# DEFENDANTS AS VICTIMS

## A scoping review of vulnerability, victimhood and safeguards from charge to conviction

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# EXECUTIVE SUMMARY

This report provides a scoping review of legal, socio-legal and criminological research on vulnerability, victimhood, and the rights of suspects and defendants who are also victims of crime from arrest through to charge, conviction and sentencing. It aims to (i) map and synthesise the existing literature, (ii) clarify definitions and conceptual boundaries, (iii) enhance our understanding of relevant policies and practices, and (iv) make recommendations for action and further inquiry. This report has also taken into account the views expressed by stakeholders in consultation meetings, summarised in Appendix 1. The consultation involved a mixture of legal practitioners, academics and third sector organisations.

The report addresses two main research questions:

**1)** How do histories of victimisation and other vulnerabilities affect suspects and defendants in their ability to mount an adequate defence?

**2)** Are current procedural protections and support mechanisms effective in addressing these challenges or likely to exacerbate them further?

As earlier commentators have highlighted, there is a lack of parity between the protections offered to vulnerable non-defendant witnesses and those offered to vulnerable defendants in criminal trials.[1] Existing protections for vulnerable defendants seek to enable them to give their best evidence, placing their wider support or welfare needs secondary. To date, little consideration has been given to the impediments that defendants who are victims of crime face in obtaining the safeguards, special measures and supports that are available to non-defendant victim witnesses. Current legal research on suspects or defendants who are victims tends to focus on specific groups and on the adequacy of defences, and few studies examine cross-cutting issues.[2] This report therefore aims to draw together consideration of these areas of law and to identify barriers that are common to groups of suspects or defendants who are victims. The key findings, areas for future law reform, and suggestions for future research identified in this report are summarised below.

## 1.1 Key findings

Defendants who are victims and vulnerable defendants are unlikely to be a minority in the criminal justice system. There is clear and consistent evidence that histories of victimisation, addiction and mental ill-health are highly prevalent amongst suspects, defendants and convicted offenders in England and Wales:

- the overall rate of recognised mental disorders is around 40%, with neurotic, affective, and psychotic disorders and learning disabilities/ difficulties being the most common.[3]
- almost 60% of female offenders have experienced domestic abuse as adults, and around 80% struggle with mental ill-health.[4]
- around 65% of offenders recruited into county lines are children.[5] Of these, up to 77% have experienced domestic abuse,[6] the majority are drug users, and around 40% struggle with mental ill-health.[7]

1 Jenny Talbot and Jessica Jacobson, 'Adult Defendants with Learning Disabilities and the Criminal Courts', (2010) 1(2) *Journal of Learning Disabilities and Offending Behaviour* 16; Samantha Fairclough, '"It Doesn't Happen... and I've Never Thought it was Necessary for it to Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 21(3) *The International Journal of Evidence & Proof* 209; Roxanna Dehaghani 'Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody' (2020) 30(2) *Social and Legal Studies* 251.

2 Notable exceptions are Nicola Wake and Alan Reed, 'Reconceptualising the Contours of Self-defence in the Context of Vulnerable Offenders: A Response to the New Zealand Law Commission' (2016) 3(2) *Journal of International and Comparative Law* 195, and Nicola Wake, 'Human Trafficking and Modern Day Slavery: When Victims Kill' (2017) 9 *Criminal Law Review* 658.

3 See Chapter 3, section 1.3 (Prevalence).

4 See Chapter 1, section 1.5 (The victim-offender overlap) and Chapter 3, section 1.3 (Prevalence).

5 Chapter 2, section 1.5 (Vulnerability and county lines).

6 See Chapter 3, section 1.3 (Prevalence).

7 See Chapter 3, section 1.3 (Prevalence).

In addition, there are significant issues with identification, especially in the early stages of the investigation, which means diversion services remain under-utilised, potential defences may not be raised or spotted, and procedural protections designed for vulnerable suspects and defendants are not put in place. Even when defences are raised, they are not often successful. These findings are clear from the two case studies presented in this report.

At the same time, there are limits to the lens of victimhood when it comes to responding to defendants who are victims. As this report shows, defendant or suspect status tends to trump a person's victim status once they enter the criminal justice system. However, given the insufficiencies of the current framework for recognising victims of abuse and exploitation, merely extending protections for victims to suspects or defendants with a history of victimisation is unlikely to be sufficient. Moreover, it is vital that a suspect or defendant's dual status as a victim should not conceal the fact that they are entitled to exercise their rights to a fair trial and to participate effectively in the justice process. Rather than a reason to remove rights and entitlements, the dual status of suspect or defendant and victim should attract additional safeguards that recognise the barriers that this group faces in defending themselves, as well as their support needs as victims of crime. Where their victimisation is directly linked to their offending, legal defences and sentencing principles should also reflect their reduced culpability.

Similarly, the concept of vulnerability is of limited utility when applied to defendants who are victims of crime. When it comes to safeguards and special measures, a concept of vulnerability that prioritises witnesses and non-accused victims is deployed. A more neutral concept of vulnerability that does not discriminate between the victimhood of witnesses and suspects or defendants has the potential to ensure that all those who need support or protection while navigating the criminal justice system receive it. Most immediately, better identification of the vulnerabilities that can result from victimisation could help to better safeguard the rights and welfare of those who are at risk of ongoing harm or intimidation by their abusers or exploiters. However, as this report shows, vulnerability is often a vague and poorly-defined concept, and its use in practice is often influenced by stereotypes and assumptions. For example, it may not be immediately apparent to criminal justice professionals that a woman accused of theft, or a young man found in possession of drugs, may be victims of abuse or exploitation. Importantly, the criminal justice process itself is also a source of vulnerability, and victims who interact with it are at risk of further harm and criminalisation.[8]

When it comes to the trial stage, stereotypes of the 'responsible' victim and the 'helpless' victim risk not doing justice to people who offend due to complex dynamics of abuse or exploitation. The first stereotype means that courts expect defendants who claim to be victims of abuse or exploitation to demonstrate what the court views as responsible behaviour, for example by seeking help from criminal justice agencies when in danger or taking steps to escape abuse or exploitation. To avoid prosecution or conviction, those who do not meet the stereotype of the 'responsible' victim are often required to demonstrate that they fit the second stereotype: that of the 'helpless' victim. Here, defendants are required either to demonstrate that no other reasonable course of action was open to them, or to demonstrate their vulnerability by showing that they were suffering from a mental disorder at the time of the offence. However, reliance on a framework of vulnerability tends to pathologize what may be understandable responses by victims to their own victimisation. Reliance on stereotypes of victims as responsible or helpless also disguises the impact of structural barriers to accessing support, including race, gender or social class, and the inadequacies of support services and the police. For all these reasons, vulnerability should be understood not solely as an innate characteristic of some who are processed by the criminal justice system but as a product of a person's wider circumstances, including their interactions with the state.

8 Sandra Walklate and Kate Fitz-Gibbon, 'Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women through Furthering the Power of the State' (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 1, 8 – 9.

This report is structured as follows. Chapter 1 presents a case study of victims of domestic abuse who offend due to their abuse. Chapter 2 presents a second case study of victims of modern slavery or human trafficking who are recruited into county lines gangs and offend due to their exploitation. Chapter 3 presents a comparative analysis of the safeguards and special measures available to suspects and defendants who are defined as 'vulnerable' and the provision made for victims of crime who are witnesses.

Together, the three chapters point to gaps in the current framework of safeguards for suspects and defendants who are victims of crime:

*Chapter 1: Domestic Abuse*

- After domestic abuse incidents, women are disproportionately likely to be arrested (due to counter allegations, the use of weapons, etc.);
- Beyond such incidents, police and prosecutors hesitate to recognise the relevance of domestic abuse to offending, and their understanding of coercive and controlling behaviour is often limited;
- Even if correctly identified as such, victims of domestic abuse - including those who offend due to coercion or pressure from their abusers and those who use violent resistance against their abusers - struggle to 'fit' their experiences within the narrow scope of existing defences, including duress and self-defence;
- The partial defences of loss of control and diminished responsibility are ill-suited to victims who kill their abusive partners. Loss of control continues to be modelled on a male response to anger or fear, and diminished responsibility tends to pathologize victims' responses to abuse.

*Chapter 2: County Lines*

- Police are unsure when to classify members of county lines as victims, notably if they have 'willingly' joined (e.g., to secure their own drug supply);
- A referral to the National Referral Mechanism for identifying victims of modern slavery and trafficking may thus come too late or not at all, and even if it is made promptly, a positive decision by the Single Competent Authority that a person is a victim of modern slavery or trafficking does not automatically halt prosecution;
- Like victims of domestic abuse, young and vulnerable members of county lines can struggle to fit their cases within duress and self-defence, and even the more specific statutory defence under section 45 of the Modern Slavery Act (MSA) 2015, whose purpose is to address circumstances of exploitation;
- The impact of the section 45 defence is limited by a stringent definition of compulsion and a long list of excluded offences, including many that one may reasonably expect victims to engage in due to exploitation.

*Chapter 3: Status, Safeguards and Special Measures*

As Chapter 3 demonstrates, there is little recognition of the challenges faced by suspects or defendants who are victims in the scheme of safeguards and special measures provided for those who are identified as 'vulnerable'.

- Mental disorders are often only detected if they manifest in unusual, 'childlike' behaviour;
- At the investigation stage, custody interviews are not and need not usually be conducted by a specially trained officer; Achieving Best Evidence guidance does not cover suspects; referrals to Liaison & Diversion services are not mandatory; and suspects have no right to an intermediary;
- Appropriate adults, if called at all, are expected to perform a demanding set of tasks (often without training), do not enjoy legal privilege, and can be removed if deemed 'unreasonably obstructive';
- At the trial stage, vulnerable defendants who give evidence at trial are excluded from the statutory special measures scheme; some measures (with variable eligibility thresholds) are provided in case law and in the Criminal Procedure Rules, but they are less known and less used, and expert opinions on whether they are necessary can be set aside;
- Defendants with communication needs can apply for a HM Courts & Tribunals Service (HMCTS)-approved intermediary, but an appointment for the duration of the trial will be 'extremely rare';
- Intimidated defendants remain largely unprotected.

As a result of these deficiencies, all three chapters indicate that most defendants who are victims will have their victimhood recognised only at sentencing. Up to that point, they are required to navigate the criminal process through a complex patchwork of safeguards and special measures unequal and inferior to those for vulnerable (non-accused) witnesses and victims. Taking victimhood or vulnerability into account at the sentencing stage is insufficient to palliate the hardships imposed by criminal investigation, prosecution and conviction.

## 1.2 Priority areas for reform

While setting out a full programme of suggestions for reform is beyond the scope of this review, the following are priority areas for reforms to law and policy:

- Improving training for police, prosecutors, defence lawyers, and/or judges in recognising and responding to evidence that a suspect or defendant has been subject to domestic abuse, modern slavery or trafficking, or is otherwise a victim of a crime;
- Encouraging greater efforts to divert victims of domestic abuse and young and vulnerable people who have been recruited into county lines gangs from prosecution, including where they are accused of serious offences;
- Providing greater support for suspects and defendants who are victims of domestic abuse, modern slavery and trafficking and ensuring that support is on a par with the services available to non-accused victim witnesses;
- Providing enhanced education or instructions to juries on the impact of domestic abuse on defendants who are victims;
- Encouraging judges to admit a wider range of expert evidence to ensure that cases are viewed in their full context. This should include social context evidence in cases involving defendants who are victims of domestic abuse, such as evidence on the limitations of existing support services and/or police responsiveness, and expert evidence on coercive control from non-medical experts;
- Reforming the defence of duress so that it can apply to defendants who (i) are psychologically coerced into offending by the person who is abusing or exploiting them and/or (ii) who offend in response to a fear of non-violent abuse from the person who is abusing or exploiting them;
- Reforming self-defence to better accommodate defendants who use pre-emptive violence and/or violence that is disproportionate to the immediate threat due to a cumulative history of domestic abuse or exploitation and a fear of future violence;
- Reforming partial defences to murder to better respond to defendants who kill their (ex-) partners due to experiencing domestic abuse. Consideration should be given to introducing a partial defence of excessive self-defence or self-preservation for those who are ineligible for self-defence;
- Reforming the defence under section 45 of the MSA 2015 by widening the concept of 'compulsion' to better respond to the intense forms of psychological coercion used in county lines operations;
- Amending Schedule 4 of the MSA 2015 to ensure the section 45 defence can be raised in relation to more offences that are commonly committed by victims, beyond those relating to drug use and supply;
- Integrating the National Referral Mechanism more fully into the criminal process, including by harmonising the timelines between determinations by the Single Competent authority and criminal justice processes.
- Improving the transparency and quality of decisions by the Single Competent Authority and encouraging judges to admit them as a form of expert evidence at trial, and/or requiring the CPS to be more explicit in their charging decisions if they decide to go ahead and prosecute victims of modern slavery and/or trafficking;
- Developing a workable definition of (innate and situational) vulnerability that is on a par with that of existing witness provisions in the Youth Justice and Criminal Evidence Act (YJCEA) 1999, and placing it in Police and Criminal Evidence Act 1984 (PACE) Code C;
- Ensuring regular, research-based vulnerability training for all custody officers;
- Clearly defining the role of the appropriate adult, and who can perform it, in PACE Code C, and requiring basic background checks on spouses, etc., where indicated; placing a narrow definition of 'unreasonably obstructive' appropriate adult behaviour in PACE Code C; and extending legal privilege to discussions between suspects, solicitors, and appropriate adults to promote open communication and ensure non-compellability as a prosecution witness;

- Amending section 78 of PACE to stipulate that evidence obtained in violation of Code requirements protecting a suspect's fundamental rights is presumed 'unfair';
- Removing the exclusion of defendants from the special measures scheme in sections 23-30 of the YJCEA, or introducing a separate special measures scheme for defendants, and mandating early and routine consideration of eligibility (under either scheme) to change professional and juror (mis)conceptions and increase practical uptake;
- Encouraging judicial deference to trained medical and communication experts when it comes to determining whether and, if so, which special measures are necessary;
- Regulating, training, and funding intermediaries as part of a unitary government scheme; and
- Reversing criminal legal aid cuts to increase defence capacities.

## 1.3 Recommendations for future research

This project has focused on two case studies of suspects or defendants who are victims. The research presented suggests that further cross-cutting research is needed to establish the commonalities and differences in the challenges faced by the broad range of suspects or defendants who are victims of crime. In the course of this research, the following groups were identified as warranting further investigation:

- Adults and children who are trafficked or coerced into sex work, who later become involved in trafficking or coercing others into sex work
- Victims of modern slavery and trafficking who have been brought into the country from abroad and who may be prosecuted for immigration offences

Future research should examine whether there is a case for extending the reform proposals examined in this report to all defendants and suspects who are victims and, if so, how.

# CHAPTER 1: DEFENDANTS AS VICTIMS IN THE CONTEXT OF DOMESTIC ABUSE

## 1.1 Introduction

This chapter reviews the literature on the intersection between experiencing domestic abuse[9] and offending or being identified as an offender by state agencies. It first sets out what we know about the nature of domestic abuse and how offending and criminalisation can be linked to domestic abuse. It then examines the extent to which accused persons or defendants who have experienced domestic abuse are recognised as victims by the criminal justice system. The discussion demonstrates that there are weaknesses in the criminal justice system's response to domestic abuse, spanning from policing and first reports through to charge, conviction and sentencing,[10] and points to both substantive and procedural law reform proposals.

This chapter further considers whether the lenses of vulnerability and victimhood are a useful means for addressing the critiques of the current system. It concludes that these concepts tend to require suspects and defendants to conform to the stereotype of the 'responsible' victim, who seeks help from criminal justice agencies when in danger, or the stereotype of the 'helpless' victim, who has no means of escape or of obtaining help, or who is prevented from behaving responsibly by a psychiatric syndrome brought on by the abuse. The social entrapment approach developed by Julie Tolmie and colleagues[11] represents a potential means of moving away from this individualised and pathologizing response to offending by victims and towards a recognition of the structural factors that constrain their choices. This chapter therefore contains some suggestions, drawn from the literature, on how this approach could be implemented in England and Wales.

## 1.2 Defining domestic abuse

In England and Wales, there has been a policy shift towards taking domestic abuse - in all its forms - more seriously,[12] and this is reflected in recent legal reforms.[13] A notable example is the offence of controlling or coercive behaviour in an intimate or family relationship introduced by section 76 of the Serious Crime Act 2015. This offence was intended to respond to domestic abuse as a pattern of behaviour in a departure from the traditional focus of the criminal law on discrete incidents of violence.[14] The statutory guidance[15] accompanying the offence sets out a wide range of controlling and coercive behaviours. These include physical or sexual violence, emotional and psychological

9 The term 'domestic abuse' is used in this report when referring to all forms of abuse, including violence and coercive or controlling behaviour. The term 'domestic violence' is used where employed by commentators. Where appropriate, distinctions will be drawn between physical or sexual violence and non-physical forms of abuse.

10 Michele Burman and Oona Brooks-Hay, 'Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control', (2018) 18(1) *Criminology and Criminal Justice* 67; Vanessa Bettinson and Jeremy Robson, 'Prosecuting Coercive Control: Reforming Storytelling in the Courtroom (2020) 12 *Criminal Law Review* 1107.

11 Julia Tolmie, Rachel Smith, Jacqueline Short, Denise Wilson and Julie Sach, 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence' (2018) *New Zealand Law Review* 182.

12 See for example, Home Office, *Tackling Violence Against Women and Girls* (HM Government 2021); Home Office, *Tackling Domestic Abuse Plan: Command Paper 639* (HM Government, 2022); Crown Prosecution Service, 'Domestic Abuse: Policy Statement' (cps.gov.uk, 5 December 2022) <https://www.cps.gov.uk/publication/domestic-abuse-policy-statement> (accessed 23 September 2024).

13 Cassandra Wiener, 'From Social Construct to Legal Innovation: The Offence of Controlling or Coercive Behaviour in England and Wales' in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer-Verlag 2020).

14 Vanessa Bettinson, 'Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?' (2016) 3 *Criminal Law Review* 165, 169.

15 Home Office, *Controlling or Coercive Behaviour: Statutory Guidance Framework* (Home Office 2023)

abuse, economic abuse, coercing the victim into carrying out criminal behaviour, isolating the victim from sources of social support, making false allegations against the victim, and threatening to take away children or pets or to expose sensitive information about the victim.[16]

The offence and statutory guidance were influenced by the concept of coercive control. Coercive control was defined by Evan Stark as 'a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation and control'.[17] However, while the statutory guidance includes physical violence as an example of controlling or coercive behaviour, the offence itself does not require such violence to be demonstrated. Rather, the offence was designed to target psychological abuse, on the assumption that physical abuse would be dealt with under existing legislation.[18] The offence therefore fails to fully capture the phenomenon of coercive control.[19]

More recently, a statutory definition of domestic abuse was introduced by section 1 of the Domestic Abuse Act 2021:

Behaviour of a person ('A') towards another person ('B') is 'domestic abuse' if—

**a)** A and B are each aged 16 or over and are personally connected to each other, and

**b)** the behaviour is abusive.

Behaviour is 'abusive' if it consists of any of the following—

**a)** physical or sexual abuse;

**b)** violent or threatening behaviour;

**c)** controlling or coercive behaviour;

**d)** economic abuse;

**e)** psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

Personally connected is defined by section 2(1) of the Act:

For the purposes of this Act, two people are 'personally connected' to each other if any of the following applies—

**a)** they are, or have been, married to each other;

**b)** they are, or have been, civil partners of each other;

**c)** they have agreed to marry one another (whether or not the agreement has been terminated);

**d)** they have entered into a civil partnership agreement (whether or not the agreement has been terminated);

**e)** they are, or have been, in an intimate personal relationship with each other;

**f)** they each have, or there has been a time when they each have had, a parental relationship in relation to the same child;

**g)** they are relatives.[20]

This definition has not been universally welcomed as, for some commentators, the terminology of 'abuse' shifts the focus away from violence, and its gender-neutral wording overlooks the gendered nature of domestic abuse.[21] In addition, it tends to separate out discrete forms of abuse, rather than to conceptualise domestic abuse or coercive control as a pattern or accumulation of behaviours. Consequently, the law perpetuates confusion

16 Ibid, 15 – 16.

17 Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press 2007), 5

18 Wiener, 'From Social Construct to Legal Innovation' (n13).

19 Ibid.

20 As defined by section 63(1) of the Family Law Act 1996: '"relative", in relation to a person, means— (a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person's spouse, former spouse, civil partner or former civil partner, or (b) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or of the half blood or by marriage or civil partnership) of that person or of that person's spouse, former spouse, civil partner or former civil partner, and includes, in relation to a person who is cohabiting or has cohabited with another person, any person who would fall within paragraph (a) or (b) if the parties were married to each other or were civil partners of each other.'

21 Jo Aldridge, '"Not an Either/or Situation": The Minimization of Violence Against Women in United Kingdom "Domestic Abuse" Policy' (2021) 27(11) *Violence Against Women* 1823.

as to whether physical or sexual violence ought to be conceptualised as separate offences or as part of controlling and coercive behaviour, and encourages a tendency to charge and prosecute perpetrators for discrete violent or sexual incidents separately, overlooking the cumulative nature of repeated incidents of abuse.[22] It also creates a '"hierarchy of harm" whereby physical violence still dominates in the assessment of both the existence and severity of domestic violence'.[23] As set out below, this 'hierarchy of harm' in turn informs police and prosecutor responses to domestic abuse and poses a barrier to the recognition of histories of domestic abuse amongst suspects.

## 1.3 Vulnerability, victimhood and domestic abuse

While moves to proscribe coercive and controlling behaviour and to combat domestic abuse through the criminal law may appear progressive, they risk exposing victims to further harm. Domestic abuse victims may be constructed as 'vulnerable' victims in recognition of the impact that abuse can have on a person's capacities to function in society and to live up to the norms of the reasonable or responsible person. These vulnerabilities may, in turn, impact upon their ability to advocate for themselves and to navigate a complex criminal justice system. However, domestic abuse victims are also vulnerable to criminalisation. As Sandra Walklate and Kate Fitz-Gibbon argue, marginalised women may rightly be wary of depending on the criminal justice system to protect them from abuse given the system itself can be a source of abuse.[24] They may fear engagement with the authorities due to the possibility of having their children removed from them, due to fear of exclusion from their communities, or due to structural or overt discrimination. Women also face the hurdle of living up to the image of the 'blameless victim' that the criminal justice system requires.[25]

Calling on assistance from the criminal justice system may result in women being constructed as 'dual offenders' and charged with offences[26] – a concern that is also reflected in research on male victims.[27] Yet failing to seek help may later be taken as evidence that they are not true victims, or that they are deserving of blame for choosing to fight back rather than to leave or appeal to others. A victim's previous calls for help may also be taken as evidence that he or she was not subject to coercion on a later occasion.[28]

Domestic abuse victims accused of offences face particular challenges if they do not live up to two stereotypes implied by the law: the stereotype of the 'responsible' victim and the stereotype of the 'helpless' victim. The former is expected to use their capacities to summon help from the authorities or to leave their abuser, while the latter is expected to be incapable of escaping or calling for help, whether due to an objective lack of options or due to a mental disorder. When it comes to victims who are treated as suspects or defendants, the framework of vulnerability is not fit to respond to the realities of domestic abuse, or to grasp it as a social problem undergirded by structural inequalities rather than a solely individual or private problem.

22 Cassandra Wiener, 'Defining Coercive Control in Law: Problems and Possibilities' in Mandy Burton, Vanessa Bettinson, Kayliegh Richardson and Ana Speed (eds), *The Edward Elgar Handbook of Domestic Abuse* (Edward Elgar Publishing 2024).

23 Charlotte Bishop, 'Domestic Violence: The Limitations of a Legal Response' in Sarah Hilder and Vanessa Bettinson (eds) *Domestic Violence*, (Palgrave Macmillan 2016) 60.

24 Sandra Walklate and Kate Fitz-Gibbon, 'Why Criminalise Coercive Control?', (n8), 8 – 9.

25 Ibid, 9.

26 Ibid, 9.

27 Luke Martin, 'Debates of Difference: Male Victims of Domestic Violence and Abuse' in Sarah Hilder and Vanessa Bettinson (eds), *Domestic Violence* (Palgrave Macmillan 2016) 186; Benjamin Hine, Elizabeth A. Bates and Sarah Wallace, '"I Have Guys Call Me and Say 'I Can't Be the Victim of Domestic Abuse'": Exploring the Experiences of Telephone Support Providers for Male Victims of Domestic Violence and Abuse' (2022) 37 (7-8) *Journal of Interpersonal Violence* NP5594; Arlene Walker, Kimina Lyall, Dilkie Silva, Georgia Craigie, Richelle Mayshak, Beth Costa, Shannon Hyder and Ashley Bentley, 'Male Victims of Female-Perpetrated Intimate Partner Violence, Help-Seeking, and Reporting Behaviors' (2020) 21 (2) *Psychology of Men & Masculinities* 213.

28 See *GAC* [2013] EWCA Crim 1472.

Julia Tolmie and colleagues instead use a conceptual framework of social entrapment to explain offending by victims of intimate partner violence. This framework has three dimensions:

**a)** the social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's life;

**b)** the indifference of powerful institutions to the victim's suffering; and

**c)** the exacerbation of coercive control by the structural inequities associated with gender, class, race and disability.[29]

They argue that this model should be adopted at the investigative, trial, sentencing and post-sentence stages by relevant actors, including the police, expert witnesses, defence and prosecution lawyers, juries, probation officers, restorative justice practitioners, professionals managing community sentences and home detention, and parole boards. At the trial stage, detailed evidence must be gathered on all three dimensions to assist courts and criminal justice agencies to understand the effect of the abuse on the victim and their options for resistance and escape. Courts should also be encouraged to use the social entrapment approach in formulating questions for witnesses and in interrogating the evidence.

The social entrapment approach requires departing from traditional responses to domestic abuse that tend to hold the victim responsible for their own safety. It repudiates the use of theories like battered woman syndrome (BWS) that rely on the stereotype of the 'helpless' victim who is psychologically traumatised by the abuse and rendered powerless and incapable of rational action through a process of 'learned helplessness' or the development of post-traumatic stress disorder (PTSD).[30] The social entrapment framework shifts the focus from the victim's '"personal deficiencies" and "choices" to understanding her coercive circumstances, including the manner in which her perpetrator isolated her and systematically closed down resistance, and the inadequate responses to her attempts to seek help.'[31]

Tolmie and colleagues suggest that applying this approach in legal settings could help juries to more accurately assess the reasonableness of the defendant's actions where an abuse victim has used violence against the abuser. As set out below, this suggestion has been taken up by authors writing in the context of England and Wales, from prosecution decisions to the criminal trial and sentencing.

## 1.4 Domestic abuse, gender and sexuality

Domestic abuse is a gendered crime: women are disproportionately more likely to be subjected to it and perpetrators are predominantly men.[32] According to the official statistics from the Crime Survey for England and Wales (CSEW) for 2022-23, 5.7% of women reported experiencing domestic abuse in the last year compared to 3.2% of men.[33] Lifetime prevalence is significantly higher for women, with 27% of women reporting experiencing domestic abuse since the age of 16 compared to 13.9% of men.[34] Women are almost twice as likely as men to report experiencing abuse by an intimate partner.[35] Between March 2020 and March 2023, 74.7% of female victims of domestic homicide were killed by their partner or ex-partner compared to 30.6% of male victims.[36] Mixed race women were most likely to have experienced domestic abuse

29 Tolmie *et al.*, 'Social Entrapment', (n11), 185. This Framework was Originally Developed by James Ptacek in *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press 1999).

30 Tolmie *et al.*, (n11), 203-204.

31 Ibid, 206.

32 For a review, see David Gadd, 'Domestic Violence' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (Oxford University Press 2023).

33 ONS, 'Dataset: Domestic Abuse Prevalence and Victim Characteristics. Year Ending March 2023' Table 1a. (ONS, 24 November 2023) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseprevalenceandvictimcharacteristicsappendixtables> (accessed 23 September 2024).

34 Ibid.

35 Ibid.

36 Ibid, Table 22c.

in the last year (9.2%), followed by white women (6%) and mixed race men (5.8%).[37] While the CSEW reports that an estimated 2.1 million people aged 16 years and over experienced domestic abuse in the last year,[38] the police only recorded 1,453,867 domestic abuse-related incidents and crimes in England and Wales in the same period.[39]

These figures should be viewed in light of the significant barriers victims face in reporting domestic abuse to the police, seeking help from support services, and disclosing domestic abuse to services. Male victims face additional barriers in reporting their experiences to the police and having them taken seriously due to social stereotypes of domestic abuse as involving only male perpetrators and female victims.[40] LGBTQ+ victims face additional barriers to disclosure and credibility due to heteronormative and cisgender social norms, including assumptions amongst support services about who is likely to be a victim or a perpetrator.[41] Women from ethnic minorities also face additional barriers, including language barriers, a lack of access to public services due to their immigration status, pressure from their community or culture to remain in the relationship, and beliefs in racial stereotypes amongst staff in support services.[42]

Research on gender differences in the use of violence in relationships highlights that, while both women and men can be violent,[43] women are less likely to be the initiators of violence, are more often acting in self-defence or engaging in violent resistance when they use violence, use less severe violence than men, and are less likely to use coercive and controlling tactics.[44] Women are more likely than men to use weapons, often to protect themselves.[45] Marianne Hester's study of 692 intimate domestic violence perpetrators reported to the police in North East England found 'little evidence that cases involving dual perpetration might generally be categorised as "mutual" and men were in the main the primary aggressors'.[46] Sole female perpetrators constituted the smallest group (8.4%), followed by dual perpetrator cases (11.8%) with the remainder involving sole male perpetrators (79.77%).[47] When the sole female perpetrator cases were tracked across time, 45% were found to be dual perpetrator cases. Repeat violence was much more likely to be perpetrated by men than for women, and men's violence and abuse was much more intense and severe.[48]

While men do experience coercive control in relationships,[49] it is more commonly experienced by women.[50] For Evan Stark, the primary harm inflicted by men through coercive control is

37 Ibid, Table 6.

38 ONS, 'Domestic Abuse Prevalence and Trends, England and Wales: Year Ending March 2023' (ONS, 24 November 2023). < https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2023> (accessed 23 September 2024). This figure is equivalent to 4.4% of the population aged over 16.

39 Ibid.

40 Hine *et al.*, '"I Have Guys Call Me and Say 'I Can't Be the Victim of Domestic Abuse'", (n27).

41 Catherine Donovan and Rebecca Barnes, 'Help-Seeking Among Lesbian, Gay, Bisexual and/or Transgender Victims/survivors of Domestic Violence and Abuse: The impacts of Cisgendered Heteronormativity and Invisibility' (2020) 56(4) *Journal of Sociology* 554.

42 Omolade Femi-Ajao, Sarah Kendal and Karina Lovell, 'A Qualitative Systematic Review of Published Work on Disclosure and Help-Seeking for Domestic Violence and Abuse among Women from Ethnic Minority Populations in the UK' (2018) 25(5) *Ethnicity & Health* 732.

43 Hine *et al.*, '"I Have Guys Call Me and Say 'I Can't Be the Victim of Domestic Abuse'", (n27), NP5596 – NP5597

44 Marianne Hester, 'Portrayal of Women as Intimate Partner Domestic Violence Perpetrators' (2012) 18 (9) *Violence Against Women* 1067.

45 Ibid; see also Susan M. Edwards, '"Demasculinising" the Defences of Self-Defence, the "Householder Defence" and Duress' (2022) 2 *Criminal Law Review* 111.

46 Marianne Hester, 'Who Does What to Whom? Gender and Domestic Violence Perpetrators in English Police Records' (2013) 10(5) *European Journal of Criminology* 623, 635.

47 Ibid, 626.

48 Ibid, 627 – 628.

49 Hine *et al.*, (n27), NP5596 – NP5597.

50 Evan Stark and Marianne Hester, 'Coercive Control: Update and Review' (2019) 25(1) *Violence Against Women* 81.

political, as it involves depriving women of 'rights and resources that are critical to personhood and citizenship'.[51] Perpetrators 'use various means to hurt, humiliate, intimidate, exploit, isolate, and dominate their victims' in order "to secure privileges that involve the use of time, control over material resources, access to sex, and personal service."'[52] However, while 'female violence is more likely to be reactive' than male violence, there is evidence that female perpetrators of intimate partner violence do engage in proactive, or direct, aggression.[53]

Catherine Donovan and Marianne Hester's research has shown that patterns of coercive control characterise some same-sex relationships. In their survey research, 38% of respondents self-reported experiencing domestic abuse in a same-sex relationship at some time in their lives.[54] Only slightly more women than men self-identified as having experienced domestic abuse.[55] Less than one in five experienced abuse amounting to intimate terrorism or coercive control in the last 12 months in a same sex relationship, and one in ten experienced the most severe domestic abuse.[56] Forms of abuse were gendered, with heterosexual women and gay men reporting experiencing physical violence and physically coercive sexual violence from male perpetrators.[57] Gay men experienced more financial abuse, while lesbians and heterosexual men were more likely to report emotional violence and lesbians were more likely to report emotionally coercive sexual violence.[58]

In sum, the available research suggests that there are gender differences in the experience of and perpetration of domestic abuse, and that people of any gender or sexuality can be victims or offenders. Stereotypes about who is a typical victim and who is a typical offender can not only present barriers to disclosure but also to the recognition of a person as a victim or perpetrator of domestic abuse by the authorities. As set out in the next section, there are also gender dynamics and stereotypes at play when it comes to the treatment of victims of domestic abuse who are suspected of crimes.

## 1.5 The victim-offender overlap

While there is a body of existing research on the relationship between women experiencing domestic abuse and subsequently offending, the same is not true of male victims, those who identify as LGBTQ+, and victims of domestic abuse other than intimate partner violence. More research is needed to determine the nature and extent of the victim-offender overlap in these groups.

Histories of domestic abuse are common amongst female offenders. Almost 60% of women in prison or under supervision in the community report experiencing domestic abuse[59] and 57% of women in prison report having been victims of domestic violence as adults.[60] According to HM Inspectorate of Prisons, 58% of women surveyed at the largest women's prison in the UK, HMP Bronzefield, had experienced domestic abuse and 34% were experiencing it at the time they were imprisoned.[61]

51 Stark, *Coercive Control,* (n17), 5.

52 Ibid.

53 Annette McKeown, Patrick J. Kennedy and Joanne McGrath, 'Female Perpetrators of Intimate Partner Violence' in Shelley L. Brown, Lorraine Gelsthorpe, Louise Dickson and Leam A. Craig (eds), *The Wiley Handbook on What Works with Girls and Women in Conflict with the Law: A Critical Review of Theory, Practice, and Policy* (Wiley 2022), 357.

54 Catherine Donovan and Marianne Hester, *Domestic Violence and Sexuality: What's Love Got to Do with It?* (The Policy Press 2014), 97.

55 Ibid, 101.

56 Ibid.

57 Ibid.

58 Ibid.

59 Home Office, *Controlling or Coercive Behaviour: Statutory Guidance Framework* (n15), [32].

60 Prison Reform Trust, *'There's a Reason We're in Trouble': Domestic Abuse as a Driver to Women's Offending* (Prison Reform Trust 2017), 7.

61 HM Inspectorate of Prisons, *Report on an Unannounced Inspection of HMP & YOI Bronzefield* (HM Inspectorate of Prisons 2016), 59.

Drawing on the work of Andreas Schloenhardt and Rebekkah Markey-Towler[62] on human trafficking victims, Bettinson and colleagues propose three ways in which offending can be related to domestic abuse:

> **Firstly, 'status' offences in which victims are placed in a precarious position by an abusive partner – for example, in respect of immigration or benefits, or a failure to act to protect vulnerable others. Secondly, 'consequential' offences in which victims are put into criminality under pressure from partners – for example, drug dealing or prostitution. Thirdly, 'liberation' offences in which victims commit crimes to improve or remove themselves from their abusive situation – such as acquisitive crimes to mitigate a lack of access to independent finances or acts of violent resistance targeted against partners.[63]**

Vanessa Munro, Vanessa Bettinson and Mandy Burton highlight that victims of controlling and coercive behaviour may be more likely to engage in non-violent offences during the course of their relationship like drug dealing, prostitution, or shoplifting.[64] Research indicates that female offenders often commit non-violent offences out of love or out of fear of their abusive partners.[65] In research by the Prison Reform Trust, women describe committing offences such as theft or shoplifting on their abusive partner's behalf, to protect their partner from prosecution, or to support their partner's drug use.[66] They also describe offending under pressure from their partner, offending due to financial abuse and a consequent lack of resources, or committing violent offences against men as a result of experiencing domestic abuse.[67]

The evidence further suggests a relationship between past victimisation and other adverse experiences and the perpetration of domestic abuse by women. Substance misuse (particularly of alcohol or cocaine), traumatic experiences including a history of being a victim of abuse, emotional regulation difficulties, and mental ill-health are all risk factors for women perpetrating intimate partner violence.[68] Female perpetrators of domestic abuse are also more likely to be perceived by the police to be alcoholic or mentally ill.[69] This suggests that women who are identified as domestic abuse perpetrators have a range of inherent vulnerabilities that may, in turn, impact upon their ability to engage with criminal justice processes and to defend themselves against criminal charges.

Much of the literature on the victim-offender overlap focuses on women who have been accused or convicted of serious violent offences involving their partner or ex-partner, either as a victim or as a co-offender. Women who killed their male partners after many years of abuse

62 Andreas Schloenhardt and Rebekkah Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises and Perspectives' (2016) 4(1) *Groningen Journal of International Law* 10.

63 Vanessa Bettinson, Vanessa E. Munro and Nicola Wake 'A One-Sided Coin? Attributing Agency and Responsibility in Contexts of Coercive Control' in M. Bone, J. J. Child, and J. Rogers (eds.) *Criminal Law Reform Now: Proposals and Critique* (1st ed., Vol. 2) (Bloomsbury 2024). Thanks to the authors for sharing a pre-publication version of this source. Note that page numbers were not available and are therefore not provided for quotations.

64 Vanessa Munro, Vanessa Bettinson and Mandy Burton, 'Coercion, Control and Criminal Responsibility: Exploring Professional Responses to Offending and Suicidality in the context of Domestically Abusive Relationships' (2024) 33(3) *Social and Legal Studies* 392.

65 Stephen Jones 'Partners in Crime: A Study of the Relationship Between Female Offenders and Their Co-Defendants' (2008) 8(2) *Criminology & Criminal Justice* 147.

66 Prison Reform Trust, '*There's a Reason We're in Trouble*', (n60), 10.

67 Ibid.

68 McKeown *et al*., 'Female Perpetrators', (n53), 358.

69 Hester, 'Portrayal of Women', (n44), 1072.

have received particular attention.[70] Research has further highlighted cases in which women have been convicted of murder or manslaughter based on joint enterprise or complicity with their abusive current or former partner.[71] These women often endured coercion, fear, and physical or emotional abuse at the hands of their co-defendants, and they see this, alongside factors such as drug use and economic circumstances, as limiting their freedom of choice when it came to offending.[72] Women have also been convicted of causing or allowing a child to die[73] after their violent partners killed their children.[74]

There is a lack of research on the relationship between domestic abuse and offending for other groups subject to domestic abuse. Some qualitative studies have found that men who disclose domestic abuse report being treated as potential perpetrators or as making counter-allegations by the police and support services.[75] This suggests that male victims may be at risk of being misidentified as perpetrators, which may be a result of gender stereotyping. There is some evidence of a relationship between children witnessing or experiencing domestic abuse and later committing violent offences against their parents or other family members.[76] However, more research is needed to interrogate the mechanisms behind this relationship.

## 2.1 Arrest, charge, and decisions to prosecute

Evidence and indicators of domestic abuse are relevant at the earliest stages of the criminal justice system, and this stage presents the most significant opportunities for diversion away from prosecution and towards support services. However, diversion relies upon the abuse being identified in the first place, and the barriers to disclosure and stereotypical beliefs discussed earlier can impede this process. Although there is evidence that domestic abuse victims commit a range of offences in response to abuse, the only written guidance from the College of Policing and the CPS focuses on the need to distinguish perpetrators from victims in domestic abuse incidents. There is no published guidance for the police or Crown Prosecutors on how to approach cases in which a potential victim of domestic abuse is suspected of other offences.

Histories of domestic abuse are often missed by police and prosecutors. In keeping with the 'hierarchy of harm' discussed above, these professionals often readily recognise physical or

70 Vanessa Bettinson and Nicola Wake, 'A New Self-Defence Framework for Domestic Abuse Survivors who use Violent Resistance in Response' (2024) 87(1) *Modern Law Review* 141; Centre for Women's Justice, *Double Standard: Ending the Unjust Criminalisation of Victims and Violence Against Women and Girls* (Centre for Women's Justice 2022); Centre for Women's Justice and Justice for Women, *Women Who Kill: How the State Criminalises Women We Might Otherwise be Burying* (Centre for Women's Justice and Justice for Women 2023); Vanessa Bettinson, 'Aligning Partial Defences to Murder with the Offence of Coercive and Controlling Behaviour' (2019) 83(1) *Journal of Criminal Law* 71; Susan Edwards, 'Women Who Kill Abusive Partners: Reviewing the Impact of Section 55(3) Fear of Serious Violence Manslaughter - Some Empirical Findings' (2021) 72(2) *Northern Ireland Legal Quarterly* 245.

71 Becky Clarke and Kathryn Chadwick, *Stories of Injustice: The Criminalisation of Women Convicted under Joint Enterprise Laws* (Manchester Metropolitan University 2020); Centre for Women's Justice and Justice for Women, *Women Who Kill* (n70), Susie Hulley, 'Defending "Co-offending" Women: Recognising Domestic Abuse and Coercive Control in "Joint Enterprise" Cases Involving Women and their Intimate Partners' (2021) 60(4) *Howard Journal of Crime and Justice* 580.

72 Charlotte Barlow and Siobhan Weare, 'Women as Co-offenders: Pathways into Crime and Offending Motivations', (2019) 58(1) *Howard Journal of Crime and Justice* 86.

73 Domestic Violence, Crime and Victims Act 2004, s. 5 (as amended by the Domestic Violence, Crime and Victims (Amendment) Act 2012, s. 1).

74 Sarah Singh, 'Punishing Mothers for Men's Violence: Failure to Protect Legislation and the Criminalisation of Abused Women' (2021) 29 *Feminist Legal Studies* 181.

75 Martin, 'Debates of difference', (n27), 186; Walker *et al.*, 'Male Victims of Female-Perpetrated Intimate Partner Violence', (n27), 213-223; Hine *et al.*, (n27), NP5598.

76 Alexandra Papamichail and Elizabeth A. Bates, '"I Want My Mum to Know That I Am a Good Guy…": A Thematic Analysis of the Accounts of Adolescents Who Exhibit Child-to-Parent Violence in the United Kingdom' (2022) 37 *Journal of Interpersonal Violence* NP6135; Nina Biehal, 'Parent Abuse by Young People on the Edge of Care: A Child Welfare Perspective' (2012) 11(2) *Social Policy and Society* 251.

sexual abuse but struggle to identify controlling and coercive behaviour.[77] Professionals are more likely to identify controlling and coercive behaviour and to raise it as relevant when dealing with serious violent offences, such as homicide.[78] Police officers in particular are not amenable to recognising the relevance of controlling and coercive behaviour or domestic abuse to offending, as it can be seen as a 'get out of jail free card' when one is faced with the prospect of being charged with a crime.[79]

Guidance from the College of Policing advises that police officers attending the scene of a suspected domestic abuse incident should try to identify the primary perpetrator and avoid arresting both parties where both appear to have committed offences.[80] In determining the primary perpetrator, officers are directed to examine whether:

- the victim may have used justifiable force against the suspect in self-defence
- the suspect may be making a false counter-allegation
- both parties may be exhibiting some injury and/or distress
- a manipulative perpetrator may be trying to draw the police into colluding with their control or coercion of the victim, by making a false incident report.[81]
- In cases of counter-allegations, officers are advised to evaluate each party's account separately and to complete a risk assessment for both parties if both claim to be victims.

Hester's study in North East England highlights that women are disproportionately likely to be arrested following a domestic violence incident.[82] This raises concerns that pro-arrest policing policies are resulting in 'gendered injustice' against women who are not primary perpetrators.[83] However, the research also highlights that 'at least some of the police were using a gender-sensitive approach to determining the primary aggressor'.[84] This suggests that the police are moving, over time, away from an incident-based approach and towards a more contextualised or pattern-based approach to identifying primary and retaliatory violence in relationships.

Where a defence is likely to be available to a defendant, this can be taken into account at the evidential stage of the Full Code Test when the prosecutor is evaluating whether there is a realistic prospect of conviction.[85] Consequently, defences are not only relevant at the trial stage: they can be an important means of avoiding prosecution. In addition, a history of domestic abuse victimisation can be taken into account at the public interest stage. The Code for Crown Prosecutors specifies that 'a suspect is likely to have a much lower level of culpability if the suspect has been compelled, coerced or exploited, particularly if they are the victim of a crime that is linked to their offending'.[86] Prosecutors can therefore decline to prosecute where there is sufficient evidence of compulsion, coercion and exploitation affecting culpability, even where this falls short of a legal defence. There is, however, no data or research available on whether and how this happens in practice.

Legal guidance from the Crown Prosecution Service (CPS) on domestic abuse similarly draws attention to the issue of counter allegations, self-defence and alleged reciprocal abuse. Police

77 Munro, Bettinson and Burton, 'Control, Coercion and Criminal Responsibility', (n64).

78 Ibid.

79 Ibid, 14. See also Andy Myhill, Kelly Johnson, Abigail McNeill, Emily Critchfield and Nicole Westmarland, '"A Genuine One Usually Sticks Out a Mile": Policing Coercive Control in England and Wales' (2022) 33(4) *Policing and Society* 398.

80 College of Policing, *Domestic Abuse: First Response* (College of Policing, 24 February 2022) <https://www.college.police.uk/app/major-investigation-and-public-protection/domestic-abuse/first-response#determining-the-primary-perpetrator-and-dealing-with-counter-allegations> (accessed 23 September 2024).

81 Ibid.

82 Hester, 'Who Does What to Whom?', (n46), 623.

83 Ibid, 633.

84 Ibid.

85 CPS, *Code for Crown Prosecutors* (cps.gov.uk, 26 October 2018) <https://www.cps.gov.uk/publication/code-crown-prosecutors> (accessed 23 September 2024) [4.7].

86 Ibid, [4.14].

and prosecutors are encouraged to conduct a 'thorough investigation...into the background of the relationship between the victim and alleged suspect to ensure that the full context of the incident is understood'.[87] However, no published research is available examining the accuracy of identification of victims and primary perpetrators by the CPS.

The Centre for Women's Justice recommends that any substantive legal reforms should be accompanied by a comprehensive cross-government policy implementation framework. This would include statutory guidance, training for criminal justice agencies in identifying domestic abuse, judicial directions, support for victims/survivors, and special measures to protect vulnerable defendants.[88] They suggest that the CPS should introduce guidance for charging and prosecution decisions in relation to victims of domestic abuse and undertake a review of the public interest test to ensure that it takes abuse into account and is implemented consistently.[89]

Bettinson and colleagues suggest that the CPS should consider the principles of the social entrapment model when assessing the victim's situation, including 'the nature of the coercive control perpetrated by the abuser and how this reduced the defendant's capacity for action, as well as the responses of frontline services and what the victim (now defendant) could realistically be expected to do given that previous experience and ongoing threat'.[90]

While police and prosecutors are aware of the need to distinguish primary perpetrators, the risk of victims being misidentified as perpetrators and charged as offenders remains. As set out in the next section, this misidentification may become more difficult to remedy as the person moves through the criminal justice system. Failures to identify a history of domestic abuse at the arrest and charging stages where this is relevant to other types of offending may also continue into the trial stage. Even where such histories are identified, the evidence may fall short of a legal defence. Consequently, the arrest and charging stages in the process constitute a vital means of filtering out cases of suspects who are victims before they go to court. Broadening the criteria for the defences set out in the next section could also be of use at the pre-trial stage, as those who are identified as likely to fulfil a defence could be filtered out of the system at this stage.

## 3.1 Empirical evidence of the treatment of victims who are defendants at trial

According to research by the Centre for Women's Justice based on roundtables with domestic abuse service providers, 'it is common for women to be accused of offences arising from their experience of domestic abuse, and it is routine for this not to be taken into account'.[91] Domestic abuse practitioners further stated that women experiencing domestic abuse were advised against raising domestic abuse in their defence or in mitigation 'because it is seen as making an excuse'.[92] This raises several concerns for victim-defendants during the trial process, which is highlighted further by research by the Centre for Women's Justice and Justice for Women. They report on four trials in which failures by women defendants to disclose their experiences of violence prior to homicide were a key factor in the prosecution case against them.[93] Defence lawyers interviewed in the research reported cases in which prosecutors downplayed the abuse experienced by the defendant, pursued murder charges inappropriately, or declined to accept a guilty plea to manslaughter. Defendant women also

87 CPS, 'Domestic Abuse' (*CPS.gov.uk* 5 December 2022) <https://www.cps.gov.uk/legal-guidance/domestic-abuse> (accessed 23 September 2024).

88 Centre for Women's Justice, *Double Standard,* (n70).

89 Ibid, 68.

90 Bettinson *et al.*, 'A One-Sided Coin?', (n63).

91 Centre for Women's Justice, *Double Standard,* (n70), 22.

92 Ibid, 23.

93 Centre for Women's Justice and Justice for Women, *Women Who Kill* (n70), 29.

reported having their pleas rejected.[94] Lawyers voiced further concerns that a lack of knowledge and understanding of violence against women and girls or a lack of experience in representing women amongst some defence lawyers could result in a history of domestic abuse being missed or misunderstood, and in a weaker defence case being made.[95]

Additional concerns have been raised in studies of women who were accused of offences alongside their intimate partners. This includes women convicted of violent offences on the basis of joint enterprise liability despite not having participated in any violence, and women convicted of causing or allowing the death of a child at the hands of their partner.

In a study by Susie Hulley, 12 women convicted of serious violence alongside their intimate partners described histories of 'multiple experiences of violence, control and abuse at the hands of significant men in their lives'.[96] A majority of those convicted alongside their male partner 'testified to being subjected to serious violence, coercive control or both, by him' and 'a significant number' reported that they thought their partners would have killed them had they not come to prison.[97] They reported that their experiences had often been missed or ignored by state agencies, including social services, and many believed that their calls for help or protection would not be heard.[98] Women reported difficulties with raising evidence of domestic abuse in the absence of corroboration from police records.[99]

In a separate study by Becky Clarke and Kathryn Chadwick of women convicted of mostly serious violent offences under the doctrine of joint enterprise, 90% had not engaged in any violence and most had played only a marginal role in the offence.[100] Almost half of the women disclosed that their daily life at the time of the offence was marked by domestic violence. A larger number had experienced violence or abuse as adults or children.[101] In 87% of those cases in which domestic violence was disclosed, the perpetrator of the violence was the woman's co-defendant and the victim was the perpetrator of the violence in five cases.[102] In some cases, women's experiences of abuse and violence were silenced in the courtroom, while in other cases their experiences were exploited by the prosecution to paint them in a negative light.[103] Women reported that their defence teams discouraged them from raising evidence of violence and health issues in court.[104]

Clarke and Chadwick's research further highlights that defendants appearing alongside their abusers as co-accused are at risk of intimidation or re-traumatisation in the courtroom. One woman reported feeling 'under duress' at her trial due to the presence of her co-defendant in the same waiting room and court room and unable to speak up due to the threat of domestic violence. Another spoke of feeling very unsafe 'handcuffed to a man and everyone staring at me with the two male [co-defendants] in [the] dock'.[105] Hulley also reports that a woman's partner continued to abuse her when they appeared in court as co-defendants by attempting to speak to her and by writing 'a load

94 Ibid, 40 – 42.
95 Ibid, 43 – 46.
96 Hulley, 'Defending 'Co-offending' Women', (n71), 589.
97 Ibid.
98 Ibid, 591.
99 Ibid, 595 – 596.
100 Clarke and Chadwick, *Stories of Injustice,* (n71), 10.
101 Ibid, 17.
102 Ibid.
103 Ibid.
104 Ibid, 16.
105 Ibid. Stakeholders in our consultation stressed the importance of protecting defendants throughout the trial process. This includes ensuring severance in cases where the defendant's co-accused may have been involved in their exploitation or abuse. See Appendix 1: Stakeholder responses to consultation.

of lies on a piece of paper' he held up for her to read.[106] The coercive nature of their relationship went unrecognised.[107]

Six of the cases reviewed by Clarke and Chadwick involved an infant victim, and in five out of six cases the victim was the woman's own baby.[108] There was evidence of domestic abuse by the male co-defendant in all six cases and of recent or current involvement of the police or social services. However, this history was silenced in court.[109] This silencing is particularly regrettable given that the relevant sentencing guideline states that being the victim of domestic abuse, including coercion and/or intimidation (where linked to the commission of the offence), indicates lesser culpability.[110] According to Clarke and Chadwick, defendants who were victims themselves were often constructed by the prosecution as 'failed mothers' who should have foreseen the risk to their children and should have acted upon it.[111]

Histories of domestic abuse may also be used by the prosecution to incriminate a defendant at the trial stage rather than seen as an indication of vulnerability or lesser culpability. Sarah Singh analysed media reports of cases in which mothers were prosecuted for causing or allowing the death of a child contrary to section 5 of the Domestic Violence, Crime and Victims Act (DVCV) 2004. In one case, a woman's previous experience of domestic abuse at the hands of her partner, who went on to kill her child, was taken as evidence that she ought to have foreseen the possibility of violence and failed to prevent it 'out of fecklessness rather than fear'.[112] In another, evidence that a woman's partner was violent towards her after the death of their daughter was presented by the prosecution as proof that she was aware of her partner's propensity for violence and should have taken steps to protect the child.[113]

Hulley recommends targeted training on coercive control for criminal justice practitioners to counteract myths and stereotypes that can disguise women's status as victims.[114] She also suggests that the Victims' Code should apply to women defendants who are victims of abusive relationships and that they should be entitled to special measures in court. For co-accused women, this may include sitting separately from their co-defendants or giving evidence behind a screen.[115] Hulley further recommends the development of detailed policy guidelines for police and prosecutors on the application of complicity liability to cases of women who are victims of their co-defendant's violence. According to Hulley, this guidance should require the police and prosecution lawyers to investigate the whole intimate relationship between the co-accused and to take into account evidence of coercive control. This, she argues, should help to ensure that victims are not prosecuted in the first place. Similar guidance should be in place for judges and juries to encourage them to focus on the whole relationship, rather than on the violent incident that led to the co-defendants being charged.

Jonathan Herring argues that it is inappropriate to charge defendants under section 5 of the DVCV Act 2004 where they have been subject to domestic violence by the person who went

106 Hulley, 'Defending 'Co-offending' Women', (n71), 596 – 597.

107 Ibid, 597.

108 Clarke and Chadwick, *Stories of Injustice* (n71), 28.

109 Ibid, 29.

110 Sentencing Council, 'Causing or Allowing a Child to Suffer Serious Physical Harm/ Causing or Allowing a Child to Die' (sentencingcouncil.gov.uk, 1 April 2023) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/causing-or-allowing-a-child-to-suffer-serious-physical-harm-causing-or-allowing-a-child-to-die/> (accessed 23 September 2024). See for discussion, Vanessa Bettinson, *Coercive Control as Mitigation at Sentencing* (Sentencing Academy 2023).

111 Ibid.

112 Singh, 'Punishing Mothers for Men's Violence', (n74), 189.

113 Ibid, 191-192.

114 Hulley, 'Defending Co-offending Women', (n71), 598.

115 Ibid, 598.

on to kill a child or vulnerable adult.[116] This is because the '[d]omestic violence suffered by the defendant will impact on the woman's awareness of the situation; the alternatives open to her and the risks to the children. It can distort a person's perception of reality and sap their energy to do anything more than survive'.[117] He suggests that defendants in this situation should have a defence. Samantha Morrison, by contrast, argues that a defence is unnecessary as domestic violence can be considered when considering whether the defendant took reasonable steps to protect the victim from a risk of death or serious physical harm. She also argues that it can be taken into account when considering whether the defendant was or ought to have been aware of the risk.[118] However, the work of Clarke and Chadwick and Singh discussed above suggests that a history of domestic abuse can be incriminating rather than exculpatory at the trial stage. As set out below, general defences are often insufficient to respond to a defendant's experiences of victimisation.

## 3.2 Defences

Much of the remaining literature focused on the trial stage examines the sufficiency of existing defences for defendants who are victims of domestic abuse, particularly for women who have killed their (often male) abusive partner or ex-partner. This section begins with a review of two general defences that have received significant scrutiny: duress and self-defence. It then turns to consider partial defences to murder.

### (a) Duress

As a general defence[119] that results in an acquittal, duress would seem to be a fitting defence for victims who are coerced into offending by an abuser or by their circumstances. However, as Janet Loveless argues, the defence is likely to be under-used by women coerced by domestic violence as their circumstances 'can be all too easily perceived as "falling short of duress"'.[120] Duress requires the defendant to raise sufficient evidence of duress and, once raised, it is for the prosecution to disprove it.

Four elements must be established. First, that the defendant reasonably believed in the presence of a threat of death or serious physical (not psychological) injury to him or herself, to a member of his or her family, or to someone for whom the defendant might reasonably feel responsible.[121] Second, that the defendant reasonably believed that the threats would be carried out immediately or almost immediately and that there were no reasonable means of escaping the threat.[122] Third, that the threat was a direct cause of the defendant committing the offence.[123] Fourth, that a sober person of reasonable firmness of the defendant's age and sex would have done as the defendant did.[124]

As duress requires a threat of death or physical injury, it excludes consideration of the psychological, sexual and emotional abuse that often characterises abusive relationships. This is 'because the defence is based on the way in which men may more typically experience coercion through clearly identifiable specific threats of

116 Jonathan Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' (2007) Dec *Criminal Law Review* 923.

117 Ibid, 929.

118 Samantha Morrison, 'Should There Be a Domestic Violence Defence to the Offence of Familial Homicide?' (2013) 10 *Criminal Law Review* 826.

119 Note that duress is a defence to all crimes apart from murder, attempted murder and treason involving the death of the sovereign (*Gotts* [1992] AC 412). It is not available to an individual charged with murder as an aider, abettor, counsellor or procurer (*Howe* [1987] AC 417) but it is available if an individual is charged with conspiracy to murder (*Ness and Awan* [2011] Crim L.R. 645).

120 Janet Loveless, 'Domestic Violence, Coercion and Duress' (2010) 2 *Criminal Law Review* 93, 95.

121 *Baker* [1997] Crim LR 497; *Wright* [2000] Crim L.R. 510 CA; *Z* [2005] 2 AC 467

122 *Abdul-Hussain* [1999] Crim LR 570; *Heath* [2000] Crim LR 109

123 *Valderrama-Vega* [1985] Crim LR 220

124 *Howe* (n119).

serious harm rather than by the incremental destruction of self-esteem characteristic of prolonged domestic violence'.[125] As Amy Elkington points out, it seems illogical that threats of death or serious harm are sufficient for duress while victimisation amounting to the serious offence of controlling and coercive behaviour is not.[126] In addition, it is likely to be challenging for a victim of domestic abuse who fears future, non-immediate violence from an abuser based on a history of violence to successfully raise evidence of duress.[127]

As is the case with self-defence, considered below, the myth that the victim could and should have just left the relationship or sought help can pose a barrier to successful duress pleas.[128] Given that leaving or seeking help could be the most dangerous option, a victim may have no other choice but to stay with her abuser.[129] As Bettinson *et al*. argue:

> **the legal logic that still prevails places victim-offenders in a double-bind: while prior help-seeking is seen to corroborate the existence of abuse, and potentially its duration and severity, victims' engagement with services (no matter how futile) indicates an awareness of, and willingness to, seek out alternatives, which undermines their claims to compulsion.[130]**

A related problem is the possibility for the defence to be excluded where a woman is deemed to have 'voluntarily associated' with her violent partner when she foresaw or ought to have foreseen the risk he would subject her to compulsion by threats of violence.[131] As Baroness Hale suggested in *Hasan*,[132] this limitation is not appropriate for 'battered wives' or others in close relationships with their duressors, as these groups are not in a comparable situation to those who have chosen to join gangs or terrorist organisations. However, the law as it stands does not rule out this possibility.

A further problem with duress is that it tends to pathologize victims of domestic abuse rather than to recognise that the abuse constrains their choices, or that their choices may be explained by the extreme nature of their situation. As the test for duress is essentially objective, a defendant may be unsuccessful in raising duress even where the court believes he or she felt compelled to commit the offence if the court does not believe that a 'sober person of reasonable firmness' would have done the same.[133] The rule in *Bowen*[134] permits the jury to take into account characteristics that make a person less able to resist threats when considering whether a sober person of reasonable firmness would have done as the defendant did. However, this exception is limited to evidence that the individual suffers from a recognised mental illness or psychiatric condition, such PTSD or BWS leading to 'learned helplessness'.[135] BWS is a contested concept characterised by gendered stereotyping of women as 'passive, irrational and submissive'.[136] In addition, the idea of 'learned helplessness' is not apt to explain cases in which a victim acts violently rather than passively in response to abuse.[137] As a result, the defence of duress tends to reinforce the stereotype of victims as helpless, and lacking

125 Loveless, 'Domestic Violence, Coercion and Duress', (n120), 95

126 Amy Elkington, 'Allowing a Defence to Those Who Commit Crime under Coercive Control' (2022) 86(2) *Journal of Criminal Law* 295, 299, citing *N* [2007] EWCA Crim 3479, 300.

127 Loveless, 'Domestic Violence, Coercion and Duress', (n120), 97

128 Ibid, 99-100.

129 Ibid.

130 Bettinson *et al.*, 'A One-Sided Coin?', (n63).

131 Elkington, 'Allowing a Defence to Those Who Commit Crime under Coercive Control', (n126), 301.

132 [2005] UKHL Crim 903, [77] – [78].

133 See the case of YS [2017] EWHC 2839, discussed in The Criminal Bar Association, 'Defences available for women defendants who are victims/survivors of domestic abuse. Briefing note prepared for the summit held by the Prison Reform Trust in London on. Tuesday 17th October 2017' (Criminal Bar Association, 2017) <https://prisonreformtrust.org.uk/wp-content/uploads/2022/02/CBA-domestic-violence-briefing.pdf> (accessed 23 September 2024).

134 *Bowen* [1996] EWCA Crim 1792.

135 *Emery* (1992) 14 Cr. App. R. (S.) 394.

136 Loveless, 'Domestic Violence, Coercion and Duress' (n120), 104.

137 Ibid.

agency. Those who fight back against abuse therefore risk having their victim status disbelieved. A social entrapment lens, by contrast, would shift the focus to how the abuse and social responses to it constrained the defendant's choices.

The Centre for Women's Justice has proposed introducing a new statutory defence for survivors of domestic abuse modelled on the defence under section 45 of the MSA 2015 for victims of trafficking who are compelled to offend.[138] Hulley similarly recommends the development of defences 'for women who are found to have intended to assist or encourage the principal offender, but who felt compelled to do so due to multiple and accumulated experiences of violence and abuse'.[139]

The proposal from the Centre for Women's Justice would require a nexus between the abuse and the offence, and courts would have to 'determine on the facts whether victims/survivors were compelled to offend as part of, or as a direct consequence of, their experience of domestic abuse'.[140] It would also have to be shown that 'a reasonable person in the same situation as the person and having the person's relevant characteristics might do that act'. Relevant characteristics would include 'age, sex, any physical or mental illness or disability and any experience of domestic abuse'. [141] The PRT put forward such a proposal during the drafting of the Domestic Abuse Bill[142] but it was ultimately rejected by Parliament.[143]

Bettinson *et al.* argue that although the PRT's proposal is wider than duress, the inclusion of a reasonable person standard runs the same risk of assuming that the defendant had reasonable alternatives to offending and of overlooking the social entrapment of domestic abuse.[144] Like the MSA 2015 defence, the PRT's proposal would have excluded a broad range of offences that domestic abuse victims may reasonably be expected to engage in as a result of coercion by an abuser.

Bettinson *et al.* present a more developed coercion-based defence for victims of domestic abuse. Like duress, their proposed defence would be a general defence but would not apply in cases of murder or attempted murder. To avail of the defence, 'the coercer must be personally connected to the defendant and the coercion by domestic abuse[145] must have compelled the defendant to commit the offence charged'.[146] Drawing on the Domestic Abuse Scotland Act 2018, they propose that the link between abusive behaviour and coercion:

> **is underscored by its having, amongst its purposes, to make victims dependent on or subordinate; to isolate them from friends, relatives or other sources of support; to control, regulate or monitor their day-to-day activities; to deprive them of, or restrict, their freedom of action; or to frighten, humiliate, degrade or punish.[147]**

Defendants would not be required to show 'reasonable fortitude' but instead that they lacked the 'fair opportunity' to act differently. 'Fair opportunity' is to be understood in light of 'the nature and type of coercion, responses by statutory and voluntary agencies when made aware of the circumstances, and any characteristics or circumstances of the defendant that affected the nature and type of coercion or the agency

138 Centre for Women's Justice, *Double Standard,* (n70), 67.

139 Hulley, 'Defending 'Co-offending' Women', (n71), 599.

140 Centre for Women's Justice, *Double Standard,* (n70), 81.

141 Prison Reform Trust, *Written Evidence Submitted by the Prison Reform Trust (DAB01): Domestic Abuse Bill – Legal Protection for Survivors Who Offend due to Domestic Abuse* (Prison Reform Trust 2021) <https://publications.parliament.uk/pa/cm5801/cmpublic/DomesticAbuse/memo/DAB01.pdf> (accessed 23 September 2024).

142 Ibid.

143 Bettinson *et al.*, 'A One-Sided Coin?', (n63).

144 Ibid.

145 As defined by section 1 of the Domestic Abuse Act 2021.

146 Bettinson *et al*, 'A One-Sided Coin?', (n63).

147 Ibid.

response to it'.[148] Relevant characteristics and circumstances would include, but would not be limited to, 'race, age, gender, physical or mental illness or disability, socio-economic status, parental status, sexuality, religion, and immigration status'.[149]

Bettinson *et al.* suggest that the now-abolished defence of marital coercion could alternatively be revived and reformed so that it would apply 'where A and B are personally connected'[150] rather than only to married women. However, they suggest that a broad definition of coercion that includes controlling and coercive behaviour 'may cause the judiciary consternation, given their approach to duress'.[151] They argue that a revived defence would need to include a requirement that the defendant's actions were due to the abuser's controlling and coercive behaviour and require consideration of the defendant's wider circumstances and social entrapment.

Broadening the MSA 2015 defence in this way may, however, be insufficient to counteract the tendency of the law and legal actors to construct defendants as capable of, and therefore responsible for, avoiding the commission of an offence. As will be seen from the discussion below, there is a tendency for courts to privilege medical evidence, and measures will therefore need to be taken to encourage judges to admit over other forms of expert evidence where this is sufficiently relevant and of sufficiently high quality.

## (b) Self-defence or private defence

As Aileen McColgan argues, self-defence appears to be the most appropriate defence for women who kill their abusers out of fear for their lives as it best reflects the facts of such cases and results in an acquittal.[152] However, female victims of domestic abuse are not often successful in raising self-defence. As there is no official record in the UK of how often criminal defences are raised or how often they succeed,[153] the data below is drawn from studies that rely upon media reports, law reports, unreported cases, court observations, interviews, and/or case files.

The Centre for Women's Justice and Justice for Women found in their study of 92 cases between April 2008 and March 2018 that most women who killed their partner or ex-partner in the course of an abusive relationship were convicted of murder or manslaughter.[154] This was despite evidence that in 77% of cases the women had experienced violence or abuse from the male deceased.[155] Self-defence was successfully pleaded in six cases and unsuccessfully in fourteen.[156] The Wade Review similarly found that it was rare for defendants to successfully raise self-defence in intimate partner homicides, with Home Office data showing just seven acquittals between April 2016 and December 2020 in intimate partner homicide cases, including two women acquitted on the basis of self-defence and five men.[157]

In Rachel McPherson's study of 111 cases involving women accused of homicide between 2008 and 2019 in Scotland, she identified 31 cases where the deceased was the defendant's partner or ex-partner. In all but one case, the deceased was male. In 20 of these cases (66.7%) there were references to prior domestic abuse or fighting between the parties, and in one case the defendant and male deceased were accused of mutual domestic abuse.[158] No further proceedings

148 Ibid.

149 Ibid.

150 As defined by section 2 of the Domestic Abuse Act 2021.

151 Bettinson *et al.*, 'A One-Sided Coin?', (n63).

152 Aileen McColgan, *'General Defences' in Donald Nicolson and Lois Bibbings (eds) Feminist Perspectives on Criminal Law* (London: Cavendish, 2000).

153 Rachel McPherson (ed), *Women Who Kill, Criminal Law and Domestic Abuse* (Routledge 2023), 84.

154 Centre for Women's Justice and Justice for Women, *Women Who Kill,* (n70).

155 Ibid, 22.

156 Ibid, 48.

157 Clare Wade, *Domestic Homicide Sentencing Review,* (Ministry of Justice 2023), [9.2.3]. These figures are based on a sample of 120 cases examined by the review.

158 Rachel McPherson, 'Women and Self-Defence: An Empirical and Doctrinal Analysis' (2022) 18(4) *International Journal of Law in Context* 461, 462.

were taken in two cases involving partner homicide.[159] Only three women who were tried for murder or culpable homicide of a male partner or ex-partner raised self-defence.[160] None of the three were acquitted and two were convicted of murder. Of the 10 women in the larger sample who raised self-defence at trial, four were convicted of murder, five of culpable homicide, and one of assault. McPherson argues this suggests particular reluctance to claim self-defence in intimate partner homicide cases.

Howes *et al*.[161] highlight the following barriers to success for victims of domestic abuse who plead self-defence after using violence against their abusers:

- insufficient corroborating evidence from state agencies where the woman has not previously disclosed abuse;
- women providing false accounts of the incident and undermining their credibility in the eyes of the jury;
- the stereotype that a woman 'gave as good as she got' and the use by the prosecution of a defendant's previous violent behaviour or bad character evidence to undermine her status as a victim;
- the defendant's use of a weapon, which is likely to be interpreted as disproportionate by the jury even where she feared for her life;
- the common myth that women in violent relationships should just leave and/or seek help from the police or other services;
- reluctance on behalf of the defendant to give evidence in court or failures by the defence to present evidence of abuse in court;
- a tendency to focus on events immediately before and after the killing and to miss the woman's fuller history;
- overreliance on medical experts in court, variability in quality of expert evidence, and difficulties in persuading courts to admit non-medical expert evidence of coercive control.

Commentators have suggested both legislative reform and procedural changes to improve access to self-defence for victims of domestic abuse. The Centre for Women's Justice and Justice for Women recommend extending the householder defence under section 76(5A) of the Criminal Justice and Immigration Act 2008 to domestic abuse victims. This would mean that the defence could still succeed where the force used by the defendant (D) against someone (V) who was perpetrating domestic abuse against them was disproportionate (but not grossly disproportionate) provided that the degree of force was reasonable in the circumstances as D believed them to be.[162] A similar proposal was put forward by the Prison Reform Trust (PRT) in their evidence to the Public Bill Committee on the Domestic Abuse Bill.[163] In rejecting the proposal, the Government stated that 'improved understanding and awareness of the nature of domestic abuse...will mean the existing defences are more able to respond flexibly and proportionately than a narrowly defined statutory defence'.[164]

Vanessa Bettinson and Nicola Wake suggest that the PRT's proposals could have gone further.[165] They suggest that the exclusion of mistaken beliefs in the need to use self-defence that arise from voluntary intoxication[166] could disadvantage victims of domestic abuse who self-medicate in response to the effects of abuse.[167] They further point out that, although there is no duty to retreat

159 Ibid, 464.

160 Ibid, 465.

161 Sophie Kate Howes, Katy Swaine Williams and Harriet Wistrich, 'Women Who Kill: Why Self-Defence Rarely Works for Women Who Kill Their Abuser' (2021) 11 *Criminal Law Review* 945

162 Centre for Women's Justice and Justice for Women, *Women Who Kill,* (n70), 143; Centre for Women's Justice, *Double Standard,* (n70), 72

163 Prison Reform Trust, *Written Evidence Submitted by the Prison Reform Trust (DAB01)* (n141).

164 Home Office Public Protection Unit, *Further Government Response to the Report from the Joint Committee on the Draft Domestic Abuse Bill*, Session 2017-19 HL Paper 378 / HC 2075: Draft Domestic Abuse Bill, CP214 (TSO 2020), 13.

165 Bettinson and Wake, 'A New Self-Defence Framework', (n70), 141.

166 Criminal Justice and Immigration Act 2008, s. 76(5).

167 Bettinson and Wake, 'A New Self-Defence Framework', (n70), 159.

in the law of England and Wales, it remains a factor for consideration.[168] Retreat may be unlikely in cases of domestic abuse 'where the cumulative impact of abuse and the futility of former (if any) retreats signify to the victim/survivor that retreating is not a viable option, or alternatively that it exacerbates the abuse'.[169] They suggest that a statutory rebuttable presumption should be introduced in cases involving domestic abuse 'that the victim/survivor was unable to realistically retreat safely'.[170] This proposal is, however, likely to encounter resistance, as it implies a blanket assumption that police or other responses to domestic abuse are insufficient to protect victims. Removing retreat as a factor from self-defence altogether could be another way to ensure a more equal application of the law to domestic abuse victims and others who use self-defence.

Bettinson and Wake suggest that courts should adopt a social entrapment lens when considering the threat that the defendant perceived and the reasonableness of the degree of force he or she used in self-defence. They suggest that the Crown Court Compendium should be amended to require jurors to consider a social entrapment approach explained above, in all cases involving domestic abuse:

> **the coercive and controlling behaviour the abuser used and how this reduced the victim's/survivor's space for action; the responses of frontline services and what they could realistically be; and, the impact of any intersecting inequalities in the victim's/survivor's life on how they responded to the coercive and controlling behaviour and frontline services and how this further exacerbated the coercive control.[171]**

They further suggest that general evidence on coercive control from non-medical experts could help to educate jurors on its implications and counteract unhelpful assumptions or stereotypes about victims. This evidence would not be based on BWS and would thereby 'avoid the implication that the defendant was operating under some form of diminished responsibility rather than reacting reasonably in the circumstances as she perceived them'.[172] However, evidence based on the individual case is likely to be more powerful than general evidence, and measures will need to be taken to encourage courts to admit expert evidence from non-medical experts.

Nicola Wake and Alan Reed highlight parallels between the experiences of victims of human trafficking or modern slavery and victims of family violence. Both groups face '[t]hreats, force, coercion, control, abuse of power, exploitation, patterns of harm and entrapment'.[173] They also draw parallels with ostensible gang members who are in fact victims of control and coercion by the gang, and third-party abuse. They propose the creation of a partial defence to homicide of self-preservation that would sit below self-defence and could be used by a broad range of abuse victims. Wake and Reed propose that this defence should apply where the defendant uses unreasonable force to kill the victim in response to a genuine fear that they or an identified other person will suffer serious abuse at the hands of the victim. The absence of a requirement for an imminent threat and a proportionate response would be justified by the fact the defence is only partial.[174] The serious abuse requirement would be broadly construed and would include psychological and/or sexual harm in addition to physical violence.[175] The defence would be modelled on loss of control and would require 'that a person of the defendant's age with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way in the circumstances'.[176]

168 Ibid, 147. See Criminal Justice and Immigration Act 2008, s. 76(6A).
169 Ibid, 157.
170 Ibid.
171 Ibid, 163 – 164.
172 Ibid, 170.
173 Nicola Wake and Alan Reed, 'Reconceptualising the Contours of Self-Defence', (n2).
174 Ibid, 237.
175 Ibid, 238.
176 Ibid.

They recommend that this defence be accompanied by social framework evidence that would '[highlight] the relevance of the dynamics of the relationship, strategic responses designed to resist, avoid or escape the violence and the ramifications of those efforts, in addition to social and economic factors pertinent to the abuse.'[177] Wake and Reed further propose the introduction of jury directions that describe the nature of domestic abuse and highlight that there is no typical response to abuse, and that it is not uncommon for victims of family violence to stay with or return to an abusive partner and to not report the violence or seek help.[178]

The Wade Review suggested that a partial defence of self-preservation could have the advantage of shifting the focus from the psychiatric condition of the offender 'and more readily meet what some experts claim is a normal response to the abuse of coercive control'.[179] Implementing this change would also be helpful in addressing the incompatibility between self-defence and the partial defences of loss of control and diminished responsibility as alternative defences where self-defence fails. As these defences involve admitting intent to kill or cause really serious harm they tend to contradict claims of self-defence.[180]

## (c) Loss of control

The partial defence of loss of control was introduced by Section 54 (1) of the Coroners and Justice Act 2009. The defence was reformed following criticism that the requirement in the old defence of provocation for a 'sudden and temporary loss of self-control' favoured male defendants and did not adequately respond to cases in which women who killed their abusers after experiencing 'slow-burn anger' for a sustained period.[181] The defence applies where:

> **a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if— (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control, (b) the loss of self-control had a qualifying trigger, and (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.[182]**

Two qualifying triggers apply: (1) D's fear of serious violence from V towards D or another identified person (the fear trigger), and (2) D's justifiable sense of being seriously wronged in response to things done or said that constitute circumstances of an extremely grave character (the anger trigger). While the legislation requires that D lose self-control, that loss does not need to be sudden. Loss of control may be delayed, or 'follow on from the cumulative impact of earlier events'.[183]

Susan Edwards examined the outcomes for 40 women who killed their male (n = 39) or female (n = 1) partner or former partner and who were convicted between April 2011 and March 2016.[184] The vast majority (30) were convicted of murder, while only three were convicted of manslaughter by diminished responsibility and seven of 'other' manslaughter.[185] None were acquitted. Publicly available information did not suggest that any were based on loss of control.[186] This was despite evidence of violence against the defendant in four and evidence of arguments between the parties in ten murder cases.[187]

177 Ibid, 245.
178 Ibid, 246.
179 Wade, *Domestic Homicide Sentencing Review,* (n157), [9.4.14].
180 Ibid, [9.4.16].
181 Anna Carline, 'Critical Perspectives on the Partial Defence of Loss of Control: Justice for Women?', in Rachel McPherson (ed), *Women Who Kill, Criminal Law and Domestic Abuse* (Routledge 2023), 52.
182 Coroners and Justice Act 2009, s. 54.
183 *R v. Dawes* [2013] EWCA Crim 322; [2013] 2 Cr. App. R. 3, [54].
184 Edwards, 'Women Who Kill Abusive Partners', (n70).
185 Ibid, 262.
186 Ibid.
187 Ibid, 265.

The Wade Review found that loss of control was relied on in just 9% of intimate partner homicide cases between 2018 and 2020. The plea was only successful in two cases, both involving female defendants who killed their abusive male partners.[188] Notably, both convictions followed murder trials and the defendants were represented by specialist solicitors or counsel and/or received considerable support from specialist solicitors.[189]

As Amanda Clough argues, the requirement for a loss of control means that the reformed defence 'continues to be based upon the male experience'.[190] It may be difficult for a defendant to demonstrate that they lost their self-control in response to coercive and controlling behaviour that did not include a threat of physical violence.[191] Clough suggests that the defence could be reformed to remove the requirement for the defendant to lose self-control, as this tends to prioritise the male response to anger or fear.[192] However, such an amendment would fundamentally alter the defence, as it would no longer be based on a loss of self-control. It is not clear what would replace the requirement for the defendant to lose self-control, and a defence based solely on evidence that the qualifying triggers were met would seem overly broad. The introduction of a partial defence of self-preservation, as suggested by Wake and Reed above, could instead go some way to providing an alternative defence for abuse victims who kill their abusers in circumstances that do not amount to self-defence.

For evidence of coercive control to be considered in loss of control, the evidence would have to speak to one of the qualifying triggers. As is the case with duress, the fear trigger requires a fear of serious violence from the victim, and a fear of further emotional or psychological abuse is insufficient.[193] Psychological or emotional abuse is more likely to be relevant to the anger trigger. Jonathan Herring argues that domestic abuse should be readily regarded as a very serious wrong, and that this may shift the focus away from the victim's psychological suffering and towards the wrongfulness of the abuse.[194] For Bettinson, if the qualifying trigger is interpreted in this way, this would make the loss of control defence preferable to the defence of diminished responsibility for victims of domestic abuse who kill.[195]

A further area of contention is the exclusion of sexual infidelity as a qualifying trigger.[196] The aim of this provision was to bar male killers who acted on 'assumptions of ownership of their spouse or partner' from using the defence.[197] However, after *Clinton*,[198] the exclusion 'does not prevent coercively controlling killers from claiming the partial defence since sexual infidelity may be considered where it is part of the context in which to evaluate the qualifying trigger'.[199] Conversely, the exclusion risks barring the defence for defendants accused of 'killings in response to coercive control where allegations of sexual infidelity and/or threats to reveal a partner's alleged infidelity may form part of the pattern of control of the victim'.[200] Nicola Wake and Alan Reed argue that judges ought to exclude the first type

188 Wade, *Domestic Homicide Sentencing Review* (n157), [9.5.2].

189 Ibid, [9.5.11].

190 Amanda Clough, 'Coercive Control: Transforming Partial Defences to Murder in England and Wales' (2023) 87(2) *Journal of Criminal Law* 109, 112. See also Edwards, '"Demasculinising" the Defences of Self-Defence', (n45).

191 Clough, 'Coercive Control: Transforming Partial Defences to Murder in England and Wales' (n190), 112.

192 Ibid.

193 Bettinson, 'Aligning Partial Defences to Murder', (n70).

194 Jonathan Herring, "The Serious Wrong of Domestic Abuse and the Loss of Control Defence" in Allan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility Manslaughter: Domestic, Comparative and International Perspectives* (Ashgate 2011), 66.

195 Bettinson, 'Aligning Partial Defences to Murder', (n70).

196 Coroner's and Justice Act 2009, s. 55(6)(c).

197 Andrew Ashworth, 'Homicide: Coroners and Justice Act 2009 s.54--Loss of Control--Qualifying Trigger' (2012) 7 *Criminal Law Review* 539, 543.

198 [2012] EWCA Crim 2.

199 Nicola Wake and Alan Reed, 'Reconceptualising Sexual Infidelity Provocation: New Anglo-Scottish Reform Proposals' (2024) 88(1) *The Journal of Criminal Law* 17, 25.

200 Ibid.

of case from the remit of loss of control, while the defence should be allowed to go to the jury in the second type of case.[201]

Wake and Reed further suggest that a new qualifying trigger of a gross breach of trust could be introduced into loss of control where it caused the defendant to have a justifiable sense of being seriously wronged. This trigger would be partially based on excuse and partially on justification.[202] They recommend the introduction of an additional trigger 'where protection was regarded necessary in response to domestic abuse' from the deceased.[203] Where this trigger is used, social entrapment criteria should also be considered. Where the gross breach of trust trigger involved sexual infidelity, Wake and Reed recommend 'that consideration should be given to whether allegations of sexual infidelity evidence control or being controlled'.[204]

The case of *Martin (Farieissia)*[205] suggests that expert evidence of PTSD and dissociative behaviour can be taken into account in loss of control. In that case, the court held that such evidence:

> **(i) could lend support to the proposition that at the time of the killing the appellant lost her self-control; (ii) could go to the gravity of the trigger for loss of control; (iii) could be relevant to the question of whether a person of the appellant's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of the appellant, might have reacted in the same or a similar way to the appellant; (iv) could explain the appellant's reported loss of memory at the moment of the killing, either as a part of a dissociative state linked to PTSD, and/or a state of intense emotional arousal leading to impaired encoding, and/or state dependent effects; and (v) could provide context for the appellant's undoubted lies to the police.[206]**

However, the court did not assess whether the expert evidence did, in fact, support a partial defence of loss of control. Presumably, in future cases, expert evidence would be filtered through the requirements of loss of control, and the effect of the PTSD on the defendant's capacity for tolerance and self-restraint would be excluded.

Bettinson suggests that presenting expert evidence of controlling and coercive behaviour at both the second and third stage of the test of loss of control could help to bring the defence into alignment with the offence under Section 76 of the Serious Crime Act 2015.[207] She suggests that evidence demonstrating how the deceased's controlling and coercive behaviour would satisfy the anger trigger should be presented to assist the court, and 'things done or said' should not be restricted to the deceased's final act but should encompass their repeated and continuous behaviour. She argues that evidence of coercive control is also relevant to the consideration of the circumstances in which the defendant found themselves. However, the defendant will still be judged against the standard of a woman in her circumstances with 'a normal degree of tolerance and self-restraint'. Evidence that the experience of coercive control reduced the defendant's capacity to exercise self-control is unlikely to be taken into account in the loss of control defence. Instead, the defendant, like the appellant in *Challen*,[208] discussed in the next section, may have to resort to pleading diminished responsibility.

201 Ibid.
202 Ibid, 39.
203 Ibid, 46.
204 Ibid, 46.
205 [2020] EWCA Crim 1798.
206 Ibid, [30].
207 Bettinson, 'Aligning Partial Defences to Murder', (n70).
208 *Challen* [2019] EWCA Crim 916; [2019] 2 WLUK 736; [2020] M.H.L.R. 260; [2019] Crim. L.R. 980.

## (d) Diminished responsibility

Introduced by the Homicide Act 1957 and reformed by the Coroners and Justice Act 2009, the partial defence of diminished responsibility can reduce a murder conviction to one of manslaughter. It is defined by section 2 of the Homicide Act 1957[209] as follows:

A person ('D') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—

**a)** arose from a recognised medical condition,

**b)** substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and

**c)** provides an explanation for D's acts and omissions in doing or being a party to the killing.

The relevant elements of subsection 1A are the ability:

**a)** to understand the nature of D's conduct;

**b)** to form a rational judgment;

**c)** to exercise self-control.

Finally, 'an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct'.[210]

The 2009 reforms were expected to make it easier for women who kill their abusers to rely on the defence by widening the scope of the medical conditions that the plea could be based upon.[211] The Wade Review indicates that women in this situation may be more successful in raising diminished responsibility than loss of control, as four women in their sample were convicted of manslaughter by reason of diminished responsibility.[212]

However, as Louise Kennefick highlights, the requirement for a 'recognised medical condition' means that defendants without a formal diagnosis are unable to rely on the defence.[213] Being a victim of domestic abuse is insufficient to ground a plea.[214] In this sense, diminished responsibility is at odds with the offence of controlling and coercive behaviour, which does not require evidence of psychiatric injury.[215] Diminished responsibility is therefore unlikely to be available for all victims of controlling and coercive behaviour who kill their abusive partners, unless they can show that the abuse caused or exacerbated a recognised medical condition.[216]

As is the case with duress, there are concerns that relying on diminished responsibility feeds into stereotypes of women as abnormal and 'mad'[217] and to medicalise victims of domestic abuse.[218] These critiques highlight the shortcomings of the lens of vulnerability as a means of responding to women who are both defendants and victims. As Siobhan Weare argues, diminished responsibility tends to deny a woman's agency on the basis that she is suffering from a medical condition that impairs her decision-making and cognition.[219] Weare argues that this process further perpetuates the abuse women have experienced and oversimplifies their lived experiences.[220] A note of caution is therefore necessary when advocating for defences based on victims' perceived vulnerabilities. Not all victims of

209 As amended by Coroners and Justice Act 2009, s. 52.

210 Homicide Act 1957, s.2(1B).

211 Siobhan Weare, 'Labelling Her Mad: Diminished Responsibility and Medicalised Responses to Women Who Kill Their Abusers' in Rachel McPherson (ed), *Women Who Kill: Criminal Law and Domestic Abuse* (Routledge 2023), 42.

212 Wade, *Domestic Homicide Sentencing Review,* (n157), [9.6.6].

213 Louise Kennefick, 'Introducing a New Diminished Responsibility Defence for England and Wales' (2011) 74(5) *Modern Law Review* 750.

214 Elkington, 'Allowing a Defence to Those Who Commit Crime Under Coercive Control', (n126)

215 Ibid, 81.

216 See *Challen,* (n208).

217 Weare, 'Labelling Her Mad', (n211).

218 Bettinson, 'Aligning Partial Defences to Murder', (n70), 80.

219 Ibid.

220 Ibid.

domestic abuse will suffer from a diagnosable medical condition,and requiring evidence of such a condition tends to draw the focus away from the abuse that led to their offending.

Returning to *Challen*,[221] the Court of Appeal noted that as the expert evidence submitted by the defence on appeal had not been available to defence counsel at trial, neither Challen's mental state nor the impact of abuse by her husband, the deceased, had been explored in any detail. While the Court refused Professor Evan Stark's evidence of coercive control, it did receive psychiatric evidence from Dr Gwen Adshead. The Court did not pronounce on whether Challen was a victim of coercive control, nor on the impact it had upon her ability to exercise self-control or her responsibility for her actions. However, it accepted that Dr Adshead's evidence that the appellant was suffering from a personality disorder and mood disorder at the time of the killing, coupled with the appellant's husband's controlling and coercive behaviour, undermined the safety of Challen's conviction. Notably, Dr Adshead submitted that the interplay between the coercive control and Challen's mood disorder meant 'that the more severe symptoms of a mood disorder were masked during the time that the appellant and the deceased lived together'.[222] Thus, evidence of coercive control may be relevant to diminished responsibility where it had the effect of concealing the appellant's mental disorder or where it may help to explain their behaviour.

Challen further demonstrates a tendency for courts to prioritise medical evidence over other evidence related to an abused person's circumstances. As Anna Carline argues, while it is positive that coercive control was recognised in *Challen*, the fact that the appeal was only successful in relation to diminished responsibility continues the problematic pathologization of abused women.[223] Bettinson similarly remarks that:

> **it is far from a satisfactory situation that the impact of coercive control upon the victim has to be fitted within this language of abnormality. The feelings of many victims of coercive control, though varied, are normal responses to the denial of their autonomy.[224]**

Consequently, defences that are more apt to recognise the role of the abuser in killings by domestic abuse victims may be more suitable than diminished responsibility. These include duress, self-defence, loss of control and potentially a new partial defence of self-preservation. As discussed in relation to these defences, there is a clear case for reforms that adopt a social entrapment lens. This would help the law and legal practices to move away from a focus on individual pathologies and towards a more holistic understanding of the ways in which abuse and social responses to it can constrain a victim's choices. However, Courts may resist the bringing of broad social context evidence that does not clearly connect to the facts in a specific case. Evidence of specific failings by identified organisations in supporting the defendant or responding to reports of domestic abuse may be more likely to succeed.

## 4.1 Sentencing

Experiencing domestic abuse can constitute a mitigating factor or a factor reducing culpability at the sentencing stage. As Bettinson argues, the experience of domestic abuse or coercive control, while not necessarily entirely negating agency, 'erodes a person's capacity for choice' thus reducing their culpability for offending.[225] This is because the options a victim has to escape the abuse or to avoid committing offences are constrained by the need to navigate their own safety as well as by structural factors and their own social position.[226]

Given the narrow remit of the defences already considered, it is at the sentencing stage that evidence of domestic abuse may be most likely to make a difference to the outcome of a case. However, sentencing cannot mitigate the stigma

221 *Challen,* (n208).
222 Ibid, [44].
223 Carline, 'Critical Perspectives on the Partial Defence of Loss of Control', (n181), 60.
224 Bettinson, 'Aligning Partial Defences to Murder', (n70), 81.
225 Bettinson, *Coercive Control as Mitigation at Sentencing,* (n110), 8.
226 Ibid.

and adverse outcomes for a person's professional, personal and family life that come with a criminal conviction. Moreover, sentencing guidelines do not take a consistent approach to responding to evidence of domestic abuse, and there is no research available on how judges approach the assessment of culpability or mitigation on these grounds in practice.

The Sentencing Council's *General Guideline: Overarching Principles* states that where a victim is involved in an offence through 'coercion, exploitation and intimidation' this is a factor reducing the seriousness of the offence or reflecting personal mitigation. This factor 'may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts'.[227] Courts are reminded by the guideline to be alert to factors that suggest coercion, exploitation and intimidation that offenders may find difficult to articulate, and, where appropriate, to ask for these to be addressed by a pre-sentence report (PSR). The guideline also draws attention to the potential for offenders with these experiences to be vulnerable, and to find it more difficult to cope with custody or to complete a community sentence. The general guideline applies where there is no offence-specific guideline and is also to be used in conjunction with offence-specific guidelines. Bettinson highlights that, as the general guideline 'does not explicitly refer to coercive control, merely "coercion" and "intimidation", sentencers are not encouraged to identify non-physical methods of abuse and its full impact upon the victim-offender'.[228] There is no research on the extent to which PSRs identify coercive control or its impact upon the offender, nor on the extent to which judges take this into account in sentencing.[229]

Similar factors feature in offence-specific guidelines. The theft guideline[230] states that performing a limited function in the offence under the direction of others or involvement through coercion, intimidation or exploitation indicates lesser culpability. The presence of a mental disorder or evidence of a difficult and/or deprived background or personal circumstances can also be taken into account as a mitigating factor. However, there are inconsistencies in the extent to which coercion, intimidation or exploitation appears in offence-specific guidelines, and whether it is included as an indicator of reduced culpability or personal mitigation.[231] As culpability is assessed first under sentencing guidelines, this suggests that evidence of coercion, intimidation or exploitation may have a greater impact upon sentence at this stage than at the stage of mitigation.[232] It is unclear why these factors appear in different forms across the guidelines.[233] While it is unclear whether this has any impact in practice,[234] it may nevertheless be helpful to amend the guidelines to render them more consistent.

In current sentencing guidelines for violent offences, excessive self-defence or the presence of a mental disorder linked to the commission of the offence is an indicator of lesser culpability.[235] Where a person is convicted of causing grievous bodily harm (GBH) with intent to do GBH or wounding with intent to do GBH, acting in

227 Sentencing Council, 'General Guideline: Overarching Principles' (sentencingcouncil.org.uk, 1 October 2019) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> (accessed 23 September 2024).

228 Bettinson, *Coercive Control as Mitigation at Sentencing,* (n110), 5.

229 Ibid.

230 Sentencing Council, 'Theft – General' (sentencingcouncil.org.uk, 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general> (accessed 23 September 2024)

231 Bettinson, *Coercive Control as Mitigation at Sentencing* (n110), 11.

232 Ibid, 11 – 12.

233 Ibid, 12.

234 Ibid, 12.

235 See the guidelines on common assault, assault occasioning actual bodily harm, inflicting grievous bodily harm (GBH), causing GBH with intent to do GBH / wounding with intent to do GBH. Links to the relevant guidelines are available from the Sentencing Council's website: <https://www.sentencingcouncil.org.uk/outlines/assault/> (accessed 23 September 2024).

response to prolonged or extreme violence or abuse by the victim also indicates lesser culpability. In addition, a history of serious violence from the victim towards the offender or a defendant's difficult and/or deprived background or personal circumstances[236] can be taken into account as a mitigating factor in respect of several violent offences. However, use of a highly dangerous weapon or weapon equivalent indicates high culpability, and use of a weapon or weapon equivalent that is not highly dangerous indicates medium culpability. This may mean that a woman who uses a weapon may be punished more severely than a man who uses only bodily force.[237]

In murder cases, acting to any extent in self-defence, in response to provocation,[238] or in fear of violence[239] are statutory mitigating factors that can be taken into account at sentencing.[240] However, there is no equivalent mitigating factor to the anger trigger where a person's circumstances fall short of the partial defence of loss of control.

The Wade Review makes several recommendations in relation to the sentencing of domestic abuse victims convicted of homicide offences:

- That the starting point of 25 years that applies where a knife or other weapon is taken to the scene should be disapplied in cases of domestic murder.[241]
- That consideration be given to amending sentencing guidelines so that in cases of domestic manslaughter the use of a weapon is not necessarily an aggravating factor.[242]
- That a history of victimisation through coercive control be a statutory mitigating factor in murder cases.
- The statutory mitigating factors for sentencing in murder be amended to be consistent with the partial defence of loss of control.[243]

The Government agreed with the majority of the recommendations of the Review and agreed to propose that the Sentencing Council update their guidelines based upon it.[244] Notably, however, these recommendations will not apply beyond the case of homicide. The use of weapons may therefore remain an aggravating factor for non-fatal violent offences, even though women may also commit such offences using weapons due to disparities in physical strength between them and their abusers.

While the sentencing stage presents an opportunity for experiences of victimisation that were excluded from the remit of defences at the trial stage to be considered, this is not adequate to mitigate the impact of a criminal conviction or the label of murderer, nor the hardships involved in defending oneself at trial. In addition, recognition of abuse at the sentencing stage relies upon it being disclosed by the defendant and/or raised by the defence, and similar barriers are likely to apply here as to the trial stage.

There is evidence that magistrates receive limited training on coercive control, and that reductions in culpability may be contingent on the perceived severity of the threat, with those subjected to physical violence likely to be treated more sympathetically.[245] Bettinson therefore suggests that better training is required for sentencers, including magistrates, in recognising coercive control, and that adopting a social entrapment lens may assist sentencers in applying coercive control as a mitigating factor.[246]

236 Ibid. Only the second factor is referred to in the guideline for common assault.

237 Although note that strangulation, suffocation or asphyxiation are indicators of high culpability in the guidelines on common assault, assault occasioning actual bodily harm, inflicting grievous bodily harm (GBH), causing GBH with intent to do GBH / wounding with intent to do GBH (n235).

238 Where the offence was committed before 4 October 2010, before loss of control replaced provocation.

239 Where the offence was committed on or after 4 October 2010.

240 Sentencing Act 2020, Schedule 21, s. 10(e).

241 Wade, *Domestic Homicide Sentencing Review,* (n157), [7.1.13]

242 Ibid, [8.2.10].

243 Ibid, [7.1.17].

244 Ministry of Justice, 'Domestic Homicide Sentencing Review and Government Response' (gov.uk, 17 March 2023) <https://www.gov.uk/guidance/domestic-homicide-sentencing-review> (accessed 23 September 2024).

245 Bettinson, *Coercive Control as Mitigation at Sentencing* (n110), 10.

246 Ibid, 9.

## 5.1 Discussion and conclusion

The most effective means of responding to histories of victimisation in people suspected of criminal offences is to divert them away from arrest or prosecution at the earliest opportunity. While there is a dearth of empirical studies of the ways in which police and prosecutors identify and respond to evidence of domestic abuse, existing studies suggest that it is not taken seriously enough. While prosecutors can consider a wider range of factors at the charging stage than is possible at the trial stage, this relies upon adequate investigation and consideration of domestic abuse by the police, which can be prompted by prosecutors evaluating the case file.

Reforming defences to better respond to the impact of domestic abuse on a defendant's choices is an attractive option for addressing the challenges faced by those who are victims. At the moment, the concept of vulnerability applied by the criminal law tends to focus on the defendant's inherent vulnerabilities rather than on how external factors, such as the actions of the abuser and the deficiencies of support services and the police, made them vulnerable. Widening the remit of duress and self-defence has the potential to result in greater numbers of victims being diverted from prosecution and towards support services at an early stage. Extending the householder defence to domestic abuse victims could be a viable means of counteracting unfavourable inferences from women's use of weapons to protect themselves. However, this step is likely to be more limited in its impact than a more thoroughgoing reform of self-defence. While extending the section 45 defence in the MSA 2015 to domestic abuse victims appears to be a straightforward solution, if the defence is limited to a narrow range of offences its impact in practice is likely to be minimal.

There is also a tension between agency and vulnerability when it comes to victims of domestic abuse who offend. On the one hand, the stories of domestic abuse victims discussed in this chapter and wider literature demonstrates that they are far from lacking in energy, agency, and fortitude. On the other hand, the law tends to blame and punish those individuals who demonstrate an ability to act independently without conforming to the stereotype of the 'responsible' victim. As a result, agency is a double-edged sword: it recognises the strengths of individuals who have been through severely adverse circumstances, but at the risk of blaming them for failing to conform to often ill-informed ideas of how victims should behave.

Piecemeal reforms directed only at domestic abuse victims would not fully respond to other groups considered elsewhere in this report who offend due to coercion, abuse or exploitation. Future research should examine whether the suggested areas for reform set out below could, if appropriate, be extended to victims of other forms of abuse. This would have the benefit of ensuring greater consistency of protection for disadvantaged groups while creating a framework that responds to their circumstances rather than the category of victim they fall into.

This chapter has identified the following areas for law and policy reform:

- Improving training for police, prosecutors, defence lawyers, and/or judges in recognising and responding to evidence that a suspect or defendant has been subject to domestic abuse;
- Encouraging greater efforts to divert victims of domestic abuse from prosecution, including where they are accused of serious offences;
- Providing enhanced education or instructions to juries on the impact of domestic abuse on defendants who are victims;
- Encouraging judges to admit a wider range of expert evidence to ensure that cases are viewed in their full context. This should include social context evidence in cases involving defendants who are victims of domestic abuse, such as evidence on the limitations of existing support services and/or police responsiveness, and expert evidence on coercive control from non-medical experts;
- Reforming the defence of duress so that it can apply to defendants who (i) are psychologically coerced into offending by the person who is abusing or exploiting them and/or (ii) who offend in response to a fear of non-violent abuse from the person who is abusing or exploiting them;

- Reforming self-defence to better accommodate defendants who use pre-emptive violence and/or violence that is disproportionate to the immediate threat due to a cumulative history of domestic abuse or exploitation and a fear of future violence;
- Reforming partial defences to murder to better respond to defendants who kill their (ex-)partners following a prolonged period of domestic abuse. Consideration should be given to introducing a partial defence of excessive self-defence or self-preservation for those who are ineligible for self-defence;
- Encouraging judges to admit a wider range of expert evidence to ensure that cases are viewed in their full context. While broader social context evidence could be introduced, specific evidence about the defendant's own situation may be more persuasive in individual cases.

# CHAPTER 2: DEFENDANTS AS VICTIMS OF COUNTY LINES

## 1.1 Introduction

Drug markets are often characterised by unequal and/or exploitative relationships between the individuals who organise the markets and those who engage in the selling of drugs 'on the ground'.[247] This chapter focuses on the practice of 'county lines': an area in which there is often an overlap between victim and suspect or defendant. It begins by outlining what county lines are, how they operate and why there is a distinct offender/victim overlap. It then goes on to draw out the implications for suspects or defendants who are victims of crime in the county lines context by modelling their journey through the criminal justice process. It concludes by summarising the key issues facing suspects and defendants who are victims of coercion or exploitation through their participation in county lines networks, and highlighting key areas for future law and policy reform.

## 1.2 Defining county lines

According to Home Office guidance, the term 'county lines' is 'used to describe gangs and organised criminal networks involved in exporting illegal drugs into one or more importing areas within the UK, using dedicated mobile phone lines or other form of "deal line."' They are likely to exploit children and vulnerable adults to move [and store] the drugs and money and they will 'often use coercion, intimidation, violence (including sexual violence) and weapons.'[248] County lines can also be defined as 'criminal networks based mainly in cities that export illegal drugs to one or more out-of-town locations.'[249]

The term 'county lines' first appeared in a National Crime Agency Report in 2015. Despite the long history of networks of organised drug-trafficking, the county lines model has been characterised as emerging with the growth of technology and, in particular, smartphone technology.[250] Prior to this, as noted by Densley *et al.*, 'organized criminals shipped in bulk to regional wholesalers' before filtering into local markets via 'low-level retailers'.[251] Technology has transformed the drug supply process, with smartphones and social media enabling dealing across national, regional and local levels.[252]

## 1.3 How the county lines model operates

Research has identified a number of different ways in which the county lines model operates, including 'commuting', 'cuckooing' and 'holidaying'.[253] Commuting refers to the practice of sellers travelling to the new target market on

247 Tiggey May and Mike Hough, 'Drug Markets and Distribution Systems' (2004) 12 *Addiction Research & Theory* 549; Matrix Knowledge Group, *The Illicit Drug Trade in the United Kingdom* (Home Office 2007).

248 Home Office, *County Lines Guidance: Overview* (Home Office, 11 December 2023) https://www.gov.uk/government/publications/county-lines-programme/county-lines-programme-overview (accessed 23 September 2024).

249 John Pitts, *County Lines* (HM Inspectorate of Probation Academic Insights 2021) 4.

250 National Crime Agency, *NCA Intelligence Assessment: County Lines, Gangs, and Safeguarding* (nationalcrimeagency.gov.uk, 12 August 2015) https://nationalcrimeagency.gov.uk/who-we-are/publications/359-nca-intelligence-assessment-county-lines-gangs-and-safeguarding-2015/file > (accessed 23 September 2024).

251 James Densley, Robert McLean and Carlton Brick, *Contesting County Lines: Case Studies in Drug Crime and Deviant Entrepreneurship* (Bristol University Press 2023). See also Matrix Knowledge Group, *The Illicit Drug Trade in the United Kingdom,* (n247).

252 Pitts, *County Lines,* (n249).

253 Leah Moyle, 'Situating Vulnerability and Exploitation in Street-Level Drug Markets: Cuckooing, Commuting and the "County Lines" Drug Supply Model' (2019) 49 *Journal of Drug Issues* 739

a daily basis to sell drugs before returning at the end of the day.[254] Cuckooing refers to longer-term stays that are facilitated by the appropriation of a local resident's premises, sometimes as part of a consensual agreement and other times as a result of coercion and threatening behaviour as discussed later in this chapter.[255] Holidaying is an in-between practice whereby individuals may stay in hotels in a given location for a few days before returning home.[256] In other words, these are all terms which are used to explain the ways in which the drugs are moved across England and Wales.[257] The use of mobile phones to facilitate the movement and distribution of drugs is central to county lines models more generally and has been discussed in existing studies.[258] With this in mind, research has begun to explore the importance of the link between technology, social media and the rise of county lines.[259]

## 1.4 County lines and defendants as victims

The county lines model differs from other models of drug distribution in the extent to which it systematically relies upon the exploitation and recruitment of young people and vulnerable adults.[260] Although research indicates that young people have been involved in illegal drug markets for a number of years, often acting as 'runners' (individuals that transport the drugs to different places over the course of a drug deal) studies have suggested that the ways in which young people are used in county lines models is unique.[261] This perspective is not without criticism, however, with Densley *et al*. recently arguing that the 'standard story' of county lines overlooks the 'diversity of county lines' activity, in particular critiquing the problems inherent to the 'racialized construction of UK "gangs"'. They go on to note that 'there is a risk that law enforcement agencies are policing the *mythology* of county lines, not its reality.'[262]

Nevertheless, there is a consensus that county lines models target and exploit vulnerable adults and children through methods of coercion to transport drugs across regional borders and undertake the supply operation at a street level.[263] In the context of this project, that means that individuals engaged in county lines operations are often both suspects or defendants and victims. They may become suspects or defendants due to engaging in drug distribution and supply prohibited under the Misuse of Drugs Act 1973.[264] But they may also be victims to the extent that they

254 Ross Coomber and Leah Moyle, 'The Changing Shape of Street-Level Heroin and Crack Supply in England: Commuting, Holidaying and Cuckooing Drug Dealers Across "County Lines"' (2018) 58 *British Journal of Criminology* 1323; Gavin Hales and Dick Hobbs, 'Drug Markets in the Community: A London Borough Case Study' (2010) 13 *Trends in Organised Crime* 30; James Densley, Robert McLean, Ross Deuchar and Simon Harding, 'An Altered State? Emergent Changes to Illicit Drug Markets and Distribution Networks in Scotland' (2018) 58 *International Journal of Drug Policy* 113.

255 Jack Spicer, Leah Moyle and Ross Coomber, 'The Variable and Evolving Nature of "Cuckooing" as a Form of Criminal Exploitation in Street Level Drug Markets' (2020) 23 *Trends in Organized Crime* 301.

256 Coomber and Moyle, 'The Changing Shape of Street-Level Heroin and Crack Supply in England', (n254); Hales and Hobbs, 'Drug Markets in the Community', (n254).

257 For more in-depth discussion see Moyle, 'Situating Vulnerability', (n253).

258 Coomber and Moyle, 'The Changing Shape of Street-Level Heroin' (n254); Hales and Hobbs, 'Drug Markets in the Community' (n254).

259 Michelle L. Storrod and James Densley, '"Going Viral" and "Going Country": the Expressive and Instrumental Activities of Street Gangs on Social Media' (2017) 20(6) *Journal of Youth Studies* 677.

260 James Windle, Leah Moyle and Ross Coomber, 'Vulnerable Kids Going Country: Children and Young People's Involvement in County Lines Drug Dealing (2020) 20 *Youth Justice* 64

261 Ibid, 64. See also Leah Moyle, 'Situating Vulnerability' (n253); Grace Robinson, Robert McLean, James Densley, 'Working County Lines: Child Criminal Exploitation and Illicit Drug Dealing in Glasgow and Merseyside' (2019) 63 *International Journal of Offender Therapy and Comparative Criminology* 694

262 Densley, McLean and Brick, *Contesting County Lines,* (n251) 11.

263 Moyle, 'Situating Vulnerability', (n253)

264 Offences under the Act are split broadly into eight categories, with multiple offences under each category. In brief, the categories are: possession, supply, production, occupier, opium related offences, supply of articles, inchoate offences and obstruction offences. There is also an offence relating to importation under the Customs and Excise Management Act 1979, s.170. The Misuse of Drugs Act also provides the legal classification of controlled drugs.

experience forms of coercion as well as, in some instances, physical and sexual violence.[265] As set out later in this chapter, this coercion may amount to modern slavery or trafficking under the terms of the MSA 2015.

Research has highlighted the ways in which drug users are more vulnerable to be recruited into drug markets under a county lines model.[266] For example, it has been suggested that because drug users (as the buyers) are coming into contact with sellers that are likely to be affiliated with gangs or to be gang members, there is a higher risk that they will be coerced or pressured into engaging in selling themselves through threats, violence or otherwise.[267]

Research has further indicated that young people who are involved in county lines are exposed to a range of dangers – which Moyle and Coomber have called a 'spectrum of harm.'[268] It is clear from their research that this spectrum encompasses non-physical and sexual harm as well as trafficking and exploitation alongside examples of more explicit physical violence.[269] Highlighting the wide-ranging forms of violence that individuals might be involved in as part of county lines operations, Moyle and Coomber suggest that tackling the county lines model requires us to look beyond homogenous experiences of violence.

Notably, one study reported that individuals involved in county lines most often experience psychological stress and anxiety because of their involvement. This was particularly highlighted in the context of cuckooing, with individuals reporting that their house being taken over for drug operations made them feel as though they had lost control of their property as the operation took over.[270] Individuals have also reported experiencing intimidation and destructive behaviours if they attempted to refuse to undertake drug running or other forms of supply related labour. Studies show that verbal assault is common and is particularly pronounced when women are involved in the operations.[271]

Furthermore, research has long established that drug markets rely upon exploitative relationships particularly between the groups who organise and those who undertake retail drug sales.[272] Again, more recent studies have sought to emphasise the ways in which these relationships in county lines are likely to be systematically exploitative to the extent they rely more on gang affiliated networks than they do on 'user-dealers' (individuals who both use and deal drugs).[273] As such, scholars have argued that current understandings of drug markets under the county lines model are lacking in complexity and nuance.[274]

265 Sally Atkinson-Sheppard, Coral Dando, Tom Ormerod, Bregetta Robinson, 'Coercion and Crime: Converges, Divergences and "County Lines" (2023) 00(0) *Criminology and Criminal Justice* 1 (online first).

266 Geoff Coliandris, 'County Lines and Wicked Problems: Exploring the Need for Improved Policing Approaches to Vulnerability and Early Intervention' (2015) 7 *Australasian Policing: A Journal of Professional Practice and Research* 26; Andrew Whittaker, James Densley, Len Cheston, Tajae Tyrell, Martyn Higgins, Claire Felix-Baptiste, and Tirion Havard, 'Reluctant Gangsters Revisited: The Evolution of Gangs from Postcodes to Profits' (2020) 26 *European Journal on Criminal Policy and Research* 1; Paul Andell and John Pitts, 'The End of the Line? The Impact of County Lines Drug Distribution on Youth Crime in a Target Destination' (*Youth & Policy*, January 2018) <https://www.youthandpolicy.org/articles/the-end-of-the-line> (accessed 23 September 2024).

267 Geoff Coliandris, 'County Lines and Wicked Problems', (n266); Andrew Whittaker *et al.*, 'Reluctant Gangsters Revisited', (n266); Paul Andell and John Pitts, 'The End of the Line?', (n266).

268 Moyle, 'Situating Vulnerability', (n253).

269 Ibid, 739.

270 Coomber and Moyle, 'The Changing Shape of Street-Level Heroin', (n254).

271 See Jennifer Fleetwood, 'Keeping Out of Trouble: Female Crack Cocaine Dealers in England (2014) 11 *European Journal of Criminology* 91; Jennifer Fleetwood, 'Mafias, Markets, Mules: Gender Stereotypes in Discourses about Drug Trafficking' (2015) 9 *Sociology Compass* 962; Heidi Grundetjern and Sveinung Sandberg, 'Dealing with a Gendered Economy: Female Drug Dealers and Street Capital' (2012) 9 *European Journal of Criminology* 621.

272 Coomber and Moyle, 'The Changing Shape of Street-Level Heroin' (n254).

273 Ibid, 1323.

274 Moyle, 'Situating Vulnerability' (n253); Jack Spicer, 'That's Their Brand, Their Business': How Police Officers Are Interpreting County Lines' (2019) 29(8) *Policing and Society* 873.

Finally, participants in county lines can be children and adolescents alongside young adults.[275] A National Crime Agency report from 2019 suggested 1% of 'county lines' featured the exploitation of local 'juveniles' and 13% featured the exploitation of out-of-force young people; and 2% featured child sexual exploitation or abuse'. As Wroe notes, 'The significance of these figures is inflated when translated into policy and media discourses, yet 'the significant harm inflicted on a minority of young people is now a priority issue for child welfare agencies in the statutory and non-statutory sectors.'[276]

## 1.5 Vulnerability and county lines

Existing policy documents have identified one of the core challenges associated with tackling county lines as understanding and responding to the vulnerabilities of those involved.[277] In particular, research has indicated the need to better understand the vulnerabilities faced by those involved in county lines and has encouraged a move beyond the victim/offender binary.[278]

Leah Moyle explores the possibility of using the concept of vulnerability to better explain or discuss the specific issues faced by individuals who engage in county lines practices.[279] However, as Fineman notes, vulnerability can be a 'slippery concept' both in scholarship and legal policy,[280] and the use of vulnerability as a theoretical framing is not without criticism.[281] For example, Densley *et al.* have recently argued that 'while county lines have been linked to vulnerable children going missing from school, home and care, and/or being found in areas miles from home, many of the people arrested in county lines operations are adults with dubious vulnerability claims'.[282] As such, county lines is a diverse operation and overly simplistic claims about vulnerability may distort our understanding of its operation.

Turning to the available statistics published by the NCA, it is known that around 74% of police regions reported exploitation of vulnerable people, with 12% of police regions reporting exploitation of adults with physical disabilities, 37% with mental health problems, 61% reporting the exploitation of drug users and 65% of police regions reporting exploitation of children. It also reported that most respondents were unemployed and in receipt of state benefits. [283]

Studies have also suggested that vulnerable adult females are often targeted in county lines operations under the guise of romantic

275 Rachel Sturrock and Lucy Holmes, *Running the Risks: The Links Between Gang Involvement and Young People Going Missing* (Catch22 2015)

276 Lauren Elizabeth Wroe, 'Young People and "County Lines": A Contextual and Social Account" (2021) 16(1) *Journal of Children's Services* 39, 40; Moyle, 'Situating Vulnerability' (n253).

277 National Crime Agency, *County Lines Gang Violence, Exploitation & Drug Supply 2017* (National Crime Agency 2017) < https://nationalcrimeagency.gov.uk/who-we-are/publications/234-county-lines-violen-ce-exploitation-drug-supply-2017/file> (accessed 23 September 2024)

278 See Moyle, 'Situating Vulnerability', (n253).

279 Ibid.

280 Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism* 1.

281 Existing literature draws upon academic commentary that exists in relation to sex work. For example, see Vanessa Munro and Jane Scoular, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20 *Feminist Legal Studies* 189; Anna Carline and Jane Scoular, 'Saving Fallen Women Now? Critical Perspectives on Engagement and Support Orders and their Policy of Forced Welfarism' (2015) 14 *Social Policy and Society* 103; Jane Scoular and Anna Carline, 'A Critical Account of a "Creeping Neo-Abolitionism": Regulating Prostitution in England and Wales' (2014) 14 *Criminology and Criminal Justice* 608; Vanessa Munro and Jane Scoular, 'Harm, Vulnerability and Citizenship: Constitutional Possibilities in the Criminalisation of Contemporary Sex Work' in Antony Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo and Victor Tadros (eds), *The Constitution of Criminal Law* (Oxford University Press 2013).

282 Densley, McLean and Brick, *Contesting County Lines* (n251), 11.

283 National Crime Agency, *County Lines Gang Violence*, (n277)

interest.[284] As Havard *et al.* note: 'by creating the impression of a romantic relationship and then using smartphones and social media as tools for round-the-clock surveillance...men are able to force women into working on behalf of the gang.'[285] Recent studies have further drawn attention to the induction of vulnerable women into county lines activities as emblematic of coercive control.[286] Other research has highlighted that sex work and county lines drug operations are often interlinked.[287]

The reasons why people become involved in county lines are complex. In particular, some studies have indicated that, despite facing multiple forms of violence, some individuals are attracted to join county lines operations.[288] This is because, for some of those involved, receiving payment in the form of drugs is seen as lucrative as they then no longer have to pay for their own drug habits.[289] Others have suggested that the sense of community – and being part of a gang – can make the prospect attractive particularly to young people.[290] As such, some individuals involved in county lines, despite the risks and violence that it may involve, see themselves as actively choosing to take part.[291] This causes considerable issues with identification of vulnerability or victimhood on the part of decision makers such as police and prosecution.

## 2.1 A defendant/victim's journey through the criminal justice system

The remainder of this chapter maps the typical journey through the criminal justice system for a defendant/victim in the context of county lines. First, consideration is given to policing and the challenges that might arise for the effective identification of defendant/victim in this context. This includes discussion of the public interest duty that the police have under the MSA 2015 as well as the operation of the National Referral Mechanism (NRM) for suspected victims of modern slavery or trafficking. The chapter then considers issues that might arise when the Crown Prosecution Service (CPS) is making a charging decision, including parallel proceedings under the MSA 2015. It then turns to the trial stage, examining the applicability of defences, including duress, self-defence and the defence under section 45 of the MSA 2015. Finally, consideration is given to sentencing and appeal. This includes the difficulties that can arise when criminal and non-criminal proceedings are ongoing at the same time.

284 See Tirion Elizabeth Havard, James A Densley and Jane Wills, 'Street Gangs and Coercive Control: The Gendered Exploitation of Young Women and Girls in County Lines' (2023) 23 Criminology & Criminal Justice 313; Barnardos, *Guidance on child sexual exploitation, a practitioner's resource pack* (Barnardos, 2014).

285 Havard *et al.*, 'Street Gangs and Coercive Control', Ibid; Storrod and Densley, '"Going Viral" and "Going Country"' (n259).

286 Havard *et al.* (n284).

287 Katherine Quinn, Julia Dickson-Gomez, Michelle Broaddus and Maria Pacella, '"Running Trains" and "Sexting-in": The Functions of Sex within Adolescent Gangs' (2019) 51 *Youth and Society* 151.; Rose Wesche and Julia Dickson-Gomez, 'Gender Attitudes, Sexual Risk, Intimate Partner Violence, and Coercive Sex among Adolescent Gang Members' (2019) 64 *Journal of Adolescent Health* 648.

288 See Moyle, 'Situating Vulnerability' (n253); Leah Moyle and Ross Coomber, 'Earning a Score: An Exploration of the Nature and Roles of Heroin and Crack Cocaine "User-Dealers"' (2015) 55 *British Journal of Criminology* 534.

289 For a criticism of this see Ross Coomber, 'There's No Such Thing as a Free Lunch: How "Freebies" and "Credit" Operate as Part of Rational Drug Market Activity' (2003) 33 *Journal of Drug Issues* 939.

290 For literature around young people and gang culture see: Robert Ralphs, Juanjo Medina and Judith Alridge, 'Who Needs Enemies with Friends Like These? The Importance of Place for Young People Living in Known Gang Areas' (2009) 12 *Journal of Youth Studies* 483; Jenny Parkes and Anna Conolly, 'Dangerous Encounters? Boys' Peer Dynamics and Neighbourhood Risk' (2013) 34(1) *Discourse: Studies in the Cultural Politics of Education* 94; Emma Alleyne and Jane Wood, 'Gang-Related Crime: The Social, Psychological and Behavioural Correlates' (2013) 19 *Psychology, Crime and Law* 611; James Windle and Daniel Briggs, 'Going Solo: The Social Organisation of Drug Dealing within a London Street Gang' (2015) 18 *Journal of Youth Studies* 1170.

291 See James Windle and Daniel Briggs, '"It's like Working Away for Two Weeks": The Harms Associated with Young Drug Dealers Commuting from a Saturated London Drug Market' (2015) 17 *Crime Prevention and Community Safety* 105

## 2.2 Policing

For the purposes of this chapter, it is important to understand how the police interact with potential defendants, and potential victim-defendants, in the context of county lines. The identification of victimhood is a central issue at this stage, as it has significant ramifications for how the individual is treated at subsequent stages. Research has highlighted several issues facing the police in their response to county lines-related crimes and to suspects who may be victims.

Lydon and Emanuel sought to better understand the experience of specialist officers working on county lines.[292] They identified three primary issues. Firstly, officers tended to associate county lines with habitual knife-carrying, episodes of serious violence, and links to gang involvement which was attributed, in part, to conceptual notions of 'gangs'. This meant that when officers came into contact with vulnerable adults and children who were carrying weapons they often described how it could be difficult to ascertain whether they ought to be treated as a victim or a suspect as they may simultaneously appear to be both.

Secondly, Lydon and Emanuel identified how officers often held a range of understandings as to why children or vulnerable individuals may become involved in county lines. In some circumstances, officers made judgements as to whether an individual 'willingly' joined the gang or whether they were potentially 'groomed' or 'coerced' from the outset, with this initial judgement then shaping how the individual was treated moving forward. Finally, officers spoke about the challenges they can face when dealing with the possibility of a defence under section 45 of the MSA 2015 being raised. They suggested that it can be difficult to adequately explore whether the defence may be raised because of 'no comment' interviews making it difficult to probe the suitability of the defence.

Bonning and Cleaver sought to explore how county lines drug networks are understood from the perspective of a London Borough and from the police perspective.[293] Their study highlights that the crossover between local drug markets, gang activity and county lines is a blurred and complex one which requires further research, and that this complexity is one of the reasons why policing in this context can prove difficult.[294] In particular, the study emphasises that it is clear that young people from disadvantaged communities are not the only participants in county lines, and the authors advocate that more be done to understand who is engaging in these networks as well as how they are engaging.[295]

Spicer's 2019 study involved interviewing police officers about their response to county lines. He found that 'at least in principle, those local users characterised as vulnerable and who had been caught up in county lines activity, either through undertaking labour or having been cuckooed, were discussed as being victims and not appropriate candidates for law enforcement action'.[296] Spicer notes the police argued their main priority was to safeguard such individuals.

Since 2018, there have been two significant developments in the policing of county lines. The first was the introduction of the National County Lines Co-ordination Centre (NCLCC) in 2018. Since 2018, there have been two significant developments in the policing of county lines. The first was the introduction of the National County Lines Co-ordination Centre (NCLCC) in 2018. The centre aims to coordinate policing activity through 'improved information and intelligence sharing, strategic assessments, and planning and support for police operations' and is reflective of the policy-shift towards tackling county lines in earnest that

292 David Lydon and Peter Emanuel, 'New Insights to County Lines Drug Supply Networks: A Research Note on a Study of Police Experiences of the Intersectionality of Victimhood and Offending' (2022) 90 *British Society of Criminology Newsletter* 1759.

293 John Bonning and Karen Cleaver, 'There is No "War on Drugs": An Investigation into County Line Drugs Networks from the Perspective of a London Borough' (2021) 94 *The Police Journal* 443.

294 Ibid.

295 Ibid.

296 Jack Spicer, 'The Policing of "County Lines" in Affected Import Towns: Exploring Local Responses to Evolving Heroin and Crack Markets' (PhD Thesis, University of Western England 2019) 137.

can be seen by the Home Office emphasis on the issue.[297] The second response, and the one most significant for this chapter, is the introduction of the National Referral Mechanism in 2014 to which the police are first responders, considered next.

## 2.3 National Referral Mechanism (NRM)

The National Referral Mechanism is a framework for identifying victims of modern slavery and human trafficking in order to refer them for additional support. This support can include legal representation, accommodation, protection and any other psychological or emotional support that may be necessary. One of the explicit mandates of the framework is to not only help those who identify as victims of modern slavery and human trafficking but also to oblige first responders to make referrals for those who are either unwilling to be identified as such or those who do not realise they are victims.[298] County lines drug trafficking is explicitly recognised in the NRM framework as a practice likely to involve criminal exploitation and is therefore considered to involve practices of modern slavery. [299]

The police – as first responders – have a statutory duty to refer potential victims of modern slavery or trafficking into the National Referral Mechanism (NRM): the UK framework for identifying victims and ensuring they receive appropriate support.[300] If the individual is over 18, consent must be given for the referral but for individuals under 18 no consent is necessary. If an adult refuses a referral, the chief officer for the relevant police area must instead follow their 'duty to notify' obligations to the Home Office.[301] This duty specifies that certain public authorities must notify the Home Office of any individual that they believe to be a victim of slavery or human trafficking.[302] The obligation to refer or duty to notify applies to all police forces and local authorities in England and Wales as well as the Gangmasters and Labour Abuse Authority and the National Crime agency. The duty to refer remains irrespective of whether an individual is the victim of a crime, a witness or a defendant.[303] Consequently, it is entirely possible that an individual can be a defendant in relation to criminal proceedings but a victim in the context of the NRA.

Once a referral has been made, the Single Competent Authority (SCA) (a team within the Home Office) then must decide whether the individual is a victim of modern slavery. The body does not have investigative powers but can request information to make their decision. The decision-making process of the SCA consists of two stages. Firstly, the SCA must decide whether there are reasonable grounds to believe the person is a victim (an RG decision). This decision is based on an assessment of whether there is reason to believe—based on objective factors but falling short of conclusive proof—that the individual is a victim of modern slavery. The test, as indicated from local government sources can be summarised as 'I suspect but cannot prove' that an individual is a victim of modern slavery or 'whether a reasonable person having regard to the information in the mind of the decision maker, would think that there are Reasonable Grounds to believe that the individual is a victim of modern slavery'.[304]

297 David Lydon and Peter Emanuel, 'New Insights to County Lines Drug Supply Networks' (n292), 15.

298 Home Office and UK Visas and Immigration, 'National Referral Mechanism Guidance: Adult (England and Wales)', (gov.uk, 15 May 2024) <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales> (accessed 23 September 2024).

299 Home Office, 'Criminal Exploitation of Children and Vulnerable Adults: County Lines' (Home Office, 20 October 2023) <https://www.gov.uk/government/publications/criminal-exploitation-of-children-and-vulnerable-adults-county-lines/criminal-exploitation-of-children-and-vulnerable-adults-county-lines> (accessed 23 September 2024).

300 MSA 2015.

301 Home Office, 'Guidance: Report Modern Slavery as a First Responder' (Home Office, 28 May 2019) https://www.gov.uk/guidance/report-modern-slavery-as-a-first-responder (accessed 23 September 2024).

302 MSA 2015, s. 52.

303 The list of others who can refer potential victims of trafficking or slavery can be found here: CPS, 'Modern Slavery and Human Trafficking: Offences and Defences, Including the Section 45 Defence' (cps.gov.uk, 30 April 2020; updated most recently 26 January 2024) <https://www.cps.gov.uk/legal-guidance/modern-slavery-and-human-trafficking-offences-and-defences-including-section-45> (accessed 23 September 2024).

304 Home Office, 'Guidance: Report Modern Slavery as a First Responder' (n301).

According to guidance, this decision will be made within five working days of the referral providing there is sufficient information for the decision to be made.[305]

Following this, a conclusive grounds (CG) decision will be made. This will occur a minimum of 30 days after the RG decision and is based on whether 'on the balance of probabilities' there are sufficient grounds to decide the individual is a victim.[306] While the guidance provides a minimum time frame of 30 days for a Conclusive Grounds decision, there is no set timeframe in which CG decisions must be made. The average waiting time in 2021-22 for a CG decision was 400 days.[307] It is often the case that additional information will be requested from the first responder (in this instance, the police) in order for a CG decision to be made.[308] CG decisions are referred to as 'negative' (i.e. it is not believed, on the balance of probabilities, that this person is a victim of modern slavery or trafficking) or as 'positive' (i.e. it is believed that this person is a victim). If a decision is negative, it is possible for reconsideration to be granted in circumstances in which more or new information about the case becomes available. However, this is not a formal right of appeal and a decision will only be reconsidered where there are clear grounds to do so.[309]

Alongside the NRM decision-making in the Home Office, there is currently a pilot project running in twenty sites evaluating decision-making by local authorities entrusted with safeguarding responsibilities for children.[310] The purpose of the pilot is to 'test whether determining if a child is a victim of modern slavery within existing safeguarding structures is a more appropriate model for making modern slavery decisions for children'.[311] The timelines set for the pilot project are 45 days maximum for an initial RG decision and a maximum of an additional 45 days only for a CG decision (90 days in total).

In the context of county lines, the statutory duty for the police to refer into NRM or to notify the Home Office is significant because it means that individuals may be facing criminal proceedings whilst at the same time being assessed as to whether they are a victim of modern slavery. Most importantly, as outlined below, individuals who are recognised by the NRM as victims of trafficking or modern slavery are expected to be considered for diversion from prosecution. As such, recognition of their victimhood is critical for such diversion to be possible.

## 2.4 Charging and CPS decision-making

A key concern when it comes to CPS decision-making is that the SCA's timescales do not always map neatly onto the stages of the criminal justice system, particularly given the significant delays in issuing decisions as well as in supplying evidence for the NRM assessment.[312] For example, it is possible that an NRM referral is made later in the process if potential victim status is not

305 Ibid.

306 CPS, 'Modern Slavery and Human Trafficking' (n303).

307 And there is evidence that in practice it takes considerably longer, with some cases taking over a year. In 2021-22 statistics showed it took 400 days on average to get a Conclusive Grounds decision. See Home Office, 'Modern Slavery: National Referral Mechanism and Duty to Notify Statistics: Quarter 2 2021 – April – June' (gov.uk, 5 August 2021) <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-2-2021-april-to-june> (accessed 23 September 2024).

308 Home Office, Modern Slavery & The National Referral Mechanism (Home Office, November 2021) <https://www.local.gov.uk/sites/default/files/documents/SCA%20%20LGA%20presentation.pdf> (accessed 23 September 2024).

309 Ibid.

310 To be eligible a child must be at least 100 days away from their 18th birthday.

311 Home Office, 'Devolving Child Decision Making Pilot Programme: General Guidance' (Home Office, 5 December 2023) <https://www.gov.uk/government/publications/piloting-devolving-decision-making-for-child-victims-of-modern-slavery/devolving-child-decision-making-pilot-programme-general-guidance-accessible-version> (accessed 23 September 2024).

312 For example, difficulty with finding interpreters and obtaining expert evidence can lead to significant delay in having the full application assessed. See Beth Mullan-Feroze, 'New Test for 'Reasonable Grounds' Decisions in Modern Slavery Guidance Withdrawn' (*Helen Bamber*, 12 July 2023) <https://www.helenbamber.org/resources/latest-news/new-test-reasonable-grounds-decisions-modern-slavery-guidance-withdrawn> (accessed 23 September 2024).

recognised at an earlier stage by the police.[313] The CPS are not first responders and so cannot make referrals. However, they do have a positive duty to look for signs of trafficking or exploitation and to communicate with the police about making a referral if they believe there is evidence of relevant victimisation.

The CPS provides indicative guidance as to what ought to happen depending on when an NRM referral is made. If a referral is made after an individual has been charged but is yet to stand trial or appear in court, it is considered preferable for a decision to have been given by the SCA prior to a plea being entered. If a person has been identified prior to a prosecutorial decision being made, the decision to prosecute should, wherever possible, occur after the SCA decision. [314] However, CPS guidance does suggest there are some circumstances in which a decision might be made while the outcome is pending.[315]

CPS guidelines also make clear that decisions to prosecute must be weighed particularly carefully where a CG decision has been made. It is also important to note that although it is theoretically possible for the CPS to proceed with a prosecution in light of a positive CG decision, the findings of the SCA must be taken into account by the CPS. For example, if a decision to prosecute is made, irrespective of a CG decision, there is an onus on the CPS to explain their decision to prosecute in light of the CG decision and prosecutors are required to both justify and record their reasons for prosecuting (i.e. that it remains in the public interest to do so). The CPS and its prosecutors 'must act compatibly with Article 4 of the European Convention on Human Rights (ECHR) which prohibits slavery and forced labour.' They are also bound under Article 26 of the Council of Europe Anti-Trafficking Convention to 'provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so.'[316]

CPS guidance also makes clear, however, relying on the case of *Brecani*,[317] that prosecutors are not bound by SCA decisions.[318] In other words, if the SCA finds that an individual is a victim of modern slavery or trafficking, it does not preclude a prosecution from occurring. This decision is justified on the basis that the tests being applied by the SCA are different to those that are being considered by the CPS. For example, it is possible for an individual to receive a positive CG decision, meaning that on the balance of probabilities they are likely to be a victim of modern slavery, but for the CPS to decide to charge the same individual with a crime.[319] It is important to highlight that the standard of proof required to rely on the defence under section 45 of the MSA 2015 is not the same as what is required to be considered a victim under the SCA scheme.[320]

The fact that the CPS are not bound by decisions made by the SCA is a key issue for victim/defendants in the context of county lines. This is because it is possible for an individual to be deemed a victim by the SCA through a positive CG decision *and* for them to be charged by the CPS for an offence. Although CPS guidance suggests that this rarely occurs in practice, relevant case law tells a different story. For example, in the case of *V.C.L*

313 This missed opportunity for diversion is discussed in case law detailed later in this report.

314 The challenges of timeline differences between the NRM process and criminal prosecution was emphasised by our stakeholders, who noted that frequent and lengthy delays in CG decision-making adversely affects those in police custody who are awaiting a trafficking determination while facing prosecution (Appendix 1: Stakeholder responses to consultation).

315 CPS, 'Modern Slavery and Human Trafficking' (n303).

316 Ibid.

317 [2021] EWCA Crim 731.

318 Ibid.

319 Notwithstanding the potential that defences could be raised as is discussed in due course.

320 In our stakeholder discussions, it was suggested that from practitioners' anecdotal experience, the introduction of the defence under section 45 of the MSA 2015 (discussed below in more detail) may have made prosecution *more* likely for victims of trafficking as previously they were able to rely on the principle of non-punishment to help avoid prosecution. It was suggested that because there is now a statutory defence, the CPS may proceed with the justification that victims of trafficking will be able to raise the defence (Appendix 1: Stakeholder responses to consultation).

*and A.N. v the United Kingdom*[321],, the European Court of Human Rights stated that 'by prosecuting despite credible suspicion the defendants were [victims of trafficking], the domestic authorities failed to take operational measures in line with international standards to protect minors'[322] The justification given for this, as discussed above, is that the SCA are not thinking about criminal liability and responsibility when deciding whether or not someone is a victim of trafficking.

In summary, the incompatibility between the SCA decision-making process and criminal justice timelines, in addition to the use of different standards of evidence by each, can result in a situation whereby individuals who are determined by the SCA to be victims of modern slavery or trafficking are not necessarily recognised as such by the criminal justice system. As a result, they will not necessarily be prioritised for diversion from prosecution. Or, indeed, they may be unable to raise a defence under section 45 of the MSA 2015, as discussed in the next section.

## 2.5 Issues at trial: Available defences

### (a) Duress

In the context of county lines, it is possible that the common law defence of duress may be raised. The requirements of this defence are set out in Chapter 1 of this report. It is important to highlight that if an individual voluntarily joins an illegal organisation or a similar group with criminal objectives and coercive methods and exposes themselves to illegal compulsion, that individual will not be able to rely on duress.[323] Thus, it is reasonable to assume that an individual who joins a gang in the context of county lines may struggle to raise the defence of duress unless there is clear evidence that their admission to the gang was not voluntary. Furthermore, the House of Lords has made clear that the policy of the law should be to discourage association with known criminals and thus it should be reluctant to excuse the criminal conduct of those who do associate themselves.[324]

### (b) Self-defence

Victims of modern slavery or trafficking may use violence against those exploiting them, including in the county lines context. However, as for victims of domestic abuse, the accessibility of self-defence for victims of county lines gangs is problematic. To be successful in raising such a defence, victims need to demonstrate that their use of force was reasonable, proportionate and necessary to protect them from an imminent threat of violence.[325] Wake and Reed, advocating for the reform of partial defences for abuse victims, note the similarities between the experiences of victims of modern slavery and those of family violence, including '[t]hreats, force, coercion, control, abuse of power, exploitation, patterns of harm and entrapment'.[326] However, both types of victim face barriers to accessing self-defence if the threat was not violent or imminent.

Wake notes, when discussing homicide perpetrated by victims of modern slavery, that 'in most trafficking/family violence victim claims, the power imbalance in the relationship is likely to mean that circumstances in which these killings occur in spontaneous confrontations will be rare, as victims may wait until their 'more powerful' exploiter is off-guard and/or resort to the use of a weapon, rendering self-defence inapplicable.'[327] Wake also notes imminence and proportionality work 'against vulnerable individuals who are more likely to wait until their exploiter/abuser is off-guard, in contrast to physically stronger aggressors

321 *V.C.L. and A.N. v. The United Kingdom (applications nos. 77587/12 and 74603/12)*, Council of Europe: European Court of Human Rights, 16 February 2021.

322 See Sean Mennim, 'The Non-Punishment Principle and the Obligations of the State Under Article 4 of the European Convention of Human Rights: *V.C.L. AND A.N. v the United Kingdom* (applications nos.77587/12 and 74603/12) (2021) 85 *The Journal of Criminal Law* 311.

323 *Fitzpatrick* [1977] N.I.LR. 20; *Sharp* [1987] QB 853.

324 *Z* [2005] 2 A.C. 467.

325 See Chapter 1 for further details.

326 Nicola Wake and Alan Reed, 'Reconceptualising the Contours of Self-Defence', (n2)

327 Nicola Wake, 'Human Trafficking and Modern Day Slavery' (n2).

who "can afford" to attack a smaller and weaker victim.'[328] To summarise, victims of exploitation who may attack their exploiter may also be more likely to use a weapon, or to plan an opportune moment given that their exploiters may be physically stronger than them or possess other advantages. However, this asymmetry that is characteristic of exploitative relationships undermines the ability of such victims to be able to successfully rely on self-defence.

## (c) Modern slavery defence

The most common defence that appears to be raised by victims of exploitation in the context of county lines and drug trafficking can be found in Section 45 of the MSA 2015. This section sets out a defence for slavery or trafficking victims who commit offences. There are two defences – one for adults and another for children (defined as a person under 18). The defences are as follows:

A person is not guilty of an offence if—

**a)** the person is aged 18 or over when the person does the act which constitutes the offence,

**b)** the person does that act because the person is compelled to do it

**c)** the compulsion is attributable to slavery or to relevant exploitation, and

**d)** a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.[329]

A person is not guilty of an offence if—

**a)** the person is under the age of 18 when the person does the act which constitutes the offence,

**b)** the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

**c)** a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.[330]

Under CPS guidance, if there is sufficient evidence to suggest that the person is a victim of trafficking or slavery, and the other conditions of section 45 are met, then no charges should be brought.[331] However, the defence can only be raised in relation to certain crimes – the exhaustive list being set out in Schedule 4 of the MSA 2015. It is possible to rely on section 45 in relation to drug offences and, as discussed below, the case law suggests that this has been attempted. However, Schedule 4 is problematic in the context of county lines, as it excludes several offences that we may expect victims of trafficking or modern slavery to engage in, including low-level violent offences. This limits its utility as a defence for defendants/victims.[332]

If a prosecutor believes that a defence under section 45 is not likely to succeed, the prosecutor must then consider whether it is in the public interest to prosecute, as per the Code for Crown Prosecutors (CCP). As well as considering the CCP, when dealing with potential victims of modern slavery, prosecutors must also consider:

'Whether there is a nexus or connection between the trafficking/slavery or past trafficking/slavery and the alleged offending; and, if so, Whether the force of compulsion from the trafficking/slavery or past trafficking/slavery acting on the suspect is enough to remove their culpability/criminality or reduce their culpability/criminality to a point where it is not in the public interest to prosecute them.'[333]

This is similar to the position for victims of domestic abuse, albeit the guidance on modern slavery and trafficking is much more detailed.

Another issue relates to the burden of proof in relation to the section 45 defence. At present, it is not entirely clear where the burden of proof lies. From the CPS guidance discussed above, it was

328 Ibid.

329 MSA 2015, s. 45(1).

330 MSA 2015, s. 45(4).

331 CPS, 'Modern Slavery and Human Trafficking' (n303).

332 This was drawn attention to repeatedly in our stakeholder consultations with practitioners emphasising that the bar on certain offences being available was problematic for many victims of exploitation (Appendix 1: Stakeholder responses to consultation).

333 CPS, 'Modern Slavery and Human Trafficking' (n303).

originally indicated that there was an evidential burden on the defendant to raise that they are a victim and that it would then be for the CPS to disprove this beyond reasonable doubt. If the CPS were unsuccessful, the legal burden then falls to the defendant to prove the relevant elements of the defence under section 45.[334] As such, a defendant in this position is both a defendant – to the extent they are facing criminal proceedings – and a victim in the sense that they are trying to prove that they are a victim of modern slavery or trafficking. Wake and Mennim have criticised the imprecision of the burden of proof, emphasising the unfairness of placing the burden on the defendant to prove themselves to be a victim to the required criminal standard.[335] In the case of *MK*,[336] the Court of Appeal made clear that the burden on the defence is evidential only with the legal burden then falling to the prosecution.[337] This is now considered the correct approach in relation to section 45.

Notably, the Law Commission has explored the advantages in reversing the burden of proof for duress.[338] They suggest a reverse burden may be advantageous as, at present, it can be difficult to disprove the offence. Although concerns were raised that a reversal might present challenges in relation to the ECHR, it was concluded that this would not be a serious issue. However, the Court of Appeal has raised the potential that a reverse burden may result in the *double victimisation* of trafficked individuals because they would experience not only the crime that had been committed against them but also a criminal justice system with standards that are too high to afford them proper protection.[339] One risk that then arises is the possibility that a reverse burden of proof undermines the intent of section 45, which was to afford protection to trafficked individuals and abide by the non-punishment principle.[340]

Wake and Mennim have suggested that this is a problem that can only be remedied by the legislation itself setting out clearly what the burden of proof should be. They have raised concerns about the inadequacy of guidelines or policy positions in this context, suggesting that they are not best placed nor necessarily clear enough to address the issue.[341] Finally, since *Brecani,* NRM decisions as to whether or not an individual is a victim are not admissible at trial as they are not considered 'expert evidence'.[342]

## 2.6 Issues of compulsion and coercion

Commentators have highlighted the potential unfairness of the varying degrees of compulsion that might have to be considered in relation to defendant-victims and drug offences under section 45 of the MSA 2015.[343] It is important to note that the cases discussed within this section are all

334 MSA 2015, s. 45.

335 See Sean Mennim and Nicola Wake, 'Court of Appeal: Burden of Proof in Trafficking and Modern Slavery Cases: *R v MK; R v Gega* [2018] Crim 667' (2018) 82 *The Journal of Criminal Law* 282.

336 [2018] Crim 667.

337 Mennim and Wake, 'Court of Appeal: Burden of Proof in Trafficking and Modern Slavery Cases' (n335); Bethany Simpson, 'Modern Slavery and Prosecutorial Discretion: When Is It in the Public Interest to Prosecute Victims of Trafficking?: *R v GS* [2018] EWCA Crim 1824' (2019) 83 *The Journal of Criminal Law* 14.

338 See Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006).

339 *MK* (n336).

340 See Mennim, 'The Non-Punishment Principle', (n322). The non-punishment principle stipulates that the involvement of trafficked persons in unlawful activities as a direct consequence of their trafficking experience should not be criminalised or punished and was introduced by the United Nations. See Office of the High Commissioner for Human Rights (OHCHR) 'Recommended Principles and Guidelines on Human Rights and Human Trafficking', Principle 7, Guideline 2.5, Guideline 4.5. Addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1). Council of Europe Convention on Action against Trafficking in Human Beings 2005, Art. 26.

341 Mennim and Wake, 'Court of Appeal: Burden of Proof in Trafficking and Modern Slavery Cases' (n335).

342 In our stakeholder discussions most agreed that this was appropriate in the sense that they felt it was unclear how determinations were being reached and what expertise was being drawn on. However, they also felt that such a bar led to the prosecution of victims, with the suggestion being that making the NRM process more robust as a preferable alternative to the status quo (Appendix 1: Stakeholder responses to consultation).

343 Sean Mennim, 'Defining the Line Between Victim and Offender: Trafficked Victims and Prosecutorial Discretion: *R v O; R v N* [2019] EWCA Crim 752' (2019) 83 *The Journal of Criminal Law* 410.

concerned with non-British nationals who have imported drugs in the UK and have then sought to rely on the section 45 defence. These cases were also concerned with questions pertaining to immigration. However, they remain useful as they illustrate issues with the section 45 defence that could also arise in cases more directly associated with county lines.[344] The lack of available case commentaries that relate to county lines does not necessarily mean that these cases do not reach trial. It may be that they are not reported for other reasons. However, as was identified in the policing section of this chapter, there are considerable issues with the policing of county lines as a drug supply model which may also have an impact on the number of cases that reach trial.

In relation to the section 45 defence, scholars have highlighted how narrowly the courts have construed the requirement of 'compulsion', seemingly treating clear examples of coercion as insufficient. For example, in *N*[345] the court indicated that if an individual is in possession of a mobile phone this might be taken as indicative that they have not been trafficked, or at least had alternative viable options that they could have chosen instead of engaging in criminal behaviour.[346] This is counter-intuitive in the context of psychiatric studies that clearly evidence the impact of mental coercion on an individual's wellbeing.[347] However, in *O & N*,[348] the court stated that having a mobile phone should not be seen as counter-intuitive when establishing status as a victim of trafficking – suggesting there has been a shift towards a more holistic approach to understanding coercion.

In *MK*,[349] Lord Burnett acknowledged that there is an intended significant difference between section 45 and the common law defence of duress, as section 45 has a broader ambit.[350] As was set out above, duress is narrow in scope and makes clear that individuals that engage with, or involve themselves with, criminal organisations are unlikely to be able to rely on duress as a defence. Section 45, in comparison, does not make a blanket exclusion of these individuals – meaning that it may be possible for an individual who has engaged with a gang to raise a section 45 defence.

At the same time, Lord Burnett explained that the objective test of compulsion, as set out in section 45, is intended to counter the potential for individuals to concoct false claims and, thus, to discourage trafficking.[351] This suggests that the test of compulsion in section 45 was designed with the intention of creating a defence that is broader than duress whilst at the same time narrow enough to ensure that the law is not used by criminals to evade criminal proceedings and thus to allow trafficking to continue.

It is also important to highlight that, as discussed previously, research suggests that some individuals who are involved in county lines may not recognise that they are being coerced into engaging in illegal behaviour. For example, Leah Moyle highlighted how some young people consider themselves to be autonomously deciding to engage in the behaviour for the financial rewards or incentives.[352]Although we do not know for certain, it is unlikely that individuals who view their experiences of engaging in county lines in this way will be able to rely on section 45 as a defence. The question as to how the law ought to engage with this subset of individuals merits further consideration.

344 While it falls outside the term of reference of this study (which is largely concerned with domestic trafficking within the UK), stakeholders routinely noted the problematic interaction of immigration law and criminal proceedings for victims of modern slavery whereby their immigration status was perceived to trump their recognition as a potential victim of trafficking (Appendix 1: Stakeholder responses to consultation).

345 [2019] EWCA Crim 752.

346 Mennim, 'Defining the Line Between Victim and Offender', (n343), 410.

347 See Hayley Beresford, 'Patients or Perpetrators? An Exploration of Psychological Trauma in Incarcerated Gang and Non-Gang Males' (MPhil Thesis, University of Kent 2022); Susanne Lohmann, Sean Cowlishaw, Luke Ney, Meaghan O'Donnell and Kim Fellingham, 'The Trauma and Mental Health Impacts of Coercive Control: A systematic review and meta-analysis' (2024) 25 *Trauma, Violence and Abuse* 630.

348 n345.

349 n336.

350 Mennim and Wake, 'Court of Appeal: Burden of Proof in Trafficking and Modern Slavery Cases' (n335).

351 Ibid.

352 See Moyle, 'Situating Vulnerability', (n253).

## 2.7 Appeal and sentencing

A key issue in relation to sentencing, conviction and appeal in the context of county lines is the question of what ought to happen when a SCA referral is made after a conviction has occurred. This question arose specifically from commentary surrounding the case of *R vs GS*.[353] The facts of the case, in brief, were that a Jamaican national was stopped at an airport with large amounts of cocaine on her person. She maintained that she was forced to smuggle the drugs into the UK by another individual. At trial, she was unsuccessful in raising the defence of duress and she was convicted of being knowingly concerned in the fraudulent evasion of the prohibition of a controlled Class A drug.[354] She was sentenced to seven years in prison and, on her release, was successful in her application to be recognised as a victim of trafficking in relation to asylum and the SCA also made a CG decision that she was a victim. As such, GS applied for an extension of time for leave to appeal against her conviction. This was refused, as 'the court was not satisfied that GS was under such a level of compulsion that her criminality or culpability was reduced to below a point where [prosecution] was not in the public interest.'[355]

This raises issues relating to the varying levels of compulsion that must be proven and their relationship to culpability. In particular, the court relied on the fact that GS did have alternatives available to her at the time of the offence and therefore the compulsion was not high enough to negate a public interest to prosecute. The decision has been criticised, as has the courts' continued application of 'an objective standard when considering elements of compulsion and fortitude requiring [victims of trafficking] to behave reasonably and seek out opportunities to resist and escape.'[356] Indeed, this decision might also be considered as further evidence that the unfairness of varying levels of compulsion standards results in. There are also clear parallels with the way that the courts view domestic abuse victims. As discussed in Chapter 1, courts expect victims to conform to the stereotype of the 'responsible' victim and to take any opportunity to seek help or to escape from their situation rather than to offend.

Simpson has also highlighted how the decision in GS reflects the broader lack of guidance as to how to proceed with cases like this.[357] This is a notable and important gap – especially in a context in which there are clear international obligations to uphold the non-punishment principle for victims of trafficking.[358] Furthermore, victim-defendants in GS's situation would not be entitled to rely upon section 45 as it is not intended to offer retrospective protection where the offence pre-dated the MSA 2015.[359]

The case of *S*[360] was concerned with a similar issue but it was decided that section 45 could be taken into account.[361] S (the applicant) pleaded guilty to a drug charge whilst awaiting a conclusive grounds decision from the SCA.[362] It was expected that the decision would come during proceedings, but at the point of plea it was still unknown. Upon receiving their CG decision, S appealed their conviction, seeking an extension of time. The appeal was allowed, with Lord Justice Singh noting the 'highly unusual circumstances' of the case.[363] As such, it might be argued that some of the issues

353 [2018] EWCA Crim 1824.

354 Misuse of Drugs Act, s. 170(2).

355 Simpson, 'Modern Slavery and Prosecutorial Discretion', (n337).

356 Ibid, 14.

357 Ibid, 14.

358 See n340.

359 This position was reaffirmed in *CS* [2021] EWCA Crim 134. For commentary see: Neil Parpworth, 'Prosecuting Victims of Modern Slavery and Trafficking: Does s45 of the Modern Slavery Act 2015 Have Retrospective Effect?' (2015) 85 *The Journal of Criminal Law* 236.

360 [2020] EWCA Crim 765.

361 Ibid; See also Bethany Simpson, 'The Reasonable Victim of Modern Slavery: *R v N* [2019] EWCA Crim 984' (2019) 83 *The Journal of Criminal Law* 508 for another case in which the same conclusion was reached.

362 Sean Mennim, 'Trafficked Victims and Appeals against Guilty Plea Convictions: *R v S* [2020] EWCA Crim 765' (2021) 85 *The Journal of Criminal Law* 66.

363 Ibid.

here have been rectified by the introduction of section 45, but at the same time, the court made clear such decisions would only be made in exceptional circumstances.[364]

With regard to sentencing, as outlined in Chapter 1, the Sentencing Council's *General Guideline: Overarching Principles* states that where a victim is involved in an offence through 'coercion, exploitation and intimidation' this is a factor reducing the seriousness of the offence or reflecting personal mitigation. This factor 'may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts'.[365] In this respect, where a defendant is recognised to be a victim of exploitation, there should be mitigation at sentencing stage. In stakeholder consultations, respondents in fact noted that sentence mitigation was a more successful stage of the criminal justice process for victims of exploitation compared with trial and pretrial processes. However, they noted that this reflected a more serious problem where such individuals should have instead have been able to raise a successful defence, or to be diverted from prosecution.[366]

In addition, for those under the age of 18, which is a considerable proportion of those involved in county lines, Sentencing Council's *General Guideline* emphasises that:

> when sentencing children or young people (those aged under 18 at the date of the finding of guilt) a court must have regard to:
>
> - the principal aim of the youth justice system (to prevent offending by children and young people); and
> - the welfare of the child or young person.[367]

There are also explicit sentencing guidelines for those convicted of offences under the MSA 2015[368] and such guidelines acknowledge the importance of the *Equal Treatment Bench Book* in the treatment of vulnerable individuals.[369] However, the guidelines refer to specific offences relating to modern slavery rather than to those who may be convicted of other offences and who may wish to raise the circumstances of their exploitation or coercion in mitigation. As we have seen in this chapter, the primary group of offences for which defendant/victims are likely to be prosecuted are drug offences, although not limited to these. It should be noted that those prosecuted for drug offences can rely on the section 45 MSA 2015 defence as such offences are not excluded under Schedule 4.

While the existence of the section 45 defence and the positive stakeholder view on mitigation compared to other parts of the criminal justice process suggests that victims of exploitation can have sentences mitigated, this returns us to a central issue: that mitigation will again rely on recognition of a defendant's victimhood at some point in the criminal justice process. As we have seen previously, there are challenges to this recognition: many participants in county lines activities may consider themselves acting voluntarily, or be seen by authorities as acting voluntarily and this will undermine the degree to which such compulsion can be recognised at a sentencing stage.[370] Such assumptions about voluntary behaviour will also undermine mitigation.

In addition, county lines activities fall under the categorisation of a gang-based offence, which is classified in the Sentencing Council overarching

364 Ibid.

365 Sentencing Council, General Guidelines: Overarching Principles, available at: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> (accessed 23 September 2024).

366 Appendix 1: Stakeholder responses to consultation.

367 Sentencing Council General Guidelines, 'Sentencing Children and Young People' (sentencingcouncil.org.uk, 1 June 2017) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/> (accessed 23 September 2024).

368 Sentencing Council, Sentencing Guidelines for Use in Crown Court (sentencingcouncil.org.uk) <https://www.sentencingcouncil.org.uk/crown-court?s&collection=modern-slavery> (accessed 23 September 2024).

369 Judicial College, *Equal Treatment Bench Book* (Judicial College 2024).

370 See Windle and Briggs, 'It's Like Working Away for Two Weeks' (n291), 105.

principles determining seriousness as an aggravating factor.[371] This means such involvement in county lines is in itself likely to in fact be seen as an aggravating factor, rather than a mitigating one, despite such 'membership' being the product of coercion or compulsion.

Looking specifically at drug offences sentencing guidelines, while they do explicitly separate out culpability thresholds distinguishing between a 'leading', 'significant' or 'lesser' role in drug offences, such categorisations can also be problematic in the context of county lines. Compulsion and exploitation is only explicitly recognised in mitigation for those who play a 'lesser' role so although individuals subject to coercion and exploitation may be likely to continue in county lines and progress into a more central role in drug supply, this assumption of responsibility is likely to militate against mitigation of sentencing.[372]

In addition, even if individuals are categorised as playing a 'lesser' role, the starting point for possession with intent to supply for a category 4 offence is 18 months custody. Other relevant sentencing guidelines for the defendant/victim overlap includes offences such as s8 of Misuse of Drugs Act 1971 of 'permitting premises to be used'. Here, while mitigating factors include vulnerability as well as 'pressure, intimidation and coercion falling short of duress', if the defendant in question is coerced into permitting the 'premises to be used primarily for drug activity' this will attract higher culpability. In this way we see that the seriousness of an offence will often limit mitigation available at the sentencing stage even if said offence was committed in circumstances of pressure and exploitation.

## 3.1 Summary and conclusion

This chapter has highlighted key issues facing defendant/victims in the context of county lines. These can be summarised as:

1) Lack of police or CPS recognition of victimhood/vulnerability that can affect whether such individuals are diverted from prosecution, adequately supported or able to rely on appropriate defences should the matter proceed to trial.
2) Limits of the available defences at trial with both the defence under section 45 of the MSA 2015 and the common law defence of duress relying on a narrow conception of 'compulsion' that fails to recognise the coercive exploitation of county lines defendants/victims.
3) In addition, the large number of excluded offences under schedule 4 of the MSA 2015 severely limits the offences to which it can be applied, thus leaving many defendant/victims unable to raise it.

The following suggested areas for reform can be drawn out:

- It is clear that the major issue for defendants/victims in county lines is that their potential victimhood is not identified sufficiently early: in these situations the potential safeguards, opportunities for diversion, and potential defences become significantly more difficult to raise and they are far less likely to have their victimhood taken appropriately into account the further into the criminal justice process theircase proceeds.
- It would clearly therefore be useful to provide greater education and guidance to policing services to recognise the potential victimhood of participants in county lines at an early stage, including those who do not present as immediately vulnerable, such as those who are not juveniles and/or not victims of physical violence. This early recognition of victimhood would ensure appropriate referrals to the NRM were made and other available safeguards put in

371 See Sentencing Council, 'Aggravating and Mitigating Factors', (sentencingcouncil.org.uk) <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/> (accessed 23 September 2024).

372 Sentencing Council, *Drug Offences, Definitive Guideline,* (Sentencing Council, 2020) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-definitive-guideline-Web.pdf> (accessed 23 September 2024).

place. This could also help ensure that the CPS did not proceed to prosecution without carefully considering whether diversion from prosecution may be more appropriate for county lines defendant/victims.

- For situations where a prosecution is proceeded with, the non-admissibility of NRM decisions at trials for these individuals is problematic in that it makes it more difficult for defendants who are victims of trafficking to successfully raise the defence under section 45 of the MSA 2015. The incompatibility of timelines between SCA determinations and the criminal justice process also causes difficulties. Harmonisation of these processes and ensuring SCA decisions were more transparent and robust to allow potential admissibility as expert evidence would potentially enhance protection of genuine victims of modern slavery or trafficking from criminal prosecution.
- As outlined in the previous chapter on domestic abuse, it is clear there is potential benefit in reforming the scope of available general defences which could be widened to take into account the limited choices of victims of exploitation when it comes to how they may perceive threats, respond with violence towards their exploiters or be able to 'retreat'.
- In addition, reforming the MSA 2015 to cover a greater scope of offences would assist those defendant/victims whose exploitation may have led to other forms of offending beyond drug use and supply.

# CHAPTER 3: STATUS, SAFEGUARDS AND SPECIAL MEASURES

## 1.1 Introduction

The journey of vulnerable people through the criminal process—understood here to comprise all stages from the initial police investigation of a reported crime to the formal prosecution, trial and sentencing of a convicted offender in court—is a long and complicated one governed by a myriad of rules, hard and soft, statutory and judge-made, general and specific, and at times remarkably inconsistent. Our primary aim in this chapter, therefore, is to bring clarity to the status quo. What are the provisions in place for the protection and assistance of vulnerable witnesses, and how do they compare to those for vulnerable suspects and defendants, including those with histories of prior victimisation? Based on our analysis of what turns out to be two rather different regimes, we reflect on the rationales behind them, and the challenges faced by many suspects and defendants with vulnerabilities or histories of victimisation not just to participate effectively in the proceedings but to be treated with respect and care. We conclude by identifying priority areas for law and policy reform.

## 1.2 Vulnerability and victimhood amongst suspect and defendant populations

It makes sense to start with some explanations as to what constitutes 'vulnerability' and 'victimhood' under the law in England and Wales. Victimhood is by far the easier concept to define, due to the significant expansion of statutory and non-statutory guidance, services and support that have been made available to victims over the course of recent decades. A key resource in this regard is the Ministry of Justice's Code of Practice for Victims of Crime (Victims' Code),[373] which lays down the rights of victims in England and Wales, and the minimum standards that they can expect from public service providers who are involved in the investigation and/or prosecution of crime. According to the introductory notes in the latest (November 2020) edition of the Code, a person will be treated as a 'victim' if they are:

i. a person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence; [or]
ii. a close relative (or a nominated family spokesperson) of a person whose death was directly caused by a criminal offence.[374]

Not all victims will be treated equally, however. Alongside those who have been subjected to the most serious offences and those who have been targeted persistently, the Code reserves a range of so-called 'enhanced rights' for victims who are 'vulnerable' or 'intimidated'. As will be seen below, this two-tiered approach runs through all stages of the criminal process and it is mirrored, to some extent, for 'vulnerable' suspects and defendants as well.

Determinations of who is and is not 'vulnerable' are much less straightforward. As the latest (April 2023) interim version of the Equal Treatment Bench Book points out, '[t]here is no general definition of "vulnerability" under the law'; rather, '[w]itnesses and parties may be "vulnerable" … as a result of various factors',[375] set out, more or less consistently, across legislation, guidance, and rules. For suspects and defendants, the main provisions in this regard are found in the Code of Practice C to the Police and Criminal Evidence Act 1984 (PACE Code C), the Youth Justice and Criminal Evidence Act 1999 (YJCEA), and the Criminal Procedure Rules 2020 (CrimPR).

373 Ministry of Justice, *The Code of Practice for Victims of Crime in England and Wales* (*Victims' Code*) (Ministry of Justice, 2020).

374 Ibid, 3. Note that sections 1(1), (2) of the Victims and Prisoners Act 2024—recently signed into law—propose a broader definition that extends to persons who have seen, heard, or otherwise directly experienced the effects of criminal conduct at the time the conduct occurred, or whose birth was the direct result of criminal conduct.

375 Judicial College, *Equal Treatment Bench Book* (February 2021 edition, Judicial College) 49.

PACE Code C regulates the detention, treatment and questioning of persons by the police. Where a person is, or might be,[376] vulnerable, specific safeguards, discussed in detail below, must be put in place. According to paragraph 1.13(d) of the Code, the term 'vulnerable' applies to any person who, because of a mental health condition or mental disorder [...]:

i. may have difficulty understanding or communicating effectively about the full implications for them of any procedures and processes connected with:
   - their arrest and detention; or (as the case may be)
   - their voluntary attendance at a police station or their presence elsewhere [...], for the purpose of a voluntary interview; and
   - the exercise of their rights and entitlements.

ii. does not appear to understand the significance of what they are told, or questions they are asked or of their replies.

iii. appears to be particularly prone to:
   - becoming confused and unclear about their position;
   - providing unreliable, misleading or incriminating information without knowing or wishing to do so;
   - accepting or acting on suggestions from others without consciously knowing or wishing to do so; or
   - readily agreeing to suggestions or proposals without any protest or question.

Chapter 2 of the Code of Practice to the Mental Health Act 1983[377] defines the conditions that can fall within the scope of this provision,[378] including, notably, affective disorders, such as depression or bipolar disorder; neurotic, stress-related and somatoform disorders, such as anxiety, PTSD, or obsessive compulsive disorder; eating disorders; mental and/or behavioural disorders caused by psychoactive substance use (addiction, on its own, is not sufficient)[379]; learning disabilities; autistic spectrum disorders, including Asperger's syndrome; and behavioural and/or emotional disorders in young persons. Note for Guidance 1G of PACE Code C makes clear, however, that even in cases where a suspect is not, or is not known to be, suffering from a recognised mental disorder, they may still encounter the functional difficulties listed in paragraph 1.13(d). Vulnerability, therefore, can, and indeed should, be assessed 'on a case by case basis'—with one crucial exception: those who appear to be under 18 ('juveniles')[380] are considered vulnerable simply by virtue of their age, and thus will require appropriate protection and assistance under any circumstances.

After the investigative stage, vulnerability is no longer uniformly defined, if indeed it is defined at all. The only two statutes explicitly addressing it are section 33A of the YJCEA and CrimPR 18.23. Section 33A of the YJCEA was inserted by the Police and Justice Act 2006 to extend the option of giving oral evidence via live link at trial to vulnerable defendants.[381] Yet, while initially intended to govern all criminal cases in the Magistrates' and Crown Courts, it has recently been amended by the Police, Crime, Sentencing and Courts Act 2022 to apply only to the Service Courts; and that means strictly speaking live link directions for defendants, vulnerable or not, are now subsumed by the court's wider live link powers in sections 51, 52 of the Criminal Justice Act 2003 (CJA). The CJA provisions are general provisions, however, used for all participants in relevant proceedings (including jurors, for instance), and they make no mention of vulnerability or what it

376 PACE Code C, paragraph 1.4.

377 Department of Health and Social Care, Code of Practice: Mental Health Act 1983 (www.gov.uk, 15 January 2015) <https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983> (accessed 23 September 2024).

378 PACE Code C, Note for Guidance 1GB.

379 Mental Health Act 1983, s. 1(3).

380 PACE Code C, paragraph 1.5.

381 Interestingly, though, unlike the amending statute and the more comprehensive scheme of special measures for non-defendant witnesses in sections 23-30 of the YJCEA, the wording of section 33A specifically does not refer to these defendants as 'vulnerable'. Rather, the measure is made available to 'certain accused persons.' Sections 51, 52 of the Criminal Justice Act 2003, as will be seen shortly, are even less specific in this regard.

might mean as a special criterion for eligibility.[382] The current Criminal Practice Directions (CrimPD), effective as of November 2023, moreover still refer to the YJCEA as authoritative.[383] So, even if section 33A has officially lost much of its original significance, it still seems to be taken into account, and that means it is necessary here to at least sketch how vulnerability is defined under this section.

Like PACE Code C, section 33A of the YJCEA distinguishes between defendants who are vulnerable on account of their mental disposition,[384] and defendants who are vulnerable by age.[385] In case of the former, the defendant has to (i) suffer from a mental disorder within the scope of the Mental Health Act 1983 (as discussed above) or otherwise have a significant impairment of intelligence or social functioning which, in turn, causes them to (ii) be unable to participate effectively in the proceedings as a witness giving oral evidence in court.[386] That means the threshold is very high, and it is higher than that for non-defendant witnesses: whereas a defendant must be 'unable' to participate effectively,[387] a witness struggling with the same mental condition—or for that matter, a physical disability or disorder—is vulnerable, and thus eligible for special measures,[388] as soon as the quality of evidence is 'likely to be diminished'.[389] And similarly, in the case of vulnerability by age, a defendant under 18, unlike a witness of the same age,[390] is not *per se* vulnerable; they, too, must be compromised by their level of intellectual ability or social functioning to participate effectively.[391] Now as said, the 2022 amendment to the YJCEA may have resolved these disparities by allowing the court to use its wider live link powers in sections 51, 52 of the CJA; though, more likely, it simply abolished the live link as a truly 'special' measure for vulnerable defendants.

Either way, at least with regard to trial intermediaries progress has been made. The new CrimPR 18.23, inserted in April 2021, invokes a standard of vulnerability[392] identical to that of the witness provision in section 16 of the YJCEA. The court, under this rule, 'must' appoint an intermediary if that is necessary to facilitate a defendant's effective participation in a hearing, and if their ability to participate is 'likely to be diminished' because of either (i) their age, if the defendant is under 18, or (ii) a mental disorder within the scope of the Mental Health Act 1983 (as discussed above), a significant impairment of intelligence or social functioning, or a physical disability or disorder.

382 Instead, the court ought to consider 'all the circumstances of the case' and the guidance by the Lord Chief Justice (section 51(5)), which, too, does not address the issue of defendant vulnerability or, indeed, the use of live link for the purpose of giving evidence at trial. For the full guidance, see: Judiciary UK, 'Live Links in Criminal Courts: Guidance' (judiciary.uk, July 2022) <https://www.judiciary.uk/wp-content/uploads/2022/07/Live-links-Guidance-for-criminal-courts-July-2022.pdf> (accessed 23 September 2024).

383 See CrimPD 6.4.4.

384 Youth Justice and Criminal Evidence Act 1999, s. 33A(5).

385 YJCEA, s. 33A(4).

386 YJCEA, ss. 33A(5)(a), (b).

387 Note that being 'unable' to give (effective) evidence in one's own defence can, under settled doctrine (*John M* [2003] EWCA Crim 3452), lead to a finding of unfitness to plead—and thus to the question of whether or not a full trial can be held at all. The Law Commission has recommended that diverting a defendant from the regular process should be a last resort, however; and the Government, in its 2023 response, has reinforced this understanding of the law. See Law Commission, *Unfitness to Plead* (Law Com No 364 2016) and Ministry of Justice, *Government response to the Law Commission Report 'Unfitness to Plead'* (Ministry of Justice 2023).

388 And 'enhanced rights' under the Victims' Code (n373), which, too, uses the definition in section 16 of the YJCEA.

389 See the witness provision in s. 16(1)(b) of the YJCEA.

390 See the witness provision in the s. 16(1)(a) of the YJCEA.

391 See YJCEA, s. 33A(4)(a). Of course, regardless of whether the defendant is deemed 'vulnerable' under this provision, being tried and/or sentenced in the Youth Court means certain adjustments (to the courtroom layout, for instance) will always be made—but the most serious cases are heard only in the Crown Court. For an overview of the practice and procedure in the Youth Court, see Emma Arbuthnot and Naomi Redhouse, 'Youth Courts and Young Defendants' in Penny Cooper and Heather Norton (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (Oxford University Press, 2017) 229, 236-40, 251-56.

392 Though, again, without actually referring to the defendant as 'vulnerable'.

Finally, in addition to this patchwork of vulnerability provisions, which will be returned to later in the discussion below, YJCEA also contains special—and exclusive—measures for non-defendant witnesses who are 'intimidated'. According to section 17(1), a witness is eligible for assistance[393] if the quality of evidence given by the witness is 'likely to be diminished by reason of fear or distress', which, as section 17(2) explains, can arise from a variety of circumstances, including, in particular, (a) the nature and alleged circumstances of the offence, (b) the age of the witness, (c) the social and cultural background and ethnic origins of the witness, their domestic and employment circumstances, as well as any religious beliefs or political opinions, and (d) any behaviour towards the witness on the part of the defendant, their family members or associates, or any other person who is likely to be a defendant or a witness in the proceedings. Sections 17(4), (4A), moreover, and this is critical for our case studies, stipulate that witnesses who are complainants (that is, victims) in respect of certain offences are deemed 'intimidated', and thus eligible for special measures, unless they wish *not* to be so eligible. These offences include (a) sexual offences, (b) offences under sections 1 or 2 of the MSA 2015, and (c) any other offence where it is alleged that the behaviour of the defendant amounted to domestic abuse within the meaning of the Domestic Abuse Act 2021. The same holds true for witnesses, who need not be complainants, in respect of a certain number of 'relevant', primarily violent, offences listed in Schedule 1A of the YJCEA.[394] Defendants, as said, will not be considered under any of these provisions, even if they are, de facto, intimidated.

In conclusion, 'victimhood' is understood to describe the (factual) status of a person who has been directly and adversely affected by crime, and not all victims are also 'vulnerable'. Rather, 'vulnerability' is primarily understood in terms of procedural competence. Recognised factors include young age as well as mental, intellectual and social impairments. Special provision is made for 'intimidated' witnesses, notably those who have been victims of domestic abuse, sexual offences, and modern slavery. However, this provision excludes suspects and defendants, even those who may have a similar history of victimisation or who may be experiencing intimidation.

## 1.3 Prevalence

Armed with these considerations, and before exploring how they are being addressed, it is worth taking a look at some of the available facts and figures about the prevalence of vulnerability and victimhood among suspects and defendants in England and Wales—also, and in no small part, to dispel the notion that this is a minor issue, and to flag just how often it is being (dis)missed.

So first, regarding suspects, the research suggests that a significant number of adults in police custody are 'mentally vulnerable', much greater than in the general population,[395] according to the definition in paragraph 1.13(d) of PACE Code C. An initial study by Iain McKinnon and Don Grubin, for instance, who collected data at two London police stations in 2009 and 2010, found that 39% percent of the 237 suspects in their sample had a mental disorder (psychoses, affective disorders, and learning disabilities/difficulties being the most common), but only around half of them (52%) were identified as vulnerable by the police.[396] A later study, published in 2021, generated almost identical results,[397] with data from mental health services in police custody confirming high levels

393 And 'enhanced rights' under the Victims' Code (n373), which, too, uses the definition in section 17 of the YJCEA.

394 See YJCEA, ss. 17(5) and (6).

395 The most recent available data for the UK suggests that around 17% of persons aged 16 and over are living with a current mental disorder. See Carl Baker and Esme Kirk-Wade, *Mental Health Statistics: Prevalence, Services and Funding in England* (House of Commons Library 2024) <https://researchbriefings.files.parliament.uk/documents/SN06988/SN06988.pdf> (accessed 23 September 2024).

396 Iain McKinnon and Don Grubin, 'Health Screening of People in Police Custody: Evaluation of Current Police Screening Procedures in London, UK' (2013) 23(3) *European Journal of Public Health* 399. Compare also Iain McKinnon and Don Grubin, 'Evidence-Based Risk Assessment Screening in Police Custody: The HELP-PC Study in London, UK' (2014) 8(2) *Policing* 174.

397 Chiara Samele *et al.*, 'The Prevalence of Mental Illness and Unmet Needs of Police Custody Detainees' (2021) 31(2) *Criminal Behaviour and Mental Health* 80.

of psychiatric morbidity.[398] Similarly, we know that young suspects are particularly prone to having communication and/or neuro-developmental disorders,[399] often paired with a history of neglect, institutional care, and exclusion from school. Yet, often, the police will treat them as vulnerable, instead of just formally identifying them as such, only if they are 'upset and tearful' or otherwise able to actively 'perform' their vulnerability in front of the custody officer.[400]

For defendants, the data looks very similar, especially when deduced from prison and probation figures. A 2011 multi-stage study conducted by researchers affiliated with the Criminal Justice and Health Research Group at the University of Lincoln, for instance, found that, again, almost 39% of the offenders under supervision at the Lincolnshire Probation Trust had a current mental disorder (neurotic, affective, psychotic and eating disorders being the most common) and almost 49% had a past/lifetime condition. And again, identification of these conditions was rather poor: while staff picked up on around three quarters of affective disorders (73%), and recorded around half (47%) of offenders suffering from anxiety, they identified only a third (33%) of offenders with psychosis, a fifth (21%) of offenders with personality disorders, and none of those with an eating disorder.[401] Similarly, the research shows that learning disabilities/difficulties are significantly more prevalent among offenders (up to 10%) than in the general population (around 2%), but they often remain unidentified unless they manifest in concerning behaviour.[402] Different vulnerabilities can overlap, of course, and mental disorders in adult offenders, in particular, are often disguised by symptoms of substance abuse—which, alongside persistent training and funding issues, could be one of the reasons why so many of them are missed or misinterpreted.[403] But, as a recent London study into the prevalence of mental disorders in defendants attending court suggests, the situation may be worse than already thought: in addition to almost half (48.5%) of defendants attending from custody, around 20% of defendants from the community had at least one mental condition; yet, only around 17% of those attending from custody, and around 5% from the community, were referred to the Liaison and Diversion service (L&D) for assessment and treatment.[404] That means the data from prisons, probation and L&D is unlikely to reveal the true scale of psychiatric morbidity.

398 Andrew Forrester *et al*., 'Demographic and Clinical Characteristics of 1092 Consecutive Police Custody Mental Health Referrals' (2017) 28(3) *Journal of Forensic Psychiatry & Psychology* 295.

399 An extensive meta study by Nathan Hughes *et al*., 'Nobody Made the Connection: The Prevalence of Neurodisability in Young People Who Offend' (The Office of the Children's Commissioner, 2012) revealed that whereas the prevalence of communication disorders in the general population ranges from 1-7%, among young offenders it is as high as 60-90%; for learning disabilities, the comparison is between 2-4% to 23-32%; for ADHD, between 1-2% to 12-19%, and for autistic spectrum disorders, between 0.6-1.2% and 15%.

400 See the recent study by Miranda Bevan, 'Behind Closed Doors: Protections for Child Suspects in Police Custody' in Roxanna Dehaghani, Samantha Fairclough and Lore Mergaerts (eds), *Vulnerability, the Accused, and the Criminal Justice System: Multijurisdictional Perspectives* (Routledge 2023) 111; and also Roxanna Dehaghani, '"Vulnerable by Law (But Not by Nature)": Examining Perceptions of Youth and Childhood "Vulnerability" in the Context of Police Custody' (2017) 39(4) *The Journal of Social Welfare & Family Law* 454. These and other implementation issues will be returned to in the discussion below.

401 The full report by Charlie Brooker *et al*., 'An Investigation into the Prevalence of Mental Health Disorder and Patterns of Health Service Access in a Probation Population' (University of Lincoln 2011) is available online at <https://www.cep-probation.org/wp-content/uploads/2018/10/An-investegation-inro-rhw-prevalence-of-mental-health-disorder-final-report.pdf> (accessed 23 September 2024).

402 The evidence on learning disabilities/difficulties is somewhat uncertain due to a lack of agreement on criteria and assessments, see Nancy Loucks, 'No One Knows: Offenders with Learning Difficulties and Learning Disabilities – Review of Prevalence and Associated Needs' (Prison Reform Trust 2007). The full report is available online at: <https://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/No%20One%20Knows%20Prevalence%2C%20full%20report.pdf> (accessed 23 September 2024).

403 Jenny Talbot, 'Fair Access to Justice: Support for Vulnerable Defendants in the Criminal Courts' (Prison Reform Trust 2012), 10, suggests that 75% of adult prisoners have a 'dual diagnosis' of mental illness and addiction, see: <https://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/FairAccesstoJustice.pdf> (accessed 23 September 2024).

404 Penelope Brown *et al*., 'Prevalence of Mental Disorders in Defendants at Criminal Court' (2022) 8(3) *BJPsych Open* e92. In addition, more than 5% of all defendants were estimated to be unfit or 'borderline unfit' to plead.

Studies specifically on suspects and defendants who are also victims are very limited. With regard to our case studies, two recent reports are worth mentioning, however. The Prison Reform Trust, in its 2017 report on female offending, found that more than half (57%) of all women in prison in England have been victims of domestic abuse as adults, and especially many young women (30%) have experienced sexual abuse.[405] We also know that, as of 2023, around 80% of women in prison in England and Wales have mental health concerns, and that they account for a disproportionate number of self-harm incidents (29%) despite making up only 4% of the total prison population.[406] Similarly, with regard to grooming, trafficking and exploitation of young people involved in county lines, the specialist criminal justice think tank Crest Advisory published a dedicated report finding that three quarters (77%) of the young people in their 2022 research sample had been subject to domestic abuse, and well over half (61%) had been victims of crime, more generally. In addition, many of them (around 40%) struggled with mental health, around half (53%) had been excluded from school at least once, and all of them had a history of substance abuse.[407]

Taken together, these studies make clear that not only are vulnerability and victimhood, combined and in isolation, highly prevalent among suspects and defendants in England and Wales, but they are identified so late in the process—or not at all—that prison, of all places, is where they tend to become a genuine concern. To understand why that is, the next section provides an overview of the safeguards and special measures in place throughout the criminal process, and how the status of being a witness (including a 'genuine' victim) compares to that of being a suspect or defendant.

## 2.1 Overview of safeguards and special measures for witnesses, suspects and defendants

This chapter now turns to compare the provision of safeguards and special measures for witnesses who are victims and for vulnerable suspects or defendants, including those who are victims. It starts by considering police investigations and then goes on to consider charging and pre-trial issues before concluding with a discussion of the trial and sentencing stages. As set out below, safeguards and support for witnesses at the investigation stage are much more defined and robust than for vulnerable suspects. At the pre-trial stage, the most significant safeguard for vulnerable suspects is the charging decision itself. Pre-trial preparation for vulnerable witnesses and defendants is similar, but witnesses are provided with dedicated practical and emotional support not available to defendants who are victims or otherwise vulnerable. At the trial stage, all witnesses are entitled to practical and emotional safeguarding at court and vulnerable and intimidated witnesses can apply for special measures under sections 23-30 of the YJCEA. By contrast, defendants are excluded from the statutory special measures scheme. However, they have been given access to some special measures through case law. Similar to what we see in relation to victims of domestic abuse and county lines, the offender's innate vulnerabilities and prior victim status is most likely to be considered at sentencing. However, as discussed further below, this is insufficient to mitigate unfairness stemming from failures to identify and support vulnerable or victimised suspects or defendants at an earlier stage.

405 Prison Reform Trust, '*There's a Reason We're in Trouble*', (n60).

406 See Prison Reform Trust, *Bromley Briefings Prison Factfile: February 2024* (Prison Reform Trust 2024) available online at <https://prisonreformtrust.org.uk/wp-content/uploads/2024/02/Winter-2024-factfile.pdf> (accessed 23 September 2024).

407 Joe Caluori *et al.*, 'County Lines: Breaking the Cycle' (Crest Advisory 2022). The report and individual case studies are available online at <https://www.crestadvisory.com/post/county-lines-breaking-the-cycle-final-report> (accessed 23 September 2024).

## 2.2 Police investigation

### (a) Witnesses

As stated at the beginning, statutory and non-statutory support for victims in England and Wales has increased considerably over recent decades, and that is true for other witnesses, especially vulnerable witnesses, as well. Apart from the Victims' Code,[408] the key pieces of government guidance in this regard are the Witness Charter,[409] which, similarly to the Code, sets out the standards of care that all witnesses can expect from the criminal justice system, and Achieving Best Evidence in Criminal Proceedings (Achieving Best Evidence),[410] which outlines good practice in interviewing witnesses and victims pre-trial, and in preparing them for giving effective testimony in court.

Early on in the investigation, and continuing throughout, both the Victims' Code and the Witness Charter place a duty on the police to conduct a 'needs assessment',[411] including an assessment of whether the witness might be vulnerable or intimidated in the sense of sections 16 and 17 of the YJCEA, as explained above; and based on the results of this primary assessment, they are required to signpost and/or refer the witness to relevant support services, which then will be delivered on a local basis. General services include Citizens Advice, Victim Support, and Witness Care Units (which offer practical support and facilitate communication with the police, the Crown Prosecution Service (CPS), and later the court), as well as restorative justice and health and social care. Where indicated, the witness may also be provided with specialist support, for instance, by an Independent Sexual Violence Advisor or an Independent Domestic Violence Advisor, who then goes on to act as the single point of contact for the witness throughout the entire process.

Interviews with vulnerable and intimidated witnesses, even more so than regular ones, require a dedicated 'interview strategy'[412] and they must be 'carried out by or through professionals trained for that purpose'.[413] Vulnerable witnesses with communication problems that are likely to diminish the quality of their evidence are eligible for assistance from a so-called registered intermediary[414] who is trained, regulated and funded by the Ministry of Justice.[415] Interviews with young witnesses must be carried out in separate facilities by a trained officer or social worker and should be video-recorded so that they can be played back as evidence-in-chief under section 21 of the YJCEA.[416]

Witnesses who are victims can make a 'victim personal statement' after the interview (or later in the process), which can be read, including on their behalf, or referred to by the court if and when the offender is being sentenced.[417] Parents, guardians and other carers can make a victim personal statement for a vulnerable victim who is or feels unable to do so themselves.

408 Ministry of Justice, *Victims' Code* (n373).

409 Ministry of Justice, *The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System* (Ministry of Justice 2013).

410 Ministry of Justice and National Police Chiefs' Council, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (Ministry of Justice 2022).

411 See Right 4 of the Victims' Code (n373), and Standards 4 and 8 of the Witness Charter (n409), respectively.

412 See Kevin Smith and Rebecca Milne, 'Vulnerable Witnesses: The Investigation Stage' in Penny Cooper and H.H.J. Heather Norton (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (Oxford University Press, 2017), who describe, in detail, the considerations that should guide police during (i) the initial contact, (ii) the pre-interview process, (iii) the interview itself, and (iv) the post-interview process.

413 Ministry of Justice, *Victims' Code* (n373), Right 2; Ministry of Justice and National Police Chiefs' Council, *Achieving Best Evidence* (n410).

414 Ibid.

415 Ministry of Justice, 'Ministry of Justice Witness Intermediary Scheme' (www.gov.uk, 25 January 2019) <https://www.gov.uk/guidance/ministry-of-justice-witness-intermediary-scheme#:~:text=Registered%20Intermediaries%20are%20provided%20through,quality%20professional%20support%20when%20needed> (accessed 23 September 2024).

416 On interview strategy, see Ministry of Justice, Achieving Best Evidence (n410), Chapter 2.34-2.77. The same measure can be considered for vulnerable adult witnesses, see YJCEA, s. 27 and below.

417 Ministry of Justice, *Victims' Code*, (n373), Right 7.

## (b) Suspects

As explained earlier, the PACE Act and specifically the accompanying Code C provide the legal framework for the treatment of suspects in police custody for investigation, that is, suspects who have been arrested and detained for questioning, or who have come in of their own accord and are questioned under caution. Paragraph 1.0 of Code C stresses that all suspects must be treated fairly, responsibly, with respect, and without unlawful discrimination. For young suspects ('juveniles')[418] and adult suspects who qualify as 'vulnerable' under paragraph 1.13(d), a range of special provisions, usefully summarised in Annex E of the Code, apply. Failure to follow these or any other provisions of the Code does not necessarily mean that the evidence obtained will be inadmissible but it 'shall be taken into account' by the court,[419] notably, when ruling on applications to exclude unfair or unreliable (confession) evidence under sections 76, 78 of the PACE Act.

An initial assessment of a suspect's vulnerability should take place immediately upon their arrival in custody, when the officer in charge is required to determine under paragraph 3.5(c) of Code C whether the suspect is, or might be, in need of medical treatment or attention and/or assistance from an 'appropriate adult' (more on these in a moment). If vulnerability concerns emerge later on—for instance, during an interview or a search—or if they are raised by a legal representative, then the assessment needs to be reconsidered. Crucially, paragraph 1.4 demands that the police err on the side of caution: 'If at any time an officer has any reason to suspect that a person of any age may be vulnerable [...], in the absence of clear evidence to dispel that suspicion, that person shall be treated as such', and 'reasonable enquiries shall be made to ascertain what information is available that is relevant to any of the factors described in paragraph 1.13(d)'. As is made clear by Note for Guidance 1GA of Code C, that includes information from Liaison & Diversion services (L&D). Commissioned by the NHS, L&D practitioners help the police make assessments, encourage out-of-court disposals, and refer eligible suspects for treatment, such as drug/alcohol rehabilitation programmes.[420] There is, however, no strict duty for the police to consult with L&D, and they might not if the suspect is not obviously vulnerable. But the suspects themselves and their legal representative as well as an appropriate adult, if called, can ask them to do so.[421]

With regard to the interviewing of vulnerable suspects, Note for Guidance 11C of Code C admits that '[a]lthough juveniles or vulnerable persons are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to providing information that may be unreliable, misleading or self-incriminating'; and so '[s]pecial care should always be taken when questioning such a person'. Yet, there is no detailed guidance comparable to Achieving Best Evidence on how the interview itself is to be prepared and carried out,[422] and young and vulnerable suspects are not—and need not be—routinely questioned by an officer specifically trained for that purpose. Suspects with communication problems that require an interpreter have a right to be provided with one,[423] but (unlike in Northern Ireland) there is no full equivalent to the Witness Intermediary Scheme which supports suspects at the investigative stage.[424] The only significant procedural safeguard, therefore, is often the 'appropriate adult'.

418 PACE Code C, paragraph 1.5.

419 PACE, s. 67(11).

420 Services have reached 100% coverage across the jurisdiction. In Wales, they are called 'Criminal Justice Liaison'.

421 Ibid. Individual NHS Trusts provide guidance on (self-)referral on their L&D websites, as well.

422 But see The Advocate's Gateway, 'The Advocate's Gateway: Responding to Communication Needs in the Criminal Justice System', which provides a number of 'toolkits' for the questioning of vulnerable persons, including suspects and defendants, on their website: <https://www.theadvocatesgateway.org/toolkits-1-1-1> (accessed 23 September 2024). These toolkits cover general principles (2, 12), specific disorders (3, 4, 5), and the questioning of young people (6, 7).

423 PACE Code C, paragraph 3.12.

424 Contracted HMCTS-approved intermediaries, introduced in April 2022, can be booked only for court hearings. For a detailed explanation of the new scheme and comparison with Northern Ireland, see John Taggart, 'Vulnerable Defendants and the HMCTS Court-Appointed Intermediary Services' (2022) (6) *Criminal Law Review* 432.

An appropriate adult (AA), according to paragraph 1.7 of Code C, can be a parent, guardian or any person responsible for the suspect's care or custody; someone who is not employed by or under the direction of the police but has experience in dealing with vulnerable persons, such as a social worker; and failing these, 'some other responsible adult'. It does not specify whether the police have to conduct a background check on the person and/or assess the quality of their relationship with the suspect. Seemingly, any AA will do. Their role, according to paragraph 1.7A of Code C, is to 'safeguard the rights, entitlements and welfare' of the suspect, which means they are expected, among other things, to support, advise and assist them in communicating and participating in relevant procedures, check if the police are acting 'properly and fairly' (and report if they are not), and help the suspect understand their rights and make sure that these rights are being respected. Seeing as these are fairly demanding tasks, the Home Office has issued guidance for AAs,[425] and it is good practice to provide this guidance to all those who are unfamiliar with the role.[426] But, again, there is no strict duty for the police to inform AAs of what is expected of them, save in respect of the interview,[427] during which they are meant to act not merely as observers but to advise the suspect, facilitate communication, etc. Paragraph 11.17A makes clear, however, that 'if their conduct is such that the interviewer is unable properly to put questions to the suspect', they may be required to leave, and then the interview can be continued with a different AA.

Outside the interview context, AAs must be given the opportunity to effectively discharge their role. That includes reading—or re-reading—the suspect's rights in their presence,[428] and allowing them to inspect the whole of the custody record 'as soon as practicable after their arrival at the station and at any time on request';[429] conducting intimate and/or strip searches only if the AA is present and of the same sex as the suspect;[430] as well as securing a solicitor upon the AA's request.[431] Lastly, 'if available at the time', AAs, alongside the suspect and their solicitor, can make representations prior to any decision about the continued detention of the suspect by the police.[432]

To summarise, therefore, witnesses who are categorised as vulnerable or intimidated have access to specialist support and every witness has a right to early and ongoing needs assessments by the police and relevant support services (upon referral). By contrast, the identification of vulnerable suspects relies upon assessments by the police, and referrals to liaison and diversion services for vulnerable suspects is not mandatory. While for witnesses, interviews must follow government guidance, be carried out by a trained officer and, where needed, facilitated by a registered intermediary, interviews with suspects are not, and need not, routinely be carried out by a trained officer, and suspects have no right to a registered intermediary. There is no guidance for the police in dealing with vulnerable suspects comparable to that for vulnerable witnesses: the only significant safeguard is the 'appropriate adult', who will be expected to perform a complex range of tasks (often, without any training).

## 2.3 Charging and pre-trial

### (a) Witnesses

During the pre-trial phase, witnesses are entitled to updates and information by the police and/or their local Witness Care Unit about the progress of their case, and to ongoing needs assessments by relevant support services.[433] The latter is particularly important if the witness is vulnerable or intimidated, and called to give evidence at trial.

425 Home Office, *Guidance for Appropriate Adults* (Home Office 2003).

426 AAs can be sourced from various 'Appropriate Adult Services', who will send trained staff to the police station.

427 PACE Code C, paragraph 11.17.

428 PACE Code C, paragraph 3.17.

429 PACE Code C, paragraph 2.4.

430 Although the latter can be waived, see PACE Code C, Annex A, paragraphs 5 and 11(c).

431 PACE Code C, paragraph 6.5A.

432 PACE Code C, paragraph 15.3.

433 See Ministry of Justice, *Victims' Code*, (n373), Rights 4 and 6; Ministry of Justice, *Witness Charter*, (n409), Standards 7 and 8, respectively.

Pre-trial preparation, then, might involve a multi-agency conference to discuss and plan practical and emotional safeguarding as well as any special measures applications under sections 23-30 of the YJCEA (more on this below); the appointment of a personal 'witness supporter';[434] one or more pre-trial court visits, arranged and hosted by the Witness Service, to learn about and become familiar with the trial process and environment;[435] and, where indicated, specialist pre-trial therapy and counselling.[436]

It is standard, moreover, to hold a 'ground rules hearing'. Ground rules hearings are a type of case management hearing, designed to discuss and direct fair treatment and questioning, that follow the plea and trial preparation hearing, and precede the witness's testimony at trial.[437] According to case law,[438] and CrimPD 6.1.4, '[t]he greater the level of vulnerability, the more important it will be to hold such a hearing', and it is mandatory in every trial involving an intermediary, who then will also be required to attend.[439] The advocates on both sides are expected to have their lines of questioning for the witness drafted at this point, and the intermediary—where there is one—to have looked the questions over and written their report, to make sure that they can 'actively assist the court in setting ground rules and giving directions'.[440] CrimPD 6.3.34 contains a non-exhaustive list of matters to be discussed during the hearing. They include:

- when the witness will view their recorded police interview/evidence-in-chief;
- the overall length of cross-examination;
- the relevance of toolkits;[441]
- cross-examination by a single advocate in a multi-handed case;
- any restrictions on the advocate's usual duty to 'put the defence case';
- what explanation is to be given to the jury.

To make sure that the rules and other adaptations to the trial arrangements agreed on during the hearing are complied with, CrimPD 6.1.5 emphasises that it is 'essential' for them to be recorded. Especially in cases where the hearing is held some time before the start of the trial or where there is a change in advocates, that record will help safeguard the witness (who is not in attendance at the original hearing) and avoid having to pause and reconvene later on.

## (b) Suspects/defendants

During the pre-trial phase, the most significant safeguard for vulnerable suspects, arguably, is the charging decision itself.[442] Police and Crown Prosecutors make the same set of assessments

434 Virtually anyone can be a 'witness supporter': family, friends, volunteers and professionals. The point is to give the witness a sense of comfort during the hearing, knowing 'their person' is there with them—in the courtroom and, at the discretion of the court, on the witness stand as well. See Jessica Jacobson and Linda Harlow, 'Witness Support' in Penny Cooper and H.H.J. Heather Norton (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (Oxford University Press, 2017) 57, 64, 72-73

435 Young and vulnerable witnesses may be offered more than one pre-trial visit to reduce stress and assess whether the intended special measures are right for them. Whenever possible, they should be able to visit the courtroom in which the trial will take place, or see a trial 'in action', meet with their appointed intermediary, where applicable, and practise using live link technology. See CrimPD 6.3.30 and Jacobson and Harlow, 'Witness Support' (n434), 71-72

436 The CPS recently (May 2022) published updated guidance on this on their website. The previous version, jointly published with the Home Office and the Department for Health in 2002, was focused on the needs of young witnesses only. CPS, 'Pre-Trial Therapy' (www.cps.gov.uk, 26 May 2022) <>https://www.cps.gov.uk/legal-guidance/pre-trial-therapy> (accessed 23 September 2024).

437 See CrimPR 3.9. For a discussion of, and commentary on, how these hearings are organised and run, see Penny Cooper and Laura Farrugia, 'Ground Rules Hearings' in Penny Cooper and H.H.J. Heather Norton (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (Oxford University Press, 2017) 391.

438 In *Lubemba* [2014] EWCA Crim 2064 at [42], the Court of Appeal recommended that a ground rules hearing be held 'in every case involving a vulnerable witness, save in very exceptional circumstances.'

439 See CrimPR 3.9(2)(a)(i), CrimPD 6.3.31.

440 CrimPR 3.9(2)(a)(ii).

441 The Advocate's Gateway toolkit 1 (see above n422) offers guidance on holding effective ground rules hearings.

442 See Miranda Bevan, 'Vulnerable Suspects: The Investigation Stage' in Penny Cooper and H.H.J. Heather Norton (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (Oxford University Press, 2017) 95, 131-34

when reaching this decision. Relevant principles are set out in specific Guidance on Charging[443] and the Code for Crown Prosecutors,[444] both of which are issued by the Director of Public Prosecutions.

Where a suspect has been identified as vulnerable, and there is sufficient evidence to proceed to charge or offer an out-of-court disposal, the public interest stage of the Full Code Test and, more specifically, the suspect's level of culpability, may militate against formal prosecution. Paragraphs 4.14(b) of the Code for Crown Prosecutors makes clear that regard should be had 'to whether the suspect is, or was at the time of the offence, affected by any significant mental or physical ill health or disability, as in some circumstances this may mean that it is less likely that a prosecution is required'.[445] However, this is immediately weighed against 'how serious the offence was, whether the suspect is likely to reoffend and the need to safeguard the public or those providing care to such persons.' Somewhat more assertively, paragraph 4.14(d) of the Code states that 'the younger the suspect, the less likely it is that prosecution is required.' With regard to suspects who fall within the scope of our two case studies, the Code notes in paragraph 4.14(b), that they are 'likely to have a much lower level of culpability if the suspect has been compelled, coerced or exploited, particularly if they are the victim of a crime that is linked to their offending,' such as modern slavery and domestic abuse. If the decision is to charge, then this should be communicated in the presence of an AA, but there is no power to detain a vulnerable suspect just so that an AA can attend.[446] In any case, both the suspect—now a defendant—and the AA are to be given a written charge notice.[447]

Pre-trial preparations for vulnerable defendants are similar to those for vulnerable witnesses. As emphasised by CrimPD 6.4.2(b), (c), they should be given the opportunity to visit the court (with their appointed intermediary, where applicable), and to have a practice session where a special measure direction to give evidence via live link is considered. A ground rules hearing is not required unless the trial involves an intermediary, but it 'must always be considered';[448] and once again, the main guidance is that '[t]he greater the level of vulnerability, the more important it will be'.[449] If deemed necessary or beneficial, generally at least two ground rules hearings will be held: one before the start of the trial, to discuss and agree on any adaptations to the trial arrangements that will help the defendant follow the proceedings more easily, such as when and how many breaks should be scheduled; and one during the trial itself, provided that the defendant elects to give evidence, to discuss and agree on an appropriate approach to questioning.[450]

To recap, agencies involved in supporting witnesses collaborate to ensure their practical and emotional safeguarding at trial as well as the timely application for special measures. Holding a 'ground rules hearing' is standard (and mandatory, where an intermediary is used), pre-trial visits are encouraged, and mental health support is made available. When it comes to vulnerable suspects, the most significant safeguard is the charging decision itself. Guidance for police and Crown prosecutors encourages diversion in case of young and mentally vulnerable suspects and those whose conduct relates to prior victimisation. If charged, pre-trial preparations are similar to those for vulnerable witnesses, albeit witnesses are provided with additional practical and emotional support.

443 CPS, 'Director's Guidance on Charging, sixth edition, December 2020, incorporating the National File Standard' (www.cps.gov.uk, 31 December 2020) <https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-sixth-edition-december-2020-incorporating-national-file> (accessed 23 September 2024)

444 CPS, 'The Code for Crown Prosecutors' (www.cps.gov.uk, 26 October 2018). Regularly updated and available online at <https://www.cps.gov.uk/publication/code-crown-prosecutors> (accessed 23 September 2024)

445 However, this is immediately weighed against 'how serious the offence was, whether the suspect is likely to reoffend and the need to safeguard the public or those providing care to such persons.'

446 See PACE Code C, paragraph 16.1 and Note for Guidance 16C. Usually, that means the suspect will be released on bail to attend for charging once an AA has been secured, see Bevan, 'Behind Closed Doors' (n400), 134.

447 PACE Code C, paragraph 16.3.

448 CrimPD 6.4.1.

449 CrimPD 6.1.4.

450 See Cooper and Farrugia, 'Ground Rules Hearings' (n437), 399.

## 2.4 Trial and sentencing

### (a) Witnesses

When attending court, all witnesses are entitled to practical and emotional safeguarding by the Witness Service—which has staff and volunteers in every court—and to ongoing support by their local Witness Care Unit.[451] This may involve anything from being told about what to expect from the hearing, and being offered help in arranging travel and child care, to special arrangements for entry and exit from the courtroom and dedicated support during the waiting period. When giving evidence, vulnerable witnesses in the sense of section 16 of the YJCEA (see above) have access to the full range of special measures under sections 23-30 of the YJCEA. Those are:

- screening the witness from the defendant (section 23);
- evidence by live link (section 24);
- exclusion of (most of) the public and the press (section 25);
- removal of wigs and gowns (section 26);
- video-recorded evidence-in-chief, cross- and/or re-examination (sections 27 and 28);
- examination through intermediary (section 29); and
- use of communication aids (section 30).

Intimidated witnesses in the sense of section 17 of the YJCEA (see above) have access to all special measures except for those designed to address communication needs, that is, sections 29 (examination through intermediary) and 30 (use of communication aids) of the YJCEA. CrimPD 6.3.15(a) makes clear that different measures can be used in combination; and the threshold for eligibility, as discussed above, is relatively low, requiring only that the measure(s) will likely improve the quality of the witness's evidence, and that giving a direction to that effect is 'in the interests of justice'.[452] The latter, of course, will usually follow from the former.

Where applicable, practical and emotional safeguarding and support obligations persist through to the sentencing hearing. Vulnerable and intimidated witnesses are eligible for special measures (as above) to assist with the reading of their victim's personal statement (VPS) if they have prepared one. The granting of any such measure lies within the discretion of the court.[453]

### (b) Defendants

According to CrimPD 6.1.1,[454] the court is required to take 'every reasonable step' to facilitate the participation of any person, including the defendant, which includes enabling them to give their best evidence and make sure they can follow the proceedings. The kinds of practical adaptations to be considered in this regard are listed in CrimPD 6.4.2; for instance, the need for the defendant to sit with family (or a 'supporting adult') in a court which permits easy, informal communication with counsel; the need to timetable the case in a way that accommodates the defendant's ability to concentrate; or the need, in cases that attract a lot of public or media interest, to enlist police assistance 'to avoid the defendant being exposed to intimidation, vilification or abuse.' However, there are no provisions for the protection from third parties, for example from the defendant's abusive spouse, or co-defendants who may have abused or exploited the defendant.

Vulnerable defendants who elect to give evidence in their own defence do not have access to the statutory special measures scheme under sections 23-30 of the YJCEA; and as pointed out above, the late addition of the defendant live link direction in section 33A has recently been subsumed by the court's wider live link powers in sections 51,

451 See Ministry of Justice, *Victims' Code* (n373) and Ministry of Justice, *Witness Charter* (n409), Right 8 and Standards 10 and 13.

452 The court must also take into account any views expressed by the witness: YJCEA, ss. 16(4), 17(3).

453 For details, see ACC Gareth Cann, 'A Working Protocol between ACPO, the Crown Prosecution Service (CPS), Her Majesty's Court & Tribunals Service (HMCTS), the Witness Service and the Senior Presiding Judge for England and Wales on Reading Victim Personal Statements in Courts' (www.cps.gov.uk, July 2016) available on the CPS website: <https://www.cps.gov.uk/publication/reading-victim-personal-statements-court-protocol> (accessed 23 September 2024).

454 Which refers to the case management provisions in CrimPR 3.8 and Part 18 of the CrimPR, more generally.

52 of the CJA.[455] Section 104 of the Coroners and Justice Act 2009, moreover, which was designed to amend the YJCEA to provide for defendant intermediaries, has never been implemented. As a result, much of what is available to defendants by way of special measures today is actually found in case law,[456] and reflected, more or less comprehensively, in the CrimPD and CrimPR. Those measures are:

- screening the defendant;[457]
- exclusion of (most of) the public and the press;[458]
- removal of wigs and gowns;[459]
- examination through intermediary;[460] and
- use of communication aids.[461]

Seeing as these measures have been developed by the courts—in characteristically unsystematic and ad hoc fashion—eligibility criteria have remained somewhat uncertain, and the rules around the provision of defendant intermediaries used to be particularly abstruse. CrimPR 18.23, added in April 2021, is a welcome improvement in that regard, as it sets a clear threshold, equal to that for vulnerable witnesses, as discussed above.[462] The duration of the appointment has remained discretionary, but CrimPR 18.23(2) comprises a list of factors for the court to consider, such as the intermediary's recommendations, the likely impact of the defendant's age and mental capacity on their ability to follow the proceedings, any assistance that the defendant has received in the past, and any expert medical opinion provided to the court.[463] While it is possible, according to CrimPR 18.23(3)(a), to appoint an intermediary for the duration of every hearing, the Court of Appeal has stated that this will be 'extremely rare',[464] and that seems plausible to the extent that defendants cannot access the Ministry of Justice Witness Intermediary Scheme. There is now an option to apply for a contracted HMCTS-approved intermediary,[465] but the services are not equal and defendants can face considerable sourcing and funding constraints as well as a more variable standard of support as a result.[466] Irrespective of these difficulties, however, CrimPD 6.2.7 clearly states that an ineffective intermediary direction—due to local unavailability or a lack of expertise, for instance—will not be deemed to render the trial unfair.

At the sentencing stage, a defendant's innate vulnerabilities, such as age, and mental and

455 These provisions, again, do not mention 'vulnerability' and they contain no criteria for eligibility apart from that any direction to give evidence via live link must be 'in the interests of justice'.

456 The inherent common law powers of the court to give directions to regulate the trial, including to accommodate a vulnerable defendant, have been preserved by section 19(6)(a) of the YJCEA.

457 *Waltham Forest Youth Court* [2004] EWHC 715 (Admin). It is not clear who exactly is eligible, however, as the case involved a 13-year-old defendant with learning difficulties.

458 CrimPD 6.4.5; with no clear threshold for eligibility.

459 CrimPD 6.4.2; again, it is not clear who exactly is eligible, as the provision arose from the ECtHR judgment in the case of *T v United Kingdom* (1999) 30 EHHR 121, which involved an intimidated 11-year-old defendant.

460 CrimPR 18.23; *Sevenoaks Youth Court* [2009] EWHC 3088 (Admin), *Head* [2009] EWCA Crim 140.

461 CrimPR 3.8(7)(b)(vii); with no clear threshold for eligibility.

462 To recapitulate, a defendant must be either under the age of 18 or suffering from a mental disorder in the sense of section 1(2) of the Mental Health Act 1983, or a significant impairment of intelligence or social functioning, or a physical disability or disorder that means their ability to participate is likely to be diminished.

463 The Court of Appeal has made clear, however, that such an opinion 'is not determinative'. Rather, the question of whether an intermediary is necessary and, if so, for how long 'is a question for the judge to resolve, who is best placed to understand what is required in order to ensure the accused is fairly tried', see *Thomas* [2020] EWCA Crim 117 at [38]; compare also *Rashid* [2017] EWCA Crim 2 at [71].

464 *Rashid* (n463). A more recent judgment by the High Court in *Bromley Youth Court* [2020] EWHC 1204 (Admin) suggests that this statement may have been a factual, rather than a strictly legal, one.

465 See HM Courts & Tribunals Service, 'HMCTS intermediary services' (www.gov.uk, 1 April 2022) <https://www.gov.uk/guidance/hmcts-intermediary-services> (accessed 23 September 2024).

466 The first case to flag this as a genuine issue of procedural fairness was *R v Secretary of State for Justice* [2014] EWHC 1944 (Admin). For details on the new scheme, see Taggart, 'Vulnerable Defendants', (n424)

physical health, will be taken into account.[467] The Sentencing Council has published special guidelines for sentencing offenders with mental disorders, developmental disorders, or neurological impairments.[468] The General Guideline also lists 'being coerced, intimidated or exploited' as mitigating factors.[469] Where needed, the court can use its inherent powers to adapt the sentencing hearing to the defendant's circumstances, or it may decide to give a direction under sections 51, 52 of the CJA for it to be held remotely.

To conclude, all witnesses are entitled to practical and emotional safeguarding at court; vulnerable and intimidated witnesses can apply for special measures under sections 23-30 of the YJCEA and witness support obligations persist through to the sentencing hearing. By contrast, vulnerable defendants are excluded from the statutory special measures scheme, but access to some of those measures has been enshrined in case law and, more recently, in the CrimPR. Defendants can apply for a contracted HMCTS-approved intermediary, but an appointment for the full duration of the trial will be 'extremely rare'. The court must consider practical adaptations, such as seating arrangements and/or regular breaks for defendants, and their innate vulnerabilities and prior victim status will be taken into account at sentencing.

## 3.1 Discussion and suggestions for reform

This overview of safeguards and special measures clearly demonstrates that, although progress no doubt has been made, support for vulnerable suspects and defendants still trails behind that for vulnerable witnesses. In many respects—notably, due to gaps and inequities in resource and service allocation, statutory provision and relevant guidance, as well as the range of criteria used to establish eligibility—it is both less accessible and substantively inferior. Against this backdrop, and in moving, once again, from the task of defining vulnerability to the means for addressing it, the final part of this chapter concludes by identifying priority areas for reform and some of the action points raised in the academic literature to enhance the protections afforded to vulnerable suspects and defendants, and, in particular, those with prior victim status.

## 3.2 Defining vulnerability

As was seen above, a variety of mental disorders, legally recognised as vulnerabilities, are not only endemic among suspect and defendant populations in England and Wales, but they are often sometimes routinely missed. While this is a problem of considerable concern, and one that can and must be addressed,[470] it does not capture the full extent of what one might call the 'vulnerability identification deficit'. That deficit, for suspects and defendants, is also, and in some cases primarily, a result of definitional choices: choices that reflect and perpetuate a conception of vulnerability that prioritises witnesses and 'genuine' victims over alleged offenders, instead of applying equally to both sides and across the entire criminal process. Any conversation about the scope of potential law reform, therefore, must start by revisiting this conception to make room for more equitable definitional boundaries and protections. And that, in turn, requires reflection not just on what it means for suspects and defendants to be vulnerable in—and to—the criminal process, but on why it is so vital to alleviate these challenges effectively and early on.

467 For an overview of the key principles, guidelines, sentences and disposals available under the Mental Health Act 1983, see H.H.J. Heather Norton, 'Sentencing' in Penny Cooper and H.H.J. Heather Norton (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (Oxford University Press, 2017) 469

468 Sentencing Council, 'Sentencing offenders with mental disorders, developmental disorders, or neurological impairments' (sentencingcouncil.org.uk, 2020) Sentencing offenders with mental disorders, developmental disorders, or neurological impairments – Sentencing (sentencingcouncil.org.uk) (accessed 23 September 2024)

469 All guidelines currently in effect are available online at: https://www.sentencingcouncil.org.uk/ (accessed 23 September 2024).

470 For instance, through mandatory L&D assessments. As noted above, L&D services rely on referrals by other authorities, especially the police. Yet, as has been established by Brown *et al.* (n404), currently only a fraction of cases involving vulnerable suspects and defendants are in fact referred. Absent a more suitable triage model, systematic screening by L&D professionals—while costly—appears to be the best way to address this.

Begin by recalling the sheer maze of statutory and non-statutory vulnerability provisions used to determine eligibility for the safeguards and special measures discussed in this chapter. It was seen that suspects in police custody who are (or appear to be) under 18 are considered vulnerable by virtue of their age, whereas all other adult suspects need to exhibit a set of functional difficulties generally, though not necessarily, in connection with suffering from a recognised mental disorder under the Mental Health Act 1983.[471] Later on, as defendants, mental ill-health and a more flexible 'impairment of intelligence or social functioning' become separate criteria linked to a diminished ability to participate effectively in the proceedings,[472] but young age by itself may no longer meet the threshold,[473] and a physical disability or disorder becomes relevant only where appointment of an intermediary is being considered.[474] Meanwhile, (non-accused) witnesses, under the YJCEA and the equivalent provisions in the Victims' Code,[475] are designated as vulnerable in any and all of these cases; and dedicated support, including access to most of the special measures scheme, is extended to intimidated witnesses, as well—especially, if they have been victims of sexual offences, domestic abuse and/or modern slavery.[476] It is clear, moreover, that vulnerability with regard to witnesses has taken on a broader meaning than simply a diminished ability to participate. Ongoing reforms to services, guidance and protection in England and Wales over the last three decades have been driven by a holistic concern for witnesses' individual needs and welfare, an acknowledgement of the unique risks and challenges associated with navigating an adversarial system, and their right, under basic equality considerations, to have access to justice like everybody else.[477]

Now, of course, personally and procedurally, the position of witnesses and 'genuine' victims is, in many respects, significantly different from that of suspects and defendants, including those who themselves are victims of crime. And that, as will be seen very shortly, may well mean that some vulnerabilities have to be accommodated in different ways. But closing the gap between suspects and defendants and all other witnesses when it comes to recognising what it is to 'be' vulnerable in the first place does not deny those differences—to the contrary; it is an essential step towards accommodation and, thus, the fair and humane administration of justice under the law.

After all, being able and being enabled, where necessary, to participate effectively in criminal proceedings against oneself is a fundamental right—enshrined in Article 6(1) of the European Convention on Human Rights (ECHR)—and it extends into the earliest stages of the investigation.[478] Every court and every public agency involved, moreover, has a positive legal duty to safeguard and promote the welfare of vulnerable people in their care, irrespective of the capacities in which they come before them.[479] And so, recognising suspect and defendant vulnerability is not an optional consideration. It is a necessary precondition for discharging the state's existing obligations to protect both the integrity of the person and the integrity of the process. At minimum, then, what should be required is parity around the various kinds of innate factors (age, mental and physical impairments) that must always be taken into account. But just as there are situational factors impacting how resilient

471 See PACE Code C, paragraph 1.13(d) and Note for Guidance 1G.

472 See CrimPR 18.23. Recall YJCEA, s. 33A, requiring 'inability', is now limited to the Service Courts.

473 The uncertainty here arises from the previous definition in section 33A of the YJCEA, now subsumed by sections 51, 52 of the CJA (see ibid), and the patchy case law on special measures discussed above.

474 See CrimPR 18.23

475 See YJCEA, s. 16 which is referred to as authoritative in the 'enhanced rights' of the Victims' Code.

476 See YJCEA, ss. 17(1) and 17(4), (4A) and Ministry of Justice, *Victims' Code*, (n373)

477 Jacobson and Harlow, 'Witness Support' (n434), 57-8

478 See *Salduz v Turkey* (2009) 49 EHRR 19; *Teixeira de Castro v Portugal* (1998) EHRR 101

479 Key pieces of legislation in this regard are the Children Acts 1989 and 2004, the Care Act 2014, and the Equality Act 2010. Compare also Samantha Fairclough, 'The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment' (2021) 41(4) *Oxford Journal of Legal Studies* 1066

witnesses and 'genuine' victims are within a given procedural context—a fact broadly acknowledged in the intimidation provisions of the YJCEA and Victims' Code - so there are situational factors impacting the experiences and capabilities of those who stand accused.[480] Indeed, both of our case studies clearly show that fear and distress due to group pressures, financially, emotionally or sexually exploitative relationships, threats, and other instances of victimisation are not found solely among non-accused witnesses. And that means vulnerability of suspects and defendants, too, needs to be conceptualised not purely as a matter of disposition but as a matter of circumstance and, crucially, in light of the risks it poses both to the person and the process if it goes unnoticed at key moments of the investigation, charging and trial.[481]

These risks are well-known. During the custody interview, vulnerable suspects can make not just unreliable or incongruous statements but relevant omissions[482] or full-blown confessions (true or false) that will cause near irreparable damage to their defence;[483] and of course, failures to detect and counteract these dangers early on will then make it much harder for prosecutors, as well, to reach the appropriate charging decisions. As was seen above, the Code for Crown Prosecutors explicitly stipulates both that significant mental or physical impairments can militate against formal prosecution, and that suspects who have been 'compelled, coerced or exploited, particularly if they are the victim of a crime that is linked to their offending', are 'likely to have a much lower level of culpability'.[484] However, if none of this is flagged at interview, then there is a good chance these provisions will not be considered. And that means prosecutors may wrongly affirm the public interest in prosecution, fail to spot relevant defences, and miss the opportunity to divert eligible suspects towards more appropriate care and coping pathways. As a result, defendants with vulnerabilities may end up either pleading guilty[485] or proceeding to trial, where they may struggle to follow the activities in the room, effectively confer with counsel, and give their best evidence on the stand. In fact, they may want to avoid giving evidence altogether for fear of making a bad impression on court and jury,[486] or to avoid a gruelling cross-examination likely to result in additional stress or trauma.[487] These are the risks, personal and procedural, that the law and

480 On the conceptual distinction between innate and situational vulnerability, see Kate Brown, Kathryn Ecclestone and Nick Emmel, 'The Many Faces of Vulnerability' (2017) 16(3) *Social Policy and Society* 497, 499-500. 'Resilience', a term introduced by Samantha Fairclough, 'Resilience-building in Adversarial Trials: Witnesses, Special Measures and the Principle of Orality' (2023) 0(0) *Social & Legal Studies*, might actually be the better concept. It derives from a strand of vulnerability theory (inspired by Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 1) which argues that we, as human beings, are all vulnerable—but differently resilient. It appears in the work of Roxanna Dehaghani, as well, see, e.g., 'Interrogating Vulnerability', (n1)

481 In this vein, see Samantha Fairclough, Lore Mergaerts and Roxanna Dehaghani, 'The Vulnerable Accused in the Criminal Justice System' in Roxanna Dehaghani, Samantha Fairclough and Lore Mergaerts (eds), *Vulnerability, the Accused, and the Criminal Justice System: Multijurisdictional Perspectives* (Routledge, 2023) 1, 3, 7-10

482 Note that due to sections 34, 35 of the Criminal Justice and Public Order Act 1994—subject to safeguards set out in *Cowan* [1996] QB 373, as affirmed in *Becouarn* [2005] UKHL 55—a court and jury may draw adverse inferences from a suspect's (and later, a defendant's) decision to exercise their right to remain silent

483 See Samantha Fairclough and Holly Greenwood, 'Vulnerable Defendants, Special Measures and Miscarriages of Justice in England and Wales' in Roxanna Dehaghani, Samantha Fairclough and Lore Mergaerts (eds), *Vulnerability, the Accused, and the Criminal Justice System: Multijurisdictional Perspectives* (Routledge, 2023) 162, 173-75; and Fairclough, Mergaerts and Dehaghani, 'The Vulnerable Accused in the Criminal Justice System', (n481) 7-8

484 Code for Crown Prosecutors, paragraph 4.14(b)

485 Especially, as pleading guilty, and doing so early in the process, is incentivised with a sentencing discount under section 73 of the Sentencing Act 2020. The guilty plea rate in England and Wales in 2023 was roughly 65%, see: Ministry of Justice, 'Criminal court statistics quarterly, England and Wales, October to December 2023' (2024) https://www.gov.uk/crime-justice-and-law/justice-system-transparency#research_and_statistics (accessed 23 September 2024)

486 Which, again, may lead the court and/or jury to draw adverse inferences from their silence, see above n 109.

487 A dilemma fully acknowledged, though, no doubt, unsatisfactorily addressed, for witnesses testifying in a non-defendant capacity, see Louise Ellison and Vanessa E. Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2017) 21(3) *International Journal of Evidence & Proof* 183

those who apply it must be sensitive to. Yet, while recognising them is key, and much overdue, it is not enough. The rules and mechanisms in place to address them must deliver the protection and assistance needed to alleviate them. So, looking more closely at the investigative and trial stages now, the next part of this chapter considers whether or not that is the case.

## 3.3 Addressing vulnerability

### (a) Appropriate adults

The idea behind the introduction of the PACE Act in 1984, and specifically the accompanying Code C, was to address deficiencies associated with the old Judges' Rules, a set of guidelines specifying the practices and procedures to be followed during the detention and questioning of (especially young and mentally vulnerable) suspects in police custody so as to ensure any evidence obtained would be admissible at trial.[488] The new legal framework revised and tightened those guidelines, trying to increase fairness and accountability, but it did not mark a genuine departure. First of all, the PACE Act itself did not, and to this day does not, contain a general definition of vulnerability or of the precise nature of the AA safeguard intended to address it. Both, as was seen above, are found only in the Code and thus are subject to professional interpretation and implementation by the police officer in charge. Due to this particular configuration, a breach of relevant Code provisions will be 'taken into account' at trial,[489] but it will be consequential only if it has rendered the evidence unreliable or unfair according to sections 76, 78 of the Act;[490] and of course, provided that the case proceeds to trial at all. While the former (section 76) relates exclusively to confessions, and requires the evidence to have been obtained either by oppression or 'in consequence of anything said or done which was likely, in the circumstances existing at the time, to render [it] unreliable,[491] the latter (section 78) is a discretionary provision relating to any evidence that, if admitted, 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'[492] Although open to stricter interpretation in line with Code requirements - especially the most basic ones of calling a suitable AA at all and of protecting the suspect's rights and entitlements[493] - the courts have applied these rules very cautiously and with deference to police judgement.[494] Overall, therefore, the PACE framework seems not just poorly designed to enforce compliance,[495] but it has clearly retained the old Judges' Rules' narrow focus on securing the formal integrity of the evidence over the welfare of the suspect.[496]

Even that, however, does not work particularly well in practice. For one, there is the identification deficit. While young suspects, according to Note for Guidance 1G of Code C, are vulnerable simply by virtue of their age and thus easily identified if not necessarily treated as such by the police,[497] vulnerable adult suspects, as seen above, are often falling through the cracks. That can be due to a lack of professional training in how to identify the mental disorders recognised under paragraph 1.13(d) of the Code, or due to too narrow an

488 Roxanna Dehaghani, 'Interpreting and Reframing the Appropriate Adult Safeguard' (2022) 42(1) *Oxford Journal of Legal Studies* 187, 189-190

489 See PACE Act, s. 67(11)

490 And that includes no consequences for the police officer responsible for the breach, as section 67(10)(a) of the PACE Act comprehensively shields them from both civil and criminal liability.

491 PACE Act, ss 76(2)(a) and (b)

492 PACE Act, s. 78(1)

493 See PACE Code C, paragraphs 1.7A and 1.13(d). It is worth noting that these references informed by a broader understanding of vulnerability were included only in 2018, alongside an acknowledgment of the right to silence.

494 Roxanna Dehaghani, *Vulnerability in Police Custody: Police Decision Making and the Appropriate Adult Safeguard* (Routledge, 2019) 24-25, 54-70. In cases involving a defendant who was 'mentally handicapped', they have also at times used section 77 of the PACE Act—which provides for a special jury direction— to caution against the potential unreliability of confession evidence instead of excluding it under section 76 of the Act.

495 See Roxanna Dehaghani, 'He's Just Not That Vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody' (2016) 55(4) *Howard Journal of Crime and Justice* 396

496 Dehaghani, 'Interpreting and Reframing the Appropriate Adult Safeguard', (n488) 191-95

497 Treatment may hinge on the 'performance', see Dehaghani, "Vulnerable by Law (But Not by Nature)", (n400)

understanding of what it might mean to fail the functional assessment (of the ability to understand, communicate, etc.) that, in theory, is carried out in relation to every suspect whether or not they are suffering from such a disorder.[498] Research has shown that many police officers think that vulnerable suspects will genuinely need assistance from an 'appropriate adult' only if they exhibit 'childlike' characteristics.[499] And of course, the situation is worse still for those who the law does not currently classify as vulnerable at all. Unless a suspect is both willing and able to disclose circumstances of victimisation, for instance, their double status will likely go unnoticed. (Although, to be sure, that might still happen even if it is disclosed: recent studies on domestic abuse, for instance, sadly suggest that police are reluctant to take such claims seriously, especially if they are voiced by Black and minority ethnic women.[500])

What is more, though, and this cuts to the core of the matter, even in cases where identification is not actually the issue, implementation of the AA safeguard can still be remarkably ineffective. This may be because no action is taken to call an AA at all,[501] or because the AA who is called is unable to perform the tasks associated with the role. As was discussed above, an AA's 'job description' is a demanding one. They are expected, among other things, to 'support, advise and assist' the suspect during the interview and any other procedures (such as a search); to 'observe whether the police are acting properly and fairly to respect their rights and entitlements'; and to 'ensure that those rights are protected', if necessary, by notifying a superior officer.[502] Depending on who arrives in the custody suite—a distressed parent full of worry or frustration, an untrained volunteer from a privileged background, a social worker eager to instil a sense of responsibility in the suspect, or a paid AA trying to establish good working relations with the police—these tasks may feel overwhelming, intimidating, unclear, and they may be performed inadequately due to a lack of skills and experience and/or proper regard for the suspect's needs.[503] The latter, especially, can lead to disastrous consequences in cases where vulnerable suspects with prior victim status are 'assisted' by a person with whom they have an abusive or exploitative relationship. And again, PACE Code C contains no requirement at all for the police to run even the most basic background check on a parent, a partner or 'some other responsible adult',[504] who comes rushing in to act as the suspect's 'preferred' AA. Moreover, the fact that AAs do not enjoy legal privilege,[505] and can be removed from the interview if they are considered 'unreasonably obstructive' by the custody officer in

498 See PACE Code C, Note for Guidance 1G.

499 Dehaghani, *Vulnerability in Police Custody* (n494) 79-93.

500 Compare the research by Victim Support, 'New research shows police failing to act on domestic abuse reports - ethnic minority victims worst affected' (victimsupport.org.uk, 1 December 2022) available online at: <https://www.victimsupport.org.uk/new-research-shows-police-failing-to-act-on-domestic-abuse-reports-ethnic-minority-victims-worst-affected/#:~:text=Domestic%20abuse%20victims%20are%20reporting,new%20research%20by%20Victim%20Support> (accessed 23 September 2024). They found that of the 1,004 women in their study sample, well over half (53%) had reported an instance of domestic abuse at least twice, and nearly a quarter (24%) at least three times, before appropriate action was taken by the police.

501 The probability of the evidence being questioned at trial (and thus, the probability of there being a trial in the first place) appears to be a persuasive factor, see Dehaghani, *Vulnerability in Police Custody,* (n494), 118-28.

502 PACE Code C, paragraph 1.7A.

503 There is plenty of research to suggest that the calm and competent 'one-size-fits-all' AA envisioned by Code C does not exist, see, e.g., Roxanna Dehaghani, 'Defining the "Appropriate" in "Appropriate Adult": Restrictions and Opportunities for Reform' (2020) (12) *Criminal Law Review* 1137; and Tricia Jessiman and Ailsa Cameron, 'The Role of the Appropriate Adult in Supporting Vulnerable Adults in Custody: Comparing the Perspectives of Service Users and Service Providers' (2017) 45(4) *British Journal of Learning Disabilities* 246; as well as Harriet Pierpoint, 'How Appropriate are Volunteers as "Appropriate Adults" for Young Suspects? The "Appropriate Adult" System and Human Rights' (2000) 22(4) *Journal of Social Welfare & Family Law* 383; 'A Survey of Volunteer Appropriate Adult Services in England and Wales' (2004) 4(1) *Youth Justice* 32

504 PACE Code C, paragraph 1.7.

505 *A Local Authority v B* [2008] EWHC 1017 (Fam). That means, if the case ends up proceeding to trial an AA could be compelled to give evidence against a suspect (then, defendant) who they were initially called to protect.

charge,[506] may have a chilling effect even on those who understand what is required of them and are keen to assist and protect the suspect as best as they possibly can.[507]

In light of these concerns and our previous reflections on the need for a more evolved conception of suspect and defendant vulnerability, the following reforms—based on the research discussed and referenced in this chapter—should be considered:[508]

- develop a workable definition of (innate and situational) vulnerability that is on a par with that of existing witness provisions in the YJCEA, and place it in PACE Code C;
- ensure regular, research-based vulnerability training for all custody officers;
- clearly define the role of the AA, and the types of people who can perform it, in PACE Code C, and require basic background checks on spouses, etc., where indicated;
- place a narrow definition of 'unreasonably obstructive' AA behaviour in PACE Code C;
- extend legal privilege to discussions between suspects, solicitors, and AAs to promote open communication and ensure non-compellability as a prosecution witness; and
- amend section 78 of the PACE Act to stipulate that evidence obtained in violation of Code requirements protecting a suspect's fundamental rights is presumed 'unfair'.

## (b) Special measures

The scattered, selective and, to an extent, uncertain provision of special measures for vulnerable defendants who elect to give evidence at trial[509] is as much a result of slow, piecemeal reform as it is a deliberate decision to ensure they are being treated differently from other, non-defendant witnesses with similar needs. That conclusion is inevitable when considering that defendants are explicitly excluded from the statutory scheme in sections 23-30 of the YJCEA but becomes clearer still when taking into account the reasoning of the interdepartmental working group whose 1998 report 'Speaking Up for Justice' paved the way for the scheme's original enactment.[510] The group was convened to address the perennial issue of how to secure quality evidence from vulnerable witnesses, especially young people, who struggle to recall and coherently articulate their version of events in open court, and thus often were deemed incompetent or at least unreliable enough to make it near impossible to convict based on their testimony alone.[511] Leaning on the principle of procedural equality, and drawing in broader concerns about welfare, the group decided that 'failure to recognise and compensate for inequalities between witnesses seems both inhumane (when this results in stress or trauma for the witness) and unjust.'[512] Yet, they were adamant that neither of these concerns would apply to the defendant. In fact, it must have seemed so obvious to them that in a report that spans over 270 pages only a

506 See paragraph 11.17A of PACE Code C and discussion above. What is and is not 'obstructive' is not defined in the Code and thus for the custody officer to decide. Repeatedly urging the suspect to exercise their right to remain silent, or pressing for legal representation might—worryingly—be enough, compare Dehaghani, 'Interpreting and Reframing the Appropriate Adult Safeguard' (n483) 192-93.

507 Ibid 192-93, 196.

508 Roxanna Dehaghani's work has been particularly instructive and we are grateful for her feedback on this report.

509 To recapitulate, there are several common law powers, partially reflected in the CrimPD and CrimPR, to screen the defendant, exclude most of the public and/or the press, remove wigs and gowns, and examine the defendant through an intermediary. The only statutory 'special measure' of giving evidence via live link (section 33A of the YJCEA) has recently been subsumed by the court's wider live link powers, applicable to all trial participants, in sections 51, 52 of the CJA—and again, those provisions make no mention of vulnerability as a criterion for eligibility. Unlike for other witnesses, there is also no option for video-recorded examination (in-chief, cross, or re-direct), or for adjustments based on intimidation rather than vulnerability in the stricter sense.

510 See Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office, 1998).

511 Samantha Fairclough, 'Speaking Up for Injustice: Reconsidering the Provision of Special Measures through the Lens of Equality' (2018) (1) *Criminal Law Review* 4, 7-9.

512 Home Office, *Speaking Up for Justice*, (n510) 105.

single paragraph was dedicated to the question of whether or not defendants should be included in the new scheme:

> **[T]he law already provides for special procedures to be adopted when interviewing vulnerable suspects. Also, the defendant is afforded considerable safeguards in the proceedings as a whole so as to ensure a fair trial. For example, a defendant has a right to legal representation which the witness does not and the defendant has a right to choose whether or not to give evidence as s/he cannot be compelled to do so. Also, many of the measures considered [in the report] are designed to shield a vulnerable or intimidated witness from the defendant... and so would not be applicable in the case of the defendant witness... In these circumstances, [we] concluded that the defendant should be excluded from the definition of a vulnerable or intimidated witness.[513]**

None of these reasons are persuasive and they should not have withstood serious parliamentary scrutiny.[514] First of all, claiming—correctly—that 'the law already provides for special procedures to be adopted when interviewing vulnerable suspects' in police custody does not address, let alone refute, the need for continued assistance at trial, especially, as was just seen, since AAs, if called at all, are often ineffective. Second, on the argument that defendants are being 'afforded considerable safeguards in the proceedings', a legal representative does not and, frankly, cannot adapt the court environment to their client's individual needs or provide tailored communication support like an intermediary would, etc.; and while it is true that no defendant can be compelled to testify, they certainly, and that too was seen earlier, have a right to do so and to be enabled to do so to the best of their ability, if they so wish.[515] Third, the idea that special measures are solely 'designed to shield a vulnerable or intimidated witness from the defendant' does not mean that they cannot also be used—as many of them now are—to assist a vulnerable defendant. In fact, doing so may be absolutely vital for a successful defence, including where a defendant with a history of prior victimisation, such as modern slavery or domestic abuse, is at risk not just of giving 'bad evidence' but of emotional trauma just like a non-defendant witness in similar circumstances would be.[516] Thus, in their own words, the working group should indeed have agreed that both considerations of equality and of humane treatment must militate in favour of including defendants in the scheme.[517]

But they did not, and neither did subsequent parliaments, so any efforts to create parity in terms of eligibility and access have been drawn-out, 'unenthusiastic'[518] and, at times, regressive.[519] And of course, the basic, hard-to-erase message that special measures are something that defendants simply do not need continues to have a negative impact on the practical uptake even of measures that have become available: [520] they are less known, including among seasoned practitioners, and having been advertised—at the peak of the victims' agenda—as a tool for the prosecution, some barristers purposely refrain from making an application on their client's behalf for fear of looking incompetent and/or arousing suspicion

513 Ibid, 23.

514 For a more detailed discussion, see Fairclough, 'Speaking Up for Injustice', (n511), 11-16.

515 Again, this is a core tenet of adversarialism and a fundamental right enshrined in Art 6(1) of the ECHR, which it might be necessary to exercise in certain cases to prevent the court and the jury from drawing adverse inferences under Criminal Justice and Public Order Act 1994, ss. 34, 35.

516 A risk clearly acknowledged in the respective witness provision in ss. 17(4), (4A) of the YJCEA.

517 See Fairclough, 'Speaking Up for Injustice' (n511); and 'The Lost Leg of the Youth Justice and Criminal Evidence Act 1999', (n479) 1078, where she rightly notes that 'an individual's differential status as the accused or a witness is not of material relevance to whether the treatment they receive is inhumane.'

518 Samantha Fairclough, 'The Consequences of Unenthusiastic Criminal Justice Reform: A Special Measures Case Study' (2021) 21(2) *Criminology & Criminal Justice* 151.

519 The most worrying example, again, is the revocation of the defendant live link measure in section 33A of the YJCEA, now subsumed by the court's wider powers in sections 51, 52 of the CJA.

520 Samantha Fairclough, '"It Doesn't Happen..." (n1); 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45(3) *Journal of Law and Society* 457; and 'The Consequences of Unenthusiastic Criminal Justice Reform', (n518).

from jurors that might harm their case.[521] Add to that the difficulties in sourcing suitable defendant intermediaries,[522] the effects of criminal legal aid cuts on already depleted defence capacities,[523] and the courts' inclination to set aside expert opinion on whether or not special measures are indicated in the first place,[524] and it is fair to say that vulnerable defendants find themselves in a perilous situation—one that can be eased only through a set of integrated reforms. Based on the research discussed and referenced in this chapter—we suggest the following proposals should be considered:

- remove the exclusion of defendants from the special measures scheme in sections 23-30 of the YJCEA, or introduce a separate special measures scheme for defendants;[525]
- mandate early and routine consideration of eligibility (under either scheme) to change professional and juror (mis)conceptions and increase practical uptake;
- encourage judicial deference to trained medical and communication experts when it comes to determining whether and, if so, which special measures are necessary;
- regulate, train, and fund intermediaries as part of a unitary government scheme; and
- reverse criminal legal aid cuts to increase defence capacities.

## 4.1 Conclusion

This chapter set out to analyse and compare the justice journey of vulnerable witnesses to that of vulnerable suspects and defendants. The picture that emerges is sobering. Psychiatric morbidity, substance abuse and histories of victimisation, combined and in isolation, are all highly prevalent among suspects and defendants in England and Wales. And yet, not only are these vulnerabilities often, and at times routinely, missed and dismissed, but the handful of mechanisms designed to address them are falling short of providing the protection and assistance needed—if they are implemented at all.

Being able to participate effectively in criminal proceedings against oneself and, where necessary, being enabled, is a core tenet of adversarialism and a fundamental right enshrined in Article 6(1) of the ECHR. Every court and every public agency in England and Wales, moreover, has a positive obligation to safeguard and promote the welfare of all young and vulnerable people in their care, irrespective of the capacities in which they come before them. Defaulting on either commitment by committing to the status quo thus not only jeopardises the integrity of the process, and the safety of associated convictions, but the integrity of the person under the law.

Focusing on the investigative and the trial stages as the two stages where failures to identify and address innate and situational vulnerabilities swiftly and correctly will carry the greatest risks, we concluded by urging consideration of a range of reform proposals that are prompted by, or have been made in, the literature we reviewed. The key targets are: definitional parity and clarity as to what constitutes vulnerability; professional training for custody officers to close the identification deficit and rein in discretion; increased protections for—and from—AAs to ensure the safeguard is reliable and effective; tougher judicial oversight

521 In addition, and this is anecdotal evidence based on conversations we had with a handful of practitioners, there appears to be a benefit—for the case, not necessarily the defendant him- or herself—to letting the jury experience their vulnerability first-hand, unmediated, and without appeal to a personal characteristic 'deserving' of attention and assistance which, for many jurors, is difficult to assign to anyone other than a 'genuine' victim or witness.

522 See for commentary, Taggart, 'Vulnerable Defendants' (n424). See also Taggart, '"I Am Not Beholden to Anyone… I Consider Myself to Be an Officer of the Court": A Comparison of the Intermediary Role in England and Wales and Northern Ireland' (2021) 25(2) *International Journal of Evidence & Proof* 141, 155-59.

523 Roxanna Dehaghani, Rebecca Helm and Daniel Newman, 'The Vulnerable Accused and the Limits of Legal Aid' in Roxanna Dehaghani, Samantha Fairclough and Lore Mergaerts (eds), *Vulnerability, the Accused, and the Criminal Justice System: Multijurisdictional Perspectives* (Routledge 2023) 192.

524 See for commentary, Abenaa Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22(4) *International Journal of Evidence & Proof* 321, 333-335.

525 While this should, of course, be on a par with the witness provisions in terms of eligibility and substance, opting for a separate scheme could allow for a 'fresh start' and greater emphasis on the fundamental, and fundamentally neutral, rationale of effective participation instead of the protection of vulnerability per se.

of core PACE Code requirements; equal access to, and routine consideration under, the special measures provided in the YJCEA (be that through inclusion in the existing scheme or introduction of a new one for defendants); judicial deference to trained medical and communication experts when it comes to determining eligibility for those measures; and better funding across the board to bolster defence capacities, including by making available a shared pool of registered intermediaries to address persistent issues around sourcing. None of these proposals will automatically put suspects and defendants on a par with witnesses and 'genuine' victims who are considered 'deserving' of protection from the pressures of an adversarial process due to their innate and situational vulnerabilities. But they will strengthen the currently inadequate protections extended to the fundamental right to effective participation.

# CONCLUSION

While this report has been divided into two case studies and one comparative study, common themes unite the substance discussed in all three chapters. The criminal justice system is not well-equipped to recognise victimhood or vulnerability amongst suspects and defendants. Both concepts tend to prioritise those who are perceived to be innocent, which is to say witnesses or victims who are not accused of an offence. When it comes to suspects or defendants who are also victims, the former status tends to trump the latter, and they are not provided with the same support or safeguards as victims who are witnesses. This is the case even where they have been the victim of an offence that would otherwise result in them being classed as a vulnerable or intimidated witness.

Where the overlap between victim and defendant status is recognised, as in the case of some defences, defendants are expected to conform to stereotypes of the 'responsible' victim or the 'helpless' victim. The former encourages scepticism towards victims who, despite seeming to have the ability and/or resources to seek help from support services or the authorities, failed to do so before committing an offence. The latter requires victims to demonstrate a lack of capacity to behave as a 'responsible' victim, either due to having no means of escape or calling for help, or due to a recognised medical or psychiatric condition, and a link between this incapacity and the commission of an offence. Both stereotypes fail to adequately capture the complex dynamics of abusive or exploitative relationships and the real-world limitations on the ability of support services and the police to respond appropriately to victims.

In brief,[526] key priorities for reform identified by this report include:

- Improving training for police, prosecutors, defence lawyers, and/or judges in recognising and responding to evidence that a suspect or defendant has been subject to domestic abuse, modern slavery or trafficking or is otherwise vulnerable;
- Making greater efforts to divert victims from prosecution and modifying key defences to better accommodate victims who offend;
- Harmonising the criminal justice process and the processes for identifying victims of modern slavery or trafficking;
- Improving the appropriate adult safeguard and introducing a definition of innate and situational vulnerability that applies equally to victims, suspects and defendants;
- Giving defendants access to the same safeguards and special measures that vulnerable and intimidated victims or witnesses are entitled to;
- Amending section 78 of the PACE Act to stipulate that evidence obtained in violation of Code requirements protecting a suspect's fundamental rights is presumed 'unfair';
- Reversing criminal legal aid cuts to increase defence capacities.

526 A full list of priorities for reform and recommendations for future research is included in the Executive Summary.

# APPENDIX 1: STAKEHOLDER RESPONSES TO CONSULTATION

## 1.1 Challenges faced by suspects or defendants who are victims

Stakeholders explained that the vast majority, if not all, of the people they work with have experienced some form of victimisation or vulnerability. Categories stakeholders identified included: victims of modern slavery who have resorted to hiring others to escape from exploitation, victims of domestic abuse who retaliate against their partners, victims of domestic abuse who are coerced into offending, and victims of county lines drug trafficking.

Stakeholders highlighted the challenges suspects encounter in having their vulnerability or victimhood addressed, as police often struggle to reconcile their vulnerability with their suspected involvement in criminal activity. Many victim-offenders, particularly children, are adept at masking their vulnerability. Stakeholders also highlighted the pressure on practitioners to secure funding and gather medical evidence in time to make applications for special measures.

In cases of county lines drug trafficking, stakeholders noted that defendants are frequently tried in courts located in areas where their exploitation took place, alongside individuals involved in their exploitation. This situation undermines the defendant's ability to mount an adequate defence, as giving evidence about their exploitation could expose them to retributive violence or re-trafficking.

Stakeholders also highlighted the challenges faced by domestic abuse victims in joint enterprise cases where their co-defendant is their abuser. The lack of availability of special measures for defendants under the Youth Justice and Criminal Evidence Act 1999 means domestic abuse victims may choose to plead guilty rather than being tried alongside their abuser. For domestic abuse victims accused of attacking or killing their abuser, short trial listings prevent defendants from adequately outlining the background of abuse leading up to the alleged offence. This is compounded by jurors' limited understanding of the dynamics of domestic abuse and the risk of jurors being prejudiced by harmful stereotypes, for example the belief that the victim would have left if they were truly being abused.

## 1.2 Suggested reforms

Stakeholders identified the need for training for professionals at all stages of the criminal justice process to identify vulnerability and victimhood, and urged a greater emphasis on early diversion of victims from prosecution.

Where diversion is not possible, stakeholders stressed the importance of protecting defendants throughout the trial process. This includes ensuring severance in cases where the defendant's co-accused may have been involved in their exploitation or abuse. Although in general it is common for co-defendants to run 'cut-throat' defences, stakeholders stressed that this is inappropriate where one co-defendant is intimidated and fearful of the other.

Particularly in cases involving county lines drug trafficking, stakeholders highlighted the need to relocate cases from the area where the offending took place and provide defendants with secret bail addresses for their protection. Stakeholders also argued for the extension of special measures under the Youth Justice and Criminal Evidence Act 1999 to include defendants.

Stakeholders also emphasised the need for data collection on how the National Referral Mechanism (NRM) and section 45 defence is operating on the ground, to better inform future reform proposals. They also highlighted the need to balance concerns about the potential misuse of the section 45 defence with the need to ensure it is accessible to all victims of trafficking.

## 2.1 Domestic abuse: specific suggestions for reform

### (a) Training

Stakeholders identified a lack of understanding amongst professionals of the dynamics of domestic abuse and how it can lead to offending. In particular, there is a tendency for professionals to focus solely on the incident rather than examining the context of the abuse leading up to it. They recommended that training should prioritise educating professionals on the nature of coercive control, the reasons why victims may remain in abusive relationships, and the impact of trauma on victims. Trauma-informed practice was said to be critical to building a relationship of trust with defendants and enabling them to disclose their histories of abuse.

Stakeholders pointed to Specialist Domestic Abuse Courts (SDVC) as an example of how better training and specialist knowledge can improve practice in cases involving domestic abuse. Stakeholders also drew a comparison to the National Referral Mechanism (NRM), highlighting that while police officers now receive training in identifying victims of trafficking, they do not receive training in identifying victims of domestic abuse.

However, stakeholders emphasised that better training is not a complete solution: professionals must also be able and willing to apply their understanding of domestic abuse in practice. Stakeholders identified practical issues which inhibit professionals' ability to grapple with cases where the defendant has been subject to domestic abuse. For example, the backlog of cases in the criminal justice system has put judges under pressure to condense trials into shorter timeframes, meaning the background of abuse leading up to the offence is missed or glossed over. Shorter court listings also mean that experienced defence barristers have less of an incentive to develop their expertise in cases where the defendant is a victim of domestic abuse, as they occupy less space in their diaries than, for example, multi-defendant drugs cases.

### (b) Diversion

Stakeholders identified the government's Female Offender Strategy as a positive development, as it has focused on referring women to specialist women's services in the community as part of a conditional caution rather than prosecuting them. Further work is needed to support the strategy and increase the number of victims being diverted, including more investment in women's services.

However, stakeholders highlighted that diversion schemes do not necessarily resolve the issue of victims being criminalised. For example, if a victim receives a conditional caution, this still results in them having a criminal record, which may impact employment opportunities. Consequently, there is a need to prioritise early interventions to prevent victims from entering the criminal justice system as defendants in the first instance, for example, minimising the number of victims arrested at the scene of domestic abuse.

### (c) Support at trial

Stakeholders highlighted the need to ensure that support for defendants who have been victims of domestic abuse is on par with the support offered to non-accused victim witnesses in court. The ineligibility of defendants for special measures under the Youth Justice and Criminal Evidence Act 1999 was highlighted as a serious issue, with defendants feeling unable to give evidence about their experiences of abuse in court or pleading guilty rather than facing a trial without access to special measures.

### (d) Jury education

Stakeholders highlighted the need to educate jurors on the impact of domestic abuse to combat commonly-held misconceptions, for example, that the victim would have left the relationship if it was abusive. Stakeholders drew parallels with the Law Commission's findings in their report *Evidence in Sexual Offences Prosecutions* that jury deliberations may be influenced by misconceptions about victims,[527] highlighting that

527 Law Commission, *Evidence in Sexual Offences Prosecutions* (Law Comm 259, 2023), [2.7].

the risk of juror prejudice is especially pronounced where the victim is on trial for an offence.

Evidence from domestic abuse experts would help to educate jurors on the dynamics of domestic abuse. However, stakeholders highlighted that such evidence is generally inadmissible at trial as it is deemed by judges to be 'commonsense' for jurors. Stakeholders argued that judicial directions alone are not enough to address deeply embedded prejudices that may arise in cases where the defendant is a victim of domestic abuse.

### (e) Social context evidence

Stakeholders emphasised the importance of social context evidence to illustrate the reasons why victims may not report abuse: for example, concerns amongst victims from ethnic minority backgrounds about facing racism or of alerting the authorities to their insecure immigration status. However, stakeholders acknowledged the practical difficulties with admitting social context evidence, as judges will only admit expert evidence if it is strictly relevant to determining the issues in the case.

### (f) Duress

Stakeholders emphasised that it is extremely difficult to successfully establish the defence of duress in a domestic abuse context. However, stakeholders highlighted that widening the defence of duress to include psychological coercion places the emphasis on the defendant's mental health rather than the history of abuse as the cause for offending. A defence should be available once it is proved on the facts that the defendant is a victim of domestic abuse, without analysing the impact of the abuse on their psychology.

Expanding the defence to include defendants who offend in response to non-violent abuse also raises the issue of diluting duress for all cases, not just those involving domestic abuse. Stakeholders therefore suggested a distinct approach for victims of domestic abuse which is explicitly tied in with the definition of domestic abuse under s. 1 of the Domestic Abuse Act 2021.

### (g) Self-defence

Stakeholders highlighted that the 'reasonable person' test is an inappropriate standard for domestic abuse victims, as it does not capture the impact that the abuse may have had on the defendant's fear and perception of threat.

### (h) Partial defences to murder

Stakeholders highlighted the difficulties in establishing manslaughter by diminished responsibility at trial in cases where the defendant is a victim of domestic abuse. The defence is often raised towards the end of the trial as an alternative to self-defence, meaning juries are not afforded an opportunity to properly grapple with the evidence or understand the issues. Stakeholders highlighted the need to simplify the criteria for diminished responsibility and modernise the language to make it easier for juries to understand.

## 3.1 County Lines: Specific suggestions for reform

### (a) Training

Stakeholders emphasised the need for improved training for professionals at every stage of the criminal justice process in recognising when a defendant has been subject to modern slavery or trafficking. They noted that such training needs to be guided by data, e.g. regarding the types of offences where the CPS is less likely to drop charges, to ensure that it effectively addresses these specific situations. Stakeholders also pointed out that timing for delivering police training can be challenging as police officers tend to rotate frequently.

Stakeholders highlighted that specialised training for defence lawyers is crucial, as they are responsible for identifying where a section 45 MSA 2015 defence may be appropriate. However, stakeholders noted that it is also important to strike a balance to prevent defence lawyers from overusing the section 45 defence out of concerns about professional negligence, while also ensuring they properly advise clients where the defence is warranted.

### (b) Diversion

Stakeholders stressed the need for a stronger focus on diverting young and vulnerable people early on in the criminal justice process. They explained that, once the police have made a referral to the NRM, it can take up to a year for the Single

Competent Authority (SCA) to deliver a Conclusive Grounds (CG) decision. Following the decision in *Brecani*,[528] which established that CG decisions are not admissible as expert evidence, stakeholders observed that judges are less inclined to adjourn trials pending a decision from the SCA. This is problematic as it prevents the CPS from dropping cases before trial based on a positive Conclusive Grounds decision. Stakeholders also identified a tension for barristers as cases progress towards trial, as advocating for the CPS to drop a case may result in forfeiting several weeks of trial-related income. Therefore, there is a need to expedite the delivery of decisions by the SCA, to ensure more defendants are diverted earlier on in proceedings.

## (c) Duress

Stakeholders pointed out that the section 45 MSA 2015 defence was introduced to address the difficulty of establishing duress in the context of modern slavery. Therefore, rather than expanding the defence of duress, stakeholders suggested that a better focus for reform would be refining the statutory defence.

## (d) Modern slavery defence

Stakeholders echoed the concerns raised by the Council of Europe's Group of Experts on Action Against Trafficking in Human Beings (GRETA) that the section 45 MSA 2015 defence excludes the possibility of withdrawing prosecution and punishment, thereby offering a narrow interpretation of the non-punishment principle.[529] Stakeholders explained that prior to the enactment of the section 45 defence, it was easier to raise an argument based on the non-punishment principle which would result in the CPS dropping the case. Counterintuitively, this suggests that the introduction of the statutory defence has resulted in fewer victims of trafficking being diverted from prosecution. Stakeholders also highlighted that in order to rely on the section 45 defence, defendants must be willing to give evidence about their experiences of trafficking at trial, which can be deeply re-traumatising.

Stakeholders also identified a need for greater clarity as to the meaning of 'direct consequence' for under-18s relying on the section 45 defence.

Stakeholders criticised the exclusions listed in Schedule 4 of the MSA 2015 as arbitrary, reflecting a lack of understanding of the nature of modern slavery. For example, the section 45 defence is unavailable for causing grievous bodily harm with intent under section 18 of the Offences Against the Person Act 1861, but is available for assault occasioning actual bodily harm under section 47 of the same Act. This inconsistency leads to advocates running artificial section 45 defences on the basis that the extent of the injuries is disputed. Stakeholders also argued that the section 45 defence should be available for the offences under sections 1 and 2 of the MSA 2015, as it is common for victims to attempt to free themselves from exploitation by recruiting others to fill their place.

## (e) National Referral Mechanism and the Single Competent Authority

Stakeholders questioned the accuracy of decisions by the SCA and did not recommend that, in their current form, they should be admissible evidence at trial. They noted a lack of transparency about how the SCA reaches its decisions. If the SCA provided the underlying materials on which a positive CG decision was based, e.g., psychiatric reports or medical records, these materials would likely be admissible at trial.

Stakeholders stressed the need to enhance the credibility of the SCA's decisions, advocating for decisions to be grounded in thorough forensic analysis. Increased confidence from the Crown Prosecution Service in the SCA's decision-making

528 n317.

529 Group of Experts on Action Against Trafficking in Human Beings (GRETA), *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom: Second Evaluation Round* (Council of Europe, 2016), [287].

may lead to more cases being dropped on the basis of positive CG decisions. Stakeholders also highlighted the importance of reducing delays and aligning the delivery of CG decisions with CPS timelines for charging and prosecutorial decisions to promote the early diversion of victims of modern trafficking.

## 4.1 Safeguards and special measures: Specific suggestions for reform

### (a) Defining vulnerability

Stakeholders highlighted that a statutory definition of vulnerability may be a 'double-edged sword'. On one hand, it may offer clarity for professionals working with defendants who are victims of crime. On the other hand, it may exclude certain categories of defendants who do not meet the statutory definition of vulnerability. For example, defendants who are vulnerable by virtue of their insecure immigration status are unlikely to be included in a statutory definition of vulnerability, as it could conflict with immigration control policies. Stakeholders also highlighted the challenge of creating a static definition for a concept that is inherently fluid. It would be near impossible to devise a statutory definition that encompasses the diverse range of circumstances in which vulnerability may arise, which means that some defendants' cases will fall outside the defined parameters.

### (b) Vulnerability training

Stakeholders emphasised the need for mandatory vulnerability training for all police officers to ensure vulnerability is picked up on while the defendant is in custody. They explained that where training is made optional, the police officers who attend tend to be those who already have an interest in and understanding of vulnerability. Stakeholders also highlighted the challenge of timing this training correctly due to high turnover and frequent role changes among police officers.

### (c) Appropriate Adults

Stakeholders highlighted that it is not always suitable for a child's parent or a family member to act as their Appropriate Adult (AA). If the parent does not speak English or is vulnerable in their own right, the defendant may be preoccupied by looking after their family member's needs rather than prioritising their own interests. Stakeholders highlighted that the vast majority of child defendants involved in county lines will deliver 'no comment' police interviews, due to the threat of retributive violence from their exploiters if they disclose information to the police. Consequently, stakeholders did not support AAs having a more active role in police interviews. They noted that AAs may encourage child defendants to disclose information to the police without recognising the risks of violence that such disclosures might invite.

### (d) Special measures

Stakeholders emphasised the need for special measures for defendants who have been victims of domestic abuse to enable them to participate fully in the trial. Stakeholders also noted a gap in the provision of special measures, as virtually no special measures are available in Parole Board hearings or inquests.

Some stakeholders advocated the importance of special measures in cases involving county lines drug trafficking, particularly where the defendant is being tried alongside someone who exploited them. However, others raised concerns that in county lines cases where a section 45 defence is being raised, the use of special measures can cause a disconnect for jurors, who may struggle to reconcile the defendant's need for special measures with the evidence of their involvement in a large-scale criminal operation. The use of special measures in such cases may be seen as encroaching on the jury's role, as it is for them to decide whether the defendant's criminal behaviour was attributable to exploitation.

Additionally, some stakeholders noted that the use of special measures or intermediaries can act as a barrier, preventing jurors from appreciating the defendant's vulnerability. They suggested that it can be helpful for the jury to observe the defendant's vulnerability firsthand, without the mediation of special measures. One stakeholder shared an example of a judge refusing an application for an intermediary despite supporting medical evidence. Interestingly, this decision ultimately worked in the defendant's

favour, as the jury were able to directly observe the full extent of the defendant's vulnerability. This unmediated connection between the defendant and the jury may have contributed to the jury delivering a not guilty verdict.

## (e) Intermediaries

Stakeholders questioned the usefulness of intermediaries, noting that some lack adequate training and do not understand the scope of their role. Additionally, stakeholders identified that defendants often struggle to relate to intermediaries and may be mistrustful of them. This issue is compounded by a lack of diversity among intermediaries, as stakeholders observed that intermediaries are predominantly from white, middle-class backgrounds. Rather than increasing reliance on intermediaries, stakeholders advocated for a greater emphasis on streamlining the trial process and simplifying the language used in court to ensure effective participation for all parties.

## (f) Legal aid

Stakeholders emphasised the need to reverse legal aid cuts to improve access to quality representation. They highlighted that the intense pressure on criminal defence lawyers, including the speed at which they must prepare cases, often results in key issues being overlooked. This pressure also contributes to empathy fatigue amongst criminal defence lawyers, diminishing their capacity to fully engage with the complexities of the defendant's case. The strain on the criminal justice system's resources also results in trials being condensed into shorter timeframes, preventing a thorough exploration of the defendant's background of abuse or exploitation during the trial.


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