

UK Border Agency questionnaire on first twelve months of operation of the National Referral Mechanism: Immigration Law Practitioners' Association Response on standard form 7 June 2010

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Helpful hints for completing this questionnaire

- Not all sections will be relevant to all organisations. Please only answer sections where you feel you are able to comment.
- Please indicate where an answer relates specifically to adults or children

Part 1: Identifying victims

1a)

What has helped you to identify a potential trafficking victim?

[Add comments in box below]

Legal representatives identify that time to build a relationship of trust and confidence is an important element in identifying a person who has been trafficked. All too often, this is not available.

Awareness and understanding of the 'Palermo Protocol' definition of trafficking are also important factors; a person can be in possession of all the facts demonstrating that a person has been trafficked but can fail to identify them as such.

1b)

Have you come across any barriers when referring into the NRM?	Yes [Add comments in box below]
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If yes, please explain what the barriers were (e.g. victim doesn't consent)

For many people it makes no sense to be referred to the National Referral Mechanism. Some see no benefit of referral. Others fear bringing themselves to the attention of the authorities because of fears about their immigration status and these fears are not outweighed by any perceived benefit in terms of support and assistance. A significant number of persons do not consent to their referral to the National Referral Mechanism. The current National Referral Mechanism deters many people from identifying themselves to the authorities as persons who have been trafficked. There are particular problems with those trafficked for forced labour, including domestic servitude and EEA nationals in this regard.

That a residence permit is granted for one year, rather than a year and a day, and consequently keeps people out of an 'upgrade' appeal by virtue of s83 of the Nationality Immigration and Asylum Act 2002 is a further reason for people to decline to be identified. ILPA has specifically highlighted this problem to the UK Border Agency, including before the National Referral Mechanism was implemented.

Re-entry bans, by operation of paragraph 320 of the Immigration Rules (HC 395 as amended) are also a deterrent to persons coming forward.

The lack of any appeal to an independent body against the decision of the competent authority is a barrier to identification: not being identified has grave consequences and without the opportunity to correct a wrong decision, other than by an application for judicial review, persons may be reluctant to be referred.

The detained fast track, with its speed of processing and incarceration of individuals for administrative convenience, is a barrier to identification. A particular barrier is that individuals are not removed from the Detained Fast Track on referral to the Poppy Project or the UK Human Trafficking Centre but only when they have prepared a report, if then. The time that it is taking to deal with 'reasonable grounds decisions' and the failure to halt the detained fast track in the meantime are particular barriers.

The definition of trafficking whereby a person who escaped from their trafficker some time ago is not considered a 'victim for the purposes of the Convention' has also been a barrier as it provides a disincentive to refer people. It is not in accordance with the Convention.

The bureaucratic first responder role and the limitations on who can be a first responder are also barriers. If a legal representative cannot find an organisation who is a first responder and is willing and able to refer the person, no referral can be made.

1c)

Is the NRM an effective tool for referring victims to appropriate support services?	No
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Please explain the reasons for your answer

Rather than the multi-agency coordination system envisaged by the OSCE the UK system is focused on a person's immigration status and their status as a trafficked person, if accorded, is very much an immigration status. The Poppy Project provides assistance in accessing the help needed, but it did that before the assistance of the National Referral Mechanism. In other cases, all too often legal representatives who wish to refer clients to specialist services have to do this themselves or rely on ad hoc efforts by other voluntary organisations supporting the person.

1d)

Where has collaborative working been particularly helpful in ensuring potential victims are referred?	[Add comments in box below]
There are reports of good practice at a local level, for example the Bristol Coalition on trafficking and local action in Wales.	

1e)

Have you come across any barriers to effective collaborative working?	Yes [Add comments in box below]
<p><u>If yes please explain what the barriers were and how these may be overcome</u></p> <p>The UK has set up a model whereby, rather than have all relevant organisations who come into contact with persons who have been trafficked provide assistance on areas within their competence, a central bureaucratic authority, applying a narrow definition of trafficking that is not compatible with the Council of Europe Convention on Action Against Trafficking in Human Beings, makes the decisions. This is a barrier to collaborative working. In the case of children we see a gradient of referral from those with more expertise (services specialised in working with children at risk of harm and subject to abuse) to those with less – the centralised competent authorities. These should be overcome by revisiting the competent authority model and changing it, so that front-line agencies are able to make 'reasonable grounds' decisions and deliver services accordingly. In cases of children, give the services responsible for child protection the authority to make decisions.</p> <p>The focus on immigration control is a barrier to effective collaborative working forcing agencies to focus on immigration control rather than take an holistic view of the needs of the trafficked person. This should be overcome by the development of multi-agency referral systems and the focus not being on immigration at all at the 'reasonable grounds' stage, with immigration processes waiting on the work of other agencies.</p> <p>Centralising the 'reasonable grounds' decision is a barrier to collaborative working. Those agencies best placed to provide protection and assistance cannot get on with the job and are being asked to fill in detailed referral forms at a stage when they have not won the trust and confidence of the client. To overcome this – see above.</p>	

The difficulty in finding legal representatives, the current low level of fixed fees in immigration and asylum cases and current Legal Services Commission payment structures and bureaucracy, as well as failure to address the implications of the requirement to be a solicitor or registered with the Office of the Immigration Services Commissioner to give immigration advice for the first responder model, are barriers to collaborative working. This should be overcome by the Ministry of Justice and Legal Services Commission addressing funding and cash-flow in immigration legal aid, and by taking the immigration focus out of the first responder/reasonable grounds stage, as described above.

Failure adequately to address questions of consent and confidentiality is a barrier to collaborative working. There is a need to develop, implement and monitor authoritative guidance on this to ensure that consents are properly obtained and confidentiality not violated. This would be facilitated by taking the immigration focus out of the first responder/reasonable grounds stage, as described above.

Prosecution of people who have been trafficked for alleged crimes committed while under the control of the traffickers is a barrier to collaborative working, as are people being held in prison or in immigration detention centres. The Crown Prosecution Service should review prosecutions to date, amend its policy and guidance and ensure that these are implemented through training and monitoring.

Part 2: The Competent Authority model

2a)

Is the Competent Authority structure working?	No [Add comments in box below]
<p><u>If no, please explain which CA is not working (UKBA or UKHTC) and in brief give your evidence for this</u></p> <p>As described above, the UK has set up a model whereby rather than have all relevant organisations who come into contact with persons who have been trafficked there are just two competent authorities – whose job, rather than to do the tasks within their competence is to pass judgement.</p> <p>When cases are dealt with by the UK Border Agency it is frequently the same individual dealing with the question of whether an individual has been trafficked and the substantive immigration decision. This leads to a focus on immigration law and the timescales of processing for immigration cases, even where this may have a deleterious effect on gathering the evidence for prosecutions of traffickers or for, potentially, for the presentation of the eventual case against traffickers in court. It also displaces the focus from putting in place the necessary protections for the person who has been trafficked to dealing with that person’s immigration status. It is stated that a trafficked person will be granted a residence permit if they meet the criteria for a grant of discretionary leave. This is a separate test and should not be elided with a test that, in accordance with the terms of the Council of Europe Convention, focuses on recovery and return in safety and dignity.</p> <p>Delays are endemic and the time limits for a reasonable grounds decision are not being met.</p> <p>In the case of children the Competent Authority model has to a large extent simply duplicated the work that specialists in child protection were already doing.</p>	

2b)

Is the two stage Reasonable and Conclusive Grounds decision process the most effective way of ensuring a victim is identified and supported?	Does not admit of a yes/no answer, see below.
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If no, please explain why and in brief what you propose in its place.

That the process is in two stages is not the root of the problem. The root of the problem lies with the centralising of that first decision as described above.

2c)

Are there further steps that need to be taken to ensure CA's decisions are of a high quality?	Yes
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If yes, please explain what you would suggest to improve it?

There should be a right of appeal to an independent body against these decisions. In circumstances where there is no relevant immigration decision for the purposes of section 82 of the Nationality, Immigration and Asylum Act 2002, the only challenge to the decision of the Competent Authority is by way of judicial review. There will be cases where there is a relevant immigration decision, and in these cases there will be scope to challenge the decision of the 'Competent Authority' as not in accordance with the law. Cases on this point are pending before the Administrative Court. However, there may be a need to challenge the decision of the competent authority at an earlier stage, for example because whether or not a person has been trafficked may go to the way in which their immigration case is being handled, or they may require special support and services in the interim. In cases where there is a relevant immigration decision.

Effect should be given to the provisions of Articles 12 and 15 of the Convention on legal assistance.

Provision should be made for legal aid in cases involving trafficking to be increased to take account of work done *vis à vis* the 'Competent Authority'.

See the criticisms of the current 'Competent Authority' model above. In addition guidance, training and monitoring must ensure that the 'reasonable grounds' stage is truly a 'reasonable grounds' stage rather than an exhaustive examination of credibility. Decision-making in children's cases should lie with child protection experts and not be passed up the line to the 'Competent Authority'.

Presumed trafficked persons should not be questioned by the police and immigration authorities during the reflection period. Fast track asylum procedures should not be used in cases where trafficking is at issue.

2d)

Are the Reasonable and Conclusive Grounds decision timescales realistic and beneficial for victims?	Does not admit of a yes/no answer, see below.
<p>The timescales are not being met, suggesting that they are not realistic for the UK Border Agency.</p> <p>It is not realistic to suppose that in all cases the information required (for a referral, let alone by the 'Competent Authority') can be obtained within the current timescales which do not permit of the building of a relationship of trust and confidence.</p> <p>Where it is possible to identify conclusively that a person has been trafficked at an earlier stage this should be done.</p> <p>Timescales can result in there being insufficient funding for organisations providing accommodation and assistance to cover the costs incurred before a 'reasonable grounds' decision is made.</p> <p>See above; police and immigration should not be questioning a trafficked person during the reflection period and no trafficking cases should go into the fast track.</p> <p>Provision for reflection periods to be extended should be used in cases where this is necessary.</p> <p>Any decision to waive the reflection period must be an informed decision and consent to a waiver should be consent freely given. Trafficked persons should have access to legal advice on the implications of a waiver for support and immigration status before being asked to consider any waiver of the reflection period.</p> <p><u>If no, please explain why.</u></p>	

Part 3: Support for Adult Victims of Human Trafficking

3a)

What is your assessment of the current system of care for adult victims?	[Please comment in box below. Indicate if your answer relates to victims of a certain type of exploitation]
<p><u>Please provide information on what has worked well, and areas that have proved problematic in your assessment.</u></p> <p>It is inadequate. This applies to all types of person and all types of application.</p> <p>Support is terminated if a negative conclusive grounds decision is reached unless such a decision is challenged by way of judicial review. This can result in cases proceeding to a judicial review in circumstances where it would otherwise have been possible to deal with the errors in the decision in the course of immigration proceedings, as being 'not in</p>	

accordance with the law' as described above.

3b)

Are some particular support needs, in practice, more difficult to meet than others?	Yes
<p><u>If yes, please explain which needs are more difficult to meet and why</u></p> <p>Needs for legal advice and assistance under Articles 12 and 15 are particularly difficult to meet because of the current low levels of legal aid funding available for these cases.</p> <p>The needs of people detained, whether in prison or immigration detention, are more difficult to meet than the needs of others. The needs of those going through criminal prosecutions, or at risk of prosecution because of the authorities' perception that they have committed crimes are particularly difficult to meet.</p> <p>The needs of persons subject to immigration control are more difficult to meet than those of British citizens, because of the current emphasis on immigration status. Those who have an alternative immigration route, albeit that involves remaining in the exploitative situation, such as domestic workers, have some of the hardest needs to meet because the current system provides a disincentive to getting in touch with the National Referral Mechanism at all.</p> <p>The needs of EEA nationals are difficult to meet because their rights and entitlements are not understood.</p> <p>The needs of those whose age is disputed are particularly difficult to meet.</p> <p>The needs of those who do not fit the authorities' perception of a 'credible' trafficked person are impossible to meet.</p> <p>Note how many of these difficulties are the result of the current UK way of dealing with persons who have been trafficked.</p>	

3c)

Is the current system capable of assessing the needs of individual victims and tailoring support appropriately?	No
<p><u>If no, please explain why not, and what needs to change in order to facilitate this</u></p> <p>See comments above. A multi-agency referral system and a removal of the focus on immigration status are needed.</p> <p>Access to legal advice and representation must be improved. This will involve changes to the levels of legal aid funding and the way in which it is paid.</p>	

3d)

What could be done to improve the coordination of victim care arrangements?	[Please comment in box below]
<p>See comments above. A multi-agency referral system needs to replace the 'Competent Authority' model.</p>	

3e)

Are there additional gaps in the process regarding victim care coordination to those outlined in the explanatory note?	Yes [Add comments in box below]
<p><u>If yes, what are these additional gaps and how do you suggest addressing them?</u></p> <p>The Explanatory Note refers to</p> <ul style="list-style-type: none"> • <i>Lack of oversight/monitoring of available accommodation and support places</i> • <i>Insufficient oversight of all live cases (referral to conclusive decision)</i> • <i>Inability to effectively track cases through the NRM process for victim care to ensure support entitlements fulfilled/needs met.</i> • <i>No centrally held record of support provided in each individual case</i> <p>As described above, the problems go far beyond these. One of the main problems is that trafficked persons are deciding, for good reason, that it is not in their best interest to be referred to the National Referral Mechanism at all.</p> <p>Another is that it does not even come to that because people are not identified.</p> <p>Another is that when people are referred, they are not being identified as trafficked, because the guidance given to decision-makers is inadequate and in places incorrect in law and, in addition, the way in which it is being applied introduces further errors.</p> <p>As to how these could be addressed, please see comments above.</p>	

3f)

Do you agree that the collation of more information is a necessary part of improving coordination and oversight of victim care arrangements?	Question does not admit of a yes/no answer.
<p>The Explanatory Note says</p> <p><i>Competent authorities (UKBA and UKHTC based) currently do not actively seek or collate any information in relation to individual support needs, or support services received by the individual unless required to inform a decision (with the exception of recording whom the individual's</i></p>	

accommodation is provided by.)

The question is predicated on the existing 'Competent Authority' model, on which see our comments above. Coordinating and centralising are not the same thing and confusion between the two is at the heart of many of the problems in the current system. We suggest that work could be done to establish standards at national level but that there is a need to devolve responsibility for delivering protection and services.

If yes:

a) What additional information to that already collected, as outlined in the explanatory note, is required? From whom can it be collected? Who should collect this information?

b) How could this information be shared regularly, without placing significant additional burdens on those involved e.g. support providers, competent authorities?

If no, how else might coordination of adult victim care be improved?

Part 4: Support for Child Victims of Human Trafficking

4a)

Accommodation and services for child trafficking victims are provided by Local Authorities. Have you come across any examples of particularly good practice in this area or examples of where things could have been improved?	[Add comments in box below]
<p>Age disputes continue to be a huge problem.</p> <p>Third country' cases have raised particular concerns. Not all local authorities have expertise in ensuring that a child going through the process and whose immigration status is uncertain has access to appropriate legal representation. The 18 February 2010 decisions of Mr Justice Collins in <i>A v SSHD</i> (CO/1995 / 2009) and <i>T v SSHD</i> (CO/1858/2010) highlighted the particular dangers for trafficked children of the UK's approach. We understand that it has subsequently been explained (in the course of proceedings in <i>R (Medical Justice) v SSHD</i> (CO/4321/2010) that since the <i>A</i> and <i>T</i> cases were heard children have not been removed to 'third countries' without notice of their removal. However, this deals only with one aspect of the unsafe practices highlighted in <i>A</i> and <i>T</i>. Those cases also give rise to the question of the extent to which social services involvement acted as a safeguard.</p> <p>Local authorities do not always understand the rights and entitlements of children who are EEA nationals.</p> <p>There are many reports of cases where Roma children who may have been trafficked for exploitation (begging etc.) are not receiving a child protection response.</p>	

There is a need to address the question of prosecutions of children working in cannabis factories if local authorities are to have an opportunity to help them.

Where trafficked children get a child protection response, based on their need, and immigration and the National Referral Mechanism do not divert attention from the child protection responsibilities of the local authority, there children are getting the best response.

Part 5: Outcome of the NRM

5a)

Has the NRM helped achieve a positive outcome for victims?	No
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Please explain the reasons for your answers and illustrate if possible

See comments above.

It has given significant numbers of people reason to stay away from authorities.

It has branded others 'not trafficked' for technical reasons where previously history and need would have been the guide.

It has reduced rather than increased a reflection period as people are questioned by immigration authorities and sometimes police during what should be the reflection period where previously it might have been possible to secure extra time for them to reflect.

5b)

Do you believe the NRM is having a positive impact on the investigation and prosecution of traffickers? What more could be done?	No [Add comments in box below]
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Please explain the reasons for your answer

We have not seen evidence that the National Referral Mechanism has contributed significantly to an increase in prosecution or indeed whether it has contributed to an increase at all.

The UK Border Agency does not appear to have built into its procedures informing people who have been trafficked that they can approach the police, whether in the context of prosecution or to provide intelligence on trafficking. There is concern that UK Border Agency officials do not well understand their responsibilities in this regard, and that those who disbelieve or doubt a claim to be a trafficked may see this as a reason not to refer the case to the police rather than allowing the police to form their own view as to whether the information is of use to them.

Without proper guarantees of protection victims are unlikely to cooperate. There are currently no guarantees.

The definition of trafficking being used by the UK Border Agency should be revisited to deal

with the question of 'not a victim of the purposes of the Convention' as the current (incorrect) interpretation may also create problems for prosecutions. Additionally a decision that a trafficking victim is not "credible" in relation to all or some aspects of the account may cause difficulties in achieving a successful prosecution.

There appear to be particular problems in pursuing prosecutions where children have been trafficked to work in cannabis factories or exploited in begging (especially Roma children).

The Crown Prosecution Service appears to struggle with the meaning of 'exploitation' in a number of cases and not to be pursuing prosecutions in cases where under the Convention definition the person has been exploited.

Section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 contains a definition of trafficking that makes it very difficult to prove the constituent elements of the offence.

5c)

Have you come across any barriers to victims being considered for residence permits?	Yes
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Please explain the reasons for your answer

See above. Disincentives to engaging with the National Referral Mechanisms at all, the desire to see information before the trust and confidence of the person providing it has been won, doubts about credibility at the 'reasonable grounds' stage and any doubts about truthfulness resulting in a rejection, the notion that a person is 'not a victim for the purposes of the Convention' despite having been trafficked, difficulties in access to legal representation in a timely manner or at all, age disputes, doubts about credibility, timescales that do not give the opportunity for trust and confidence to be won.

See also above re s.83 of the Nationality Immigration and Asylum Act 2002.

Where there is no trafficker around to prosecute, or insufficient evidence to prosecute them trafficked persons do not benefit from a residence permit on the basis of the cooperation they are giving.

The giving of a residence permit because a person's 'personal circumstances' warrant this is being interpreted as where a person fits into the existing criteria for a grant of discretionary leave to remain. As indicated above, this is contrary to the Council of Europe Convention.

5d)

Are those who are found to be eligible for a residence permit receiving them?	No
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Please explain the reasons for your answer

See above. In many cases they are not even applying for them, because they are not engaging with the National Referral Mechanism at all.

But we should also add that some of those eligible for a residence permit have a better option: asylum, humanitarian protection, indefinite leave or leave on another basis (for example some domestic workers may have the option of changing employer; people may have the option of switching to another immigration category.)

In these circumstances, the number of residence permits will not equate to the number of persons eligible for them. This does not mean that these persons do not require other forms of assistance and support.

5e)

Are victims continuing to receive appropriate support after receipt of a positive conclusive decision?	No
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If not, please explain the reasons for your answer

See above.

5f)

Does your organisation undertake any monitoring of outcomes for victims?	See below.
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If yes, please provide details. If no, please explain why you organisation does not monitor.

ILPA is not collating any data on a centralised basis. We have participated in the Anti-Trafficking Monitoring Project, an NGO initiative. See below.

Further comments

Please add any additional comments in the box below

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members, the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including UK Border Agency and other 'stakeholder' and advisory groups.

ILPA deplores the sending of this detailed questionnaire on 21 May for response by 7 June. This timescale is insufficient. The UK's fulfilment of its obligations under the Council of Europe Convention on Action Against Trafficking in Human Beings should be the subject of independent and comprehensive evaluation in an appropriate timescale.

ILPA is part of the Anti-Trafficking Monitoring Project.

The Anti-Trafficking Monitoring Project, as NGO initiative, does not have and has not had access to the information or personnel that would be available to those appointed to conduct an independent evaluation with the cooperation of Government. Its information is necessarily incomplete. ILPA has been disappointed to hear UK Border Agency officials, for example at the CTAIL (Child Trafficking Advice Line) Advisory Group speak as though the UK Government could claim that the UK had conducted independent evaluation because of the work of Anti-Trafficking Monitoring Project, funded by charitable trusts and working outside official structures.

Sophie Barrett-Brown
Chair
ILPA
7 June 2010

