is poor practice. Interviewee 8 (lawyer) explained that asylum interviews often last more than 8 hours, and the environment may be intimidating. Murphy and Vieten (2016) made a similar observation in their research into the asylum seekers and refugees' experience of life in Northern Ireland. They described trafficked victims as: 'feeling interrogated about the minutia of their personal lives as well as the factual details about their country of origin' (Murphy and Vieten, 2016: 32). As examined at Chapter 5, one of the positive advancements within the MSA is at Section 46, which caters for victims' right to present evidence through less intimidating means than at court, such as via video recordings. Ensuring that the NRM's identification process takes priority over asylum applications, therefore potentially reduces the pressures faced by victims. A better monitoring system is perhaps needed to ensure that the Home Office is following its own guidelines.

Another lawyer participant commented that when a potential victim's statements is taken, the information is then 'copied and pasted' and used in two very different decision making processes: one assessing a potential threat of persecution/danger to an individual's life in their country of origin and one assessing whether they are a trafficked victim (Interviewee 16, lawyer). They commented that the distinction between the two is necessary in the decision making process, stressing the need for 'sufficient training [to be] provided to the competent authority's staff' in this regard. This analysis is in line with the sentiment that interwoven decision making structures can interfere with victim protection (see Chapter 5). While it is undoubtedly legitimate for the immigration status of potentially trafficked victims to be considered in their overall case, decisions about each element ought to be kept separate to ensure that one does not adversely affect the other.

7.4.1. Trauma and victim protection

Southwell *et al.* (2018), suggest that it would be helpful for all legal practitioners to understand that Post Traumatic Stress Disorder interferes with memory, and that any inconsistencies in the accounts of victims of trafficking should be considered in this context. This is supported by Herlihy, Jobson and Turner's (2012) study of asylum seekers in which they explain that distressing recollections are kept in the mind in a fragmented manner, thus resulting in a victim not being able to give a consistent and chronological account of what they have experienced. In relation to sexual victimisation, retelling the event/s is likely to

evoke feelings of shame and reduced self-worth, thus affecting the shape of the evidence given (Robjant, Roberts and Katona, 2017).

Oram *et al.* (2016) identify Post Traumatic Stress Disorder, anxiety and depression as three serious mental health issues associated with sex trafficking. The level of anxiety is higher in victims who have been subjected to physical violence or have witnessed another human being physically abused (Ottisova *et al.,* 2016). Robjant, Roberts and Katona (2017) explain that a victim of rape or other forms of sexual violence is likely to re-experience, even physically feel the pain and sensations of being raped. It is an open question whether these contexts are held in mind by those tasked to interview in the context of legal proceedings, or even by lawyers and judges in relation to court cases.

> *It all ultimately comes down to the potential victim's credibility and the credibility of their story, especially in cases where the client is also claiming asylum or they are arrested in connection with a crime. In almost all of my trafficking cases, the clients have been too psychiatrically unwell to give evidence... more often than not, a tribunal won't believe that what has happened to them has happened to them or that there is any need to protect them* (Interviewee 5, lawyer).

Interviewee 12, a policy maker, noted that victims' levels of trauma impact the reliability of evidence provided in court. They highlighted the detrimental effect that requiring a vulnerable witness to give evidence, even months after the end of their ordeal, has on their wellbeing.

> *It's very difficult for people who are victims, who have been traumatised and are sometimes living chaotic lives to give evidence. Requiring them to re-live the trauma that some of them have faced, which is extreme in some cases, 18 months after they have been given counselling and settled in new ways of life is little short of cruel* (Interviewee 13, policy maker).

Where a victim's psychological condition is disregarded, following contradictory statements, they are often left with negative decisions, which expose them to further harm. The practice based knowledge provided by participants, suggests that the current law and policy serves primarily as a tool to facilitate victims' participation criminal justice processes. Any protection such as safe accommodation and interim support that the victim subsequently receives is conditional on successful prosecutions.

A long delay with NRM decisions was another anticipated theme to surface in expert interviews. Participants noted an average of 12 to 18 months between reasonable grounds and conclusive grounds decisions, during which time protections offered to victims remain limited. This also extended to asylum matters, which notably often take even longer. Victims are often required to relive their traumatic experiences as these delays result in statements being taken from them on more than one occasion, and often over a number of months. Of the lawyers interviewed, four had specific engagement with and therefore knowledge of immigration and asylum law. All expressed concerns that there remains a *culture of disbelief* in asylum matters. They extended this to victims of human trafficking, suggesting unanimously that the MSA has done little to improve on this position. Jobe (2008) reflects on an analysis of the UK's asylum system prior to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, carried out by Refugee Women's Resources Project at Asylum Aid. She reached a similar conclusion: 'a culture of disbelief was inherent in the British asylum system which… when combined with ignorance or bias against women, had a particularly severe impact on fair decision-making' (Jobe, 2008: 131).

Instead of taking into account the trauma faced by victims, there is a disproportionate focus on their credibility, a theme running through all interviews carried out with participants. This arguably serves to justify the large number of negative conclusive grounds decisions reached by the Home Office, which serves the political agenda of curbing net migration.

7.5. Access to legal aid, legal support and compensation

Article 15 of the Council of Europe Convention places an obligation on State Parties to provide for legal aid (see Table 5.1). Section 47 of the MSA extends the use of civil legal services available under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to all victims of trafficking and slavery. However, the manner in which the Legal Aid Agency applies this provision has thus far proven problematic. Currently, in order to qualify for legal aid, organisations, including law firm must have a contract with the Legal Aid Agency (LAA). Whilst the MSA includes clear provisions for legal aid, no obligation has been placed on the LAA to issue legal aid contracts for trafficking cases (Barrenechea, 2016). As a consequence, human trafficking cases are aggregated under 'miscellaneous work', a category that limits each solicitor to taking on five such cases each year. This, together with limited funding available to each individual firm, potentially deters solicitors from specialising in the area of human trafficking, and in turn represents a significant barrier to specialised, victim protection.

In addition, in practice, a victim is only able to apply for legal aid once they have been referred into the NRM and a reasonable or conclusive grounds decision has been made (Falconer and Widmann, 2017). This, in effect, means that victims are unable to receive help via legal aid prior to being referred into the system, or to receive help with the referral process itself. This is problematic as the process itself is often complex, especially for trafficked victims where there is a language barrier. Furthermore, according to Barrenechea (2016), applications made to the LAA can take between twelve to eighteen months to decide; this leaves victims in a vulnerable position, concurring with an earlier observation: 'the lack of understanding throughout the criminal justice system of what trafficking is, and how it affects those who are trafficked' (Annison and Anti Trafficking Monitoring Group, 2013: 2).

Participants commented on the continued restriction on access to legal aid for trafficked victims. Both lawyers and policy makers argued there needed to be changes in the policy on legal aid in the future.

> *The restriction on legal aid still causes a problem. We still do not have victims' advocates and my discussions with NGOs indicates that victims are not getting access to the remedies they require or the help they require because they simply can't have access to legal aid* (Interviewee 13, policy maker).

The restrictions on legal aid extend not only to lawyers, but also to NGOs and other organisations tasked with protecting and assisting trafficked victims. As regards lawyers' access to legal aid, Interviewee 11 (lawyer) provided a useful overview of how this works in practice. They explained that, being a barrister, they tend to become engaged in the process, once a negative conclusive grounds decision has been reached. They must then consider the facts of the case and make a decision on whether they believe it has merit. This interviewee noted that they often carry out the preliminary assessment free of charge. In tandem, the instructing solicitor is likely to have opened a legal help pre-action file, which means that they will be paid for their input. This, however, is contingent on their being an established merit to the case and the LAA having confidence in the evidence. If, following pre-action stages, a decision is not made to reverse the negative conclusive grounds decision, an application for judicial review is lodged, at which point the barrister will also apply for a public funding certificate. At this stage the barrister must make this application, including drafting grounds for judicial review at their own (financial) risk, as until a positive judicial decision is reached, or there is a settlement, no funding is available for their work. In light of

this, participants commented that some lawyers tend to either avoid taking on trafficking cases altogether, or avoid cases without sufficiently clear merit.

> *We are talking, well you know, probably about six hours of work you're doing at risk. If you get refused on the papers, no payment, so then you renew at risk. So, then you go to your oral permission hearing at risk. You can spend the whole day in the admin court and if you end up with a refusal of permission, you don't get paid for any of that, so you're talking maybe two to three days of work - so why would anyone be a trafficking barrister? …Why would anyone be a legal aid barrister, because of course it's not just for trafficking; that's across the board for judicial reviews… it's so depressing* (Interviewee 4, lawyer).

Chapter 5 documented the UK government rejection the JSC's suggestion to allow a statutory right of appeal for victims of human trafficking. It therefore remains the case that upon receipt of a negative conclusive grounds decision, victims have no formal appeal route and they must rely on the much more difficult process of judicial review (Elliot and Garbers, 2016). The interview data adds to the discussion in Chapter 5, which highlighted the contravention of obligations under ECAT to protect trafficked victims. Lack of access to legal aid hinders the chances of victims receiving skilled and knowledgeable legal representation, which in turn lowers their access to protection.

In Chapter 6, participants attributed the reduced focus on women's sexual exploitation, in part, to the complicated nature of the prostitution/trafficking nexus: this renders it more difficult to establish a woman's victim status. This evidential challenge collides with limited access to legal aid to create a substantial deterrence for lawyers, especially barristers, who might otherwise be interested in representing trafficked victims.

> *… frequently, decisions are served that are very last minute, often what it leads to is last-minute funding applications the NAA being overly burdened and not being able to deal with it in time. Also not understanding and merits of the decision these are all things that LAA needs training on as well, so unfortunately that is a far more complex issue than simply the Act dealing with it. I think it's about individuals that have to make this decision* (Interviewee 11, lawyer).

It is clear that practical gaps remain in the legal aid process, which is the access to justice route for trafficking victims. As funding relies on the merits of each case, staff at the LAA

must be sufficiently trained in the legal application of the MSA and its accompanying guidance.

A number of participants concurred that provisions for compensating victims remain limited. Even when traffickers are prosecuted, Slavery and Trafficking Reparation Orders are rarely, if ever awarded (see, also, Chapter 5).

> *And the other problem as well, which we've discovered is the intention in the Act, was that when there is a successful prosecution of traffickers or slave owners who are usually doing it for economic reasons that the proceeds, the assets those people have would be confiscated and would be made available to compensate the victims. That simply isn't happening and one of the reasons is, nobody is speaking for the victims as part of the criminal proceedings… it could happen but it's not happening* (Interviewee 13, policy maker).

Provision of compensation for victims of human trafficking plays an integral role in international law in relation to their rehabilitation. Cusveller and Kleemans (2018) comment that research into victims' experiences reveals their desire to be compensated, not only because it aids their recovery process, minimising the likelihood of their re-victimization but also because it 'satisf[ies] their need for justice' (Cusveller and Kleemans, 2018: 298). An unclear and ineffective route to compensation means none of these potential outcomes can be realised.

The MSA's proposed measure for compensating victims through Confiscation Orders and Reparation Orders falls short for two reasons. Firstly, the difficulties associated with the prosecution of those involved in the offences to begin with. Secondly, the low number of enforceable compensation orders being granted by courts. In their 2016 working paper, *Access to Compensation for Victims of Human Trafficking* (FLEX, 2016: 1), FLEX, highlight the fact that the MSA made no provision for the many cases in which prosecutions or convictions are impossible due to the 'high criminal threshold of proof'. This study highlights a significant discrepancy between the 39 actual convictions for human trafficking and the 2,340 'potential victims' identified by the National Referral Mechanism (FLEX, 2016: 3). This lack of provision in MSA has meant that exploited victims often have to turn to older legislative methods such as an application to the Criminal Injuries Compensation Authority. It is clear then that, in this regard, the MSA achieved little in terms of reparations, which can have a protective function.

The second shortcoming of the compensation provisions was highlighted in interview data. Lawyers were asked whether they had ever applied for and/or been granted any of the orders for compensation available to victims under the MSA: none had. This reflects the engagement of academics with this issue at Chapter 5, as well as the statistics provided by 2019 independent review of the MSA referred to in the same chapter. One participant provided the following insight.

> *One of the considerations which the Frank Field Review will have to look at is whether these orders should be available in the Crown Court so that you could have, for example, a Modern Slavery or Trafficking Risk Order imposed in addition to, for example, bail conditions, where at the moment, if that's going to happen, and it hasn't happened so far because it's too cumbersome, it would mean that investigating officers would be at the Crown Court if it's a serious case under the Modern Slavery Act, which may result in bail being granted with restrictions. But you would have to go to the Magistrates Court to get a trafficking risk order against the same people to try to prevent them from engaging in further acts of trafficking. It would be much better if it could be comprehensive and dealt with, say by a Crown Court judge who would also then be able to make and deal with, for example freezing orders of assets etc.* (Interviewee 11, lawyer).

This demonstrates the administrative difficulties of obtaining compensation for victims under the MSA. Article 15 of ECAT provides that State Parties must provide for: '…measures as may be necessary to guarantee compensation for victims'. A similar obligation is also echoed in Article 17 of the EU Directive (see Table 5.1). By failing to develop such a mechanism, the UK is again in contravention of international law, as it is not able to *guarantee* any compensation.

7.6. Conclusions

This chapter has added to human trafficking literature by exploring the practice-based knowledge (Weber *et al.*, 2014) of lawyers who work with the MSA and policy makers engaged in the UK's overall approach to trafficking.

The data has expanded some of the themes already identified in Chapter 6, providing more detailed insights in the practical effects that gaps in law and policy have on victim protection.

A number of new themes have also emerged, highlighting gaps that remain in the UK's anti-trafficking law in relation to victim protection.

- Policy makers were generally more optimistic about the provisions in the MSA than lawyers, although a number expressed their concern with ongoing gaps in the legislation. Both sets of participants agreed that development of the MSA has drawn more attention to the issue of human trafficking.
- The prompt and correct identification of victims remains an ongoing concern, mainly for lawyers. They believe the MSA to have made little practical advancement in this regard, attributed in large part to the restrictive definition of human trafficking alongside the flawed functioning of the NRM. Some policy makers shared the latter sentiment, expressing their frustration that the definition of human trafficking does not mirror that of the Palermo Protocol, thus compromising harmonisation.
- Participants stressed the importance of mediated interactions between experts such as lawyers, the police and NGOs. They suggested that lawyers should be added to the list of first responders, allowing them to refer potential victims into the NRM.
- Despite Section 47 of the MSA making specific provisions for 'civil legal aid for victims of slavery', access to legal aid remains extremely limited. With funding being dependent on the merits of each case, lawyers expressed reluctance to take on cases of trafficking for the purposes of sexual exploitation. This potentially affects the quality of expertise in the area and is therefore, potentially, detrimental to victim protection and support. Participants made practical recommendation in this respect, including the allowance of rights of appeal for trafficked victims, as well as bolstered funding for cases that result in judicial review.
- Participants, in particular, criminal defence lawyers expressed their concern with the general lack of knowledge surrounding the MSA's Section 45 defence, hence its lack of use by their colleagues. They highlighted a number of ongoing issues with the implementation of the non-prosecution provision. One major issue is the use of victims as witnesses, whilst in reality offering little assurance that the evidence will not be used against them in a trial. They concluded that Section 45 focuses on the prosecution of offenders, to the detriment of the victims, suggesting that the MSA falls short of its international obligation in this regard.
- Both sets of participants argued that more training is required for professionals tasked with identifying and supporting victims. These include the police, judges, lawyers, the

Legal Aid Agency and competent authority's staff. This is to ensure that the MSA is interpreted and applied correctly.

The next chapter takes a closer look at some of the key themes in this thesis through a comparative analysis of specific cases discussed with lawyer participants during interviews. This allows more concrete conclusions to be made on whether the MSA has resulted in any practical change to victim protection.

Chapter 8 – The MSA through practice-based examples

8.1. Introduction

This chapter presents the final empirical contribution of the thesis, drawing on the case examples discussed during interviews with lawyer participants. It presents the key details of nine cases, some from before the development of the MSA and some after. Whilst this number is small, meaning that the cases are not representative, a comparative analysis of the pre and post MSA cases enables exploration of previously identified themes in more detail. Data saturation is the widely used and accepted notion that once a certain amount of data has been collected, the researcher has gathered sufficient material, such that any further data collection or enquiry would not add new material within the data set (Saunders *et. al.*, 2018). Data saturation was not reached in this study, and specifically for this chapter. The outcome of each trafficking case depends on its particular details and is often left to the interpretation of a court (Southwell *et. al.*, 2018). Therefore, a useful method of analysis would be to find common trends or themes in responses provide by those who have regular contact with similar cases, and this does not necessarily require a large sample size. Boddy *et al*. (2017) report on the actions of an individual CEO, who possessed highly psychopathic traits, and was considered invaluable in providing rich data through a case study method. In that case, the conclusion was that certain types of psychopath frequently possess shared modus operandi (Boddy *et al*., 2017). It was therefore argued that an analysis of one CEO would be sufficient to inform how other individuals with similar positions and traits could behave. Applying this rationale, I believe that the chosen cases are valuable in providing more detailed insight into whether the MSA protects victims of human trafficking for sexual exploitation in practice.

Lawyer interviewees were asked to choose and discuss two client cases involving trafficking for the purposes of sexual exploitation: one before the introduction of the MSA and one after its implementation. They were not asked to choose cases covering any specific sections of the MSA; for example, I did not specify that they must cover victim support provisions or asylum processes. This meant that a wider variety of cases could be drawn on and general observations could be made about the workings of the MSA. Interviewees, being leaders in their fields, were keen to showcase their best work, giving mainly examples of cases where they had achieved a positive outcome for their clients. That said, the examples still demonstrate ongoing gaps in law and policy, echoing previous findings that lawyers think the legislation only fulfils some of its intended purposes, with much room for improvements.

This chapter addresses the protection and support of victims during three main stages: identification, protection as offenders and the status of victims as migrants. The chapter starts by focusing on the identification. It introduces forced marriage as an underexplored form of human trafficking (Sharp-Jeffs, 2016), showing the link this may have with sexual exploitation. The chapter then considers the practical use of the MSA's Section 45 defence in the courtroom, before it explores how trafficked women's asylum claims are handled.

8.2. Determination of victim status

Chapters 5, 6 and 7 explored how the MSA addresses the identification of trafficked victims, demonstrating a number of shortfalls. Three cases expand on this, showing little change in the practical identification of victims following the introduction of the MSA.

Interviewee 1 described a 2012 case where they acted for a female victim of human trafficking in their application for asylum. The case is a particularly clear example of the way in which prompt and correct identification has been, and continues to be, central to any protection and support they receive. The woman, in her early twenties, was trafficked into the UK by a man she believed to be her boyfriend, using a false visa. She was then forced into prostitution, with the help of another group of traffickers, and bound to them for at least two years prior to being identified as a victim. The debt bondage was achieved through inflated costs for facilitating their migration, as well as with *juju.* She was arrested and detained at a UK airport when attempting to leave the country using a false passport. She was taken into detention, kept in custody and eventually, referred to the Home Office as an illegal migrant.

Interviewee 1 noted the slow determination by the competent authority of their client's victim status. They expressed their frustration about the Home Office's role in deciding victims' trafficking statuses and the negative impact that this has on the provision of support. As noted at Chapter 5, the SCA is now the single authority tasked both with the identification of potential victims' status' and also their entitlement to the grant of discretionary leave to remain in the UK. As the SCA continues to be part of the Home Office, the concern raised by Interviewee 1 and those of earlier academics and policy makers, remain unaddressed.

> *The most worrying part of this case was that no safe accommodation was given to her at the early stages because she was kept in detention. During this time, she hadn't been recognised as a victim of human trafficking and it wasn't until one year later, after change of lawyers two times and numerous rounds of fresh evidence, that the*

> *Home Office finally accepted her account. This took over two years from the moment they were picked up by the police, and actually, it should never have been a decision for the Home Office to make* (Interviewee 1).

The woman was ultimately referred into the NRM and identified as a victim of human trafficking for the purposes of sexual exploitation. However, she received little to no support and was kept in detention for a considerable amount of time. This echoes concerns raised by policy makers at the time of drafting the MSA (Coaker, 2017) as well as those expressed by lawyers in Chapter 7. The victim's claim for asylum was eventually successful, at which point they acquired basic accommodation as well as living costs of £35 a week.

Interviewee 11 recounted a similar case from 2008. The victim was an eighteen year old woman trafficked from Africa into the UK for the purposes of prostitution. She, too, was debt bonded to her traffickers through extortionate accommodation costs: she was tormented on a daily basis and reminded of her increasing debt. One of the ways that the traffickers managed to keep her from escaping was by taking turns to rape and beat her. Eventually, she managed to escape with fake documentation, but was arrested at the border trying to leave the UK to get to another European country. Upon arrest, she was taken into custody and held in detention for possession of fake documentation. She was not questioned about why she was attempting to leave the UK, which as Interviewee 11 comments, is considered by most less favourable than entering the country.

> *Nobody bothered to ask her why she was trying to leave the United Kingdom rather than come in. It was only when she got into prison and she was sentenced to, I think 18 months' imprisonment that a probation officer started talking to her and found out the tale that is pretty horrific* (Interviewee 11).

This case was taken before the Court of Appeal, on the basis that the victim's conviction was unsafe and an abuse of process. The Court of Appeal applied the definition of trafficking set out in the Council of Europe Convention, concluding that the case before them was one involving a trafficked victim rather than a culprit. This case demonstrates a clear lack of awareness amongst a number of professionals tasked with the identification and protection of victims. The participant suggested that reaching a conclusion on the case had taken priority over victim protection, and this was a 'box ticking exercise'.

> *… and it demonstrated the lack of awareness among lawyers, judges, prison officers and everybody else, there was this phenomenon occurring right in front of our eyes and all anyone could think was this is an immigration related matter. No one had thought to consider whether there is anything fishy going on here. They just wanted to put a simple label on it: immigration offender - and be done with it* (Interviewee 11).

The next case, from Interviewee 7 took place in 2017 and involved a woman in her late twenties, also trafficked into the UK for the purposes of sexual exploitation. There was no actual sexual exploitation, but there was a threat of it, meaning that the definition of human trafficking should have been met (see Chapters 4 and 5). The victim and others in a similar position were intercepted as they were crossing borders on a boat. They were identified by the police during spot checks on vehicles that were on a ferry crossing into the UK. They were being trafficked into the country under fake nationalities and with fake identities. Interviewee 7 described their client as 'the world's worst actor' as she was unable to maintain any of the false details that she had been given by the traffickers to retell. The victim was charged with offences relating to the possession and use of forged documentation and sent to detention. There had been no appreciation at that stage, of the possibility that she had been trafficked and no NRM referral was made. Like other cases with similar outcomes, the victim was treated like a 'regular criminal', reflecting and reinforcing the dominant paradigm.

Interviewee 7 commented that taking an immigration law-enforcement approach interferes both with the process of identifying victims, as well as prosecuting the traffickers. They explained that treating victims as involved in criminality as opposed to prioritising their victim status, may result in valuable, key intelligence being lost: criminalising victims not only creates unreliable witnesses - as they are likely to provide inconsistent accounts as a result of a prolonged delays in their statements being taken - but it also contradicts the Home Office's own guidance.

> *We are criminalising them, it can be a hostile environment, even if they are cooperating, there are very few specially trained officers, there is the Kidnap and Trafficking Unit here in London and then up North as well. But it hasn't been a good experience for victims when they do cooperate. Sometimes the impact on their trafficking determination itself - there is a parallel police investigation. Because what happens then is that the NRM process becomes a criminal investigation when it shouldn't be and their guidance is explicit on that* (Interviewee 7).

An important aspect of this case was that during criminal proceedings against them, the victim was pregnant and therefore in a particularly vulnerable position. Interviewee 7 expressed their frustration about the lack of stable, suitable accommodation and support resulting from delayed identification, especially given their client's special circumstances.

> *There was a real issue about the possibility that they would be giving birth when they were incarcerated. They had been moved from detention centres to various prisons… They were put in various accommodations across the kind of prison estate and also thereafter, they went into a specific trafficking unit, but then they ended up being in mass accommodation after they got a negative conclusive grounds decision, which was awful actually. There were various levels of infestation.*

Eventually, the victim was referred into the NRM; however, this was at a late stage, when she had already spent months in prison. The reasonable grounds decision had initially been negative and so had the decision about their right of appeal. At the time of my interview with the participant, the case itself had been ongoing for two years; the individuals' victim status had recently been established, however they had not received the outcome of their asylum case, nor were they in receipt of any specific support. Instead, as Interviewee 7 explained, she had been taken in by a 'benevolent woman', someone they had met at a community group. The participant describes this as being 'just pure chance', expressing a concern that others are not so lucky, often being left to fend for themselves, following positive conclusive grounds decisions.

A comparison of the three cases does not suggest that there has been much advancement in the processes of identifying and supporting trafficking victims following the MSA. Frontline staff, as well as courts, tend to focus disproportionately on immigration law-enforcement, to the detriment of swift identification of victims and the provision of support. During the case discussions, participants were asked whether they believed the MSA had made any positive impact on the identification of victims: none thought that it had.

> *No… usually [due to] credibility. Their account is disbelieved because they lack corroborating evidence or there is inconsistency in their accounts… pretty similar to be honest. It seems to make no difference* (Interviewee 1).

> *The evidence I've seen paints a picture whereby there has kind of been a change in terminology but in terms of the extent to which that has given effect to a change in the way that cases are managed in the NRM and survivors of trafficking are being managed as a group of people with specific needs, it doesn't seem to have changed an enormous amount* (Interviewee 7).

These responses chime with those provided by participants at Chapter 6. They also add to lawyers' previously raised concerns regarding the dangers associated with a lack of definitional clarity, a lack of sufficient training for front-line professionals, including the police, and the on-going lack of short and long-term support. Interviewees attributed the latter concern to the lack of a formal statutory provision for victim support in the MSA, a sentiment echoed by Interviewee 7 in the above case.

> *I think in relation to formally coming into statute what victim's rights are... obviously, there has been a recommendation for having that, because at the moment, the Act is silent on what the victim's rights and entitlements are. So I think potentially, that was again highlighted as an issue and I am hoping that that will change* (Interviewee 12).

As explained at Chapter 5, whilst the MSA makes specific reference to victim protection under Part 5, it does not place victim support on a statutory basis. Instead, in accordance with Section 49, the Government has issued guidance, setting out best practices for victim identification and support. The comments provided in this section, as well as the cases retold by lawyer participants, suggest that by failing to place provisions for victim support on a statutory basis, the MSA does little to assist in the identification of victims, most of whom are initially treated as culprits, often being held in detention centres or even prison for a number of months, pending an outcome of their case. Despite its apparent attempt at addressing victims' needs through guidance, the Act ultimately falls short of its obligation under Section 12 (1) of ECAT to include statutory provisions which assist in victims' 'physical, psychological and social recovery' (see Table 5.1).

8.3. Forced marriage, rape and sexual exploitation

The next case further demonstrates the importance of correctly identifying vulnerable women as victims of human trafficking. It also furthers the argument that cases of sexual exploitation are often overlooked as they are more difficult to determine (see Chapter 7).

This case began in 2013 and was ongoing at the time of the interview in 2019. It involved the trafficking of a woman into the UK for the purposes of forced marriage, but it also includes elements of sexual exploitation. This was a woman of Pakistani origin in her late twenties, who was sent to the UK by her father and brother, supposedly to attend college and then university. Upon arrival, her brother attempted to arrange her marriage to his friend, in exchange for money. When she refused, the man with whom her family had made the agreement, came to her home on a number of occasions and raped her. He justified his actions, arguing it was not rape because he was going to marry her and her father and brother had arranged this. She managed to escape and reported her ordeal to the police. The police did not consider the possibility that she could be a victim of human trafficking; instead, a restraining order was granted by the family courts against the victim's brother. She was then provided with initial, short-term support by a number of local organisations.

She made an asylum claim on the basis that if she were returned to her country of origin, she would face violence at the hands of her own family, to whom she had brought shame; this claim was rejected. After two further failed attempts, a fresh claim was put through by Interviewee 8, who asked for a decision to be made on the basis of their client's clear trafficked victim status. Negative decisions were made on two occasions and the matter was ongoing at the time of the research interview.

Jobe (2008: 7) considers the word trafficker to be 'an inadequate word to describe the myriad of people involved in the sexual trafficking of women'. While, for example, one person in the chain may take the traditional role of the smuggler, and another the pimp at the end of the journey, from the recruitment stage, through to transport and eventual exploitation of trafficked women, there may be a large number of actors, each with varying levels of involvement. According to Choi-Fitzpatrick (2017), a less recognised category are family members in a position of control, who justify their exploitation by regarding their actions as protective or for the victim's own good. The above example demonstrates this well. It is unclear whether the family members knew of the rape that would follow, however, they did deceive their daughter/sister into an arrangement, that would result in forced marriage and subsequently to sexual exploitation in the worst possible way (see 'deceptive recruitment' at Figure 2.1). Interviewee 8 suggested that authorities, including the police continue to have little knowledge about this form of trafficking. They suggested that the victim's suffering could have been kept to a minimum had there been more awareness of this type of exploitation and action taken sooner.

> *She did not [receive any support in terms of living arrangements] because they did not believe her for so many years. By the time they started to, so when they made a reasonable grounds decision, she had support from organisations in [UK city] on a voluntary basis, so by that point she was allowed to have her reasonable grounds support. She didn't need it because her friend had taken her in, so she didn't want to have to start all over again. She is obviously entitled to more support now, but again she's living with a friend. And when you've been in that situation since 2013 without support, and then you become dependent on friends and you're told that you can relocate to a new area to be housed, it doesn't sound very attractive… and it was because of the faults in the identification process that it wasn't picked up sooner. I mean, this case is a really good example of how forced marriage is really misunderstood* (Interviewee 8, lawyer).

Interviewee 8 suggested that although this case commenced prior to 2015, there is still a misunderstanding as to what constitutes human trafficking, especially where the nature of the exploitation is not completely apparent. They had been involved with further cases involving forced marriage in the UK since, all of which either involved rape or coerced marital sex.

> *I've had three cases recently where the Home Office have assumed that forced marriage does not amount to trafficking and quite vigorously so, and it doesn't amount to, sexual exploitation - being slavery or trafficking. And the representatives for the Home Office were just not able to understand how it could amount to it. I mean the judges have been against them in every single instance. I think, that just highlights how nothing has really changed in terms of their understanding* (Interviewee 8, lawyer).

In its latest Statutory Guidance on the MSA (Home Office, 2020b), the Home Office classified forced marriage, alongside sham marriages and illegal adoption as 'unclear cases'. It suggests that: 'in less clear cases, the Competent Authority must consider the information in this section of the guidance and use their judgement in order to reach a decision' (Home Office, 2020b: 21). Whilst the guidance is a good starting point, comments from lawyer participants suggest that, in practice, there is still little awareness around these specific forms of exploitation. The comments also chime with earlier discussions that conflation of human trafficking with modern slavery increases the threshold at which individuals can be considered 'slaves' (see Chapter 5). Interviewee 8 further explained that two out of the three post MSA cases they have been involved with, involved internal trafficking, yet the court

took the view, in each case, that trafficking could not be established, as the women had not forcefully been removed from any country.

> *One family promises their daughter to another, sometimes years and years in advance. It's kind of like a set deal, an under the table, gentleman's handshake* (Interviewee 8, lawyer).

As the majority of the UK's currently identified trafficking cases take place internally (Home Office, 2020c: 1 and 4), cases such as this are troubling, as they suggest many victims remain unidentified and therefore unsupported. The dangers associated with misconceptions around both forced marriage and internal trafficking are made clear by Interviewee 8. This confirms the previous observation (see Chapters 5, 6 and 7) that the focus on travel within the MSA's definition of human trafficking is problematic. It also chimes with academic literature (see Chapter 2), which suggests that: 'an immigration-led approach to trafficking de-emphasises internal trafficking…increase[ing] migrants' vulnerability and facilitate[s] abuse' (Cherti, Pennington and Galos, 2012: 14).

8.4. Non-criminalisation of trafficked victims

As examined in previous chapters, trafficked women are often forced into situations where they have little or no choice but to commit an offence. This section adds to this topic by considering two case examples from before and after the introduction of the MSA. Both cases demonstrate the importance of agency when a crime is committed, and the way in which courts interpret this agency in practice. They reveal an ongoing lack of understanding surrounding the victim/trafficker nexus: women may be arrested in connection with what is considered to be low-ranking activities, such as the possession of false documentation, but they can also become involved with major operations, as co-offenders, alongside men (Cusveller and Kleemans, 2018). Trafficked women may also become involved in the trafficking of other women, a status that is 'difficult to establish legally' (Interviewee 6). The latter, more serious offences, in particular, tend to fall within the MSA's Schedule 4 exclusions to the Section 45 defence, an issue previously raised by participants in Chapter 7.

The first case took place in 2014, summarised by Interviewee 6, a defence lawyer, acting for the suspected trafficking victim as: 'a case lacking any sort of understanding about what trafficking can really entail'. A group of women who had been trafficked into the UK by an Eastern European organised crime group. The women were subjected to the most extreme forms of sexual abuse en route and were then forced into prostitution: they were threatened by

the traffickers and feared for both their own lives and those of their families. The client was a woman, who, according to Interviewee 6 had gone up the chain of command in order to survive. Following a report being filed by one of the victims, the police had raided the particular building, which was being used as a brothel. A large number of women were discovered on site, all of whom, when interviewed, claimed to have been held against their will. At trial, a substantial point being argued back and forth was whether the women should be considered voluntarily engaging in prostitution or whether they had been trafficked and exploited.

> *You end up getting bogged down on whether or not they were voluntary sex workers rather than thinking: what is this really about? You know? You should be deciding on how to help the women who are being put through all of this pain whilst also deciding on who, really, is the culprit here* (Interviewee 6, lawyer).

The defendant was arrested as she had been sending incriminating, supportive text messages to the crime gang leaders. She claimed to have been put under pressure by the gang members and that she herself had been beaten and raped: she claimed that she had pretended to side with the members as she feared her life. The Court did not accept her account and commented that she could simply have walked away from the operation or informed the authorities.

> *… so she was sort of on their side and you just couldn't get people to understand that well she'd have to in order to survive - she would have to look as though she was on their side otherwise she'd be in a life threatening position* (Interviewee 6).

The defendant was found guilty of human trafficking for the purposes of sexual exploitation and was sentenced to 10 years in prison. On appeal, an application was filed under Section 45 of the MSA, however, this was rejected on the grounds that the defendant could not possibly have been a victim, if they had 'voluntarily contributed to the operation' (Interviewee 6). The participant expressed their frustration with this outcome and of similar cases they had worked on. They suggested that the definition of human trafficking continues to be misinterpreted in criminal cases, with those in positions of power, including the SCA and courts, adopting their own moral standards on who should qualify for state protection against criminalisation.

> *The more you read about the efforts to tackle human trafficking, there is almost a choice as to who you're going to see as a victim… you know, that somehow we employ our own moral standards rather than the definition under the Trafficking*

> *Protocol as some sort of, I suppose, I would call it colloquial moral standard as to whether this person from another jurisdiction is really a victim. And you can bet your life if they were somebody else's daughter from one of the Home Counties, it would be a different story* (Interviewee 6).

This case demonstrates a disconnect between the supposed role of the court as the authority tasked with delivering legal justice, and the way in which legal professionals view this role. The suggestion that *colloquial moral standards* continue to be applied by courts, resonates with earlier academic discourse that modern anti-trafficking strategies share common traits with the 'purity movements' of the early 19th century, as well as continued patriarchal moral authority (see Chapters 2 and 4). The application of individual moral standards therefore appears to undermine law and policy. The case also suggests that courts continue to make incorrect assumptions about the levels of agency exercised by victims at the point where they themselves become implicated in trafficking. The phrase *voluntarily contributed* suggests that, by cooperating with traffickers, this woman exercised their full autonomy in making this decision, supposedly voluntarily crossing a legal line from victim to perpetrator. This is a significant hindrance to victim protection, as it is at this point that the woman's criminal activity negates their own suffering as a victim and their transition into a criminal offender becomes more relevant to the public's interest: their simultaneous victim status is thus disregarded.

The next case took place in 2017 and was heard in the same year. The case involved the prosecution of a woman, in her thirties, originally from West Africa. The defendant was arrested in connection with the possession and distribution of over 5 kilograms of cocaine and was sentenced to 18 months in prison. The defendant had originally plead guilty to the offence, receiving a lower sentence than she would have otherwise. There had, however, been no contemplation of the possibility that she could be a trafficked victim. Whilst serving her time in prison, with the help of Interviewee 12, who was working on this case, on a pro bono basis, the defendant sought to vacate her plea, instead claiming that she was a victim of human trafficking at the time of the offence. The Court of Appeal allowed her appeal, permitting fresh evidence to be presented in this matter. They considered not doing so to be in contravention of the defendant's rights under Section 45 of the MSA. It was unclear to the prosecution, whether the defendant had even been aware of the potential availability of a defence under Section 45. It was therefore concluded that the defendant had not made her plea on a sufficiently informed basis.

The new evidence showed that the victim had in fact, been trafficked to the UK, two years prior, and forced into prostitution. She had worked for many hours in two different brothels and had still been unable to repay her increasing debt to her traffickers. She had then been told that her debt could be repaid more quickly, if she agreed to sell drugs instead, a deal she had also been forced to take in order not to be killed. Eventually, the victim's conviction was quashed. Whilst a positive outcome, the reality remains that she had already spent many months in prison and other detention centres. During this time, no substantial support was provided to the victim, save for their basic needs being met.

One participant explained that cases are often dropped before the defence can be relied upon, rendering it difficult to assess the impact of the Section 45 defence.

> *We were still getting prosecutions dropped prior to having a defence and rely on the non-prosecution provisions, so I don't think you can gauge, I mean, I don't think you can answer that. We were getting cases dropped prior to the Act but that doesn't change the fact that victims are being held in custody until a decision is made* (Interviewee 6, lawyer).

Interviewee 12 commented on the need to give victims the confidence to disclose their trafficked statuses, echoing earlier commentary by participants in both interviews and surveys.

> *If you treat someone sympathetically as witnesses instead of a defendant, you know, once people start to see: well actually that person in my position was treated more, let's say more kindly, or treated as a witness rather than a suspect, then you're going to encourage people to complain rather than taking the fall themselves.*

These observations suggest that whilst the MSA now includes special measures for the protection of witnesses in criminal trials, the scope of the defence, if used, remains limited in practice. Training for frontline professionals was once again a theme running through responses on this section of interviews: numerous participants commented that the government should ensure that regular, compulsory training is available to all frontline professionals dealing with potentially trafficked victims. These include the police, Home Office staff, lawyers and judges, to ensure that there is a clear understanding of the trafficking defence. This suggestion is in line with the government's own findings and recommendation in its 2019 Independent Review of the MSA.

> *All of our expert advisors reported limited understanding of modern slavery among law-enforcement and criminal justice practitioners, especially on the statutory defence. We recommend the government should work closely with relevant organisations to ensure there is a mandatory training on modern slavery for all participants in the criminal justice system and also ensure consistent and clear guidance on the statutory defence (HM Government, 2019b:18)*

8.5. Asylum claims

As noted at Chapter 7, one of the significant gaps within the MSA is that it does not provide a separate category of leave to remain for trafficked victims. This means that, even where an individual's victim status has been established through the NRM, and there is an acknowledgement that the individual is vulnerable to further exploitation, normal immigration rules apply to the individual. There are, however, a limited number of grounds for the grant of discretionary leave to remain.

The next case took place before 2015 (the participant could not recall the exact year) and involved the trafficking of a young woman, in her early twenties, from Africa to the UK. Her exploitation had started in her country of origin, where she worked for an older woman in their home as a domestic cleaner for no pay, but instead with the promise that she would be brought with her to the UK and given better opportunities, such as an education. Arranged by the older woman for whom she worked, she was then smuggled into the UK, through a number of countries. Upon arrival in the UK, she was forced into prostitution in order to repay the debt she had supposedly built up on her journey. This included fees for food, smuggling and healthcare. She was sexually exploited for 12 months before she managed to escape and report her ordeal to the police.

This woman's status as a victim of human trafficking was established relatively quickly. She was considered a vulnerable adult, especially as some of her exploitation had taken place when she was legally a child. She was therefore put under the care of Social Services and provided with housing and basic needs, such as a small weekly allowance for food and clothes. She eventually claimed asylum, but her claim was refused in the first instance on the grounds of a lack of credibility. Her appeal was also dismissed, mainly on the basis that even if her story were true, there would be no risk to her to return to her country of origin. Interviewee 4 suggested that since the case took place a number of years ago 'the need for a risk of re-trafficking as general evidence was less known'. The judge in the First Tier

Tribunal refused the victim permission to appeal. Subsequently Interviewee 4 made an application to the International Court of Human Rights for breaches of Article 4 and Article 8. Eventually, 'there was a friendly settlement' whereby the victim was granted a three years discretionary leave to remain. At this point, the victim had already been in the UK for almost four years and they had been receiving limited support during this time. Interviewee 4 was, however, displeased with the fact that the client was not granted asylum.

> *It was pretty shocking that she didn't get asylum. She was super vulnerable…and there was a lot of you know, we had country expert evidence, we had evidence from the Poppy Project*[6]*, we had a lot of good evidence.*

Interviewee 4 did not believe that the situation had altered for the better in any substantial way following the introduction of the MSA. However, they compared this case to one decided in 2018, which shows more promise. This case involved an individual, originally from North Africa, who was facing removal from the UK, under the Dublin 3 Regulation. She had done domestic work in her country of origin in exchange for food and a room in the house. She was brought by that family to another European country, where she was expected to continue working in similar circumstances. According to the participant, she 'didn't know any better, she wasn't even aware that these people are committing crimes of domestic servitude' (Interviewee 4, lawyer). She managed to escape and lived on the streets for over two months. She then sought help from a man, who she believed to be a smuggler, in order to enter the UK. She was trafficked into the UK and forced into prostitution in order to pay off her debts.

She too managed to escape, immediately claiming asylum on the basis of non-trafficking related threats to her life if she were to return to her country of origin. It was only when she was facing removal directions that she identified herself as a victim of human trafficking. Interviewee 4, a barrister acting on the matter, consulted the acting solicitors and an application was submitted for judicial review of the case. This was to ensure that proceedings for removal could be stopped and the victim's case could be considered under the NRM. The client consented to being referred to the NRM, at which point she was released from detention, pending the outcome of her case. She received a positive conclusive grounds decision in relation to human trafficking within 4 to 5 weeks of the application.

Interviewee 8 described a similar case, which took place after 2015. The case involved a

[6] An NGO that provided safe accommodation and support for victims of trafficking for sexual exploitation.

south Asian transgendered woman who was trafficked into the UK on a promise of legitimate, paid work. She was then confronted with extensive debts and was forced into prostitution to repay them. She was discovered and arrested during a raid on the house where she was being sexually exploited and where weapons were discovered. Evidence could not link the victim to any crimes, so she was released without charge. There was no investigation into the possibility of human trafficking, meaning that she was left to fend for herself. At this point, no financial or housing support was offered to her, as her victim status was not established. The only support she received was that the police signposted her to organisations that work with those in need of financial support. However, upon release, the victim was once again picked up by her traffickers and entered into a further 'cycle of abuse' (Jovanovic, 2017: 65). Some months later, she was arrested by the police during another raid on this house, but this time she was referred into the NRM and her victim status was established.

The woman simultaneously made a claim for asylum, however, this was refused on the basis that upon return to her country of origin, she would not be in any danger and that she could relocate internally. This finding of the Court resembles the earlier sentiment of Interviewee 4 that the risk of re-trafficking is rarely carefully considered. This is surprising since this victim had already been re-trafficked internally, a common occurrence amongst trafficked victims (see Chapter 5). She successfully challenged that decision on appeal and according to the participant, now has refugee status.

Interviewees thought that the asylum process had not improved since the MSA. Referring to different cases, they noted that the law continues to create a hostile environment for asylum seekers, including trafficked victims, who have legitimate cause to believe that they would be in danger if they return to their country of origin. They supported the contention that an immigration-led narrative, whereby responses to trafficking take place through the lens of border control, facilitates dangerous irregular migration, contributing to increased trafficking (see Chapter 2).

> *… there is a massive amount of pressure which almost anybody who is conscious of the news will be aware of on the Home Department and the hostile environment that's been created for asylum seekers, it's very pernicious and I think it's resulting in a lot of despondency within the Home Office and the quality of the decision making that is coming out is consistently poor and the process is extremely bureaucratic* (Interviewee 7).

Participants stressed the importance of keeping decisions for asylum claims and those made under the NRM establishing an individuals' victim status, entirely and functionally separate. This again, echoes earlier concerns raised both by academics and policy makers during the MSA's drafting process (see Chapter 5).

8.6. Conclusion

This chapter has presented the practice-based knowledge of lawyers in relation to cases before and after the introduction of the MSA. The case examples demonstrate a number of ongoing concerns with both the MSA itself and the policy surrounding it. Overall, they show little positive change in the way that victims are treated within the legal framework and in the support they receive following the establishment of their victim status. The findings challenge the proposition that the MSA takes a victim-centred approach to human trafficking, rather they suggest that any changes to victim support and protection resulting from the development of the MSA are marginal and insubstantial (see also Chapter 7): that the positive outcomes in cases in this chapter were due not to the legislation, but the determination of victims and their lawyers. These findings strongly point towards provisions relating to victim support needing to be placed on a statutory footing. As it stands, the MSA falls short of obligations under international law to assist in victims' physical, psychological and social recovery.

Key themes that emerged from the case example data are summarised below.

- Victims' accounts are still often disbelieved due to inconsistencies, and mitigating circumstances continue to be ignored by courts. Knowledge surrounding the risk of re-trafficking as general evidence in asylum claims, as well as claims under the NRM, remains limited.
- Whilst the outcomes of the case examples discussed with participants appear positive, six out of the nine case examples involve the arrest and detainment of trafficked victims, in the first instance. The examples demonstrate that frontline staff, as well as courts, continue to focus disproportionately on criminal and immigration law-enforcement, doing so to the detriment of victim support. Victims often spend months in prison or detention centres before their victim status is established, and they are entitled to any kind of support and protection.
- The MSA's provisions for long and short-term support remain inadequate. Whilst guidance is available, setting out best practices for victim identification and support,

this remains inadequate during and after a victim's status has been established. Respondents attribute this to the fact that the MSA does not place victim support on a statutory basis.

- Women's exploitation is often difficult to prove, especially where cases are complex, or where they involve multiple forms of exploitation. Forced and sham marriages remain misunderstood as contexts for human trafficking and sexual exploitation.
- The threshold for a Section 45 defence remains too high and decisions by courts continue to contain moralistic elements. There is a misunderstanding about levels of agency amongst trafficked women who commit crimes, especially crimes that are excluded under Schedule 4 of the MSA. Women are often assumed to have made voluntary, conscious decisions to become involved in the trafficking of other women; however, participants suggest that substantial underlying factors, which push women into this criminal activity, are underexplored in the courtroom.
- The asylum process has not improved since the MSA, in part due to the lack of a category of leave to remain for trafficked victims and in part due to continued focus on curbing illegal migration, to the detriment of victim protection.
- There is a poor level of understanding among frontline professionals, both in relation to the contents of the MSA, but also in relation to how policy is interpreted and applied during the decision-making processes. The cases interviewees chose, mostly had an eventual positive outcome, however one is left wondering how many trafficked victims fall through the net, since they do not have an expert and committed legal advocate. Indeed, all of the case examples discussed involved multiple appeals to establish the women's victim statuses and/or their entitlement for leave to remain in the UK. During this time, the victims received little to no support and protection.

Chapter 9 – Findings, reflections, conclusions and recommendations

9.1. Introduction

The main objective of this thesis was to explore the Modern Slavery Act 2015, in terms of its contribution to the protection and support of women trafficked for the purposes of sexual exploitation. It also sought to establish whether the MSA meets international normative standards for victim protection. Both empirical and critical legal analyses have been used to answer the research question.

The thesis focuses on three significant stages where protection and support are critical: identification as a victim; protection from prosecution; and the asylum and leave to remain processes. The thesis places women at the centre of the trafficking debate and brings focus back to their sexual exploitation, following a sharp decline in such scholarly research (Bales, Hedwards and Silverman, 2019). This is significant, as women continue to represent a group particularly vulnerable to human trafficking (see Chapters 1 and 2).

The initial chapters to this thesis outlined its context, mapping the way in which approaches to trafficking in the UK have been influenced by wider, international frameworks. The thesis considered the gradual development of the definition of human trafficking, demonstrating a progressive change in international law. It then critically analysed the specific victim-centred provisions of the MSA, noting its subtle, but significant divergences from the Palermo Protocol's universally accepted definition of human trafficking. I argue that these divergences have the potential to negatively impact the identification and protection of trafficked victims. The possible consequences of the linguistic shift from human trafficking to modern slavery is a theme revisited in the empirical chapters of the thesis.

Chapter 3 detailed the theoretical underpinnings and methodology used in the thesis: the original contribution includes a critical legal analysis of the MSA within the context of the wider international legal and policy framework, a survey and in-depth interviews with lawyers and policy makers. The findings from the empirical data are presented at Chapters 6, 7 and 8 and they add to the knowledge base by presenting original perspectives on the workings of the law. Triangulation was used to link and compare results across the critical legal analyses and the empirical data, to answer the research question. Although the number of responses to both surveys and interviews were relatively small, the experts' varying levels and areas of experience within the field of human trafficking generated rich data. Their practice based knowledge, together with the critical legal analysis of the MSA, demonstrated

a limited victim focus in the legislation, identifying crucial ways in which the UK's current national law falls short on its obligations in terms of victim protection, failing to meet international normative standards.

This concluding chapter summarises and reflects on the main findings. It answers the question of whether the UK's national legal framework is equipped to protect women who are trafficked for the purposes of sexual exploitation and whether the MSA meets international normative standards. It suggests, ultimately, that current anti-trafficking law and policy is located within a desire to curb migration within a criminal justice framing: as a consequence, vulnerable migrants are criminalised and victim protection becomes an afterthought, despite the UK claiming to have taken a victim-centred approach in developing the legislation. Bales (2012:14) suggested that victims of modern forms of trafficking and slavery are often "used" as 'disposable' commodities (see Chapter 2). This thesis suggests that this applies in the case of the MSA, whereby the legal system often disposes of victims once it has used them in a criminal justice setting. Whilst Part 5 of the MSA does, in theory, cater to the needs of victims, the thesis has casts a critical eye over the level of protection and support it practically provides to victims. As Choi-Fitzpatrick (2015) has identified, a truly victim-centred approach must look beyond the provisions for identification, administration of short-term support and flawed rehabilitation strategies: it must place prompt identification and strategies for sustainable long-term support at the centre.

The chapter summarises the original contribution to knowledge in the study and the implications of the findings for policy and legal practice. It concludes with recommendations for policy change and further research.

9.2. Reflections on the key findings

The UK government developed the MSA in order to address major weaknesses in its then existing approach to human trafficking and protecting victims. In developing the legislation, the coalition government took into consideration much of what was suggested by policy makers, including members of parliament and independent think tanks such as the CSJ. The thesis has, however, demonstrated that a number of significant recommendations, which would potentially have advanced victim protection, were rejected at the drafting and revision stages. Although there was considerable resistance from activists and lobbying groups in relation to specific provisions of the Act - including the non-statutory nature of the NRM, the title of the Act including the words 'modern slavery' and other victim specific suggestions -

the government was mostly successful in keeping the legislation in line with its own agenda: to claim being a world leader in victim protection, whilst making limited practical change.

The government set out to create legislation to address the weaknesses in the then legal framework, including an inability to sufficiently support and protect trafficked victims. Many victims, especially migrants, were criminalised and therefore imprisoned; they were deported back to their countries of origin, or through a lack of sufficient protective mechanisms, placed back into the hands of their traffickers, only to be re-exploited. Literature suggests that this resulted, mainly, from an apparent culture of disbelief, as well as the flawed nature of the NRM. The MSA increased the scope of the NRM, ensuring that it applied to a range of forms of human exploitation, and not just human trafficking, it also created a statutory defence for victims who commit an offence as a result of their victimisation/exploitation, and it introduced provisions aimed at compensating victims for their suffering. This thesis has, however, demonstrated shortfalls in each of these supposed advancements. It has shown that victims are still being criminalised and/or left without support, thus being further exposed to being re-exploited. There remains a culture of disbelief amongst front line professionals, including the police and judges, and the NRM still falls short on protective measures.

The study's findings can be summarised under four main claims. First, whilst the victim-specific provisions of the MSA are welcome, the legislation contains significant gaps in the identification of female victims trafficked for the purposes of sexual exploitation and the provision of adequate remedies, especially long-term support. Second, the MSA places inordinate emphasis on criminal justice and the prosecution of traffickers, arguably, reducing victims to disposable commodities, or mere tools in advancing an anti-immigration agenda. Accompanying this claim, is the demonstration, through original empirical data, that, despite the Section 45 defence, most victims continue, at least in the first instance, to be treated as criminals or migration offenders, before they are identified (if ever) as victims of human trafficking. Thirdly, and in line with the former claim, there remains an emphasis on curbing illegal migration rather than identifying and protecting victims, one of the major concerns raised by policy makers, but not addressed, during the drafting of the MSA (see Chapter 5). Finally, the MSA deviates in subtle, but significant ways from international victim-focused provisions, the implication of which is a reduction in the scope of support available to victims. These claims are explored further below.

9.2.1. The gendered legal paradigm

A critical review of existing literature demonstrates that the trafficking of women for the purposes of sexual exploitation continues, not only due to the disproportionately high profit to costs ratio of the crime, but also because modern, patriarchal societies have allowed men's demand for sex to become normalised, thus fueling the business of gendered human trafficking (see, for example, Matthews, 2018). As noted in the introductory chapter, academic research has slowly shifted towards focusing on trafficking for the purposes of labour exploitation. Even when research is carried out in connection to sexual exploitation, it tends to focus on survivors' experiences, with limited attention given to the practice-based knowledge of legal and policy actors. This thesis has gone a substantial way in filling this gap.

Previous researchers have suggested that trafficking for the purposes of labour exploitation is more difficult to establish than sexual exploitation; they attribute this to the conflation of human trafficking with smuggling as they share many significant characteristics (see, for example, McGough, 2013; Deshpande and Nour, 2013). This research does not support this claim, since the lawyer participants had less recent experiences of dealing with cases involving sexual exploitation, whilst both they and policy makers were keen to discuss their thoughts on the MSA's application to labour exploitation. Participants attributed this to the complicated nature of the prostitution/trafficking nexus, suggesting that the identification of sexual exploitation is pursued less by law enforcement, who are more likely to arrest traffickers in connection with women's labour exploitation than their sexual exploitation. This means that the possibility of a woman having been trafficked for sexual exploitation is often an afterthought to their lack of a right to work in the UK, making them immigration offenders, before they can be considered a victim. We simply do not know how many women are never identified and supported at all for this reason.

In the context of the concerns of this study, the MSA now offers a statutory definition of sexual exploitation, seemingly going further than both the Palermo Protocol and the previous UK legal framework. This definition, however, remains problematic, as it has proven difficult to interpret in practice: due, in part, to the fact that the definition bounces back and forth between the MSA and the SOA, and additionally to the fact that often, judges still expect exploitation to have actually taken place in order for trafficking to be established. This is not in line with either the Palermo Protocol or the SOA, both of which clearly identify intent as

being sufficient for the purposes of exploitation. As discussed in Chapter 5, in its 2019 review of the MSA, when questioned about its sufficiency, the government concluded that the definition of exploitation and in turn sexual exploitation within the Act, are sufficiently flexible to cover emerging exploitative behaviours. What it did not do, is address the concerns raised by lawyers in this thesis: that future guidance should make clear the position in relation to an intention to exploit, confirming to judges that they must interpret the Act in line with the above-mentioned principle. This needs to be kept under review since further guidance may be required.

It appears, therefore, that the legislative ambition to limit the 'confusing' nature of the various trafficking offences has not been accomplished, a shortfall that places victims in the same dangers that the MSA had supposedly sought to address. The original data in this thesis showed that policy makers are less likely than lawyers to see the explicit reduction of focus on sex trafficking as being detrimental to victim protection. This is worrying as it is policy makers who lobbied around the MSA or contributed towards it, and it is they who can effect future change. The thesis shows that, in practice, identification and protection of women trafficked for the purposes of sexual exploitation remains limited, with sexual exploitation most often being recognised as a result of other forms of exploitation that victims have been subjected to (see Chapter 8). The implication of this is that many women go undetected as focus is not placed on this type of exploitation, or sexual exploitation is not established due to language and its problematic definition within the Act.

9.2.2. The detrimental effect of a criminal and immigration led focus

The thesis demonstrated that a conservative political agenda sat within the MSA from the very early stages of its drafting process and was evident during parliamentary debates: policy maker interviewees acknowledged the Bill's immigration focus to the detriment of victim protection. This is a significant observation as ethical outlooks often direct political debates, which in the case of the MSA, has led to the development of an Act that still prioritises reduced net migration over victim support. This claim is grounded in an examination of the wider political and legal context within which the MSA developed. It suggests that there was little political will to develop legislation that would structurally change previously flawed approaches, including the immigration or criminal justice led framing, in any substantial way.

Echoing sentiments of earlier scholars, the thesis argues that whilst the incorporation of restrictive immigration policies may appear successful in closing literal borders through

which women may be trafficked into the UK, in reality, they serve to expose vulnerable individuals to trafficking and exploitation, by leaving them with little choice but to use illegal routes (See, also, Tholen, 2010; Pope-Weidemann, 2017). Ultimately, this thesis suggests that the MSA was a conscious process of problem-structuring, rather than problem-solving: it fed into the creation of a hostile environment for immigrants, whilst providing little support and protection to those who turn out to be victims of human trafficking. To this end, it is suggested that the multifaceted nature of sex trafficking invites a much broader approach than one located within immigration control.

In principle, the new measures in the MSA - such as broadening the scope of the NRM, creating a statutory defence for victims who are involved in criminal offences linked to their exploitation and special measures for vulnerable individuals in the courtroom should increase the protections and assistance available to victims with no legal immigration status. However, in practice, the hostile environment that the UK government has created for 'illegal' migrants means that many victims continue to opt out of entering the NRM. They fear the involvement of immigration services, being relocated away from their established support networks, and the long delays in the NRM decisions, during which time they are unable to work all play a part in such decisions. As a direct consequence many victims continue to go unidentified and unsupported, or they often end up with criminal convictions, are imprisoned, become destitute and or deported. It is this reality which led participants in this study to conclude that there had been little or no positive change to victim protection through the provisions of the MSA.

Lawyer participants provided case examples which they had been involved in, most of which showed clear gaps in either the law itself, or in knowledge of professionals, including judges and lawyers, in how the victim status of individuals should be established. All the cases discussed shared a common theme: even when a positive outcome is achieved for a victim, and they are entitled to eventual support under the MSA, their accounts had invariably been disbelieved in the first instance. This means that most cases involve multiple appeals to establish a woman's victim status and/or their right to remain in the UK. The thesis showed that, during this time, most received little to no support and protection.

Another theme to emerge, both from the critical analysis of the MSA and the empirical data, was concern that the non-prosecution provisions, an obligation aimed at ensuring that states do not prosecute victims of human trafficking, remain insufficient. Participants noted slow determination of cases and a lack of understanding amongst decision makers regarding the

trafficker/victim nexus. In every case example explored in this thesis, victims of trafficking were initially arrested for committing a crime, whilst trying to escape exploitation. Delays in determining victim status renders any protection available under Section 45 of the MSA as conjectural, placing the UK in contravention of its obligation under ECAT and the EU Trafficking Directive. Whilst the MSA is the first legislation to place this provision on a statutory footing, the scope of protection it provides remains limited, not least due to the fact that far too many crimes which may be associated with trafficking are excluded from this protection (See Chapters 5 and 7).

Part 5 of the MSA appears, on paper, to have gone some way in ensuring the protections that should be available to trafficked victims. As previously suggested, the Act, however conflates its anti-trafficking measures with measures for border control. One of the main shortcomings of policy in this regard, is the SCA, and ultimately, the Home Office's role as both the authority in charge of victim identification and the authority tasked with deciding whether a victim should be granted discretionary leave to remain in the UK. This remained a cause for concern amongst both lawyers and policy makers, another issue which was raised, but not addressed, during the drafting of the legislation.

9.2.3. Divergence from international law

The thesis demonstrates that the definition of human trafficking in the MSA breaks the shared international frameworks that the Palermo Protocol established. One of the main deviations is that the MSA has, perhaps unintentionally, encoded the need for travel in the definition of human trafficking. Both lawyers and policy makers remained concerned that the definition of human trafficking is now much narrower than that intended by policy advocates at the drafting stage and that contained within international instruments. Lawyers provided examples of cases which showed that, in practice, it is still common for a woman's victim status to be denied, even with clear evidence of internal trafficking, as courts take the view that trafficking could not be established if the individual had not moved from a country. Many victims, therefore, remain unidentified and unsupported. The empirical findings chime with earlier academic literature (see Chapter 2), which suggests that an immigration-led approach within the MSA de-emphasised internal trafficking.

The empirical chapters also confirmed that the conflation of the concepts of slavery and human trafficking not only creates definitional confusion, effectively raising the threshold of what constitutes trafficking, but also implies an emotive image of the most extreme form of

human rights violations. This takes focus away from acts that would otherwise be captured under the Palermo Protocol's definition of human trafficking, restricting victim identification, making any remedies and protections available under the MSA merely hypothetical.

In addition to the title of the legislation using the concept of modern slavery, a term not defined in international law, an analysis of the specific provisions suggests that the legislation does not comply with a number of victim-focused provisions in international conventions. Access to compensation, for example, remains limited: this places the UK in contravention of its obligations under Article 15 of the Council of Europe Convention, as well as Article 17 of the 2011 EU Directive. Whilst compensation alone, as a form of short-term solution, cannot address the wider needs of survivors of trafficking, especially in relation to their long-term psychological wellbeing, there is a clear need for a prompt review of the law and policy in this regard. In addition, participants suggested that an absence of a bespoke tort of human trafficking, something that policy makers lobbied for during the drafting process, is further proof that the provisions in the MSA are strong on intent, but weak in delivery.

In line with the requirements under the Council of Europe Convention, the UK developed an NRM to identify and protect trafficked victims. Despite a number of reforms, and calls for others, the NRM remains flawed in its ability to provide victim protection. One of the main concerns this thesis has identified is the slow determination of an individual's victim status. It also notes a lack of sufficient support for victims beyond the 45 day initial period. Interviewees suggested that the NRM lacks any attention to the quality of support that is available to victims, especially, on their journeys beyond a safe house. In this regard, participants identified a disconnect between the UK's international obligations and the practical functions of the NRM.

Participants suggested that some of these shortcomings, both in terms of victim identification, and the subsequent support, could have been addressed by placing it on a statutory footing, i.e. within the provisions of the MSA. This, too, was discussed, unproductively, during early parliamentary debates. This would have potentially given victims a right to formal appeal against an SCA decision, a mechanism that is currently missing. Whilst the UK has, on paper, complied with its obligations under ECAT to incorporate a referral system into its national law, it has arguably done so in a flawed manner that keeps vulnerable people from being able to challenge decisions. It is for this reason, and others discussed in this thesis, that victims

continue to opt out of being referred into the NRM, thus remaining exposed to dangers of continued or further exploitation.

Provisions under the MSA for identification of victims and their subsequent protection remain weak. Other than a reference to the need for guidance to be published, the MSA provides no statutory measures for the identification, protection and support of victims. This goes against its obligations under Article 10 of the Council of Europe Convention as well as Articles 11 (1) and (4) of the EU Directive. To this end, both policy makers and lawyers remain underwhelmed with the MSA. They welcomed the consolidation of all trafficking crimes under one umbrella, but unanimously believed that the Act requires improvements on victim protection, especially the provision of long-term support. The UK currently lacks a legal obligation to ensure survivors' long-term safety and support. This is a major weakness in an anti-trafficking strategy that claims to centre victim protection. When women are trafficked for any purpose, especially for sexual exploitation, this not only affects their physical and mental health, but as Herlihy, Jobson and Turner (2012) suggest the trauma they have experienced continues well after they have escaped the exploitative situation. Hence, a legal framework that not only protects victims on identification with accommodation and basic needs, but also provides protections after they have been through the process, is fundamental if they can truly be said to have access to justice and to reparation.

9.3. Conclusions

The MSA has, especially by using the emotive term *slavery* in its title, enhanced political traction, thus giving the issue of human trafficking increased political and academic attention. This thesis, however, demonstrates a number of ways in which the MSA has failed to increase protection and access to justice for victims. I argue that the divergence from international law has adverse effects on victims. Although victims feature to some extent within the MSA, an analysis of the legislation's specific provisions demonstrates that their protection, particularly, their long-term protection, remains insufficient.

States tend to justify their national law and policy by synchronising them with international normative standards. This trend has the potential to effect harmonisation, but will arguably only work to protect trafficked victims, if there is full and complete compliance. Full compliance will ensure that the shared international frameworks that the Palermo Protocol established are incorporated in national laws. The universally accepted definition of human

trafficking created a benchmark against which all national laws could be evaluated and potential victims identified and protected. Yet, in practice, the UK has deviated from this definition in a substantial way that has proven detrimental to victim identification, protection and support, especially through a focus on a requirement for travel.

By developing definitions of human trafficking and exploitation that deviate from those within international standards, the MSA leaves too much open to legal interpretation. This thesis argues that by placing human trafficking under the slavery umbrella, the UK's current anti-trafficking framework contradicts the *jus cogens* of prohibition against trafficking, limiting the number of victims that may be identified, and thus entitled to support and protection.

9.4. Looking forward

Even though the UN's Sustainable Development Goals seek the eradication of human trafficking by 2030 (UNODC, 2015), interviewees highlighted that this cannot be achieved, unless law and policy is more focused on the protection of victims. Development of the MSA with a truly victim-centred approach would have allowed the establishment of an individual's victim status to take priority over their immigration status or any involvement they have had in criminality. This would have led to fewer victims beings kept in immigration detention centres as well as prisons with access to little support and protection. The study has shown a number of practical ways in which victim protection can be strengthened going forward. First, there is an ongoing need for definitional clarity. The MSA's definition of human trafficking needs to be brought in line with both the Palermo Protocol and the EU Directive definitions, neither of which emphasise the need for travel to have taken place. The MSA should also provide for a stand-alone offence of exploitation and place victim support on a statutory footing. This would allow the definition of sexual exploitation to also be interpreted more easily.

Placing the NRM on a statutory footing and creating a formal appeal route for potential victims would allow a more structured application process, thus allowing potential victims a right to appeal against arbitrary decisions. In respect of those victims who are arrested in connection with a crime they have committed whilst in a position of exploitation, there needs to be set mechanism through which data on the use of the Section 45 defence can be accessed

or recorded. This gap needs to be urgently filled as an absence of data renders it difficult to determine how frequently the defence is used for the benefit of potential victims.
More training is required for professionals including the police, judges, lawyers, the Legal Aid Agency and competent authority's staff. This is to ensure that the MSA is interpreted and applied correctly so that potential victims are promptly identified and adequately supported. One way that victims can be identified more easily is to add lawyers to the list of first responders who can refer potential victims into the NRM.

The methodology adopted in this thesis created original data that suggests avenues for future research. The original contribution of this thesis is that it presents the perspectives of professionals on the working of legislation, policy and legal norms. However, this perspective alone is perhaps insufficient in painting a clear enough picture of where the state falls short on its protective duties. Reaching out to trafficked women and following a sample through the legal process would help further document how victims continue to fall through gaps in the protection net. This would assist, not only in identifying the ways in which traffickers take advantage of the flawed provisions of the MSA, but might also help in engaging hidden victim populations. Understanding the practical loopholes and how traffickers exploit these will take us one step closer to the global ambition to eventually eradicate trafficking and women's exploitation.

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Appendix 1 - Email to experts inviting them to participate in surveys

Dear XXX

I hope you are well.

To introduce myself, I am a solicitor at Freeths LLP and am a part time PhD student with London Metropolitan University. The following link will take you to my profile at Freeths (so that you can put a face to the name):

http://www.freeths.co.uk/people/sepideh-doostgharin/

As part of my research, I am exploring whether the UK's current legal framework, especially the Modern Slavery Act 2015 offers sufficient protection for victims of trafficking for sexual exploitation. I wish to determine whether the Modern Slavery Act 2015 meets international human rights standards. I am interested in your views as a lawyer who has been involved with cases involving human trafficking and modern slavery.

I would be very grateful if you could spend approximately 10 minutes completing my below survey. I appreciate that you must be extremely busy, but your assistance will be of immense help to me.

https://www.surveymonkey.co.uk/r/K3W7CH7
As you will note, the final question asks whether you would be happy to take part in a follow-up interview. The interview should not take more than one hour and can be arranged at a place and time most convenient to you.

Please do feel free to pass this onto any of your colleagues/contacts who may possibly be able to help.

Yours sincerely

Sepideh Doostgharin

Appendix 2 - Information sheets

Lawyers:

You have been invited to participate in this survey, which will form part of my PhD research.

I, Sepideh Doostgharin, am a PhD student at London Metropolitan University exploring whether the current legal framework offers sufficient protection for victims of trafficking for sexual exploitation, especially whether the Modern Slavery Act 2015 meets international human rights standards. I am interested in your views as a lawyer who has been involved with cases involving human trafficking and modern slavery.

London Metropolitan University requires all persons who participate in social research give their explicit and informed consent. Please read the following and then decide if you are happy to take part.

Your views are being sought about trafficking for sexual exploitation and modern slavery.

You may refuse to answer any of the questions you do not wish to discuss.

Your responses will be used as data for the research.

You responses will be anonymised, your name will not be linked with the data set and you will not be identified or identifiable in any report or publication.

The survey has 24 questions and should not take longer than 10 minutes to complete.

If you have any general questions about the research project, you can contact Sepideh Doostgharin at sepXXXXXXXXX@yahoo.co.uk.

Policy makers:

You have been invited to participate in this survey, which will form part of my PhD research.

I, Sepideh Doostgharin, am a PhD student at London Metropolitan University exploring whether the current legal framework offers sufficient protection for victims of trafficking for sexual exploitation, especially whether the Modern Slavery Act meets international human rights standards. I am interested in your views as an individual involved in the development of the Modern Slavery Act 2015.

London Metropolitan University requires all persons who participate in social research give their explicit and informed consent. Please read the following and then decide if you are happy to take part.

Your views are being sought about trafficking for sexual exploitation and modern slavery.

You may refuse to answer any of the questions you do not wish to discuss.

Your responses will be used as data for the research.

You responses will be anonymised, your name will not be linked with the data set and you will not be identified or identifiable in any report or publication.

The survey has 18 questions and should not take longer than 10 minutes to complete.

If you have any general questions about the research project, you can contact Sepideh Doostgharin at sepXXXXXXXXX@yahoo.co.uk.

Appendix 3 - Consent form

Sepideh Doostgharin, a PhD student at London Metropolitan University will conduct this research. The research will aim to identify whether the current legal framework in the UK sufficiently protects victims of human trafficking for sexual exploitation, with a particular focus on the effectiveness of the Modern Slavery Act 2015. London Metropolitan University requires all persons who participate in social research studies give their written consent to do so. Please read the following, tick those boxes you agree, and sign the form if you agree to participate in the study.

□ I freely and voluntarily consent to be a participant in the research project on human trafficking for sexual exploitation and modern slavery.

□ I consent to participate in an online survey and understand that I may refuse to discuss any topic I do not wish to discuss or answer any questions I feel uncomfortable answering.

□ I give my permission for the contents of the survey to be used in this research project.

□ I understand that my name will not be linked with the research materials, and I will not be identified or identifiable in any report produced by the researchers.

□ I have been given the opportunity to ask questions about the research and my questions have been answered to my satisfaction.

□ I have been informed that if I have any general questions about the research project. I should feel free to contact Sepideh Doostgharin at sepXXXXXXXXX@yahoo.co.uk or on 07XXXXXXXXX.

I have read and understand the above and consent to participate in this study. My signature is not a waiver of any legal rights. I understand that I will be able to keep a copy of the informed consent form for my records.

Participant's signature Date

……. …….

Researcher's signature Date

……. …….

Appendix 4 - Interview guide for lawyers

1- How would you say that MSA has improved law and policy in the UK?

   a. What do think about the shift from trafficking to the concept of modern slavery?

   b. What were the missed opportunities in this piece of legislation?

2- The MSA was supposed to improve support for victims; do you believe that this happened?

   a. Specifically, has access to legal advice and support changed with the MSA? Does it give more or less access to victims?

3- In your opinion, does the MSA meet international standards, specifically in relation to:

   1- Palermo
   2- The Council of Europe Convention
   3- European Union Decisions and Directives

4- Do you believe the current ant-trafficking law and policy that exists in the UK is adequate?

5- As you are probably aware, offences committed prior to 31 July 2015 i.e. prior to the MSA are judged under old legislation for example, Section 71 of the Coroners and Justice Act 2009 deals with slavery and servitude. Do you believe that those being punished now for crimes committed before this date are better off as a result of this approach?

6- Do you believe the increased maximum jail sentence for offenders brought about by the MSA makes any real difference in eliminating re-offending?

7- Have you dealt with cases where one or more of the following were ordered by a Magistrates court?

   1- Slavery and Trafficking Prevention Orders
   2- Interim slavery and trafficking prevention orders
   3- Slavery and Trafficking Reparation Order (to pay compensation to the victim)
   4- An order for Forfeiture of land vehicle, ship or aircraft

5- Slavery and trafficking risk orders
6- How effective do you think the above are?

8- In a couple of sentences, how do you believe human trafficking can be tackled once and for all in the United Kingdom?

The pre-MSA case:

1- Can you give me a brief overview of the case, and how this person was sexually exploited?

1- Was it internal/cross border trafficking?
2- What was their citizenship status?

2- What was your client's age and gender?

3- How were they identified? Was it through the National Referral Mechanism or by some other method?

1- What was their experience of this process?

4- What support, if any, was given to them at the early stage?

1- Was safe accommodation provided?

5- Was there a criminal investigation into the trafficking?

1- Was your client required to provide a statement?
2- Was your client required to give evidence in court?

a. If so, how was this evidence given?
b. Were special measures available?

6- How long did the whole process take?

7- What was the outcome [of the criminal case, NRM, Asylum application (*to be tailored based on the interviewee's response to question 1*)]?

8- Do you know where your client is living now and whether they are safe or not?

Moving on to the post- MSA case you have chosen:

[Ask questions as above]

Additional questions (assuming the lawyer being interviewed works in Immigration):

9- How would you describe the current asylum process in the UK?

a. Do you believe that this has improved in recent years?

b. Do you believe the MSA has had or is likely to have any real, positive impact on improving the asylum process in the UK?

10- In your experience, what is the success rate in passingly applications on grounds of human trafficking today?

11- When rejected, what are the reasons generally given?

Appendix 5 - Interview guide for policy makers

1- I am interested in your [your organization's] involvements in the development of the Modern Slavery Act (2015).

1- Did you make formal submissions, were they taken into account?
2- Were you part of consultations – how did they go? Were some voices more influential than others?
3- What were the key debates in the process and how were they resolved?

2- What had you hoped the MSA would achieve?

3- How would you say that MSA has improved law and policy in the UK?

1- What do think about the shift from trafficking to the concept of modern slavery?
2- What were the missed opportunities?

4- The MSA was supposed to improve support for victims; do you believe that this happened?

1- What about access to legal advice in particular?
2- Does the Act meet international standards, specifically in relation to:
    a. Palermo
    b. The Council of Europe Convention
    c. European Union Decisions and Directives

5- Which of your [your organisation's] main goals, in terms of tackling human trafficking, remain unaddressed in the MSA?

6- As you may be aware, offences committed prior to 31 July 2015 i.e. prior to the MSA are judged under old legislation for example, Section 71 of the Coroners and Justice Act 2009. Has this created inequities in how cases are dealt with?

7- In a couple of sentences, how do you believe human trafficking can be tackled once and for all in the United Kingdom?

Appendix 6 - Offences under Section 1 and 2 of the Modern Slavery Act 2015

1 Slavery, servitude and forced or compulsory labour

(1) A person commits an offence if—

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

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

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

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

(4) For example, regard may be had—

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

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

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

2 Human trafficking

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

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

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

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

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

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

(5) "Travel" means—

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

(b) departing from any country,

(c) travelling within any country.

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

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

(b) where the travel takes place.

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

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

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

Appendix 7- The typology of 17 types of modern slavery offences in the UK

Labour Exploitation:

1. Victims exploited for multiple purposes in isolated environments;
2. Victims work for offenders;
3. Victims work for someone other than offenders;

Domestic Servitude:

4. Exploited by partner;
5. Exploited by relatives;
6. Exploiters not related to victims;

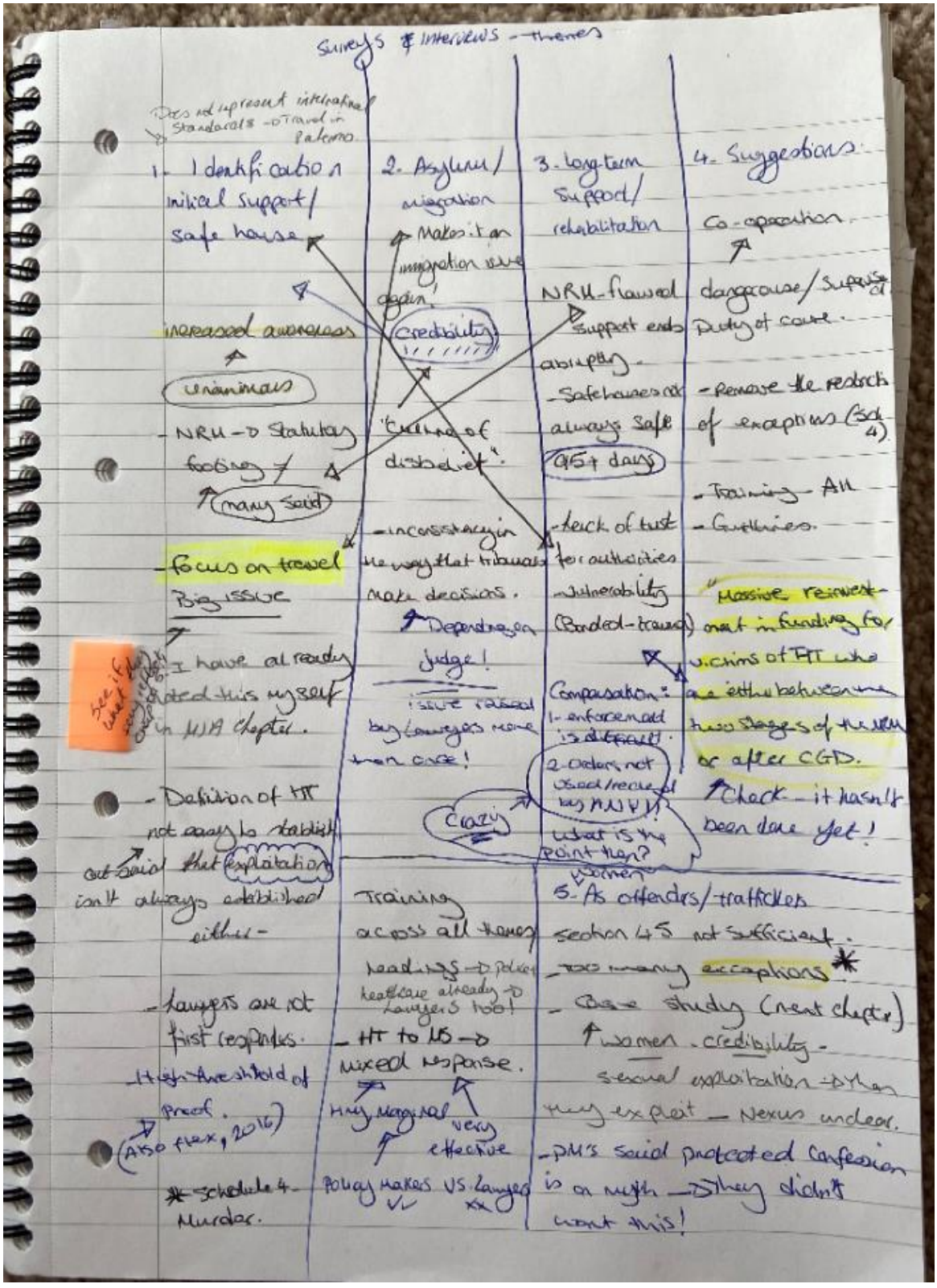
Sexual Exploitation:

7. Child sexual exploitation – group exploitation;
8. Child sexual exploitation – single exploiter;
9. Forced sex work in fixed location;
10. Forced sex work in changing location;
11. Trafficking for personal gratification;

Criminal Exploitation:

12. Forced gang-related criminality;
13. Forced labour in illegal activities;
14. Forced acquisitive crime;
15. Forced begging;
16. Trafficking for forced sham marriage;
17. Financial fraud (including benefit fraud.

Appendix 8 - Example of analytic work (1)



Appendix 9 - Example of analytic work (2)

	The NRM and identification	Consolidation of anti-trafficking legislation/modern slavery paradigm	Focus on immigration	Complicated nature of the prostitution/trafficking nexus	Corporate accountability	Awareness being raised
L1 (Interviewee 1)	No statutory footing. Protections are hypothetical. Investigation and prosecution of trafficking is covered well. Identification of potential victims and providing support is lacking.	Small/no difference.	Home Office as decision maker means currently an immigration sheet.		Noted a lack of teeth in relation to corporate accountability in the supply chains.	Noted no difference
L3 (Interviewee 3)	Believes the MSA helps bring the protections of NRM to victims' attention.	Focused the mind on the effects of HT and MS. Definition of exploitation is insufficient.	Claims for asylum mostly refused in the first instance, sometimes with no right to appeal.	Difficult to establish a woman's victim status.		More attention drawn to the issue-prompts policy change.
L4 (Interviewee 4)	Makes no provisions for leave to remain in the UK	Definitional confusion - parts of definition of HT are often not met. No uniformity in interpretation by the competent authority.	Immigration control notwithstanding the fact that victims are recognised victims of HT	Victims of sex trafficking considered illegal immigrants. Face removal directions from the UK.		Increased political traction. However, queries what practical difference it has made on the ground for identification and protection.
L5 (Interviewee 5)	Outside of its own time frame. Decision making process is slow. Because it was not placed on a statutory footing, it does not apply the correct legal standards.	Definition of HT left to interpretation. Could have been avoided to some extent by making sure that definitions at least match those of international standards	Low credibility for victims when there is an application for asylum.	Difficulties associated with specific cultural norms. Traffickers' corrupt relationships with authorities.		More focus but suggests that training is needed on the correct application and interpretation of definitions especially HT.
L6 (Interviewee 6)	NRM must allow protected confessions. Double	Reduced scope for victims to fall into. Larger burden on victims and their lawyers to		Notes a lack of understanding about the nature of the crime and	Suggests that corporate and criminal accountability should	Increased focus – potentially better understanding and

	victimisation.	prove exploitation. Protection is gendered, insulting. A suggestion that women contribute to their exploitation.		its victims. Considers women who offend as being misunderstood as victims. Victims are considered 'voluntary sex workers'.	be tied to one another. Otherwise, there is a big hole that most victims of HT are going to fall through.	better funding.
PM 1 (Interviewee 13)		Consolidation makes it easier to identify victims - however, definition of HT not in line with Palermo. Undue focus on travel.		Believes that sexual exploitation is easier to identify because it involves *forced* prostitution.		Their aim was for MS to be more widely known. Believes MSA to achieve this. Believes education programs have improved identification.
PM 2 (Interviewee 14)	NRM must allow protected confessions.	Reduces it in scope. The definition of HT is much wider. Larger burden on the victim to prove the seriousness of exploitation.		Training required to differentiate between prostitution and HT.	Businesses use the MSA for their own reputation purposes.	Increased focus enhances victim protection better education, better understanding and better funding.

Appendix 10 –Developing themes and sub-themes