

ILPA SUBMISSION TO THE REVIEW OF THE NATIONAL REFERRAL MECHANISM, ENDORSED BY THE ANTI-TRAFFICKING LEGAL PROJECT

INTRODUCTION

This submission is from the Immigration Law Practitioners' Association and is endorsed by the Anti-Trafficking Legal Project.

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

The Anti-Trafficking Legal Project (ATLeP) is a network of solicitors, barristers and specialist practitioners who advise, represent and support victims of trafficking and other vulnerable people. The network was set up to share expertise, exchange and make available useful resource materials and help develop good practice within the legal sector in dealing with vulnerable clients.

A. IDENTIFICATION

Is the identification and referral process for potential victims of trafficking effective?

1. No.
2. There is a legal obligation upon States to investigate breaches of Article 4 of the European Convention on Human Rights, to protect victims of such breaches and to punish perpetrators (*Siliadin v France* (2006) 43 EHRR 16, paragraphs 117 to 122; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 (paragraphs 285 to 288)). The UK's failure effectively to identify and protect trafficked persons is in breach of its obligations under that Article. Obligations extend to those whom the authorities know or ought to know are at real risk of being trafficked in future¹. In *Rantsev* the European Court of Human Rights held that trafficking, within the meaning of Article 3(a) of the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 15 November 2000 (the 'Palermo Protocol') and Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings² ('CoE Anti-Trafficking Convention') falls within the scope of Article 4 of the European Convention on Human

¹ *Rantsev*, paragraph 307.

² CETS No. 197.

Rights and interpreted the UK's obligations under Article 4 of the European Convention on Human Rights consistently with the CoE Anti-Trafficking Convention.

3. As set out in *CN v UK* (2013) 56 EHRR 24 at paragraph 29, the procedural obligation to investigate arises where there is a credible suspicion that a person's rights under that article have been violated. The obligation arises even if no complaint is received. As the Court held in that case :

“69...A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency”

4. In *OOO v Commissioner of Police for the Metropolis* [2011] EWHC 1246 QB, Wyn Williams J rejected (paragraphs 155 to 158) the submission on behalf of the Commissioner of Police that the duty only arose when a victim is identified “if not by name then certainly by other reliable means”.
5. In *CN* it was held that for an investigation to be effective it must be independent of those implicated in the events and capable of leading to the identification and punishment of the persons responsible (paragraph 69³). Implicit in this is that it should be capable of identifying the trafficked person.
6. The CoE Anti-Trafficking Convention and the EU Directive on Combating and Preventing Trafficking⁴ (‘EU Anti-Trafficking Directive’) both envisage two main decisions in the identification and protection of victims of trafficking:
 - a. a decision that there are ‘reasonable grounds to believe’ that a person is/has been trafficked (‘reasonable grounds decision’)⁵. This triggers a reflection and recovery period which in the UK is 45 days;
 - b. a decision that there are conclusive grounds to believe that a person is/has been trafficked⁶.
7. See also Article 5(3) of the EU Charter of Fundamental Rights.
8. Under the current system there are in effect three decision-making stages to the identification. To get to the ‘reasonable grounds’ stage, a person has to be referred formally into the National Referral Mechanism system via a designated first responder.
9. We are aware that there is ongoing work on proposals for a National Referral Mechanism for children and do not wish to pre-empt discussion on these detailed proposals in this paper. We highlight that the exploitation of children is child abuse and that any response to it must be embedded within existing child protection systems. All our comments on multi-agency working and rights of appeal apply equally to children's cases and we underscore, as we have done so many times before, the importance of

³ See also *OOO* .

⁴ Directive [2011/36/EU](#) of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [O] L 101 of 15.4.2011].

⁵ Council of Europe Convention Article 10(2); Directive 2011/36/EU . 18th preamble.

⁶ *Ibidem*.

guardians for trafficked children *inter alia* competent as a matter of law to give instructions in the child's best interests to legal representatives where the child is not able to do so.

Referral by a first responder

10. The current structure of referrals via designated first responders creates barriers to effective identification of trafficked persons.
 - a. The referral relies on a potential trafficked person coming to the attention of a designated first responder or person who is aware of the National Referral Mechanism and able effectively to bring the individual to the attention of a designated First Responder to be referred;
 - b. A trafficked person wishing to refer him/herself to the National Referral Mechanism cannot do so. For an individual to be referred s/he must be able identify that s/he is trafficked, be aware that the National Referral Mechanism exists and that a referral can and needs to be made and know to whom s/he has to present to so that a referral can be made.
11. Over time, the National Referral Mechanism has thus created a further stage of decision-making at the referral stage. This is a regrettable development and has had the effect of preventing trafficked persons from coming to the attention of the “competent authority” at all. It has also resulted in persons not being eligible for support until the “competent authority” has reached its decision. The ‘reasonable grounds’ decision is meant to be the filter, and to have a low threshold.
12. In our experience and as attested to in expert evidence in cases in which we have acted, having to repeat an account of exploitation to multiple organisations before being referred and/or able to access support, is detrimental to the well-being of trafficked persons and increases their sense of being disbelieved.
13. Funding constraints mean that some first responders are not able swiftly to set aside time and arrange an appropriate interpreter so that they can interview the person and make any necessary referral and determine if there are sufficient indicators to warrant a referral⁷. It is our experience that an interview at this stage can often take a number of hours as potential trafficked persons may be very distressed and at risk⁸.
14. The referral and reasonable grounds stages duplicate each other to a large extent and should be amalgamated saving time, thus giving effect to the obligations under Article 4 of the European Convention on Human Rights described above, and avoiding duplication of resources and problems for the trafficked person. The distinction between the roles of a first responder’ and a “competent authority” making the reasonable grounds decision is artificial and unnecessary. There is delay because once a potential trafficked person has come to the attention of a designated first responder, a

⁷ Hidden in Plain Sight: three years on Updated analysis of UK measures to protect trafficked persons Anti Trafficking Monitoring Group, October 2013, page 12, see http://www.antislavery.org/includes/documents/cm_docs/2013/h/hidden_in_plain_sight.pdf (accessed 22 July 2014). See also *It happens here: equipping the UK to fight modern slavery* Centre for social justice, March 2013.

⁸ See the Explanatory Memorandum to the CoE Anti-Trafficking Convention para 146, those “*who break free of their traffickers’ control generally find themselves in a position of great insecurity and vulnerability*”.

different body, the “competent authority”, makes the reasonable grounds decision, and usually on the papers alone, at arm’s length from the trafficked person.

15. The first responder by contrast often spends a significant amount of time with a potential trafficked person, working in the area on which they are competent, in the way in which the terms “competent authority/competent authorities” are used in other areas of national and international law including in the Office for Security and Cooperation in Europe’s National Referral Mechanism handbook⁹ to describe the State and make reference to the arm of State with responsibility for a particular area. The Explanatory Memorandum to the CoE Anti-Trafficking Convention states at paragraph 194:

“By “competent authorities” is meant the wide range of public authorities with which victims may have their first contact with officialdom”

16. The work of the First Responder will often involve more than one interview, lasting in total a number of hours. Often the First Responder will have significant experience in identifying and working trafficked persons, and thus be able to take a view on whether there are sufficient indicators to warrant a referral under the National Referral Mechanism and meet the “I suspect but I cannot prove” threshold for a positive reasonable grounds decision see *O v Commissioner of Police for the Metropolis* [2011] EWHC 1246 QB. Having a different decision-maker formalize that view, means an additional layer of administration and delay without any clear utility and all too often in information passing from the more competent person to the less competent person and from the person with more experience of the particular case to the person with less.
17. The trafficked person is required to repeat his/her narrative of exploitation to different professionals at the referral and reasonable grounds stages if interviewed. The current system does not provide the trafficked person with a specific entitlement to specialist support until a positive reasonable grounds decision has been made. This risks violating the obligation identified in *CN* at paragraph 69 that the victim or next of kin must be involved in the procedure of investigating a possible breach of Article 4 “to the extent necessary to safeguard their legitimate interests” which is the language used by the European Court of Human Rights to address matters of procedural fairness and the importance of giving a person an opportunity to deal with any adverse matters.
18. **We thus consider that there is, contrary to current practice but in line with the judgment of the European Court of Human Rights in *Rantsev*¹⁰, an obligation to afford a potentially trafficked person protection during the initial referral-reasonable grounds identification process.** The length of this stage is outside the control of the trafficked person or of the person who has made the identification and referral and the risks during this period are high.

⁹ Available at <http://www.osce.org/odihr/44346>

¹⁰ Paragraph 286: “...it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual has been, or was, at real and immediate risk of being, trafficked or exploited within the meaning of ...Article 4(a) of the Anti-trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention [European Convention on Human Rights] where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk”, see also *Osman* (1998) 29 EHRR 245 at 115.

Is the role of First Responders, in identifying and referring potential victims to the National Referral Mechanism effective?

19. It is unclear to us what training is required before an organization is designated a first responder and whether this varies depending on whether the first responder is a public authority or whether the First Respondent is a Civil Society organization.
20. Uneven patterns of referral¹¹ suggest that not all first responders are aware of the established¹² trafficking indicators and the trigger for a referral into the National Referral Mechanism.
21. In our experience, local authority social services departments seldom make a referral to the National Referral Mechanism even after a child has gone missing for suspected reasons of having been (re-)trafficked¹³.
22. Whilst the Metropolitan Police has specialist officers trained to identify potentially trafficked persons¹⁴ it is our experience that practice varies considerably between different police forces in different areas.
23. Trafficked persons continue inappropriately to be subject to prosecution including for offences which are a manifestation of their exploitation. The failure of designated First Responders to identify trafficked persons in the context of criminal proceedings is evident from a recent series of judgments from the Court of Appeal's criminal division: see *R v O* [2008] EWCA Crim 2835; *R v L and Ors* [2013] EWCA Crim 991.
24. The 'reasonable grounds' decision threshold is a low one – 'I suspect but I cannot prove'. See *O v Commissioner of Police for the Metropolis* [2011] EWHC 1246 QB and *CN v UK*, cited above. In *CN* it was held that the duty had been triggered by *CN*'s having provided a detailed statement that was "not inherently implausible". It is reached when indicators of trafficking are identified. The court in *CN* held:

"...that the domestic authorities conducted any investigation into the applicant's complaints strongly indicates at, at least on their face, they were not inherently implausible"
25. **Thus, the decision of the first responder to refer should be treated, without more, as the point at which the protections attendant upon receiving a 'reasonable grounds' decision kick in, i.e. as the equivalent of a reasonable grounds decision under the current system.** This would be in line with recognising that an effective mechanism for protection must enlist the help of all actors in the area of their competence, with the consequences of identification then binding on all. It would also reduce the risk of immigration status or potential criminal culpability colouring a decision.

¹¹ *Hidden in plain sight*, *op.cit.* at 2.2.

¹² See e.g. UN Office of Drugs and Crime *Human Trafficking Indicators* http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf (accessed 22 July 2014)

¹³ See *Trafficked Children and Missing* ECPAT UK and Missing People November 2013, http://www.ecpat.org.uk/sites/default/files/trafficked_children_and_missing_2.pdf, (accessed 22 July 2014)

¹⁴ See <http://content.met.police.uk/Site/scospececoncrime> (accessed 22 July 2014) with particular reference to Operation Maxim.

26. We draw on the experiences of Local Safeguarding Boards both for children¹⁵ (and the related Multi-Agency Safeguarding Hubs or MASH) and adults¹⁶, which comprise of a pool of professionals from different sectors, such as social services, police, health and in some areas, UK Visas and Immigration. The expertise of these boards is multi-disciplinary and they facilitate multi-agency working to achieve speedy identification and protection of potential victims of abuse. Multi-agency working is a requirement of Article 10(1) of the Council of European Convention on Action against Trafficking in Human Beings¹⁷. The Explanatory Report to that Convention provides

“127 ...Through the identification process, competent authorities seek and evaluate different circumstances, according to which they can consider a person to be a victim of trafficking.

128...Article 10, paragraph 1 requires that Parties...ensure that [their competent authorities] cooperate with one another as well as with relevant support organizations.”

27. There would remain a need for referrals but this is ordinary multi-agency working and also creates the possibility of self-referral with, for example sexual health clinics, legal representatives, schools and colleges as well as individuals. This better reflects the structure outlined in both the CoE Anti-Trafficking Convention and in the EU Anti-Trafficking Directive. Both envisage¹⁸ that the reasonable grounds’ decision can be made by a range of people who are all competent authorities, and whose expertise are drawn from different disciplines, such as the police, local authority social services or health personnel and immigration authorities.
28. **To ensure that the information gathered by the first responder/reasonable grounds decision-maker is recorded and remains available, the current referral forms should be reviewed drawing on, *inter alia*, the experiences of those who have used it to date.**

How can the National Referral Mechanism process encourage more victims to come forward, be identified and support criminal investigations

29. Both the CoE Anti-Trafficking Convention and the EU Anti-Trafficking Directive are structured so that potential trafficked persons are first identified¹⁹ and provided with support²⁰ then questions of immigration control²¹ and involvement in criminal proceedings²², if relevant, are dealt with.
30. The current identification process, with interviewing at the reasonable grounds stage, and the linking of immigration decisions to the conclusive grounds decision, is in our

¹⁵ See *Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children*, Department of Education, March 2013, Chapter 3

¹⁶ See e.g. the boards in Bath and North East Somerset, Dorset, Nottinghamshire and Buckinghamshire.

¹⁷ See also paragraph 127 of the Explanatory Report to the Convention and see Article 29.

¹⁸ Directive 2011/36/EU Article 11 and *passim*; CoE Anti-Trafficking Convention Article 10 and *passim*.

¹⁹ Directive 2011/35/EC Article 11; CoE Anti-Trafficking Convention Article 10.

²⁰ Directive 2011/35/EC Article 11, 13 and 14, CoE Anti-Trafficking Convention Article 10.

²¹ Directive 2011/35/EC Article 11, CoE Anti-Trafficking Convention Article 13.

²² *Ibidem*.

experience discouraging potential trafficked persons from coming forward to being referred via the National Referral Mechanism.

31. There are not safeguards in the current system to ensure that, for example, best evidence for use in subsequent prosecutions of traffickers is achieved. UK Visas and Immigration is not tasked with supporting victims of crime through a criminal investigation. That expertise sits with the police, social services and health services.
32. As was stated by the Lord Chief Justice in *L and Ors v R* [2013] EWCA Crim 991, victims of trafficking are victims of crime. They should be treated as victims, not criminals (or illegal entrants) and should be afforded protection in the State in the criminal investigation and more generally.
33. **Identification must be separated from immigration control.**
34. **Consideration must be given to the way in which a potential trafficked persons is signposted and/or substantively assisted to ask the police to instigate an investigation into their trafficking circumstances. The trafficked person cannot and should not be expected to do this without support.** S/he may have very little experience with public authorities, be fearful of public authorities because of past experience and be unaware of the protection that may be offered in the context of a criminal investigation and trial.

B. DECISION MAKING

Is the current decision-making process including quality and consistency of decision-making effective and timely?

35. As described above, the process of getting before a competent authority for it to make a reasonable grounds decision is not timely or effective.

Reasonable grounds

36. It is our experience that the decision-making at the reasonable grounds stage has been inconsistent and often delayed. Proper and safe identification of trafficked persons must be addressed. Training needs to be provided regularly to ensure best practice across all organisations involved in identifying and protecting trafficked persons.
37. A 'reasonable grounds' decision is currently the gateway to support, to a reflection and recovery period, to free legal advice²³ and is at present a clear trigger for release from immigration detention²⁴. Legal advice is an essential part of what a potential trafficked person requires during the reflection and recovery period to decide what s/he wants to do²⁵.

²³ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, paragraph 32.

²⁴ Enforcement Guidance and Instructions Chapter 55 at 55.10.

²⁵ Directive 2011/35/EC Article 11, CoE Anti-Trafficking Convention Article 13.

38. There has been historically, and continue to be in some cases²⁶, delays from the point of referral into the National Referral Mechanism to the making of a ‘reasonable grounds’ decision, which according to the Competent Authority’s published guidance ought to be made within five working days. Since the establishment of the Leeds National Referral Mechanism hub the time scale between referral and a reasonable grounds decision (whether positive or negative) has in our experience shortened and ‘reasonable grounds’ decisions are made much sooner after referral than previously.
39. Where they are not made by the hub, the decisions are taking much longer, for example where the decision is taken by the Criminal Casework directorate because the potential trafficked person is also on remand or is a serving prisoner (including in cases where the offence is related to the exploitation). In these cases, there is often (not always) delay between referral and a reasonable grounds decision of several months. It is not clear to us whether the allocation of decision-making for this cohort of persons is what is causing the delay. If the defendant/serving prisoner is a victim of trafficking and their criminal culpability arises out of their exploitation, these are factors increasing urgency rather than otherwise.
40. At the ‘reasonable grounds’ stage, we do not identify consistency of approach as to what evidence needs to be gathered, whether interviews are conducted, and the extent to which there is communication between the potential trafficked person, their legal representative or support worker. In our experience there is no correlation between the level of information provided by the first responder and whether or not the “competent authority” requests an interview. We have very little experience of the “competent authority” making further inquiries with the first responder or support agency assisting the potential trafficked person in the course of the ‘reasonable grounds’ decision-making although, with the appropriate consents, this could be done as an alternative to interviewing where this were in the best interests of the potential trafficked person.

Conclusive grounds

41. There remains, in our experience, no consistency in the time taken to make a “conclusive grounds” decision. In our experience most conclusive grounds decisions are made well outside the 45-day reflection and recovery period; this has significant implications for continuing support during what in effect is an extended reflection and recovery period (see ‘Access to Support / Level of Support’ below) and puts the UK at risk of breach of its obligations under Article 4 of the European Convention on Human Rights (see the decision in *CN v UK* cited above, at paragraph 69) and of Articles 10 and 12 of the Council of Europe Convention on Action against Trafficking in Human Beings.
42. Some delays appear to be because an immigration decision is also pending. Whilst there may be in some cases be a relationship between trafficking and a claim for international protection, a decision on the latter should not hold up identification. The accurate and speedy identification of a person as a victim of trafficking may assist in the determination of an immigration/asylum application.

²⁶ See *Hidden in plain sight*, *Op.cit.*

Quality of decision-making

43. The “competent authority” has in the past failed to recognise as trafficked those who escaped from their trafficking situation for some time before coming to the attention of a First Responder and/or the Competent Authority. See *R (Atemawan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin): the passage of time between the exploitation and referral to the National Referral Mechanism did not render a person “not a victim of trafficking”. The Divisional Court made the important distinction between identification, which relates to acknowledgment of a status, and consequences of having been identified: what, if any, support/protection is required to be afforded to the trafficked as a result. A person’s support and protection needs are not bounded by their being a trafficked person although being recognised as such may give them additional rights and entitlements.
44. As with the reasonable grounds decision, there is little clear information about that further inquiries are made by a ‘competent authority’ during the reflection and recovery period. The decisions we see almost always refer to widely available objective country-specific evidence on trafficking. Beyond this information, it is our experience that at the conclusive grounds stage, there is again very little communication/contact with the support agency who is providing assistance to the potential trafficked person and nor is there normally an interview with the potential trafficked person directed at the question of his/her exploitation.
45. Where the person has a parallel immigration application e.g. an asylum/humanitarian protection claim/human rights claim, we have identified a tendency to rely on the asylum interview record even though the interview is conducted for a different purpose, that of identifying future risk. An interview to identify a person as trafficked should be focused on describing treatment in the past, the gathering of intelligence and assessment of support needs. There may be some overlap but information given in one context for one purpose should not be relied on out of context without providing an opportunity, either by written representations or a separate interview, to clarify or expand on relevant matters.
46. Conflation of asylum and trafficking procedures also obscures that while a person must, but is not obliged to, assert a claim for international protection to trigger an investigation into whether they are an asylum seeker entitled to protection or not, the State’s obligations to investigate prosecute and punish breaches of Article 4 of the European Convention on Human Rights arise independently of any complaint, see *Siliadin v France* (2006) 43 EHRR 16, *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, *CN v UK* (12013) 56 EHRR 24.
47. We identify flaws in the decision-makers’ understanding of the definition of trafficking and the three elements:
 - i) persons internally trafficked subsequent to arrival from abroad have not been recognized as trafficked because it is said that they have not been transported into the UK for the purposes of exploitation;
 - ii) matters of consent have been misunderstood, e.g. victims of sexually exploitation have not been recognised as trafficked because they willingly came to the UK with an agent/a person who promised them a better life and work only to subject them to prostitution;

iii) the concept of abuse of power/position of vulnerability has been misunderstood. Children are still often found not to have been trafficked because they consented to go with a stranger adult even though consent plays no relevance in determining whether a child is a victim of trafficking in human beings. We identify particular problems where the person was exploited as a child but then reached the age of majority as though the person suddenly is able to, and does consent to his/her continued exploitation at this stage.

48. An example of such flaws is found in *AS (Afghanistan) v SSHD* [2013] EWCA Civ 1469 where, in the words of the Court of Appeal the First-tier Tribunal judge “permitted himself to observe that the Authority’s conclusion that [A] had not been a victim of trafficking was “astonishing”. See also *AG’s reference no.’s 37, 38 and 65 of 2010, R v Khan* [2010] EWCA Crim 2880.
49. Residence permits are in our experience normally readily issued at the request of the police. However, the issue of permits on the basis of personal situation of the trafficked person, in accordance with Article 14(1)(a) of the Council of Europe Anti-Trafficking Convention remains rare. We identify that there is little inquiry into the person’s personal circumstances prior to the conclusive grounds decision²⁷ and thus it is likely that there is insufficient information to make an informed decision regarding the issuing of a residence permit.
50. Since 2013²⁸ permits are being issued with a restriction on public funds. Given that permits are issued outside the rules and on the basis of circumstances which include safety, physical and mental health and family situation²⁹, evidence as to whether it is appropriate to impose such a restriction should be gathered prior to the making of a decision and given appropriate consideration. Many trafficked persons have been coerced into exploitative employment and/or debt bondage by their traffickers³⁰ and may be left vulnerable to future exploitation if not provided with support.

Right of appeal

51. In-keeping with the principles of fair administrative decision-making redress should be provided beyond the department³¹ and a right of appeal afforded against a refusal to recognise a person as trafficked. To preserve the necessary distinction between trafficking decisions and any connected immigration and/or asylum decisions, a right of appeal against a refusal to recognise a person as trafficked should be to a tribunal other than the First-tier Tribunal (Immigration and Asylum Chamber). In that way the specific issues arising in relation to trafficking decisions, the evidence upon which such decisions are based, and the international obligations applicable will not suffer from cross-pollination from immigration concerns.
52. There is currently no right of appeal against the refusal to grant a residence permit to a person conclusively identified as a victim unless such a right arises under another head of

²⁷ See *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC).

²⁸ See *Hidden in Plain Sight*, op.cit. at 4.7.

²⁹ See *UK Visas and Immigration Discretionary Leave*, v. 6 24 June 2013 (accessed 22 July 2014).

³⁰ See e.g. the Child Exploitation and Online Protection Unit *The Trafficking of women and children from Vietnam*, 20122.

³¹ *Report of the Committee on Immigration Appeals*, August 1967, Cmnd. 3387 and see *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443.

appeal. When the Immigration Act 2014 comes into force it will be important that a person refused a residence permit is treated as having made a protection or human rights claim³² and thus afforded a right of appeal³³. A residence permit serves as a further protective measure to ensure that a trafficked person can continue to recover.

Is there a relationship between an individual's claim for asylum and their trafficking claim? If yes, what impact, if any, does this have on the outcome of the trafficking decision?

53. Current practice is that asylum claims and trafficking identification mechanisms run in tandem. Trafficked persons who claim asylum are often interviewed about their asylum claim during their reflection and recovery period. That interview is then in turn relied on in making a conclusive grounds decision. The problems with this approach are explained above.
54. Some trafficked persons will have a protection claim based on circumstances related to their trafficking, for example to a risk of re-trafficking or to membership of a particular social group³⁴ of former trafficked persons who risk stigma, revenge or further debt bondage as a result of their trafficking.
55. However, this overlap will not always exist. Refugee status looks to the risk of future persecution. Identification as a trafficked person, is the establishing of a status based on past experience and having been transported/harboured/received/transferred by means of abuse of power/coercion, etc. for the purposes of exploitation. A person who falls within the definition of trafficking may not require protection against future persecution. Recognition as a trafficked person nonetheless affords significant benefit because it gives rise to necessary consideration of protective measures such as specialist support and compensation directed at redressing the previous harm, non-prosecution for crimes committed in the course of exploitation and/or leave to remain.
56. A problem with simultaneous decisions arises when the claim for international protection is conflated with identification as a victim of crime³⁵. Historically trafficking decisions were made by the same caseworkers who had responsibility for deciding asylum claims. We saw confusion and flawed decisions. Nowadays we understand that decisions are often made by different decision makers but are still made simultaneously and on the basis of a single interview. This has led to cases where the National Referral Mechanism "competent authority" has decided that an individual is a trafficked person while an asylum caseworker either does not accept this, or does not come to a view.
57. Identification as a trafficked person should take place before consideration is given to refusing asylum or humanitarian protection (a grant of asylum may be made at an earlier stage if there is already sufficient evidence on which to do so without further investigation being required). There is no reason why a person should not be given a residence permit as soon as they are identified as trafficked albeit that the claim for asylum is pending. Trafficked persons may require time and psychological help before

³² Nationality Immigration and Asylum Act 2002, s 1132 (prospective) as amended by the Immigration Act 2014.

³³ *Ibid*, s 82.

³⁴ UN Convention Relating to the Status of Refugees, Article 1A.

³⁵ "...whether trafficked from home or overseas, they are all victims of crime. That is how they must be treated..." *L et ors* [2013] EWCA Crim 991, Lord Chief Justice of England and Wales at paragraph 2.

they are able to give a coherent account on the basis of which a decision on the claim for asylum could be made.

Should the Competent Authority decision-maker make a decision by reference to a ‘reasonable degree of likelihood’ test instead of a balance of probabilities test?

58. **The reasonable grounds threshold of ‘I suspect but I cannot prove’ is appropriate at the initial stage.**
59. At the conclusive grounds stage the test is the balance of probabilities³⁶. By comparison, the asylum threshold is that of a reasonable degree of likelihood³⁷. The standard of proof reflects the difficulty in determining past fact and need to afford the asylum-seeker protection.
60. Identification as a victim of trafficking can involve difficulties in determining past fact and is also relevant to the question of current and future protection needs.
61. There are thus similarities in the analysis and we consider that **a reasonable degree of likelihood test is appropriate**. This should not however lead to a conflation of the asylum and trafficking decision-making processes.

Should a finding that a person is the victim of trafficking be uncontestable by the CPS in any subsequent prosecution against the victim?

62. Article 8 of the EU Anti-Trafficking Directive states as follows:

‘Member States shall in accordance with the basic principles of their legal systems take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in article 2 [trafficking]’

63. See further recital 14 and Article 8 of Directive 2011/36/EU and their application in *R v M(L)* [2010] EWCA Crim 2327 and *R v L* [2013] EWCA Crim 991.
64. The Crown Prosecution Service guidance on prosecution of trafficked persons for offences associated with their trafficking³⁸ recommends that prosecutions should only be pursued when in the public interest to do so³⁹.
65. The basic premise is therefore that once identified as victims of trafficking, individuals should not be prosecuted for offences relating to their trafficking unless it is firmly in the

³⁶ Victims of Human Trafficking, Competent Authority Guidance, v. 1.0 Home Office 24 October 2013.

³⁷ *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958).

³⁸ Crown Prosecution Service Legal Guidance: *Human Trafficking, Smuggling and Slavery, A three-stage approach to prosecution decision*, at http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a19 (accessed 31 July 2014).

³⁹ See further *LM et ors* [2010] EWCA Crim 2327.

public interest to do so. In practice, where individuals present with cluster problems – criminal prosecution, immigration, civil claims against traffickers, it is the criminal matter which proceeds at the fastest pace. Early identification of trafficked persons is therefore essential to enable criminal proceedings to be stayed or adjourned.

66. A positive finding that a person is a victim of trafficking should be persuasive. However a negative decision, whilst relevant, is not necessarily indicative or determinative of a person not being trafficked. Whether there is a formal National Referral Mechanism for identification, the obligation is on the state as a whole to identify, protect and safeguard persons who have been trafficked. Thus the Crown Prosecution Service has an independent obligation to consider trafficking. The Crown Prosecution Service should raise concerns with the “competent authority” decision maker, sharing this information with the victim/defendant and his/her legal team.
67. Were criminal proceedings nevertheless to be contemplated against an identified victim of trafficking, we should expect express reasoned confirmation by the Crown Prosecution Service that such proceedings were considered to be in the public interest. The trafficking finding should be considered to be prima facie evidence of a common law defence of duress⁴⁰, which is a complete defence and would need to be displaced by the prosecution. See further *R v O* [2008] EWCA Civ 2835:

“...no steps were taken by the defence to investigate the history. No consideration was given by the defence as to whether she might have a defence of duress. The possibility that she might have been trafficked was ignored. There is nothing in the transcript to suggest that any thought had been given to the State’s possible duty to protect her as a young victim. Nobody considered that if was 17 or less, she should not have been in the Crown Court at all....We hope that such a shameful set of circumstances never occurs again” (Laws LJ paragraphs 25 to 26).

68. We also highlight that the statutory obligation to deport a “foreign criminal” under s. 32 of the UK Borders Act 2007 does not apply if the Secretary of State thinks that this would convert the UK’s obligations under the Council of Europe Anti-Trafficking Convention or under the European Convention on Human Rights, including Article 4.

C. DATA COLLECTION

Is there effective victim data collection and data sharing between relevant partners?

Can and should data captured via the National Referral Mechanism support the wider modern slavery threat assessment and intelligence picture. If so, how?

How can National Referral Mechanism data support the operational intelligence response?

69. The data which are currently collected are:

⁴⁰ *Director Of Public Prosecutions For Northern Ireland v Lynch* [1975] UKHL 5 (12 March 1975).

- UK Human Trafficking Centre National Referral Mechanism statistics on referrals to the National Referral Mechanism⁴¹;
 - UK Visas and Immigration statistics on referrals to the National Referral Mechanism and positive reasonable grounds' decisions;
 - Child Exploitation and Online Protection Unit, Association of Chief Police Officers and crime statistics on reported crimes, numbers of victims, origins of victims;
 - Information from interviews.
70. The reasons data should be collected are:
- To monitor performance of protection mechanisms and decision-making, measuring numbers of referrals, numbers of persons identified, countries of origin and the stage of the process where identification took place;
 - Data-sharing between statutory and non-statutory agencies – to inform crime prevention, to disrupt trafficking networks, to respond to requests for protection mechanisms;
 - To provide intelligence to inform decision-making on requests for protection as trafficked persons and for human rights/ asylum protection;
 - To manage and allocate of resources to ensure an adequate response to prevention, protection and identification of trafficked persons.
71. Currently it is unclear to us which agency is collecting which data, with whom the data is shared, to which agency we and others working with trafficked persons should provide data , and who bears the responsibility to request or share data. For example, where the police are conducting a criminal investigation into a trafficking allegation and the Home Office competent authority is in the process of making a conclusive grounds' decision, there is no consistency practice as to data sharing.
72. Data collection is patchy. For example, data collected under police operations such as Pentameter 2 and Acumen indicated the numbers of trafficked persons identified as working in sexual exploitation but did not provide follow up information about the outcomes for those individuals and the data collected by the National Crime Agency⁴² and UK Visas and Immigration provides raw figures of numbers of referrals and types of exploitation but again, does not provide information on outcomes. There is no data available on whether those identified under Pentameter 2 made protection claims, whether they were successful, whether they subsequently disappeared, or whether there is evidence of re-trafficking.
73. We are aware of young people who were placed in semi-supported accommodation by local authorities, who were re-trafficked and subsequently came to the attention of the authorities again and received positive asylum/human rights/trafficking decisions but the incidence of this is not recorded. Recording the incidence of re-trafficking within the UK could inform prevention⁴³ and investigation operations and provide information in relation to the risks of re-trafficking if the victim is removed from the UK.

⁴¹ For the most recent (October to December 2013) statistics, 0065 UKHTC see <http://www.nationalcrimeagency.gov.uk/publications/210-ukhtc-nrm-statistics-oct-dec-2013/file> ,

⁴² See e.g. *United Kingdom Pentameter 2 Statistics of Victims recovered and Suspects arrested during the operational phase*, UK Human Trafficking Centre. Project Acumen, ACPO Migration and Associated Matters, *Setting the record: The trafficking of migrant women in the England and Wales off-street prostitution sector*, ACPO 2010.

⁴³ See *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC).

74. Information provided with the referrals from first responders varies. The National Referral Mechanism referral forms⁴⁴ requests information in a tick-box form but some first responders, particularly NGOs support this with either a statement or narrative account from the person referred and/or an analysis provided by an experienced trafficking support worker. It is unclear what is done with the additional information provided in this form, which may be trafficking intelligence, particularly when it concerns routes of entry, obtaining documents, names of perpetrators, places of exploitation.
75. Support organizations and legal representatives hear accounts from individuals that reveal patterns. Individuals who have been trafficked refer others to the same organisations for assistance and again patterns are revealed which could assist in identification of trafficked persons and disruption of networks if collated. When information is provided directly to the police, it is unclear to what extent it is collated and shared within the police force and to what extent there are adequate resources to do this.
76. For example, in 2003/4 (before the introduction of specific trafficking offences) the police were pursuing a prosecution for false imprisonment and sexual offences against the trafficker of a woman who had been arrested following deportation and return to the UK and then placed in Poppy Project care. Another woman was subsequently placed in the Poppy Project. It was only by chance that the same keyworker assisted both women, who did not know each other, and realised they had been trafficked by the same network. She alerted the police and the subsequent prosecution was successful because the women's stories supported each other. Had the women's supporting statements been reviewed by a central agency and the names of the traffickers, the routes of entry and places of exploitation been recorded and compared, the similarities would also have come to light.
77. As the second woman had not come to the attention of the police, the current system would not have identified the similarities in the cases.
78. National Referral Mechanism data can and should be used both to support trafficked persons and also to identify and disrupt trafficking and slavery and exploitation networks and to prosecute those carrying out exploitation. For this to be done effectively **the data collected therefore need to be broader and include:**
- Numbers of National Referral Mechanism referrals, broken down by country of origin, gender, types of exploitation;
 - Numbers of National Referral Mechanism referrals where persons have been re-trafficked, either cross border or within the UK;
 - Ratio of positive decision making at each stage of the process, broken down in the same way (i.e. ratio of positive decision-making on identification of male victims of trafficking for cannabis cultivation from Vietnam) and indications of whether the decision was altered after legal challenge;
 - Whether residence permits were issued, broken down as above;
 - Whether other protection claims were made, e.g. asylum, and whether successful;
 - Places of exploitation, routes of entry, document usage and fraud;

⁴⁴ See <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms> for forms as of 25 June 2014 (accessed 22 July 2014).

- Data on “conclusive grounds” decisions. This information is not currently published by the UK Human Trafficking Centre. UK Visas and Immigration are now issuing Conclusive Grounds decisions sometimes confirming the trafficking identification but refusing a residence permit, in many cases years after the person has achieved protection. This appears to be being done to generate statistics on the outcomes of identification procedures. The decisions are difficult to interpret because the persons have secured alternative leave to remain in the UK and the evidential basis for the decisions is unclear.
- Where trafficked persons have secured leave to remain in the UK by other means this should be recorded;

79. The reasons for interviewing trafficked persons when they have already achieved leave to remain in the UK through an asylum claim or when a claim for asylum is under consideration need to be clarified, particularly whether the purpose of the interview is to gather statistics on decision-making or intelligence on trafficking experiences.

80. There needs to be a better system of providing trafficking information or intelligence to the police/National Crime Agency. The UK Human Trafficking Centre provides a 24-hour tactical response but this is geared to making a report of trafficked persons in immediate need of assistance rather than to passing on information about a trafficking network where the police are not actively pursuing an investigation. In essence, there is currently no mechanism for providing intelligence where the police decide there is no prosecution to pursue.
- 81. Potential trafficked persons must consent to referral to the National Referral Mechanism and should be asked for consent before information is shared.**
82. **The obligation to request information from other agencies when making any decisions on residence permits should be enforced and confirmation provided to trafficked persons that such information has been requested.** Currently there is no consistency in the information considered when making decisions regarding residence permits.

D. Access to Support

Who should be entitled to access victim support through the National Referral Mechanism?

83. At present, trafficked persons are only eligible to access support *if* they receive a positive Reasonable Grounds decision and only for a 45-day reflection and recovery period⁴⁵. These criteria for eligibility make four problematic assumptions:
- a. That the person must be referred formally to the National Referral Mechanism by a designated First Responder;

⁴⁵ See *Help and support for victims of human trafficking: your rights if you've been trafficked into exploitation in the UK* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253621/human-trafficking-english.pdf (accessed 31 July 2014).

- b. That to be a 'victim' s/he must receive a positive Reasonable Grounds decision. There is no automatic right of appeal/challenge against a negative Reasonable Grounds decision;
 - c. That it only take 45 days total (or rather that is all that is needed) for a person to reflect and recover;
 - d. That persons' needs arising from their exploitation will not require support after the 45-day reflection period (or after they receive a positive Conclusive Grounds decision). [Or perhaps the assumption is that whatever the victims' needs, it is no longer an issue for the National Referral Mechanism.]
84. In the same way that in the UK access to asylum support arises as soon as a person registers an asylum claim and appears to be destitute (the s 95 Immigration and Asylum Act 1999 threshold), support should be provided as soon as there are credible suspicions someone may be trafficked. This is required by Articles 10(2) and 12 of the Council of Europe Convention on Action against Trafficking in Human Beings. This arises where it appears to the public authority (to whose attention the person has come) that there are indicators of trafficking. This should be irrespective of whether a formal referral to the National Referral Mechanism has been effected (not least because if there are indicators, it follows there should be a referral, but also because the requirement of a formal referral is largely dependent on the referral agency acting as it ought to rather than the need of the potential trafficked person).
85. Through this review there may be changes to the National Referral Mechanism but our observations as to the trigger for support carry over to a new structure. By reference to the current National Referral Mechanism, the trigger should arise at the stage of a referral. It should not be necessary for a formal referral to be made for the trigger for support to arise. A referral should be made where there are credible indicators of trafficking; this could arise when police raid a brothel and find a victim of sexual exploitation; or when social services investigate a private fostering arrangement to name two scenarios. See our comments on initial identification above.
86. Currently, between referral and a decision on reasonable grounds, a person is not provided with support although s/he has presented with support needs.
87. A child is likely to be able to access support via a local authority children's services when s/he comes to their attention. There is a structure for the general provision of support to children under the Children Act 1989. Support for children is more or less immigration-neutral and this should remain the case.
88. The position for adults is different. Not all trafficked persons will claim asylum, including because they do not have a claim for asylum or because they do not wish to advance such a claim. Those who do not claim asylum and have not decided what they want to do for their future (return to their country of origin or seek further leave to remain in the UK) will not, currently, be entitled to any support irrespective of whether they are destitute.
89. Trafficking gives rise to immigration concerns, support concerns, health concerns, criminal concerns, etc. Support should thus not be predicated on a claim for asylum or any other application for leave to remain. The purpose of support, as explained in the

Council of Europe Convention on Action against the Trafficking in Human Beings⁴⁶ and in the EU Directive (2011/36/EC)⁴⁷, should be directed at the needs of the victim arising out of their exploitation so that they can begin the process of recovery.

90. **The trigger for support should be where there are indicators of trafficking which currently ought to (but do not always) trigger a referral to the National Referral Mechanism – i.e. before a reasonable grounds decision is made** because:

- a. As the trafficking indicators (set out in the National Referral Mechanism forms⁴⁸, Home Office guidance⁴⁹, the *Safeguarding Children who may have been Trafficked* practice guidance⁵⁰) all recognise, trafficked persons may mistrust authorities and may have difficulties disclosing in full their accounts of exploitation. As practitioners, our experiences are that it takes some time to build up a rapport with a person to draw out the details of the exploitation. It is our experience that this can be done far more effectively if the person feels safe and his/her essential living needs are met.
- b. Many persons are at risk of re-trafficking, particularly those who may have escaped from their exploitation but have been under the control of criminal gangs. They need to be kept safe first and given an opportunity within that environment to decide what they want to do next. An analogy may be drawn with survivors of domestic violence; the approach in the UK is to provide support first, irrespective of whether the police intend to seek a criminal prosecution of the abuser or whether the family courts decide to grant a prohibitive steps order. This recognises that whatever sanctions may be levied on the abuser, the victim needs support and safety even at a stage where the domestic violence may be allegations and not proven.
- c. The need for reflection and recovery starts before the Reasonable Grounds decision. A trafficked person should be treated as such as soon as there are indicators to suggest they may be/have been exploited. There is no reason why a person who shows indicators of trafficking but has not been formally identified for whatever reason will not need the same reflection and recovery as a person who has been referred formally to the National Referral Mechanism.

- **Are the current thresholds for accessing an individual as a victim appropriate – or are they too restrictive / open to abuse?**

91. We assume the question is asking whether the current thresholds for accessing support are too restrictive/open to abuse. They are too restrictive. See above re timing.

⁴⁶ *Op.cit.* Article 12.

⁴⁷ *Op.cit.* Article 11.

⁴⁸ *Op.cit.*

⁴⁹ *Victims of Human Trafficking, guidance for frontline staff*, v. 5.0 Home Office, 21 January 2013

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275239/Human_trafficking.pdf

(accessed 22 July 2014)

⁵⁰ Department for Education and Home Office

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/177033/DFE-00084-2011.pdf

(accessed 22 July 2014)

92. Currently, adults, even where they are beneficiaries of a positive reasonable grounds decision do not always receive specialist support directed at their circumstances as trafficked persons. This is because there has been for too long a conflation of the asylum process and the National Referral Mechanism. Many persons with a positive Reasonable Grounds decision are diverted to s 95 asylum support as a matter of practice. It is our experience that many are not even offered the support available via the Salvation Army and its sub-contractors⁵¹.
93. Whether a person receives support from the Salvation Army and its sub-contractors depends largely on where in the country the person is. In our experience, in some regions specialist support is provided irrespective of a claim for asylum. In other parts of the country, trafficked persons have found that victims are almost always, diverted to the asylum support system.
94. There is currently a lack of clarity as to who can be eligible for support as a potential trafficked person/trafficked person. There is no easily accessible public document setting this out at present. There needs to be one.
95. Trafficked persons, whether they claim asylum or not, should be provided with specialist support that is directed specifically to their circumstances as trafficked persons (see further below re: level of support). This should start as soon as there are indicators of trafficking.
96. We have not come across incidents where the availability of support for trafficked persons has been subject to abuse. As explained, even who meet the current high threshold of a positive reasonable grounds decision are not always able to access support.
97. For children, the threshold for support under section 20 Children Act 1989 appears to be applicable. There appears to be nothing in place to unlock specialist support for children. The practices of the local authority children's services vary by region and by local authority. It is our experience that very few children are provided with specialist support directed at assisting them recover from their exploitation above and beyond what children under a formal care order or in voluntary care receive. There is nothing at present in the structure of the Children Act 1989 or its statutory guidance to provide for a trigger for specialist support for child victims.
98. On 17 July 2014 the Department for Education published *Care of unaccompanied and trafficked children : Statutory guidance for local authorities on the care of unaccompanied asylum seeking and trafficked children*⁵² It is necessary for that statutory guidance to link up with the National Referral Mechanism (whatever form it will take in the future) so that there is an understanding where there are indicators that a child has been trafficked arising irrespective of a formal referral or decision that s/he should be provided with

⁵¹ The Ministry of Justice/Victim Care Coordination Contract for adult victims of human trafficking in England and Wales awarded 1 July 2011 to the Salvation Army.

⁵² Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330791/Consultation_on_the_draft_regulations_and_statutory_guidance_for_local_authorities_on_the_care_of_unaccompanied_asylum_seeking_and_trafficked_children.pdf (accessed 18 July 2014)

support that is directed to assisting him/her in the recovery process irrespective of other care needs.

E. Level of Support

What support should adult victims receive, once they are referred into the National Referral Mechanism (Is the 45-day reflection and recovery period appropriate)?

99. See above.

100. There is no uniform profile of a trafficked person. There are common care and health concerns which arise from exploitation but this will present and manifest itself differently with different individuals.

101. Some of the most immediate needs will be safety, safe and suitable accommodation, food, clothing, toiletries.

102. Another will be access to healthcare. We have seen persons who have been sexually assaulted and beaten in their exploitation but who have not been able to access any treatment. Many trafficked persons will present with physical health problems which may not be apparent from a cursory physical health examination. They may have difficulties disclosing their experiences and thus self-reporting on health and care issues may be incomplete⁵³. Self-reporting can also be affected by mental health problems⁵⁴. Some trafficked persons have been subject to juju or other ceremonies as means of instilling fear and inserting control, including as means of persuading trafficked persons not to disclose their personal circumstances, for example by causing them to attribute physical health problems to their disclosing information about their traffickers⁵⁵.

103. There are not procedures in place to identify the full range of a trafficked person's needs. If a trafficked or potential trafficked person is diverted to the asylum support system, there is no provision to ensure that a Department of Health assessment of needs is undertaken. The asylum support decision is normally taken on the papers. The onus is on the person who has been trafficked to produce evidence contrary to the positive obligations of States under Article 4 of the European Convention on Human Rights as identified in *Silliadin, Rantsev* and *CN v UK*.

104. A full assessment of need is not automatic even if a person is able to access support via the Salvation Army and its sub-contractors. Legal representative's requests (with the appropriate authorities) for copies of assessments and support plans covering health and care needs have rarely been made available; very often these documents do not exist. This suggests that needs assessments are not carried out consistently, or at all in the safe house accommodation. **Clear policy and practice guidance on assessment is needed.**

⁵³ See *Identifying and Supporting Victims of Human Trafficking: Guidance for Health Staff*, Department of Health, 16 April 2013; International Organization for Migration, London School of Hygiene and Tropical Medicine, United Nations Global Initiative to Fight Human Trafficking. *Caring for trafficked persons: guidance for health providers*. Geneva: IOM, 2009.

⁵⁴ *Ibidem*.

⁵⁵ See *What the professionals know: the trafficking of children into, and through, the UK for sexual purposes*, ECPAT UK November 2001.

105. **The assessment and care planning process should not be just for the purposes of the support during the 45-day reflection and recovery period. It must serve as a starting point for future support**, for example, if a person obtains leave to remain either via a residence permit or via other applications for leave to remain. Support should not be looked at within a vacuum of the National Referral Mechanism.
106. **There should be a comprehensive assessment of care and health needs and a care plan can be developed to direct support to each person based on his/her specific needs. There exists a comprehensive framework for the assessment of needs for adults under section 47 National Health Services and Community Care Act 1990 with detailed statutory guidance examining how needs across different domains (health, social care, emotional / behavioural, risks, personal care, etc.) should be identified.**
107. **Specialist training of those undertaking these assessments will be needed** ensure that they are able sensitively but thoroughly to assess the needs of victims holistically. Training and accreditation materials could support this work.
108. The question does not address the provision of support for children. We have touched upon this briefly above; the crux of our concern is that whilst children’s services provide general welfare support for children in voluntary care and subject to a care order, there is at present no support directed at supporting trafficked children Specialist foster carers need to be recruited and trained, and supported by specialist provision of counselling and mental health services for trafficked children.
109. **Support for trafficked persons should not be limited to 45 days.** The concept of the recovery and reflection period is derived from the Council of Europe Convention on Action against the Trafficking of Human Beings, article 13. The Explanatory Notes to the Convention go into detail about the purpose of a recovery and reflection period at paragraphs 172-175:

173. Article 13, paragraph 1, accordingly introduces a recovery and reflection period for illegally present victims during which they are not to be removed from the Party’s territory. The Convention contains a provision requiring Parties to provide in their internal law for this period to last at least 30 days. This minimum period constitutes an important guarantee for victims and serves a number of purposes. One of the purposes of this period is to allow victims to recover and escape the influence of traffickers. Victims recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability. Paragraph 3 of Article 13 allows Parties not to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims’ status will not be illegitimately used.

174. The other purpose of this period is to allow victims to come to a decision “on cooperating with the competent authorities”. By this is meant that victims must decide whether they will cooperate with the law-enforcement authorities in a prosecution of the traffickers. From that standpoint, the period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be

unreliable if they are still in a state of shock from their ordeal. “Informed decision” means that the victim must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers. Such a decision requires that the victim no longer be under the traffickers’ influence.

175. The reflection and recovery period provided for in Article 13, paragraph 1, should not be confused with the issue of the residence permit under Article 14, paragraph 1. Its purpose being to enable victims to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities, the period, in itself, is not conditional on their co-operating with the investigative or prosecution authorities.

110. The Explanatory Report to the Convention say that the period should at least be 30 days⁵⁶ and records that different member-states have varying lengths of recovery and reflection periods ranging from one month, 45 days, two months, three months or unspecified. We emphasize “at least”; 45 days is a starting not an end point: it is a starting point not an outer limit.
111. In the current system of support the 45-day time limit serves as a starting *and* end point for the provision of specific support. This assumes that it takes only 45 days for all trafficked persons, irrespective of their individual circumstances and the nature and extent of their exploitation, to recover and reflect sufficiently.
112. This time limit in any event does not fit with the period between the “reasonable grounds” and “conclusive grounds” decisions, which is currently much longer than 45 days. Terminating support without a conclusive grounds decision having been made puts the trafficked person at risk including of re-trafficking or deterioration in their psychological or physical health/recovery. It is contrary to the purpose and spirit of the recovery and reflection period does not reflect support and protection for the trafficked person being the purpose of the reflection period.
- 113. Forty-five days should be as a starting point and there should be a mechanism for review so that the support needs of an individual are reviewed on a case by case basis.**

Should further support be provided, following the end of the reflection and recovery period, to help victims to move on with their lives, and if so what could be provided?

114. See above: there should not be a strict time-limit for support for trafficked persons.
- 115. If a person receives a positive conclusive grounds decision, referrals should be made to appropriate agencies, such as social services or a health authority to request assessments and consideration of the transfer of the care of the person to these relevant authorities.** If an assessment and support plan were already in place (as suggested above), this would make the transfer all the smoother.

⁵⁶ *Ibid.* Paragraph 177.

116. Support should not cease until a replacement has been put in place, it is vital to avoid the sort of interregnum that led to the death of child EG from starvation⁵⁷.
117. Social services have obligations already under section 47 of the NHS and Community Care Act 1990 to carry out assessments of needs for those who may require community care services. The threshold for a community care assessment is low; it is likely that most trafficked persons who receive specialist care will meet at least the threshold for an assessment.
118. Under section 47(5), NHS and Community Care Act 1990, the local authority social services department also has a power to provide accommodation and other means of support (emotional, psychological, personal care) pending assessments. This may be an appropriate mechanism for a transfer of support services from the National Referral Mechanism system to the mainstream system.
119. Health authorities also have various obligations to assess whether a person has continuing health care needs⁵⁸, which are important for those who meet the applicable criteria.
- 120. There cannot simply be a termination of support just because a conclusive grounds decision has been made and the decision-making process is complete.**
- 121. The principles and procedures above are also applicable to those who do not receive a positive “conclusive grounds” decision.** A person may not meet the definition as a victim of trafficking but may have community care support and health needs for different reasons. There needs to be consideration of whether a transfer of support to social services/health services is appropriate in these circumstances. There are already mechanisms in legislation to provide a gateway filter to general eligibility for mainstream support, through schedule 3 to the Nationality, Immigration and Asylum Act 2002. Thus the requirement that the support needs beyond the National Referral Mechanism for the cohort of persons who received a positive “reasonable grounds” decision but a negative “conclusive grounds” decision does not place a disproportionate burden on the State.

What are the opportunities and challenges in providing support beyond the reflection and recovery period?

122. See above. Trafficked persons do not represent an additional cohort of service users. Currently as there is no provision of support beyond the reflection and recovery period, it is our experience that those with legal representation will often approach social services and/or other State alternatives available to them already as described above. Only those supported to present to social services and other State agencies who will be able to obtain further support. This is arbitrary and unfair. **There is a need for a**

⁵⁷ Westminster Safeguarding Children Board, *Serious case review, Executive Summary Child EG 17 December 2010* updated 25 April 2012.

⁵⁸ *National framework for NHS continuing healthcare and NHS funded nursing care*, Department of Health, 1 November 2013; see <https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care> (accessed 22 July 2014).

transparent process that enables persons to apply for further support at the end of the reflection and recovery period and for those to whom support is refused to understand what has been decided, how it has been decided and why.

F. GOVERNANCE

Which organization / organizations is/are best placed to manage and administer the National Referral Mechanism; and make ‘competent authority’ decisions on trafficking claims?

123. See above, *passim*.

124. **The National Referral Mechanism identification process should be separated from immigration control.** Immigration decisions may be one consequence of identification but the matters are distinct.

125. **UK Visas and Immigration should not remain the agency charged with managing and administering the National Referral Mechanism or with making all ‘competent authority’ identification.** We summaries the reasons for this below and see the comments of the Joint Committee on Human Rights⁵⁹.

- a. The identification process – which is what the National Referral Mechanism is intended to be – should be separate from consideration of a person’s immigration status.
- b. There is a conflict of interest where those making the identification decision sit in an organization whose primary responsibility is immigration control. The Joint Committee on Human Rights⁶⁰ recommended that these functions be separated and we support their view on this.
- c. It is our experience that allocating the decision-making responsibilities in the National Referral Mechanism to UK Visas and Immigration has resulted in a greater risk of trafficked person being regarded primarily as people with immigration problems rather than as persons whose rights have been violated as victims of crime.
- d. Trafficking decisions have been conflated with asylum and immigration decisions, which is inappropriate. The difference in recognition rates between UK Visas and Immigration and the UK Human Trafficking Centre is cause for concern⁶¹.
- e. UK Visas and Immigration is not in a position to give expert and/or adequate attention to the holistic needs of victims of trafficking or to gather information in the way that would be necessary were the trafficked person to be a witness to, as

⁵⁹ Joint Committee on Human Rights, 26th report of Session 2005-2006 *Human Trafficking*, HL Paper 245-I and II; HC 1147-I and II 13 October 2006.

⁶⁰ HL Paper 245-I; HC 1147-I, *op. cit*.

⁶¹ *Hidden in Plain Sight*, *op.c.it*, para 2.9.

opposed to a defendant in, a criminal case. It is not in a position to assess the specialist needs of trafficked persons and ensure that they are able to access specialist care.

126. We make the following proposals:

- a. The referral/First Responder stage and the 'reasonable grounds' stage duplicate each other. Authorities should be empowered when, in the course of work in areas of their competence on the basis of indicators they identify, they consider that there are reasonable grounds for considering that a person may be trafficked to trigger the protections that are currently triggered by the reasonable grounds decision.
- b. At this early stage there should be referral to a multi-agency panel which would facilitate proactive work to propose an action plan for protection and services during the recovery and reflection period and further to investigate the indicators of trafficking. This panel would necessarily involve those agencies with which an applicant is engaged.
- c. A model may for an appropriate multi-agency work may be found in the current Multi-agency Risk Assessment Conference (MARAC) and in Multi-Agency Safeguarding Hubs (MASH) which deal with high risk cases and under which representatives from relevant agencies meet to consider the individual case, discuss options for increasing the safety of the person and develop a coordinated action plan with the primary focus of safeguarding. We emphasize that what is required is multi-agency, not simply multi-disciplinary working. This view is supported by Article 10 of the Council of Europe Convention on Action against Trafficking in Human Beings which requires 'competent authorities' to identify and help victims in all aspects of their protection and support needs. The National Referral Mechanism envisaged under the Convention and by the OSCE is a formalized system of identification, referral and cooperation to ensure a coordinated approach that draws on expertise of different State agencies rather than to centralize decision-making on a single body as has been done in the UK to date.
- d. Such work should be supported with specialist training, accreditation and guidance
- e. A conclusive grounds decision could be made by the panel.
- f. Immigration actions, including progressing an asylum or human rights application, should be suspended during this process save where the potentially trafficked person, having had the opportunity to take legal advice, expressly asked for consideration of an application to proceed. The multi-disciplinary panel would refer the case following completion of the action plan for a decision to be made by the immigration authorities on a residence permit.
- g. There should be a central agency with responsibility for receiving intelligence and mechanisms in place for forwarding intelligence, including in an anonymized format where a person does not consent to identifying information being shared. This agency would most obviously be the UK Human Trafficking Centre.

What more can be done to strengthen links between organizations involved in the identification and support of victims?

127. We consider that the approach outlined above would strengthen the links between organisations involved in identifying and supporting victims of trafficking as well as those with responsibility for gathering intelligence and prosecuting offenders. The centralization of the National Referral Mechanism decision-making within UK Visas and Immigration currently acts as a significant barrier to effective cooperation to safeguard trafficked persons because the main focus is on immigration control often against the trafficked person rather than a protective approach.

Are the links with wider organizations (first responders, victim support subcontractors etc.) effective and do they support successful identification of, and help for victims?

128. It is our experience that there is a lack of consistency. Those first responders with specialist knowledge and experience identifying and supporting victims of trafficking have been most effective in supporting successful identification of and help for victims. Part of the problem is funding for support; another problem is the lack of any guidance on the kinds of support that a person ought to receive. There is also insufficient inter-agency cooperation and communication over support and help for potentially trafficked and trafficked persons. Separating identification from immigration control has the potential to refocus attention on assistance and support for trafficked persons.

What are the advantages and disadvantages of placing the National Referral Mechanism onto a statutory footing and providing victims with appeal rights?

129. The first question is what National Referral Mechanism it is proposed to be placed on a statutory footing. We do not support putting the current or a similar model whereby the obligations as to identification are vested in one central government or local government entity as a single “competent authority” are placed on a statutory footing.

130. **We should support statutory underpinning of an appropriate model** because this has the potential to:

- Secure understanding of the roles diverse agencies play as “competent authorities” and underpin multi-agency working by all State bodies and those in civil society whose expertise plays a crucial role in identification. Statutory underpinning helps to ensure accountability and transparency in the decision making process and support the work of the multi-agency panel proposed above identifying its statutory obligations in a National Referral Mechanism.
- Underline and acknowledge not only the importance of identification and secure the consequences which should flow from identification: support, including as a victim of crime, and work, including in cooperation with other States to combat and prevent trafficking⁶².

131. **Rights of appeal require legislation and existing legislation on appeals must be reviewed and supplemented.** For example where social services or health authority assessments are made, a service user dissatisfied with the assessment outcome can invite

⁶² See the CoE Anti-Trafficking Convention Article 27(2), 31(4), 32 and 34; Directive 2011/36/EU Recital 14 and Article 9 and *Rantsev v Cyprus and Russia* 25965/04 [2010] ECHR 22 paragraph 289.

a review of the decision by a different decision-maker and this could be built into a model for trafficked persons.

132. High quality decision-making is an essential part of any National Referral Mechanism such that potentially trafficked and trafficked persons are identified at an early stage. Failure to identify at an early stage places trafficked persons at risk from their traffickers, and from harm through the impact of disbelief and protracted appeals. It may deter them from accessing support and mean that they do not engage with protective services, all of which can have secondary effects in the lack of prosecution of offenders and in perpetuating abuse through trafficking⁶³.
133. Fairness and the rule of law, the maintenance of confidence in decisions and quality of those decisions requires there to be a mechanism for potential trafficked persons and trafficked persons to seek review and to appeal against decisions taken by the competent authorities. Such decisions would include the failure to accept into the National Referral Mechanism a potentially trafficked person, and a negative conclusive grounds decision as well as decisions as to the proposed protection plan. In order to preserve the necessary distinction between trafficking decisions and any connected immigration and/or asylum decisions, a right of appeal against a refusal to recognise a person as trafficked should be to a tribunal other than the First-tier Tribunal (Immigration and Asylum Chamber). In that way the specific issues arising in relation to trafficking decisions, the evidence upon which such decisions are based, and the international obligations applicable will not suffer from cross-pollination from immigration concerns.
134. As discussed above, there should also be a right of appeal against the decision to refuse a residence permit. When the Immigration Act 2014 comes into force it will be important that a person refused a residence permit is treated as having made a protection or human rights claim⁶⁴ and thus afforded a right of appeal⁶⁵. Rights of appeal should always be suspensive of removal, in line with the UK's obligation under Article 10(2) of the Council of Europe Anti-Trafficking Convention.
135. Trafficked persons can only meaningfully to participate in decisions if they are able to access adequate legal advice and representation at an early stage and maintain this through the decision-making process⁶⁶. It is thus necessary that trafficked persons are able to access legal aid from the point at which an agency initially identifies indicators of trafficking and this should include legal aid for challenges to decisions not to accept an applicant into the National Referral Mechanism as well as for any legal challenges, including judicial review, relating to their status as a trafficked person or protection plan. Paragraph 32 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012, which treats a positive "reasonable grounds" decision as the gateway to legal

⁶³ See *Human Trafficking: Joint UN Commentary on the EU Directive: A Human-Rights-based approach* (November 2011): "...a critical component in the effective detention, investigation and prosecution of trafficking is the willingness of trafficked persons to assist in prosecutions. This willingness is strongly related to the protection of their safety, treatment by the police and other authorities and ultimately the risk of being deported and subjected to reprisals and victimisation."

⁶⁴ Nationality Immigration and Asylum Act 2002, s 1132 (prospective) as amended by the Immigration Act 2014.

⁶⁵ *Ibid*, s 82.

⁶⁶ See e.g. CoE Convention Explanatory Memorandum paragraph 192.

assistance, fails to provide adequate support for trafficked persons⁶⁷. The proposed residence test would compound the problem because exemption from that test for trafficked persons would not extend to judicial review⁶⁸.

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31 July 2014

⁶⁷ See further ILPA's 30 September 2013 evidence to the Joint Committee on Human Rights' enquiry into the implications for access to justice

of the Government's proposed legal aid changes.

⁶⁸ Ibid. See now *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin) (13 June 2014) (Under appeal)