

ILPA comments on the Quality Standards for the National Referral Mechanism.

ILPA is grateful for the opportunity to comment on the proposed quality standards for the National Referral Mechanism and for the extra time given in which to do so. That we have not commented on a part of the Quality Assurance Document should not be taken as implying that we agree with it.

The identification of a potential victim of trafficking necessitates information and evidence. Most often this will come, at some point, from the person by way of disclosure. The need to create an environment in which disclosure is facilitated is therefore very important and the quality standards could usefully address this.

ILPA's concerns about the UK Border Agency's role in operating the national referral mechanism are a matter of record. The current approach does not allow the issue of trafficking to be separated from issues of immigration and asylum. A lack of clarity about the relationship between the asylum process and the National Referral Mechanism makes it difficult to elaborate standards.

We understand that these standards are not new; rather that existing standards have been updated to fit within the next generation framework and format. We are concerned that the standards focus on form rather than content, process rather than quality, until the assessment made in the final decision letter is reached. A person could score highly against these standards and still make a very poor decision.

The new legal aid provisions from 1 April 2013 will mean that in non-asylum trafficking cases legal aid will not be available before a person has a reasonable grounds determination or if that reasonable grounds determination is negative. Decision-makers are likely to be hampered by trafficked persons not having a legal representative with whom they have a relationship of trust and confidence, or indeed any legal representative at all. A relationship of trust with a good legal representative can facilitate disclosure and it is anticipated that the legal aid position from 1 April 2013 will place a heavier burden on the UK Border Agency or the successor Agency.

ILPA and other members of the National Asylum Stakeholder Forum have repeatedly voiced concerns that the Asylum Operating Model to be introduced from April 2013 will not work, because it is predicated upon judging a case before investigating it. As ILPA said of legal representatives in February 2008 in its evidence to the Home Affairs Committee enquiry into human trafficking:

"...Although not every trafficked person has an irregular immigration status (as for example when a person from a member State of the European Union is trafficked), many will have. At the time when they go and see a lawyer, it may be that no one is aware that they have been trafficked. The skills of the legal representative in identifying that the person has been

trafficked will then play an important part in identification.

Many trafficked people do not come to attention of people working in NGOs or support groups. Most come through other routes such as via police, prisons or social services first. Legal representatives, whether immigration or criminal practitioners, have access to people in prisons and police stations.

Skill alone is not enough: the context in which skills are deployed is important. These cases may involve related criminal proceedings, and/or intelligence gathering to gain information about the traffickers. This should increase if government proposals to take action against trafficking in human beings, including ratifying the Council of Europe Convention are implemented. Clients may need to be accommodated in safe houses or shelters and in some cases open visits to representatives will not be possible. Clients may be suffering physical injuries and are likely to be extremely distressed. Cases will often involve obtaining medical or psychological evidence. People may need time to think about past traumatic events, and to establish a sufficient level of trust and confidence to reveal the painful and humiliating details of their experiences.

We ask the Agency not to use the abbreviation “PVoT.” This abbreviation disguises that one is dealing with a “potential” “victim” of trafficking in human beings, with a person at risk. Its use can only lower the quality of the audit.

National Referral Mechanism First responder marking standards

1. Did the responder correctly identify the individual as a potential victim of trafficking? (UK Border Agency cases only)

In the SERIOUS standard we suggest changing “and” to “and/or”. Delays have serious consequences for trafficked persons. An unjustified delay is a CRITICAL failing; so is a significant delay. A minor delay is a SERIOUS failing.

The CORRECT standard is worded badly and is repetitive. The second sentence is confusing. If relevant indicators are present then the individual should be referred. A reasonable grounds decision is based on a very low 'suspect but cannot prove' standard of proof.

2. If the potential victim of trafficking was over 18 on the date of referral has the National Referral Mechanism form been signed by the potential victim of trafficking /their representative?

In the SERIOUS standard, replace “unjustified significant” with “unjustified and/or significant.” See comments under question 1 above. A delay in providing support for a potential victim of trafficking may amount to a failure of protection. A delay in this regard may be CRITICAL.

In the MINOR standard, remove “unjustified” – if there is delay that is not justified, this is serious.

The informed consent of a child or a person with authority to consent on behalf of that child should be obtained prior to any referral, therefore to limit this standard to over 18s is wrong.

3. Where the potential victim of trafficking was under 18 on the date of referral, was a referral made to the Local Authority?

In the SERIOUS standard, replace “unjustified significant” with “unjustified and/or significant,” see above.

In the MINOR standard, delete “unjustified”- if there are delays which are not justified, this is SERIOUS or CRITICAL.

We are concerned that this point addresses only recording of the referral rather than looking at what was done to ensure that the referral was effective. For example, sending an unaccompanied child alone to social services in a taxi that arrived after the social services office has shut is a critical error. Not ensuring the immediate safety of a child in circumstances where local authorities are disputing responsibility is a serious error.

4. Did the First Responder complete all referral action, including: referring the potential victim of trafficking to a Competent Authority (via UKHTC/routing) in a timely manner using the correct referral form.

This standard is an uncomfortable mixture of form and substance. The content of the referral should be assessed separately from whether a referral was timeous and made on the correct form. It should be the subject of separate standards. This standard does not take account of the difficulty in identifying a potential victim and completing detailed information about them at what may be a very early stage in the process. The standard risks creating pressure to refer a person quickly at the expense of a referral done properly and appropriately, which may lead to a wrong negative determination. The lack of a right of appeal against these determinations increases the problems inherent in merging an emphasis on speed with an assessment of content.

5. All CID fields were updated for all potential victims of trafficking processes.

The MINOR standard relates to the CID notes not being up to date. Failure to update CID may have significant implications at this stage in a process that designed to take place in a relatively short space of time. The consequences of this may be far from minor. We can identify no “MINOR” level of error against this standard.

6. Has the potential victim of trafficking’s welfare been considered?

Throughout point six, the emphasis is on the form and not the quality of the consideration. We suggest that there are two points here, not one. The first is whether welfare has been considered; the second is whether the responder has addressed it in a satisfactory manner. This is essentially about making the most effective possible referral in the circumstances and creating conditions that could give rise to an effective referral in the future.

Failure to provide information to a person regarding their rights and the help available to them is not MINOR. Difficulties in identification and barriers to disclosure mean that the immediate and serious welfare problems (we do not think the word “issues” is helpful in this context) may not always be apparent. Without providing this information many individuals might not be aware of their rights or of the first responder’s ability to make a referral for them. A whole category of people, whose needs may not be immediately obvious, could be missed.

CORRECT: The reference to “as a minimum in English” in parentheses should be removed. If a person does not speak or read English and has no one to assist them then such a leaflet does nothing to inform them of their rights. The focus should be on the substance of the communication, not the form. The reference in parentheses to ‘initial asylum accommodation’ under the **CORRECT** standard should be removed. In many cases initial asylum accommodation may not be appropriate for a potential victim of trafficking who has claimed asylum and further safeguards may need to be implemented. In some cases referral to initial asylum accommodation, for example in the area in which the person’s traffickers may be present, may be a **CRITICAL** error.

In respect of welfare support, it cannot be enough merely for the first responder to make the referral. There should be a mechanism for following up to ensure that the referral has been effective.

National Referral Mechanism Reasonable Grounds Marking Standards

I. Compliance

a. All relevant paperwork and Home Office file (if in existence) received before the decision was made.

The standard is badly worded. It may be the case that before all information is obtained; there is sufficient information to identify the person as a potential victim of trafficking, which is, by its nature, a provisional decision. In such a case, it would be wrong to delay. What is significant is to reject someone as such a potential victim on insufficient information.

A reasonable grounds’ decision has significant consequences for many aspects of a person’s claim and related matters, not least of all, from 1 April 2013, a person’s ability to qualify for legal aid. The emphasis must be on making a good decision. Having all the necessary paperwork prior to making a decision is very important. However, the person charged with the reasonable grounds decision should be expected to make an effort to ensure that the information is obtained in a timely manner rather than waiting passively and accepting delay.

The CRITICAL standard refers to a lack of 'vital information' contained in the file which 'led to the incorrect decision being made'. The SERIOUS standard refers to 'important information'. The MINOR standard refers to information which was not significant. The difference between 'vital' and 'important' information and the question of what is significant is not meaningful in this regard. The consequence of the decision being incorrect can only be seen with hindsight. It is not acceptable that any negative decisions are taken without sight of the relevant file/paperwork where it is in existence.

The CORRECT standard refers to all relevant paperwork and the Home Office file being received prior to the decision being made. See above re the possibility of making a positive provisional decision before this. The person charged with the 'reasonable grounds' decision should not be penalised for this. The extent to which efforts are made to obtain the information in a timely manner should be given a mark. This standard should say 'received and reviewed'.

No attempt is made in the standard to look at the quality of the review of the information. No attempt is made to look at the way in which the person dealt with incomplete or poor quality information. The focus is on process, not on quality.

b. All CID fields were up to date for all potential victims of trafficking processes prior to the decision.

See comments on point five in First Responder Marking Standards.

c. Where there is insufficient information included in the initial referral has the CA proactively sought out and provided reasonable timescales for information that could prove useful in establishing Reasonable Grounds (including liaising with Police, local authorities, Corporate Partners etc) to ensure all relevant information has been gathered?

The SERIOUS standard describes a failure to provide evidence or reasonable timescales without it being decisive of the issue. How can it be concluded that this level of failure has not been decisive of the issue in any case where a negative decision was made? In any event, this could only be known *post hoc*, not at the time of the failure. In terms of ensuring that cases are uniformly and properly assessed, the decision as to whether the failure is decisive or not should have no place in determining whether the failure is serious.

That the negative decision was wrong may not be proved until much later in the process. Failure to do so is CRITICAL regardless of whether the failure is subsequently deemed to have been decisive of the issue.

d. A status interview has been completed where the potential victim of trafficking is not known to the UKBA.

The CORRECT standard assumes that the UK Border Agency policy and guidance, with which the interview must comply, is up to date, correct and appropriate. A person should not be penalised for not following guidance that is incorrect or out of date, provided they follow the correct processes for addressing this.

Nothing in the standard addresses the quality of the interview. Creating an environment to facilitate disclosure is very important as is sensitive and appropriate questioning and keeping an accurate and complete record of the interview.

2. Preliminaries

a. The decision states the potential victim of trafficking's details correctly.

It would not be CRITICAL wrongly to identify a person as a potential victim of trafficking. It would be critical to fail so to identify them. This is a provisional decision, designed to protect.

Whether the error is CRITICAL or SERIOUS may depend on what is recorded incorrectly. A failure to record that a person is a child, their gender, or that they are in immediate danger would be CRITICAL.

The CORRECT standard assumes that the UK Border Agency policy and guidance, with which the interview must comply, is up to date, correct and appropriate. See comments on point 1 d above.

3. Summary of Claim:

a. The decision letter/consideration minute contains a concise yet accurate summary of the immigration history of the potential victim of trafficking;

The identification of a potential victim of trafficking does not necessarily rely on a person's immigration history. While immigration history may be relevant, factors present in the UK may be much more relevant. Where immigration history is not obtained, this is not necessarily CRITICAL. It will depend on the facts of the case.

Where immigration history is relevant and is summarised incorrectly, this is a CRITICAL error since it since they may result in a wrong decision being reached.

The word "yet" should be omitted. Accuracy and concision are not mutually exclusive nor is there any tension between them. There may be a tension between concision and completeness.

b. The decision letter/consideration minute contains a full summary of the case;

In the CRITICAL standard we consider that problems go beyond the trafficking case. Information gleaned during the assessment of whether a person is a potential victim of trafficking is, in our experience, in some cases used against them in their claim for asylum or on another basis. Inaccurate information has ramifications beyond the trafficking decision.

The matters described under MINOR are not minor. They are CRITICAL. “Spurious” means fake or false and to add such details to the summary of a case is likely to constitute misfeasance in public office.

CORRECT – “individual’s” not “individuals”.

c. The summary is concise, logical, fully referenced and details all alternative accounts (if relevant).

The title states “all alternative account,” should be “accounts”.

The title appears leading and unnecessary. If the summary of the case complies with 3b it will include alternative accounts. The wording appears to encourage picking holes in an account.

The SERIOUS category states ‘for example the evidence is not fully sourced (all subjective evidence sources should be referenced) or the summary is in an illogical order making it difficult to follow’. The requirement fully to source evidence where the standard of proof is ‘suspect but cannot prove’ puts too high a burden on the decision maker and is not in line with the standard of proof.

Logical order is a quality to be valued but if the person gets there in the end and the decision is comprehensive and well-reasoned we do wonder whether setting things out in the wrong order will always be SERIOUS. Tempted as we are to leave this in *pour encourager les autres* it may devalue the currency of a serious error.

4. Consideration

a. The decision letter/consideration minute reaches a clear finding on Potential Victim of Trafficking Reasonable Grounds.

The SERIOUS and MINOR errors appear to be the same.

CORRECT is wrong. At this stage the decision is whether there are reasonable grounds to believe that a person is a potential victim of trafficking, not whether they are a victim of trafficking. This stage of the assessment should not require a decision on whether the potential victim requires the protection of the convention.

b. The decision letter /consideration minute provides clear, well-reasoned argument to support the Reasonable Grounds decision

CRITICAL This error is not critical if the decision is positive. This decision is initial. It is provisional. It will be reviewed later. To err on the side of caution when a failure to identify may have such awful consequences for a trafficked person is not the worst of errors.

In the ‘SERIOUS’ standard, we do not understand the reference to “or location”. Nor do we think it correct to focus on the question of whether the person needs

the protection of the convention at this stage. This is a provisional “reasonable grounds” decision. See also CORRECT.

CORRECT The focus is on ‘inconsistencies in evidence’. At the reasonable grounds stage this is inappropriate.

- c. The Reasonable Grounds decision is supported by relevant, appropriately-dated, sourced objective country information relating to the propensity of trafficking in the individual’s home country and/or the country where the trafficking took place where appropriate.**

In the standard, “individual’s” not “individuals”.

Having just said in 4b that fear on return is not the relevant matter, why frame this standard around the home country when that may be irrelevant? All too often the risks to a trafficked person are first and foremost in the UK. Propensity may be irrelevant if the person’s situation is atypical. For example, a person, in whose home country there is little evidence of trafficking who has gone to work as a servant in a third country, and is extremely unfortunate in being made a captive by a powerful family and brought to the UK. Propensity is not in point, what matters is what has happened to the individual. This is in part recognised by the words “if appropriate” but these make the standards of little use to guide those making the decisions or those auditing their work. In any event, we are at a loss to think of a country in the world where the movement of persons for their exploitation is unknown.

- d. The decision considers and gives due weight to all evidence gathered**

This is incomplete. “Due weight” makes sense only in the context of the standard of proof.

- e. Relevant mitigation factors were taken into account when assessing credibility**

“Mitigating” not “mitigation.”

The SERIOUS standard refers to the presence of mitigating factors ‘which were not taken into account or were given inappropriate weight but this was not decisive to the issue. Please see comments on 1c above.

- f. Relevant child mitigation factors were taken into account when assessing credibility**

The title of this standard, particularly “child mitigation factors”, is language so compressed as to be incomprehensible. It might help to say “That the person is a child was not taken into account properly...” Put the child at the centre of the sentence, as they should be at the centre of the decision.

g. The correct standard and burden of proof been applied

Given the very low standard of proof, any circumstances where an incorrect standard and burden of proof has been applied is CRITICAL regardless of whether it leads to a flawed decision. As above, one will only know if the decision is flawed with hindsight and it is therefore not appropriate to include in marking standards. Further 'inappropriate phrasing' equates to the wrong standard of proof being applied. The standard of proof is very clear and therefore should be phrased correctly.

h. The decision is not speculative.

This standard needs to be clear in terms of the standard of proof. A refusal for 'speculative' reasons would not be appropriate at this stage, but given that the decision is a protective one to be ratified or overturned later it is appropriate to speculate that the best explanation of the available evidence is that the person has been trafficked.

i. Where trafficking is material to the Asylum/HR claim, there is consistency on the trafficking aspect between the Asylum/HR decision and the decision of the CA.

This standard should not apply at the reasonable grounds stage.

5. Efficiency and Flow

No comment.

b. The decision is efficient with its length reflective of the nature of the case

A decision can be unnecessarily lengthy without being difficult to follow.

f. Where a positive decision has been made and the potential victim of trafficking is not already receiving specialist support has the CA offered or arranged secure accommodation and support.

SERIOUS Unjustified delays in addressing immediate and serious welfare issues may be critical. The persons in question may have been trafficked and may continue to be at risk.

MINOR Delay in addressing welfare is serious.

CORRECT It is not enough that 'steps have been taken' if they have not been effective.

See point 6 above. As above, it cannot be enough merely for the first responder to make the referral. There should be a mechanism for following up with a named contact.

g. Has the Reasonable Grounds decision been made within the defined timescales

SERIOUS We consider that the word “moderate” is misplaced. A delay of over 10 days is not moderate. It may be critical. The standard of proof is low to enable a decision to be made promptly. If it takes more than 10 days to decide that the person is not a potential victim of trafficking, then they are such a potential victim and the reasonable grounds’ decision should be positive.

National referral Mechanism Conclusive Decision Marking Standards

The standards under the conclusive decision heading are largely the same as those in the above category . Comments concerned not with the standard at the reasonable grounds stage but other aspects of the standards apply *mutatis mutandis*.

In addition

3a The decision letter /consideration minute contains a concise yet accurate summary of the PVoTs immigration history

CRITICAL Should include ‘key facts relevant to the trafficking claim not being considered’. This reference should be included in the conclusive decision category, given the importance it may have, in the same way it has been included in the corresponding section under reasonable grounds category.

3b The decision letter /consideration minute contains a full summary of the case

CORRECT It is stated that the summary should contain ‘*reference to issues core to the trafficking claim including how recruited, how travelled, and any deception, threats, coercion and exploitation involved*’. It should be made clear that these will not always be available.

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