

Submission to the Joint Committee on Human Rights Inquiry Into Human Trafficking

1. ILPA is a professional association with some 1200 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.
2. ILPA members have experience in advising people who have been trafficked and in representing them before the Home Office and on appeal. The organisation provides training for practitioners and others on trafficking. ILPA has followed closely the development of both national and European law on trafficking.
3. We are aware that this is a vast topic and have sought neither to overburden the Committee with material nor to labour unduly points that will have been made by others. We have however appended to the document extracts from our policy paper *Child First- Migrant Second*¹ covering child trafficking. We are happy to provide further information to the Committee on request. The Home Office consultation document *Tackling Human Trafficking – Consultation on Proposals for a UK Action Plan*² arrived shortly before the deadline for this submission. ILPA welcomes the thoughtful and detailed consultation paper and will be responding to it. We should be happy to make this response available to the Committee when it is ready. We have made passing reference to the consultation paper in this response, but our comments are not comprehensive.
4. We are pleased that the Committee is undertaking this thematic enquiry into trafficking, a grave violation of human rights worthy of special examination in this context.

The nature and extent of the problems arising from trafficking in the UK

Extent

5. The Committee will receive much evidence to the effect that the extent of trafficking in the UK is difficult to ascertain to any degree of exactitude³. ILPA concurs. We are pleased

¹ *Child First, Migrant Second*, Crawly, H. for ILPA (forthcoming in print)

² Home Office January 2006

³ See for example and *Tackling Human Trafficking – Consultation on Proposals for a UK Action Plan* Home Office January 2006; *Crime Reduction Toolkit on Trafficking of People*, Home Office www.crimereduction.gov.uk paragraph 2 and passim.; the research carried out for the Home Office by Kelley and Regan *Stopping Traffick: Exploring the extent of, and responses to, trafficking in women for sexual exploitation in the UK* Police Research Series Paper 125, 2000; *Cause for Concern? London Social Services and child trafficking* Somerset, C ECPAT UK, 2004 ; *What the Professionals Know: The trafficking of children into, and through, the UK for sexual purposes*, London: ECAPT UK; Bump, M.N and Duncan, J (2003) 'Conference on identifying and serving child victims of trafficking: notes and commentary', *International Migration* 41 (5), 201-218; *Safeguarding Children: The Second Joint Inspectors' Report on Arrangements to Safeguard Children*, DOH, 2005

that, as set out in *Tackling Human Trafficking* Home Office researchers are currently undertaking research better to estimate the extent of trafficking⁴, the Home Office is undertaking further research in this area. We would comment:

- It is our experience, gleaned from taking on these cases and observing reactions during training sessions that people can be in possession of all or most of the salient facts necessary to identify a case as a case of trafficking but not realise that they are dealing with such a case until this is pointed out to them.
- The publicity around trafficking for sexual exploitation means that there is probably a greater chance of a case being identified by those involved with the person as a trafficking case when it involves sexual exploitation than when it involves trafficking for, for example, labour exploitation. Much of the publicity around trafficking for sexual exploitation has focused on women, and there is at least a risk that cases involving boys and men are more likely not to be identified.
- Contact with social services and NGOs indicates that a significant number of children are being trafficked to UK for domestic slavery and that many come from West Africa and Vietnam. Families are often involved in trafficking so return to the country of origin is unlikely to be safe. Private fostering arrangements may mask domestic slavery.
- The “asylum route” has frequently been identified as one route by which people who are trafficked enter the UK: an asylum claim is the means by which they enter the country and they then disappear. Because those who claim asylum thereby bring themselves to the attention of the authorities (including in, the case of children, to social services) we would expect cases where asylum has been used as the route to be over-represented among detected cases. Those who enter on their own passports, or who have no contact with the authorities post arrival, are less likely to be detected, but this does not mean that they do not form the bulk of cases.
- Insufficient attention has been paid to the trafficking of people travelling on their own, European Union, passports.

Nature

6. In our members’ experience, the UK is both a destination and a transit country for trafficking. We do not have experience of the UK as a source country, although we have seen instances in which people have been moved from one place to another within the UK to facilitate their exploitation.

7. Members have seen cases involving trafficking for sexual exploitation, and for labour exploitation, including but not limited to domestic slavery. Cases such as the Victoria Climbié case can be viewed as cases of trafficking to obtain a social advantage, such as social security benefits. This may not in all circumstances be the most helpful prism through which to view such a case, but it is worthy of particular examination and in our view the extent to which Victoria Climbié’s immigration status contributed to the problems she had was underplayed in the inquiry into her death⁵. We are concerned that work on prostitution needs a wider focus than street prostitution.

8. The information gleaned during the police Operation Paladin Child⁶ was useful in moving people away from the stereotype of rich, international networks, who make up a part but by no means the whole of those involved in trafficking. Smaller scale operations: one family exploiting another, a few people exploiting those in a village or series of villages, also

⁴ See pages 8 to 9 of the Consultation paper.

⁵ *Keeping Children Safe: The Government’s response to The Victoria Climbié Inquiry Report and Joint Chief Inspectors’ Report Safeguarding Children*, DoH, Home Office, DfES (2003)
Paladin Child: A Partnership Study of Child Migration to the UK via Heathrow, Metropolitan Police et al, 2004.

need to be taken into account. *Tackling Human Trafficking* sets out some of the source countries.

9. The trafficking cases members see engage state responsibility to protect against grave violations of human rights including but not limited to torture or other cruel, inhuman or degrading treatment, threats to the right to life, subjection to slavery, denial of rights to liberty and to freedom of association, denial of economic and social rights, including rights to the enjoyment of just and favourable conditions of work, rights to an adequate standard of living, rights to health and to education.

The extent to which the UK legal framework is adequate to address the problem of human trafficking

10. We do not consider that existing frameworks are adequate. The relevant legal frameworks are:

- those providing specific protection for people who are trafficked;
- those providing protection to migrants, including but not limited to people who are trafficked, i.e. immigration, asylum and nationality law;
- those providing protection for people, including but not limited to migrants, who are vulnerable to particular types of exploitation: commercial sexual exploitation or labour exploitation for example.

11. Laws providing specific protection for those trafficked are needed in addition to general laws. This should be in addition to, not a substitute for, examining laws that apply generally as such laws may affect the efficacy of specific measures to protect victims and survivors of trafficking as described below.

12. The European Union has already adopted two specific measures in respect of the subject – Framework Decision on trafficking in persons (OJ 2002 L 203/1) and Directive 2004/81 on residence permits for trafficking victims (see below, the UK has not opted in). A recent document is the European Commission Communication: Fighting trafficking in human beings – an integrated approach and proposals for an action plan COM(2005) 514 final. While mention is made of the need to ensure respect for human rights in the Communication, it contains no recommendation aimed specifically at protecting the human rights of people who have been trafficked. The focus is on the enhancement of border controls and negotiations with states beyond the Union aimed at encouraging them to take measures against trafficking and smuggling of human beings.

13. We note that in *Tackling Human Trafficking – Consultation on Proposals for a UK Action Plan* the Home Office has indicated its intention to ratify the optional protocol to the Prevent Suppress and Punish trafficking in persons, especially women and children, to the UN Convention against Transnational Organised Crime. We also note that it is considering whether or not to ratify the Council of Europe Convention on Action against trafficking in human being (Council of Europe Treaty Series/197 and is asking for views on whether or not to adopt a policy on reflection periods and residence permits for victims of trafficking⁷. These are very positive developments

The Human Rights Act

14. The Human Rights Act 1998 is an important tool in providing protection to people who have been trafficked, with the specific prohibition on slavery and servitude in Article 4 directly available in domestic law. People who fear trafficking on return to their country are more likely to receive protection designed to give effect to human rights obligations than to

⁷ See page 17 of the consultation paper.

receive protection under the Refugee Convention in cases before the Home Office and UK courts.

15. The limitation of the Human Rights Act to civil and political rights makes it important to supplement the protection it offers with reference to international instruments the UK has signed and ratified, including the International Covenant on Economic, Social and Cultural Rights, because those trafficked experience multiple violations of such rights.

Laws providing specific protection for those trafficked.

The criminal law

16. The UK has made significant progress in this area since 2001, the pace of change having been accelerated by the requirement that it meet its obligations under the *EU Council Framework Decision on Combating Trafficking in Human Beings* adopted in July 2002 and requiring domestic legislation to be brought in line by 1 by August 2004. At the risk of repetition of other submissions, we summarise the legislative history here.

17. Until 2002, trafficking had not been made a specific crime in UK law. Traffickers in people, on the rare occasions when they were prosecuted, were prosecuted under existing offences relating to prostitution, or assault, etc, as in the *Plakici* case (see box below).

18. In 2002⁸, the offence of Traffic in Prostitution was created as an interim measure pending the passage of new sexual offences legislation. This made it a crime to arrange or facilitate the arrival in the UK, or departure from the UK, of person, intending that the trafficker, or another person, would exercise control over the prostitution of the person moved, whether in the UK or in another country. It also made it a crime to arrange or facilitate travel within UK of a person who had been brought into the country, where it was intended that the trafficker, or another person, would exercise control over the person moved⁹. The maximum penalty was 14 years.

19. In the Sexual Offences Act 2003, the government revisited the 2002 Act and introduced a Part into the 2003 Act on trafficking for sexual exploitation¹⁰. Sexual exploitation is defined by reference to criminal offences within UK law. Intentionally arranging or facilitating travel were criminalised. The maximum sentence was again 14 years. Trafficking was an offence whether committed inside the UK, or outside the UK by a British national or company based in Britain.

20. The first successful prosecutions under the 2003 Act were those of Taulant Merdanaj and Elidon Bregu. Young women had been trafficked to work in a Sheffield massage parlour. The case was discovered following a tip-off. Mr Merdanaj was sentenced to 18 years in prison, Mr Bregu to 9 years, for a series of offences.

21. In 2004, legislation was passed to deal with acts in contravention of Article 4 of the European Convention on Human Rights (slavery or forced labour); trafficking in human organs, and the use of force, threats or deception to induce a person to provide services, or provide another person with benefits of any kind or to enable another person to acquire

⁸ Sections 145 (and 146) of the Nationality, Immigration and Asylum Act 2002

⁹ Control over prostitution was defined as “for the purposes of gain he exercises control, direction or influence over the prostitute’s movements in a way which shows that he is aiding, abetting or compelling the prostitution”.

¹⁰ Sections 57 to 60. Section 57 deals with trafficking into the UK for sexual exploitation; section 58 trafficking within the UK, section 59 trafficking from the UK

benefits of any kind¹¹, thus taking steps to address trafficking other than trafficking for sexual exploitation.

22. The main difficulty during the passage of the 2004 Act proved to be capturing the idea expressed in the November 2000 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (“Palermo Protocol”) to the UN Convention Against Transnational Organised Crime of “abuse of power or of a position of vulnerability” and the reference to what constitutes trafficking in children under Article 3(1)(c) of the Protocol.

23. Section 4(4)(d) of the 2004 Act seeks to do this by criminalising acts whereby a person is induced to undertake an activity where s/he has a mental or physical illness, is young, or has a particular family relationship and a person without those special characteristics would be likely to refuse the request. Government ministers indicated during the passage of the Act that they considered this wording wide enough to cover very young children, or people under a disability, who did not realise they were being asked to do anything, but it remains to be seen whether this complex definition will found successful prosecutions. Again the maximum penalty is 14 years. Again the section applies to acts within the UK and acts outside the UK committed by another person.

Protection and redress for those who have been trafficked

24. All of the above is concerned with the prosecution of traffickers. What is missing from specific legislation on trafficking in the UK is protection and redress for those trafficked. The necessity for such protection and redress is highlighted in international instruments on trafficking, including, but not limited to¹², the Palermo Protocol and the Council of Europe Convention on Action Against Trafficking in Human Beings¹³, all making specific reference to human rights. We draw particular attention to the recent International Labour Office (ILO) Guidance for Legislation and Law Enforcement on human trafficking and forced labour exploitation¹⁴. Among the rights engaged are those set out in the Convention on the Elimination of All Forms of Discrimination against women (CEDAW), Part 1, Article 6, the Convention on the Rights of the Child Articles 32, 35, 34 and 39, rights under the International Covenant on Economic, Social and Cultural Rights, and under the Convention for the Elimination of All Forms of Racial Discrimination (CERD).

25. We note the practical steps the Home Office has taken for one group of trafficked, adult women who have been trafficked for sexual exploitation and other steps detailed in *Tackling Human Trafficking*¹⁵. However, legal measures are needed also. The silence of UK law on matters of protection and redress means that it fails adequately to protect people who have been trafficked, in accordance with international human rights as set out in those instruments. It also reduces the likelihood of successful prosecutions thereby contributing to a climate of impunity, despite the criminal law framework and reducing the likelihood that those trafficked will obtain redress.

¹¹ Sections 4 and 5 of The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Into force on 1 December 2004.

¹² ¹² See for example the UN GA Resolution *Trafficking in Women and Girls* 11 October 2002; UN CHR resolution *Traffic in women and girls* (16 April 2002) Office of the High Commissioner for Human Rights’ Recommended Principles and Guidelines on Human Rights and Human Trafficking (September 2002);

¹³ Council of Europe CM(2005)32 Addendum 1 final (May 2005)

¹⁴ September 2005 (ISBN 92-2-117347-X)

¹⁵ See page 15ff of that document..

26. We highlight the following as areas the UK has failed to address in domestic law. Some of them are discussed further in the context of the discussion of the Council of Europe Convention on Action Against Trafficking in Human Beings, below.

- Residence permits for those who have been trafficked (see UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Council of Europe Convention *op. cit.*). We are pleased to see that *Tackling Human Trafficking* canvasses views on residence permits and reflection periods¹⁶.
- A presumption that repatriation should generally be voluntary (*ibid*)
- Social welfare needs of those who have been trafficked (*ibid*, esp. Articles 6 & 7, although the provision of social assistance, education and housing is not made obligatory by the Protocol. However, see the Council of Europe Convention, *op. cit.*). To include specialized assistance and support such as appropriate accommodation, information in a language people can understand, medical, psychological and legal assistance and training opportunities.

27. There have been cases in which discretionary leave to remain in the UK until criminal proceedings have been completed has been granted if the trafficked person is prepared to cooperate with the prosecution, including as a witness. However, there have also been cases where people have returned to their country of origin and come back to the UK to testify.

28. Anecdotal evidence gathered by members representing people who have been trafficked, suggests that permitting people to remain for short “reflection periods” or granting discretionary leave to remain until the criminal proceedings have been completed would in many cases be unlikely to offer the protection necessary to persuade a victim to give evidence against his or her trafficker. Witness protection provisions also need to be considered. *Tackling human trafficking* refers to witness protection having been placed on a statutory footing in the Serious Organised Crime and Policing Act 2005 (into force 1 April 2006). It is vital to draw on these provisions in the case of survivors of trafficking. Where a large network is at work, the conviction of one or a few people may not suffice to make the witness safe. The most appropriate form of witness protection would appear to be the provision of long term or indefinite leave to remain in the destination country.

29. It is misguided to distinguish at the outset of a case between those willing to cooperate in prosecutions and those reluctant to do so, and only to offer to protection conditional on cooperation. Given protection, a person who was initially reluctant to cooperate with a prosecution may over time become willing to do so: all forms of protection for those trafficked, not merely those designed for someone who has indicated a willingness to cooperate in a prosecution, are likely to increase the likelihood of being able to prosecute traffickers.

Protection of migrants, including but not limited to people who have been trafficked.

Refugee Convention

30. There was an initial difficulty in persuading the then Immigration Appellate Authority that protection was potentially available to people who had been trafficked under the Refugee Convention. Following the House of Lords decision in *Islam v Secretary of State for the Home Department* [1999] WLR 105, known as *Shah & Islam* that where women and/or children are discriminated against in law and/or social and cultural practices in their country of origin, such protection is available. The basic submission in such cases is that women, girls or boys whose legal and social rights are not recognised or protected in a certain society represent a particular social group that has been socially constructed by gender and/or

¹⁶ See page 17 of the Consultation paper.

age. One of the types of persecution members of the particular social group may face in certain countries is trafficking and its attendant physical, mental and emotional abuse. The particular social group cannot be defined as “trafficked persons” as this would conflate the persecution with the definition of the group, contrary to the decision in *Shah & Islam*.

31. Cases will only succeed if the courts are persuaded that the person who has been trafficked will face persecution *on return*, whether because s/he will be trafficked again, or for other reasons. For this reason, the Convention cannot provide protection in all cases to people who have been trafficked. It is of course worth noting that people who have not been trafficked to date may make a successful claim based upon a risk of trafficking on return.

32. There are concerns that in applying the law, both in trafficking and other cases, the AIT has given undue deference to the claims by national states that they can protect those to whom they had not previously offered adequate protection and to assertions that they would be safe if they moved away from the area in which they had previously lived.

ECHR

33. It has been recognised, by the Home Office and the courts, that the treatment suffered by people who have been trafficked, amounts to inhuman and degrading treatment in breach of Article 3 of the ECHR. The courts have also found that trafficking amounts to a breach of the prohibition on slavery and forced labour in Article 4 of the ECHR, including prior to the coming into force of Asylum and Immigration (Treatment of Claimants etc, Act) which incorporates this into the definition of trafficking.

34. In some cases, the IAA and its successor the AIT have accepted that it would be a breach of the trafficked person’s rights under the ECHR to return him/her to the country of origin, for example because s/he is at risk of torture, cruel inhuman or degrading treatment. Again, it is necessary to show the requisite risk *on return*. This is not necessarily restricted to a risk of being re-trafficked but would include other human rights violations of the requisite degree of gravity on return. If there is no real risk of such treatment protection will not be granted. For this reason, the ECHR cannot provide protection in all cases to people who have been trafficked.

35. There is a problem in that breaches of Article 4 have not been identified for the same special protection with the UK system as breaches of Article 3. For example, humanitarian protection is normally given for breaches of Article 3. Asylum support (see for example s.94 of the Immigration and Asylum Act 1999) makes specific reference to Article 3. Yet when one looks at the rationale in the *Soering v UK* case in the European Court of Human Rights the salient features of Article 3 as set out in paragraph 88 of the judgment also apply in the case of Article 4. The prohibition expressed by the article is absolute. There are no exceptions to the text of Article 4(1). No derogation from Article 4(1) is permitted (see Article 15).

36. Thus neither the Refugee Convention nor the ECHR will provide the basis on which a person can stay in the UK in all cases that might otherwise be deemed to be cases where the person who has been trafficked stands in need of a reflection period or of a resident permit in recognition of past abuse and the psychological effects of the gross violation of human rights that the individual has suffered. **In ILPA’s view the UK should supplement the protection offered by the Refugee Convention and Humanitarian protection by express provision for leave to be given to people who have been trafficked who do not qualify for other forms of protection.**

Immigration and asylum law generally.

37. There is a great deal to be said on the ways in which the shortcoming of UK immigration, and asylum laws put people who have been trafficked at special risk. We are happy to provide further information if this would be useful to the Committee, but content ourselves here with a, not exhaustive, list of examples.

38. Traffickers control people through, for example:

- Threats of violence to the trafficked person or, not uncommonly, to family members including those overseas.
- Debt bondage
- Restrictions on freedom of movement. These include physical confinement, confiscation of documents, equipping the trafficked person with a mobile phone.
- Instilling a fear of authority – saying national police are in the pay of traffickers, or that if the person goes to the police s/he will be imprisoned/deported
- Isolation
- Emotional attachments
- In certain cases, from certain countries, use of religious and magic ceremonies with threats that harm will occur if the person seeks to escape the bond with the traffickers.

39. The situation of people who are trafficked may be characterised by some of the following list, which is not exhaustive:

- Working in an informal, often illicit sector
- Having limited knowledge of their rights and options
- Having limited personal freedom
- Being moved from place to place or traded between establishments
- Having experienced physical, sexual or psychological abuse or threats of abuse against self and your family
- Having no legal rights to stay in the country, no papers and being worried about removal
- Being in debt or under complex obligations to people with power over them
- Being used to discrimination: ethnic, social and on the grounds of gender
- Adopting self-protective mechanisms including under-estimation of risk; demonstrating symptoms of extreme stress, including risky behaviours
- Not being aware of having been trafficked, either because they do not give it that label or because it fits into recognised patterns of discrimination and exploitation that are treated as the norm.

40. UK asylum and immigration laws and practices exacerbate the risks created by all the above both while the person is under control of the trafficker and after they have evaded that control. This law now spans the fields of employment, and of social welfare law, all of which have implications for people who have been trafficked. Removing them from mainstream provision carries with it the risk of removing them from initiatives within the mainstream to protect those particularly vulnerable to exploitation. A (far from exhaustive) list of examples:

- Many migrants have no permission to work, nor access to social welfare systems. Access to health care is also limited for many. Because immigration status affects access, documentation may be examined and questions asked. This is likely to make traffickers reluctant to allow trafficked people to have contact with those providing social care, and trafficked people reluctant to do so, or to seek help.
- Carrier sanctions privilege the desire to keep people out of the UK over the need to know who is in the country and for what purpose, reducing the chances of identifying survivors of trafficking.
- Accelerated procedures for decision-making decrease the likelihood of trafficked people, with all the pressures upon them, disclosing the truth of their situation. Out of country appeals for those whose case is certified as “clearly unfounded”, and the presumption of

certification in cases from countries where trafficking is a recognised problem¹⁷.

Proposals to remove more appeal rights in variation cases contained in the Immigration, Asylum and Nationality Bill 2005 increase the likelihood that those who came to the UK with leave, but as a cover for their exploitation by traffickers.

- Increased difficulties in entering the UK and European union legally, and harsh border controls, make organising the evasion of those controls a more complex and profitable business and increase the chance that that illegal trade is operated not merely by smugglers, but traffickers.
- The increasing use of detention increases the pressures on those who have been subject to torture or other cruel inhuman or degrading treatment, or to deprivation of liberty.
- Difficulties in accessing competent, free legal advice because of shortage of supply, including shortage in particular areas, make it less likely that the person will have the opportunity to disclose their situation to a legal representative. Accelerated timescales make it more difficult for legal representatives to build the relationship of trust and confidence. Note that if a legal representative's instructions from the client are that s/he has not been trafficked, the legal representative cannot, as a matter of professional ethics, make the submission that the client has been trafficked, whatever the evidence suggests.
- The threat of deportation or imprisonment if the person approaches the authorities is not merely a threat voiced by trafficker, it is a real one.
- Age dispute has created considerable problems in the immigration field, particularly in protection cases, where identification as a child is a, highly policed, gateway to superior rights and entitlements. The risks to trafficked people, often travelling on false passports to lessen the risks of identification, are exacerbated where they are not recognised as children.
- Prosecutions under s.2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and the resurgence of prosecutions under forgery and other legislation under that Act increase the risks of people arriving being prosecuted in a system unaware of their rights under the 1951 Refugee Convention and in particular the protection afforded by Article 31 of the Convention and ending up in the criminal justice system without getting specialist advice and help¹⁸.
- The isolation and poverty created by the asylum support system do not create circumstances in which the person will find it easy to make contact with others and disclose their situation. Powers further to segregate people, including in accommodation centres, under Part 2 of the Nationality, Immigration and Asylum Act 2002 and current *de facto* segregation, for example when children cannot obtain places in mainstream schools, exacerbate these risks.
- The hostility toward asylum seekers, and more broadly toward migrants, in the UK also reduces the likelihood of the person making contacts with those to whom they can disclose their situation.
- The failure to use guardians for children seeking protection. A legal representative acts on instructions. Where a client is not able to give instructions because s/he is a child or under a disability the legal representative is placed in an impossible position and the client may not receive the protection s/he needs. The problem is raised in all its acuity in the case of trafficked children, who may be giving instructions on the instructions of their trafficker. We reiterate, yet again, that the Refugee Council's Panel of Advisors of Unaccompanied Children do not have the powers nor the resources to play this particular role and this is not the role they are set up and trained to play. See Annexe, and see box below.

¹⁷ See the Nationality, Immigration and Asylum Act s.94(4) and the orders made under it. It is notable that the most recent order, the Asylum (Designated States

¹⁸ See the work undertaken by HMIP into foreign nationals in UK prisons. *Ref?*

Guardians in children's trafficking case

The client is a young child who denies having been trafficked and maintains that a wish to leave local authority care to live with "father". The Immigration Service do not accept the relationship, nor that the document evidencing it is genuine. The client has an appeal against refusal of leave to enter as a returning resident (note that if the Immigration, Asylum and Nationality Bill 2005 becomes law in its current form this right of appeal will no longer exist). The child maintains that he wants leave to enter to be with his father. The representative has no one else to whom to turn for instructions.

41. ILPA has documented the particular failings of the system as they affect trafficked children, see *Child First; Migrant Second: Ensuring that every child matters*¹⁹, extracts from which are appended hereto.

42. Measures to control those who employ migrant workers have the potential to provide protection to those at risk of exploitation. We find it difficult to understand the low level of successful prosecutions under the existing offence,²⁰ and even the level of prosecutions and investigations. While appreciating that it is difficult to secure a criminal conviction, we should still have expected to see more investigations, more prosecutions and more successes. Are sufficient political will and resources being devoted to this area? How many enforcement officers are working on it?

43. Some traffickers are likely to fall within the narrower scope of the criminal offence of employing people without permission to work under the current Immigration Asylum and Nationality Bill (of course others may be employing EEA nationals or people with such permission). It remains to be seen whether the civil penalty regime proposed under the Bill will be used against them. Debates on the Bill have highlighted the difficulties, perhaps the impossibility, of using such legislation to protect against exploitation without exacerbating the discrimination in employment faced by those who are subject to immigration control or who employers wrongly identify as being so subject.

44. These difficulties will not be resolved until the UK takes seriously the protection of the human rights of migrants in general and migrant workers in particular²¹. Take the European example. In summary, British policy since 1999 has been to decline to opt-in to immigration measures that would require the UK to grant a right of admission to certain categories of person. For example the UK has not opted into the EU Council Directive on short term permits (21004/81/EC) which sets our criteria for issuing a residence permit to people who have been trafficked. The UK has declined to opt into other, more general, measures, that could assist survivors of trafficking, the Long Term Residents Directive, which concerns the rights of people who have already been admitted to the European Union, after a not inconsiderable period of residence. The House of Lords European Union Committee Report *Economic Migration to the EU*²² is worthy of special study in this regard.

Laws to protect those vulnerable to exploitation, including but not limited to migrants

Criminal laws.

45. As noted, prior to 2002, prosecutions of traffickers made use of other criminal offences they committed (see box). Thus the laws available to prosecute those trafficking a person for sexual exploitation, or trafficking a child, differed from those available to

¹⁹ Crawley, H. ILPA November 2005.

²⁰ Asylum and Immigration Act 1996, section 8.

²¹ See Kaye, M. *The Migration-Trafficking Nexus – combating trafficking through the protection of Migrants' human rights* Anti-Slavery international 2003

²² HL Paper 58 of session 2005-6

prosecute those trafficking for labour exploitation. All these laws remain available. The Criminal Injuries Compensation Board could pay out to a person who has been trafficked, following prosecution of the trafficker.

Plakici case

Luan Plakici had trafficked young women, forcing them to work as prostitutes. His activities were discovered after one of his victims escaped and went to the police. Victims were brought back from overseas to give evidence at his trial. He was convicted on 22 December 2003 on fifteen counts of assisting unlawful immigration, living on prostitution, kidnapping, procuring a girl to have unlawful sexual intercourse and incitement to rape. Plakici was sentenced to 10 years in prison, but following the CPS referring the case to the Attorney General as an example of an “unduly lenient sentence” the Court of Appeal increased the sentence to 23 years (29 April 2004).

46. The Serious and Organised Crime Act 2005 makes provision as to forfeiture of profits of crime. This provision puts the UK in a position to ratify the UN Convention on Transnational Organised Crime.

47. On 16 July 2004 the Home Office released *Paying the Price*, a consultation paper as part of its review on prostitution. The consultation closed in November 2004. *Paying the Price* does mention trafficking but many commentators have felt that the review is underplaying the nexus with the exploitation of migrants. A focus on the “public nuisance” aspects of prostitution also risks prioritising work on on-street prostitution rather than off-street, where some of the worst exploitation is taking place. In members’ experience, trafficked women and children are more likely to be hidden away in “saunas” and “massage parlours” than to be on the street. *Tackling Human Trafficking* makes reference to legislative proposals on street prostitution and we consider it problematic that a document concerned solely with trafficking retains a focus on street prostitution without further comment²³.

Legislation to protect children and to promote their welfare

48. See ILPA’s *Child First; Migrant Second: Ensuring that every child matters*²⁴ with its discussion of the potential, and the short-comings of the Children Acts 1989 and 2004 and equivalent provision for Scotland and Northern Ireland, including provisions on private fostering, to protect trafficked children. As detailed above, we have special concerns about the failure to provide guardians for children involved in immigration litigation.

Other laws

49. General employment protection legislation has been supplemented with sector specific measures such as the Gangmasters Licensing Act 2004, aimed at increasing control over those acting as gangmasters for agricultural labourers and to address exploitation in the agriculture, shellfish gathering and associated processing and packing sectors. While not limited to migrant workers, the Act is likely to affect them and indeed it shot up the political agenda following the drowning of 21 Chinese cockle pickers in February 2004. The Gangmasters Licensing Act 2004, much of which is now in force, aims to increase control over those acting as gangmasters for agricultural labourers. It is intended to open the scheme for licence applications from April 2006²⁵.

²³ See page 9

²⁴ *Op. cit.*

²⁵ See the discussion in *Tackling Human Trafficking* at pages 12 to 13.

50. As noted above, laws on immigration and asylum increasingly make separate provision for people under immigration control, the most striking example remaining s.115 of the Immigration and Asylum Act 1999. Elsewhere, as in the case of children, laws that appear to treat all equally are applied differently to persons under immigration control. Particular difficulty here is that the Home Office funds directed to local authorities supporting unaccompanied children under immigration control are insufficient to cover costs, and that families under immigration control are unlikely to have contact with social services. This affects the protection those trafficked can derive from the general law.

The law and practice on the deportation of victims of trafficking

51. Law and practice on deportation creates a risk that people have no opportunity to put their case, as described below, and of violence attendant on removal, (including risks of breaches of Article 3 ECHR²⁶). These are generally problems and affect a wider class than people who have previously been trafficked.⁵² The EU Council Directive on short term permits obliges states to inform trafficked people of the possibility of obtaining a residence permit and give them a period in which to reflect on their position. An opportunity for reflection is not usually afforded to those trafficked in the UK, who may be detected in raids to discover people working without permission to do so, including in the course of investigations into prostitution, although see the notes on the Poppy Project in *Tackling the Traffic*. ILPA is concerned that where workers are discovered in this situation there is insufficient attention given to whether they have been trafficked, and they may be removed rapidly from the UK without having had the opportunity to secure advice, care treatment or for the risks to them to have been assessed.

53. Where immigration offenders are identified they are usually taken to police stations where they are interviewed very briefly by Immigration officers who then serve them with removal directions. A few hours is insufficient for the balancing of the circumstances of an individual who has been living for some time in the UK against the importance of maintaining immigration control, as required by the Immigration Rules. It is grossly insufficient for identifying that the person has been trafficked and is intimidated by a trafficker or under duress.

54. Immigration offenders held in police stations should be provided with access to accredited immigration lawyers who are able to attend police stations in person to take instructions and represent the client before the Immigration Service before any decision is taken on removal. This requires proper funding by the Legal Services Commission who at present are only willing to provide a limited telephone advice service.

55. Detention is frequently used prior to removal. Difficulties in detainees accessing legal advice, as documented repeatedly by HMIP in their examinations of Immigration Removal Centres and the lack of automatic judicial oversight is resulting in prolonged arbitrary detention. We recommend that the Committee examine the comments of Mr Alvaro Gil-Robles, Commissioner for Human Rights, Office of the Commissioner for Human Rights, Council of Europe²⁷.

The Council of Europe Convention on Action Against Trafficking in Human Beings

²⁶ See for example Granville-Chapman, C., Smith, E., Maloney, N. Medical Foundation for the Care of Victims of Torture, 2004, especially Part II.

²⁷ Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4th - 12th November 2004, Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005, para. 49

Would ratification enhance human rights protection in the area?

56. In ILPA's view, ratification and subsequent implementation would do so. This is not to pretend that the Convention is without its flaws. Protection for people who have been trafficked arguably remains insufficient under the Convention, and the rights to be afforded them are limited²⁸. The emphasis on border measures in Article 7 is arguably misguided, and risks making the trafficker's trade more lucrative and increasing their market, but is no worse than the status quo. The weakness of monitoring provisions is also a cause for concern.

57. In considering the changes in law necessary to ratify and successfully to implement the Convention we are mindful that one of the greatest difficulties in the identification of the trafficked person. The Convention defines a trafficked person as "any natural person who is subject to trafficking in human beings" (Article 4(e)). Thus a State's obligations are incurred once a person is subject to trafficking, not following their being recognised as so subject. Therefore it is necessary to consider reform to general systems for people under immigration control as well as specific measures to protect people who have been trafficked.

Changes to law necessary to ratify and successfully to implement the Convention

To ratify

- Provision in law for residence permits for people who have been trafficked (Article 10(2), Article 13)
- Provision in law for support for people who have been trafficked (Article 12).
- Amendment of s. 4(4)(d) of the Asylum and Immigration (Treatment of Claimants etc. Act 2004 to ensure that UK law addresses adequately and unambiguously the question of abuse of power or of a position of vulnerability (see Article 4(a)); fully to give effect to the provisions making consent irrelevant in Article 4(b) and fully to cover the special protection of children required by Article 4(c). See also Article 18.
- Provision in law for the supervision of decisions of entry clearance officers to give effect to requirement to ensure offices disseminate accurate information about legal rights to come to the UK (Article 5(4)), we would suggest by the retention of rights of appeal against the refusal of entry clearance.
- Repeal of the provisions in Part 2 of the Nationality, Asylum and Immigration Act 2004 which would allow the segregated education of children in accommodation centres (Article 12(1)(d)).
- Provision in law for people to have access to legal advice prior to and during interviews with the immigration service and in subsequent proceedings: a bar on proceeding until a person who wants legal advice and representation has been able to obtain it (Article 15(2)).

Successfully to implement

- Carrier sanctions should be reviewed and provision made to remove disincentives to carriers to offer protection and assistance to those discovered on their vehicles and bring people to the attention of the authorities (Article 7(2)).
- Repeal of s.2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 to ensure that people who have been trafficked do not disappear into the prison system without having been detected (Article 10(1)).
- Withdrawal of the UK's reservation to the UN Convention on the Rights of Child would facilitate acknowledgment of the child rights approach required by the Convention (see preamble)

²⁸ See e.g. Recommendation 1695(2005) of the Parliamentary Assembly of the Council of Europe, 18 March 2005.

- An end to the exclusion of immigration and asylum functions from the ambit of all measures in race relations legislation would facilitate giving effect to the non-discriminatory approach required by the Convention (see Preamble and Article 3).
- Continued work to outlaw gender inequity in the asylum system to give effect to the requirement to take gender equality into account (see Preamble and Article 3).
- A bar on holding children in immigration detention (Article 12).
- Automatic bail hearings to provide judicial oversight of detention at the earliest possible stage (Article 12(1)).

Changes to policy necessary to ratify and successfully to implement the Convention

Successful implementation

58. We doubt, for the reasons described above in our existing survey of law and practice, whether successful implementation of the Convention is possible without radical overhaul of our immigration and asylum systems, including provision for the rights of migrant workers, real efforts to build a protective approach, and an end to the exclusion of people under immigration from social welfare and other rights and entitlements and the removal of failed, failing and punitive systems such as NASS (see Article 12(1)(a)). We shall be considering in detail all the suggestions made in *Tackling Human Trafficking*, a welcome addition to the debate. We make a few suggestions below, but these are not exhaustive.

- Changes to the operation of the legal aid system to ensure adequate supply of representation and adequate numbers of representatives (Article 10(1)), Article 12(1)(e), Article 15).
- Immigration advice for people under immigration control in police stations and procedures that give sufficient time for them to obtain advice and take decisions (Article 10(2); Article 12(1)(e)).
- Adequate systems of witness protection for people who have been trafficked must be established (Article 28)
- Consideration should be given to the role of embarkation controls in detecting trafficking and traffickers (Article 7)
- Increased access to legal migration, with the proposed points scheme adapting to provide legal means of access to the UK for workers at all skill levels (Article 5(4))
- Establishment of a fund for the compensation of people who have been trafficked (Article 15(4)).
- Timescales in immigration cases that allow for the obtaining of advice and for reflection, including an end to fast-track asylum procedures (Articles 12 and 13).
- Rights to work for people seeking asylum or humanitarian protection (Article 12(4)).
- A protective approach to all children under immigration control to protect them from trafficking, including in cases where the UK is used as a transit country. This should include use of schemes to oversee private fostering to protect children in families; change in policy in age dispute cases so that a child is accepted as a child where age is uncertain and special measures are taken pending resolution of the dispute on age; Provision for legal or other guardians for unaccompanied children, acting in the best interests of the child. Residence permits issued to children to reflect their best interests (Article 14(2)) would require amendment to the current policy of giving unaccompanied children held not to qualify for recognition as a refugee or for humanitarian protection, leave to 18. See ILPA's *Child First Migrant Second*²⁹ (Article 5(5) and 10 and 14(2)).
- Decisions on return in children's cases to be made on the basis of their best interests (Article 16).

²⁹ Op cit.

Changes to practice necessary to ratify and successfully to implement the Convention

Successfully to implement

- Re children – see ILPA’s *Child First Migrant second*.
- Increased resources devoted to combating trafficking and to strengthen national coordination (Article 5(1); Article 29)
- Research and collection of statistics into the different decision-making at different entry clearance posts abroad, to support work to give effect to the non-discrimination provisions of article 3 and the requirement to enable legal migration and disseminate accurate information as described in Article 5(3).
- Wider dissemination and regular updating of the Home Office Toolkit (Article 5(2)).
- Increased budgets for research on trafficking (Article 5(2)).
- IND to translate its documents and materials (Article 12(1)(c)).
- Increased training for officials, including police, immigration service, revenue and customs officials on trafficking (Article 5(2), article 10)
- Increased training and information for those who may have contact with people who have been trafficked including hospital staff and GPs, and social workers (Article 5(2)).
- Wider dissemination of information about rights of people who have been trafficked (Article 12)
- Better collection of statistics, especially on age disputes, children, gender, and removal to make possible effective monitoring as required by the Convention (see Preamble).
- Political will and resources devoted to delivering the National Plan for Safeguarding Children from Commercial Sexual Abuse (DoH 2001).
- Child protection police officers stationed at ports (Article 7(1))

ILPA

13 January 2006

| ANNEXE Separate file, an extract from *Child First, Migrant Second*:

Ensuring that Every Child Matters Crawley, H., for ILPA, forthcoming in print