

SOUTH AFRICAN LAW REFORM COMMISSION

DISCUSSION PAPER 111

PROJECT 131

TRAFFICKING IN PERSONS

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INTRODUCTION

The South African Law Reform Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are:

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Preface

This Discussion Paper was formulated based on the submissions received on the Issue Paper on Trafficking in Persons. The Discussion Paper contains the Commission's preliminary proposals for law reform and aims to provide persons and bodies wishing to comment or make suggestions for the reform of this particular area of the law with sufficient information to enable them to place focussed submissions before the Commission.

Submissions on the Discussion Paper will form the basis for the preparation of a Report. The Report will contain the Commission's final recommendations and will also include the Commission's final proposed draft legislation, which will be submitted to the Minister for Justice and Constitutional Development for consideration. Should the Minister deem it fit, he or she may then implement the Commission's recommendations by introducing the draft legislation into Parliament.

Respondents are not restricted to the questions posed and issues raised in this Discussion Paper and are welcome to draw other relevant matters to the Commission's attention. In making submissions, it is important that respondents consider what would be realistic to achieve as regards reform of the law in the area under investigation. The Commission assumes that respondents will agree to the Commission's quoting from or referring to comments it receives, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations in terms of the Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996) and the Access to Information Act, 2000 (Act 2 of 2000).

Respondents are requested to submit written comments or suggestions to the Commission by 30 June 2006 at the address appearing on the previous page.

Ms L A Stuurman may be contacted for further information on this Discussion Paper.

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LIST OF RESPONDENTS TO THE ISSUE PAPER

Activists networking against the exploitation of child domestic workers

Anonymous

Childline

Children's Rights Project: Community Law Centre, University of the Western Cape

Centre for the Study of Violence and Reconciliation

Network Against Child Labour¹

Department of Environmental Affairs and Tourism

Department of Foreign Affairs: Office of the Chief State Law Adviser (International Law)

Department of Social Development

International Organisation for Migration

Johannesburg Child Welfare Society

Law Society of the Northern Provinces

Lawyers for Human Rights (Johannesburg)

Lawyers for Human Rights (Pretoria)

Ministry of Community Safety, Western Cape

Ministry of Home Affairs

Molo Songololo

¹ The submission made by the Network Against Child Labour is based on the deliberations of child trafficking awareness-raising workshops held from August – October 2004.

Molo Songololo (Consultative Workshop)

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Mr Qetywayo David Africa Masoa

Mr Reynecke, Department of Home Affairs

Mrs Vivien Spiro

Ms Karin Isobel Koen

National Council of Women of South Africa

Resources Aimed at the Prevention of Child Abuse and Neglect

Rashid Patel and Company Attorneys

South African Police Service

Serious and Violent Crime Unit: South African Police Service

Sexual Offences and Community Affairs Unit, National Prosecuting Authority

South African Human Rights Commission

Sex Worker Education and Advocacy Taskforce

University of Cape Town Legal Aid Clinic

ACRONYMS

Anex Cdw:	Activists networking against the exploitation of child domestic workers
CBO:	Community-based organisation
CSVR:	Centre for the Study of Violence and Reconciliation
IOM:	International Organisation for Migration, Pretoria
NCWSA:	National Council of Women of South Africa
NGO:	Non-governmental organisation
RAPCAN:	Resources Aimed at the Prevention of Child Abuse and Neglect
SAPS:	South African Police Service
SWEAT:	Sex Worker Education and Advocacy Taskforce
VTVPA:	Victims of Trafficking and Violence Protection Act of 2000

CHAPTER ONE

INTRODUCTION

Introduction

1.1 Contemporary trafficking in persons is an organised business with linkages spread around the world and is often connected to organised crime, prostitution and modern-day slavery. Our modern-day technology also makes it easier than before to deal in human commodities. The Law Reform Commission's investigation into trafficking in persons is therefore aimed at addressing trafficking in persons within the South African context by recommending legislative and non-legislative measures in order to facilitate the effective prosecution of traffickers, the protection of victims of trafficking and the prevention of trafficking in persons.

1.2 This Discussion Paper is essentially divided into eight chapters, namely, (1) the introduction, (2) the international framework, (3) the extent of the problem within the South African context, (4) Trafficking in persons, gender and prostitution, (5) the prosecution of traffickers and other role-players, (6) the protection of victims of trafficking in persons, (7) the prevention of trafficking in persons, and (8) non-legislative measures.

Origin of the investigation

1.3 The Commission's investigations into the review of the Child Care Act¹ and sexual offences respectively considered the issue of trafficking in children. However, given the magnitude of the problem and time constraints to finalise both the investigations referred to, the Commission realised that it would not be able to conduct detailed research in order to address the problem of trafficking in children adequately. The Commission subsequently decided to place on its programme a separate investigation into trafficking in persons, including children. It also decided that this investigation should not be limited to trafficking in persons for purposes of sexual exploitation, but should consider trafficking in persons broadly. Consequently, a request for the inclusion of an investigation into trafficking in persons in the Commission's

¹ 74 of 1983.

research programme was submitted to the previous Minister for Justice and Constitutional Development. The Minister approved the inclusion of the investigation on 21 January 2003.

Purpose of the Discussion Paper

1.4 An Issue Paper on Trafficking in Persons was published on 23 January 2004 with the aim to identifying aspects relating to trafficking in persons in need of legal reform. It also aimed to elicit comment and suggestions from relevant stakeholders and to disseminate information on the issue of trafficking in persons to the public at large.

1.5 The purpose of the Discussion Paper is to set out the Commission's preliminary recommendations for law reform relating to the issue of trafficking in persons. Accompanying the Discussion Paper is proposed draft legislation on trafficking in persons. Submissions received on the Issue Paper have been taken into account and have informed the solutions identified by the Commission.

Inter-departmental meeting on trafficking in persons

1.6 Several submissions recommending numerous options for law reform were received on the Issue Paper. Based on the submissions received, an inter-departmental meeting was held on 31 August 2004. This meeting deliberated on the following issues:

- (a) Immigration status of victims of trafficking.
- (b) The provision of accommodation to adult victims of trafficking.
- (c) The involvement of parents, guardians and caregivers in the trafficking of their children.
- (d) The provision of immunity from prosecution to victims for offences committed as a direct result of their being trafficked.
- (e) The participation of victims of trafficking in court processes.
- (f) The establishment of a database on trafficking in persons.

1.7 The meeting was attended by representatives from the following stakeholders: the South African Police Service, the Sexual Offences and Community Affairs Unit, the

Office of the National Director of Public Prosecutions, the Departments of Justice and Constitutional Development, Home Affairs, and Social Development. Ms Buyi Mbambo from the United Nations Children's Fund (UNICEF) also attended the meeting.²

1.8 The purpose of the meeting was to canvass the opinion of the relevant government departments and/or institutions on issues relating to their line functions. The deliberations of the meeting will be highlighted throughout this Discussion Paper at the relevant headings.

The Children's Bill

1.9 The Children's Bill³ addresses certain aspects relating to trafficking in children. The Children's Bill is a result of a law reform process that was initiated when the South African Law Reform Commission was requested in 1997 to investigate and review the Child Care Act and to make recommendations to the Minister for Social Development for the reform of this particular branch of the law. The Bill was referred to the office of the Chief State Law Advisor in August 2003 and certified in October 2003 as Bill 70 of 2003. However, since the Bill dealt with both national and provincial matters, the joint tagging mechanism recommended that the Bill should be split into a principal Bill to be dealt with in terms of section 75 of the Constitution, and an amendment Bill to be dealt with in terms of section 76 of the Constitution. The principal Bill was approved by the National Council of Provinces on 13 December 2005 and by the National Assembly on 14 December 2005. The Bill is awaiting the signature of the President. Once the amendment Bill is passed by Parliament, the two laws will be merged into a single Children's Act.

1.10 Provisions relating to trafficking in children have been included in the Children's Bill because of the advance stage of this Bill.⁴ These provisions will be repealed by their

² The Commission would like to express its gratitude to UNICEF for the financial support provided for the meeting.

³ Bill 70D of 2003.

⁴ The researcher assigned to the Commission's investigation into trafficking in persons assisted the Department of Social Development with the drafting of the chapter on trafficking in children contained in the Children's Bill.

incorporation into the proposed trafficking legislation. This paper highlights the respective provisions of the Children's Bill under the relevant headings.

The USA Department of State Annual Trafficking in Persons Report

1.11 The Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) requires the Department of State to submit an annual report on trafficking in persons (TIP Report) to the U.S Congress regarding foreign governments' efforts to eliminate trafficking in persons. In assessing such efforts, the TIP Report rates a country on one of the following tiers:

- (a) Tier 1: countries whose governments fully comply with the minimum standards for the elimination of trafficking in persons as set out in the VTVPA;
- (b) Tier 2: countries whose governments do not fully comply with the minimum standards for the elimination of trafficking in persons as set out in the VTVPA, but are making significant efforts to bring themselves into compliance with these standards;
- (c) Tier 2 Watch List: countries whose governments do not fully comply with the minimum standards for the elimination of trafficking in persons as set out in the VTVPA, but are making significant efforts to bring themselves into compliance with these standards, and:
 - (i) the absolute number of victims is very significant or is significantly increasing; or
 - (ii) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or
 - (iii) the determination that a country is making significant efforts to bring themselves into compliance with the minimum standards was based on commitments by the country to take additional future steps over the next year.
- (d) Tier 3: countries whose governments do not fully comply with the minimum standards for the elimination of trafficking in persons as set out in the VTVPA and are not making significant efforts to do so.

1.12 Governments of countries rated as tier 3 countries may be subjected to certain sanctions. In terms of the VTVPA, the U.S Government may withhold non-humanitarian,

non-trade-related foreign assistance. In the case of countries whose governments receive no non-humanitarian, non-trade-related assistance from the U.S Government, the U.S will not provide funding for participation by officials or employees of such governments in educational and cultural exchange programmes. Furthermore, the president of the U.S will instruct the U.S Executive Director of each multilateral development bank and of the International Monetary Fund to vote against any loan or other utilisation of the funds of the respective institution to a sanctioned country (other than for humanitarian assistance, trade-related assistance, or for development assistance which directly addresses basic human needs and which is not administered by the government of the sanctioned country and confers no benefit to that government).⁵

1.13 South Africa was initially rated as a tier 2 country. However, the TIP Report of 2005 rates South Africa as a tier 2 Watch List country. This is because of a lack of evidence of increasing efforts to combat trafficking in persons over the year leading up to the TIP Report of 2005.⁶ This report further impresses on the government of South Africa the importance of passing comprehensive legislation on trafficking in persons as soon as possible.

⁵ Section 110 of the VTPA.

⁶ U.S Department of State **Trafficking in Persons Report** June 2005, p.198.

CHAPTER TWO

INTERNATIONAL FRAMEWORK

INTRODUCTION

2.1 At the international level, several instruments relating to trafficking in persons were introduced as far back as 1904 when the International Agreement for Suppression of the White Slave Trade was adopted. South Africa has signed and/or ratified various international instruments which recognise trafficking in persons as a world-wide problem. This has placed an obligation on South Africa to bring its domestic laws and policies in line with the standards set by these international instruments. Although these instruments have highlighted the problem of trafficking in persons, their enforcement remains a challenge to the authorities. The following is an overview of some of the main international instruments addressing the problem of trafficking in persons.⁷

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Recommended Principles and Guidelines on Human Rights and Human Trafficking

2.2 The recommended Principles and Guidelines on Human Rights and Human Trafficking have been developed in order to provide practical rights-based policy guidance on the prevention of trafficking, as well as the protection of victims of trafficking. The purpose of these guidelines and principles is to promote and facilitate

⁷ Other international instruments also dealing with the issue of trafficking in persons include the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of 1984; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956; the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 1949, the Convention for the Suppression of the Traffic in Women of Full Age of 1933; the Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications of 1923 as amended by the Protocol of 12 November 1947; the Convention for the Suppression of Traffic in Women and Children of 1921; Convention for the Suppression of the White Slave Traffic of 1910; the International Agreement for the Suppression of the White Slave Traffic of 1904.

the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions.⁸

2.3 The following is a summary of the recommended principles:

Principle 1: The primacy of human rights

The human rights of victims of trafficking must be respected in all efforts aimed at preventing and combating trafficking, and at protecting, assisting and providing redress to victims. Furthermore, anti-trafficking measures should not adversely affect the human rights and dignity of victims of trafficking.

Principle 2: Preventing trafficking

Preventative measures must address demand as a root cause of trafficking in persons, as well as factors that make persons vulnerable to being trafficked such as poverty, inequality and all forms of discrimination. Furthermore, public officials who are involved in the crime of trafficking must be identified, investigated and, if convicted, punished appropriately.

Principle 3: Protection and assistance

Victims of trafficking should be provided with protection and assistance, including (a) immunity from prosecution for offences committed as a direct consequence of their situation as victims of trafficking, (b) protection from further exploitation, (c) access to adequate physical and psychological care, (d) legal and other assistance for the duration of any criminal or civil proceedings against traffickers, and (e) safe repatriation to their countries of origin, as well as legal alternatives to repatriation if their return would pose a serious risk to their safety and/or that of their families.

Principle 4: Criminalisation, punishment and redress

⁸ Office of the United Nations High Commissioner for Human Rights **Recommended Principles and Guidelines on Human Rights and Human Trafficking** 2002.

The act of trafficking in persons should be criminalised, investigated and prosecuted. Appropriate sanctions must be imposed on traffickers, and the assets of traffickers must be frozen and confiscated in appropriate cases. Furthermore, the crime of trafficking in persons should be made an extraditable offence and victims of trafficking should be given access to effective and appropriate legal remedies.

2.4 The following is a summary of the recommended guidelines:

Guideline 1: Promotion and protection of human rights

Human rights should be promoted and protected in all efforts to prevent and combat trafficking in persons.

Guideline 2: Identification of victims of trafficking and traffickers

Victims of trafficking should be identified and distinguished from illegal migrants. Traffickers should be identified, including those who are involved in controlling and exploiting victims of trafficking.

Guideline 3: Research, analysis, evaluation and dissemination

Effective and realistic anti-trafficking strategies must be based on accurate and current information, experience and analysis.

Guideline 4: Ensuring an adequate legal framework

An appropriate legal framework that is consistent with relevant international instruments and standards should be developed. In developing such a legal framework, consideration should be given to the following: (a) the confiscation of the proceeds of trafficking, (b) the provision of compensation to victims of trafficking, (c) the provision of immunity from prosecution for victims of trafficking for crimes committed as a direct consequence of their situation as victims of trafficking, (d) protection from summary deportation of victims of trafficking, (e) the provision of legal information and assistance to victims of trafficking in a language they understand, (f) witness protection, and (g) the involvement of public officials in the crime of trafficking in persons.

Guideline 5: Ensuring an adequate law enforcement response

An effective law enforcement response should be ensured by securing the co-operation of victims of trafficking and other witnesses. This should be done by inter alia (a) ensuring the safety and immediate well-being of victims of trafficking, (b) training law enforcement officials in the investigation and prosecution of trafficking cases, (c) providing law enforcement authorities with adequate investigative power and techniques to enable effective investigation and prosecution of suspected traffickers, (d) protecting victims of trafficking during the investigation and trial processes and any subsequent period when the safety of the victims so requires, and (e) encouraging law enforcement authorities to work in partnership with non-governmental organisations in order to ensure that victims of trafficking receive the necessary support and assistance.

Guideline 6: Protection and support for victims of trafficking

Victims of trafficking should be provided with protection and support without discrimination. Special focus should be placed on the needs of victims of trafficking, including the provision of appropriate shelter, health care services and counselling, information on their right of access to diplomatic and consular representatives from their States of nationality, legal and other assistance in relation to any criminal, civil or other proceedings against traffickers, protection from harm, threats or intimidation from traffickers and associated persons.

Guideline 7: Prevention of trafficking

Trafficking in persons should be prevented as well as factors which increase persons' vulnerability to being trafficked. Preventative measures should include the development of programmes which offer (a) livelihood options, (b) the improvement of children's access to educational opportunities, (c) the provision of information to potential migrants on the risk of migration and options available for legal non-exploitative migration, (d) public awareness campaigns on the dangers associated with trafficking, and (e) opportunities for legal, gainful and non-exploitative labour migration.

Guideline 8: Special measures for the protection and support of child victims of trafficking

Child victims of trafficking should be provided with appropriate protection and support, taking into account their best interests and paying special attention to their views in all matters affecting them. Special protective measures for children must include (a) the rapid identification of child victims of trafficking, (b) the tracing of family members of unaccompanied children, (c) the reunification of children with family members where appropriate, and (d) the protection of the rights and interests of children at all stages of criminal proceedings against traffickers and during procedures for obtaining compensation.

Guideline 9: Access to remedies

Victims of trafficking' right to obtain adequate and appropriate remedies, including compensation, should be realised. Furthermore, victims of trafficking should be provided with information on such remedies and should be enabled to remain in the country for the duration of proceedings to obtain such remedies.

Guideline 10: Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel

States should take effective measures to prevent peacekeepers, civilian police, and humanitarian and diplomatic personnel from engaging in the crime of trafficking and related forms of exploitation.

Guideline 11: Co-operation and co-ordination between States and regions

Co-operation on an international, multilateral and bilateral level should be established between States and regions, particularly those involved in different stages of the trafficking cycle.

UNITED NATIONS CONVENTIONS AND PROTOCOLS

United Nations Convention Against Transnational Organised Crime

2.5 The Convention⁹ gives a wide meaning to organised crime, as it covers all structured groups that commit serious crime. A structured group is not necessarily a formal organisation, membership or structure, but is more than merely a group which is randomly formed for the immediate commission of an offence.¹⁰ The Convention calls on State Parties to establish the liability of legal persons for participation in serious crimes involving an organised criminal group.¹¹ This is an important provision as not all traffickers are natural persons. Some traffickers operate within a company or partnership and have assets that could be confiscated.¹² The Convention provides for the protection of witnesses in criminal proceedings and, as appropriate, for their relatives and other persons close to them from potential retaliation or intimidation.¹³ Such measures may include:¹⁴

- (a) Establishing procedures for the physical protection of such persons, including relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning their identity and whereabouts.
- (b) Ensuring that a witness's testimony is given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

⁹ South Africa signed the Convention on 14 December 2000 and ratified it on 20 February 2004.

¹⁰ Kramer K "United Nations Convention against Transnational Organised Crime and its Protocols", Paper presented at the Seminar for SADC Countries on the ratification and implementation of the United Nations Convention against Transnational Organised Crime, Mauritius, 23 – 25 September 2003.

¹¹ Article 10.

¹² International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.14.

¹³ Article 24(1).

¹⁴ Article 24(2).

2.6 The latter provisions on witness protection are formulated in stronger terms than those in article 6(1) of the Trafficking Protocol¹⁵ and, unlike the Trafficking Protocol, provide protection to all witnesses and not just witnesses who are victims of trafficking.

2.7 With regard to victim protection, the Convention obliges State Parties to take appropriate measures, within available means, to provide assistance and protection to victims of offences covered by the Convention.¹⁶ This is in contrast with article 6(3) of the Trafficking Protocol which requires States only to consider providing certain protective measures to victims of trafficking.¹⁷

2.8 The Convention further calls for the criminalisation of participation in an organised criminal group,¹⁸ the criminalisation of the laundering of the proceeds of crime,¹⁹ measures against corruption,²⁰ measures to enable the confiscation and seizure of assets gained through crime,²¹ mutual legal assistance,²² and special investigative techniques.²³

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (hereafter referred to as “the Trafficking Protocol”)²⁴

2.9 The Trafficking Protocol²⁵ is the first international instrument which deals comprehensively with the issue of trafficking in persons. Although the Trafficking Protocol is the principle instrument on trafficking in persons, it must be read with the

¹⁵ See paragraph 2.21 below.

¹⁶ Article 25(1).

¹⁷ See paragraph 2.22 below.

¹⁸ Article 5.

¹⁹ Article 6.

²⁰ Article 9.

²¹ Article 12.

²² Article 18.

²³ Article 20.

²⁴ The Protocol was open for signature in Palermo, Italy in December 2000.

²⁵ South Africa signed the Protocol on 14 December 2000 and ratified it on 20 February 2004.

Convention Against Transnational Organised Crime, as the Convention requires State Parties to legislate on various matters relevant to the issue of trafficking in persons.²⁶

Purposes of the Protocol

2.10 The purposes of the Protocol are to –

- (a) Prevent and combat trafficking in persons, paying particular attention to women and children.
- (b) Protect and assist victims of trafficking, with full respect for their human rights.
- (c) Promote co-operation amongst State Parties in order to meet these objectives.

2.11 Although one of the purposes of the Trafficking Protocol is to protect and assist victims of trafficking, the protection provisions in the Protocol are formulated in weak terms such as the following: Each State Party “shall consider” the provision of appropriate housing to victims of trafficking.²⁷ Despite this, States are still obliged to provide certain protection measures and assistance to victims of trafficking in accordance with other human rights instruments to which they are parties such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

Scope of application of the Protocol

2.12 The Trafficking Protocol applies to the prevention, investigation and prosecution of offences established in accordance with article 5 of the Protocol, where those offences are transnational in nature and involve an organised criminal group.²⁸ However, article 34(2) of the Convention Against Transnational Organised Crime makes it clear that the crime of trafficking in persons can be established in the

²⁶ Article 1 of the Trafficking Protocol stipulates that the Protocol must be interpreted together with the Convention Against Transnational Organised Crime. Article 37(4) of the Convention Against Transnational Organised Crime provides that any protocol to the Convention must be interpreted together with the Convention, taking into account the purpose of that protocol.

²⁷ Article 6(3) of the Protocol.

²⁸ Article 4.

domestic laws of a country irrespective of the transnational nature of the crime or the involvement of an organised criminal group. This is an important provision as the crime of trafficking in persons is not limited to cross-border trafficking, but also occurs within the borders of a country. Furthermore, the crime of trafficking in persons is also committed by individuals, other than organised criminal groups.

Definition of trafficking in persons

2.13 The Trafficking Protocol defines trafficking in persons as follows:

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²⁹

2.14 The above definition might complicate the prosecution of trafficking cases because it contains too many elements that would have to be proved by the prosecution.³⁰ With regard to adults,³¹ prosecutors would have to prove that one or more of the means set out in the definition have been used in order to establish a case of trafficking in persons.

²⁹ Article 3(a).

³⁰ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol 2002**, p.7.

³¹ Article 3(c) of the Protocol provides special protection to children in that it stipulates that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation must be considered “trafficking in persons” even if this does not involve any of the means set forth in the definition.

2.15 The words “abuse of a position of vulnerability” make it clear that trafficking can occur without any use of force and that victims of trafficking, especially children, may be told what to do by someone close to them, such as a parent or spouse.³²

2.16 The Trafficking Protocol does not define the terms “exploitation of the prostitution of others” and “sexual exploitation” as countries have different laws and policies on prostitution.

2.17 It is important to note that the removal of human organs for legitimate medical reasons should not be considered exploitation. Furthermore, the Trafficking Protocol does not apply to the transportation of organs alone. A case of trafficking in persons can be established only if a person is transported for the purpose of removing his or her organs.³³ Unfortunately, the Trafficking Protocol does not cover the removal of body parts, other than organs. This is clearly an oversight by the drafters of the Protocol as trafficking in persons for purposes of removing their body parts, including organs, to be used in the muti³⁴ of witch doctors is quite prevalent in Africa.

2.18 The crime of trafficking in persons consists of the following main elements: (a) **the action** i.e. the recruitment, transportation, transfer, harbouring or receipt of persons, (b) **the means** i.e. , threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, and (c) **the purpose** i.e. exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. It is important to keep in mind that all three elements do not necessarily have to take place in order to establish the crime of trafficking in persons. For example, if the victims were rescued before reaching the place of exploitation, the offender may still be prosecuted for the crime of trafficking in persons if the intention to exploit the victims can be proved. The crime of trafficking in persons can be established even though the actions that make

³² International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.8.

³³ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.10.

³⁴ Muti is defined as African medicines, spells and herbs, parts of animals or human bodies, used in traditional therapy or in witchcraft or magic. See in this regard Branford J and Branford W **A Dictionary of South African English** Cape Town Oxford University Press 1991, p.209.

up the elements of the crime took place in different countries. Victims of trafficking may also be exploited during the trafficking process before they reach the place of exploitation. Traffickers often subject their victims to physical or sexual abuse during the trafficking process in order to break their spirit and to prepare them for the abuse to which they will be subjected.

Consent of a victim of trafficking

2.19 The Trafficking Protocol states that the consent of a victim of trafficking is irrelevant where any of the actions contemplated in the Protocol's definition of trafficking have been employed.³⁵ Hence, it cannot be said that a victim, who has consented to be brought into a country illegally to work in the sex industry for payment, has consented to be subjected to the exploitation if the intention of the other party was to hold her in forced prostitution where she has limited freedom of movement and no say as to the kind and number of clients she would be serving.

Criminalising the crime of trafficking in persons

2.20 The Trafficking Protocol obliges State Parties to criminalise the crime of trafficking in persons when committed intentionally.³⁶ State Parties are further compelled to criminalise the following acts: (a) an attempt to commit the crime of trafficking, (b) the participation as an accomplice in the crime of trafficking, and (c) organising and directing other persons to commit the crime of trafficking.³⁷ It is important to note that victims of trafficking who, for instance, agree to work illegally or to travel with false or without any documentation, should not be punished for their participation in the crime.³⁸

Protection of victims of trafficking in persons

2.21 The Trafficking Protocol addresses the human rights dimensions necessary for the protection of victims of trafficking. The Protocol provides that, in appropriate

³⁵ Article 3(b).

³⁶ Article 5(1).

³⁷ Article 5(2).

³⁸ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.15.

cases and to the extent possible, State Parties must protect the privacy and identity of victims of trafficking, including making legal proceedings relating to such trafficking confidential.³⁹ This is an important provision as the safety of victims of trafficking and their families may be at risk should the identity of the victims be disclosed. However, traffickers could infer, from the nature of the complaint, the identity of a specific victim. State Parties must ensure that victims of trafficking are provided, in appropriate cases, with information on relevant court and administrative proceedings, and with assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.⁴⁰ This provision requires that victims of trafficking be provided with information through a translator or in writing in a language that they understand. Victims of trafficking should also be provided with interpreters during court proceedings.

2.22 The Protocol stipulates that State Parties shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking, including, in appropriate cases, the provision of (a) appropriate housing, (b) counselling and information in a language victims understand, and (c) employment, educational and training opportunities.⁴¹ This provision addresses the most important and urgent needs of victims of trafficking. Although the words “shall consider” and “in appropriate cases” do not place a positive obligation on State Parties to provide the mentioned services to victims, State Parties cannot neglect their responsibility in this regard as one of the purposes of the Protocol is to assist and protect victims of trafficking. It should also be kept in mind that the provision of protective measures and assistance to victims of trafficking stands independently from any efforts aimed at prosecuting traffickers.

2.23 State Parties must ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.⁴² This provision does not place an obligation on State Parties to establish a compensation fund for victims of trafficking. State Parties are only obliged to enable victims to claim compensation from offenders.

³⁹ Article 6(1).

⁴⁰ Article 6(2).

⁴¹ Article 6(3).

⁴² Article 6(6).

Immigration status of victims of trafficking

2.24 State Parties must consider whether to allow victims of trafficking to remain in their territories, temporarily or permanently, in appropriate cases.⁴³ Although this provision does not place a positive obligation on governments to grant an immigration status to victims of trafficking, it is important for governments to realise that the summary deportation of victims could lead to the unsuccessful prosecution of traffickers. This is because, in most cases, the testimony of a victim is needed to secure a conviction. When considering whether victims of trafficking should be allowed to remain in the territory of a State, appropriate consideration must be given to humanitarian and compassionate factors.⁴⁴

Repatriation of victims of trafficking

2.25 A State Party must facilitate and accept the return of a victim of trafficking who is its national or permanent resident, with due regard for the safety of that person.⁴⁵ Likewise, the State Party returning the victim of trafficking must ensure that such return is with due regard for the safety of that person.⁴⁶ This imposes a positive obligation upon governments to ensure that there is no danger of retaliation or other forms of harm (such as arrest for leaving the country or working in prostitution abroad) awaiting victims of trafficking upon returning home.⁴⁷ The Trafficking Protocol further provides for the issuing of travel documents or other authorisation necessary for victims to travel to and re-enter their countries of origin.⁴⁸

Prevention of trafficking in persons

2.26 The Trafficking Protocol emphasises the need for the prevention of trafficking in persons, including the protection of victims from revictimisation, the alleviation of

⁴³ Article 7(1).

⁴⁴ Article 7(2).

⁴⁵ Article 8(1).

⁴⁶ Article 8(2).

⁴⁷ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.27.

⁴⁸ Article 8(4).

factors that make persons vulnerable to being trafficked and the discouragement of the demand that fosters exploitation of persons.⁴⁹

Information exchange and training

2.27 The Trafficking Protocol calls on State Parties to exchange information in order to determine:⁵⁰

- (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking.
- (b) The type of travel documents that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons.
- (c) The means and methods used by organised criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and amongst individuals and groups engaged in such trafficking, and possible measures for detecting them.

2.28 Training on prevention of trafficking in persons must be provided to law enforcement, immigration and other relevant officials. The training should focus on methods used in preventing trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from traffickers.⁵¹ It is important to ensure that efforts aimed at preventing trafficking in persons do not violate the rights of individuals to enter and leave a country freely.⁵²

Border measures

2.29 The Trafficking Protocol calls on State Parties to strengthen border controls as may be necessary to prevent and detect trafficking in persons. State Parties must

⁴⁹ Article 9.

⁵⁰ Article 10(1).

⁵¹ Article 10(2).

⁵² International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.31.

further adopt measures to prevent any means of transport operated by commercial carriers from being used in the commission of the crime of trafficking in persons or any attempt to commit such a crime. Measures taken by State Parties in this regard must include establishing the obligation of commercial carriers to ascertain that all passengers are in possession of the travel documents required for entry into a country. Furthermore, consideration must be given to the denial of entry or revocation of visas of persons implicated in the commission of the crime of trafficking in persons or any attempt to commit such a crime.⁵³

Security and control of documents

2.30 The Trafficking Protocol obliges each State Party to take such measures as may be necessary, within available means:⁵⁴

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused, or readily falsified, replicated, issued or unlawfully altered.
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State and to prevent their unlawful creation, issuance and use.

Convention on the Rights of the Child of 1989

2.31 Certain provisions of the Convention on the Rights of the Child⁵⁵ are relevant to the issue of trafficking in children. The Convention calls for the implementation of measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.⁵⁶ Although this provision specifically refers to the trafficking of children, it fails to stipulate what constitute trafficking of children. State Parties are obliged to protect children from all forms of physical or mental violence, including sexual abuse.⁵⁷ The Convention provides for the right of every child to a standard of

⁵³ Article 11.

⁵⁴ Article 12.

⁵⁵ South Africa has ratified the Convention on the Rights of the Child (CRC) on 16 June 1995.

⁵⁶ Article 35.

⁵⁷ Article 19.

living adequate for the child's physical, mental, spiritual, moral and social development.⁵⁸ As a party to the Convention, South Africa is obliged to address the socio-economic conditions which force children into situations such as illegal employment and the sex trade. The Convention recognises the right of a child to be protected from performing any work that is likely to be hazardous or to interfere with the child's education, or which are harmful to the child's health or physical, mental, spiritual, moral or social development.⁵⁹ This provision is of particular relevance in instances of trafficking in children for purposes of sexual exploitation or exploitative labour practices. State Parties are required to protect children from all forms of sexual exploitation and sexual abuse.⁶⁰ Furthermore, State Parties must take appropriate measures to promote the physical and psychological recovery and social reintegration of a child who is a victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.⁶¹

Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 2000

2.32 The Protocol⁶² calls on State Parties to protect the rights and interests of child victims of trafficking, child prostitution and child pornography.⁶³ Although the Protocol does not specifically mention child trafficking, it does define the "sale of children". In terms of the Protocol, the "sale of children" means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.⁶⁴ The Protocol promotes international law enforcement co-operation with provisions covering diverse issues such as jurisdiction,⁶⁵ extradition,⁶⁶ mutual assistance in investigations, criminal or extradition proceedings,⁶⁷ and seizure

⁵⁸ Article 27.

⁵⁹ Article 32.

⁶⁰ Article 34.

⁶¹ Article 39.

⁶² This Protocol supplements the Convention on the Rights of the Child of 1989. The Protocol came into force on 18 January 2002 and was ratified by South Africa on 1 July 2003.

⁶³ Article 8.

⁶⁴ Article 2(a).

⁶⁵ Article 4.

⁶⁶ Article 5.

⁶⁷ Article 6.

and confiscation of assets.⁶⁸ Unlike the Convention on the Rights of the Child in terms of which State Parties commit themselves to take only “appropriate measures” to prevent certain practices, the Protocol places an explicit obligation on State Parties to make certain activities relating to the sale of children a criminal offence. The Protocol provides that each State Party should ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law whether such offences are committed domestically or transnationally or on an individual or organised basis.⁶⁹

- (a) The offering, delivering or accepting, by whatever means, of a child for the purpose of –
 - (i) sexual exploitation of the child;
 - (ii) transfer of organs of the child for profit; and
 - (iii) engagement of the child in forced labour.
- (b) Improperly inducing consent, as an intermediary, for the adoption of a child internally or transnationally.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979

2.33 CEDAW⁷⁰ obliges States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women.⁷¹

Rome Statute of the International Criminal Court

2.34 The Rome Statute of the International Court⁷² includes “enslavement” in its list of crimes against humanity.⁷³ It further defines “enslavement” as the exercise of

⁶⁸ Article 7.

⁶⁹ Article 3(1).

⁷⁰ Acceded to by South Africa on 18 October 2005 and entered into force on 3 September 1981.

⁷¹ Article 6.

⁷² Adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Ratified by South Africa on 27 November 2000.

⁷³ Article 7(1)(c).

any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children.⁷⁴

INTERNATIONAL LABOUR ORGANISATION INSTRUMENTS

Convention concerning Forced Labour 29 of 1930

2.35 The Convention⁷⁵ commits all State Parties to suppress the use of forced or compulsory labour.⁷⁶ The Convention defines “forced or compulsory labour” as work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.⁷⁷

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 182

2.36 The Convention⁷⁸ obliges State Parties to take immediate and effective measures to prohibit and eliminate the worst forms of child labour.⁷⁹ These include (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage, forced or compulsory labour, (b) the use, procuring or offering of a child for prostitution or the production of pornography, (c) the use of children in illicit activities, particularly for the production and trafficking of drugs and (d) work which is likely to harm the health, safety or morals of the child.⁸⁰ Unlike the Convention concerning Forced Labour, this Convention considers prostitution as a worst form of child labour. It further calls on State Parties to take effective measure (a) to prevent the engagement of children into these forms of labour, (b) to provide assistance for the removal of children from these forms of labour and for their

⁷⁴ Article 7(2)(c).

⁷⁵ This Convention came into force on 1 May 1932 and was ratified by South Africa on 5 March 1997.

⁷⁶ Article 1.

⁷⁷ Article 2.

⁷⁸ This Convention was ratified by South Africa on 7 June 2000 and came into force on 19 November 2000.

⁷⁹ Article 1.

⁸⁰ Article 3.

rehabilitation and social re-integration, (c) to identify and reach out to children at risk and (d) to take account of the special situation of girls.⁸¹ State Parties are also required to assist each other through enhanced international co-operation, including support for social and economic development, poverty eradication programmes and universal education.⁸²

REGIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights of 1981

2.37 The Charter⁸³ stipulates that every person is entitled to respect for his or her life and the integrity of his or her person.⁸⁴ The Charter recognises an individual's right to human dignity and prohibits all forms of exploitation and degradation of persons, particularly slavery; slave trading; torture; cruel, inhuman or degrading punishment and treatment.⁸⁵ The Charter stipulates that every individual has the right to liberty and security of the person.⁸⁶ Furthermore, State Parties must eliminate all discrimination against women and should ensure the protection of the rights of women and children as stipulated in international declarations and conventions.⁸⁷

African Charter on the Rights and Welfare of the Child of 1990

2.38 The Charter⁸⁸ commits State Parties to take appropriate measures to prevent the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child.⁸⁹ State Parties must take appropriate measures to prevent the use of children in all forms of begging.⁹⁰ The Charter emphasises the protection of children from all forms of economic exploitation

⁸¹ Article 7.

⁸² Article 8.

⁸³ Adopted on 27 June 1981 and entered into force on 21 October 1986.

⁸⁴ Article 4.

⁸⁵ Article 5.

⁸⁶ Article 6.

⁸⁷ Article 18(3).

⁸⁸ Entered into force on 29 November 1999.

⁸⁹ Article 29(a).

⁹⁰ Article 29(b).

and from performing any work that is likely to be hazardous or that may interfere with their physical, mental, spiritual, moral or social development.⁹¹ The Charter obliges State Parties to take specific legislative, administrative, social and educational measures to protect children from all forms of torture, inhuman or degrading treatment, especially physical or mental injury or abuse, neglect or maltreatment.⁹² Furthermore, State Parties must protect children from all forms of sexual exploitation and should take measures to prevent (a) the inducement, coercion or encouragement of a child to engage in any sexual activity, (b) the use of children in prostitution or other sexual practices, and (c) the use of children in pornographic activities, performances and material.⁹³

Protocol on the Rights of Women in Africa

2.39 The Protocol⁹⁴ supplements the African Charter on Human and Peoples' Rights. It obliges State Parties to adopt appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.⁹⁵ The Protocol further gives recognition to a woman's right to dignity⁹⁶ and prohibits all forms of exploitation, cruel, inhuman or degrading punishment and treatment against women.⁹⁷

⁹¹ Article 15(1).

⁹² Article 16(1).

⁹³ Article 27.

⁹⁴ Adopted on 11 July 2003.

⁹⁵ Article 4(2)(a).

⁹⁶ Article 3.

⁹⁷ Article 4(1).

CHAPTER THREE

EXTENT OF THE PROBLEM WITHIN THE SOUTH AFRICAN CONTEXT

Introduction

3.1 There are no official statistics on the number of persons trafficked to and from South Africa. Limited research on the issue of trafficking in persons within South Africa and across its borders makes it difficult to give an accurate overview of the extent of the problem. Moreover, as the act of trafficking in persons often takes place clandestinely, it is difficult to obtain statistics on trafficking activities. Furthermore, the majority of known trafficking cases involve women and children who have been trafficked for sexual exploitation. One of the reasons why the trafficking of men across the borders of South Africa and within its borders are under reported is the fact that most, if not all, NGOs rendering services to victims of trafficking provide such services to women and children only. This chapter therefore does not purport to be a comprehensive and accurate overview of the problem of trafficking in persons within the South African context.

Trafficking in persons versus smuggling in persons

3.2 Before discussing the issue of trafficking in persons, it is important to distinguish clearly trafficking in persons from smuggling in persons.⁹⁸ Trafficking involves the continued exploitation of the victim, whilst smuggling is the procurement of illegal entry of a person into a state of which that person is not a national or a permanent resident.⁹⁹ In this case the territorial integrity of the state is at stake.¹⁰⁰ The smuggler is usually paid a fee or other reward and his or her involvement with the smuggled person ends once illegal entry into the country has been secured. The intention of the smuggler is therefore not to exploit or otherwise subject the smuggled person to abuse of any kind. The Commission noted in the Issue Paper¹⁰¹ that the

⁹⁸ This is in line with guideline 2 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking which provides that victims of trafficking should be identified and distinguished from illegal migrants. See in this regard paragraph 2.4 above.

⁹⁹ See also article 3 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organised Crime, 2000.

¹⁰⁰ Musacchio Vincenzo "Migration, Prostitution and Trafficking in Women: An Overview" *German Law Journal* (2004) 5 (9), p. 1018.

¹⁰¹ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.33 - 34.

distinction between trafficking in persons and smuggling in persons is not always clear. For example, a trafficking case may start off as smuggling, but once the person has been smuggled into the country of destination, the smuggler may then decide to force him or her to work in the sex industry or another exploitative practice.

South Africa as a country of destination, transit and origin

3.3 The Issue Paper¹⁰² stated that South Africa is considered mainly as a country of destination for victims of trafficking. South Africa has become a lucrative market for traffickers because it serves as the economic heart of Africa and provides a market for the services of victims of trafficking. It is also a transit point for trafficking operations between developing countries and developed countries, especially Europe because it has direct flight and shipping routes to most countries in the developed world. Compounded with this is the fact that South Africa is regarded as one of the countries in the developing world whose citizens do not attempt to enter other countries illegally in significant numbers. This enables syndicates to evade suspicion at ports of entry in destination countries.¹⁰³

Methods used to ensnare persons for purposes of trafficking

3.4 Various means are being used to ensnare persons for purposes of trafficking them.¹⁰⁴ Young women are enticed by offers of employment abroad as dancers, bar hostesses, au pairs etc.¹⁰⁵ These women are unaware of the fact that they will be forced into commercial sex work or other forms of exploitative practices. Even those who know that they will be working in the sex industry have no idea of the violence to which they will be subjected or that they are going to become slaves of the traffickers. They are also misled about the conditions in which they will have to work.¹⁰⁶

¹⁰² South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.11.

¹⁰³ Barnes-September et al **Child victims of prostitution in the Western Cape** 2000, p.43, compiled for the Institute for Child and Family Development, University of the Western Cape.

¹⁰⁴ See also the definition of trafficking in persons in article 3 of the Trafficking Protocol for the various means that could be used by traffickers to ensnare their victims.

¹⁰⁵ Musacchio Vincenzo **German Law Journal** (2004) 5 (9), p. 1016.

¹⁰⁶ Musacchio Vincenzo **German Law Journal** (2004) 5 (9), p. 1016.

3.5 The Issue Paper¹⁰⁷ highlighted the ensnarement of women within South Africa for inter-country trafficking. It stated that women in South Africa often fall prey to the schemes used by traffickers to ensnare their victims. Traffickers usually make use of advertisements in which they offer work at, e.g. a health club or restaurant (usually in another province). The traffickers often pay the women's travelling expenses and accommodation costs. When the women arrive at the place of destination, they are informed that they also have to work in the sex industry. Upon refusal, they are threatened and prevented from leaving until the expenditure incurred in connection with their travel has been repaid. For example, a group of Chinese women trafficked to South Africa were beaten into submission when they refused to comply with the demands of their traffickers.¹⁰⁸ Not being able to meet these demands, the women often do what is expected from them.

The situation in which victims of trafficking may find themselves

3.6 Traffickers often make use of threats of reprisals against the families of victims to maintain a climate of fear. Victims are kept under tight control in order to deter them from reaching out to the authorities. Many trafficked women suffer violence, threats of violence, rape, psychological coercion and serious health problems from sexually transmitted diseases. Refusal to obey traffickers can lead to fines, physical violence and even death. In addition to the surveillance, violence, and threats, foreign victims fear arrest for being illegal in the country of destination.¹⁰⁹ Some victims receive no wages and are kept in servitude on the pretext of supposed debts, which they must repay in full before they can be released.¹¹⁰ However, these debts are increased continuously which diminish the possibility of repayment and release.¹¹¹

¹⁰⁷ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.12.

¹⁰⁸ See in this regard Oelofse L "Sex slaves discovered in posh city suburb: Duped Chinese women stage daring escape" **Pretoria News** 8 April 2003, p. 1.

¹⁰⁹ Musacchio Vincenzo **German Law Journal** (2004) 5 (9), p. 1021.

¹¹⁰ Musacchio Vincenzo **German Law Journal** (2004) 5 (9), p. 1023.

¹¹¹ See also paragraphs 5.68 – 5.73 below.

Purposes for which persons may be trafficked

3.7 The Issue Paper¹¹² highlighted various purposes for which persons may be trafficked. These include, but are not limited to trafficking for purposes of sexual exploitation; forced labour or slavery or practices similar to slavery or servitude;¹¹³ forced marriages; illegal adoptions or the removal of organs or other body parts. No rigid distinction can be drawn between these as persons may be trafficked for purposes of subjecting them to more than one of the various practices.

*Trafficking of persons within South Africa:*¹¹⁴

Trafficking for purposes of sexual exploitation

3.8 The trafficking of persons within South Africa is evident by the recent rescuing of a number of girls as young as 10 years old who were forced into prostitution. Some of these girls have been reported missing for nearly two years. It is reported that some of them were sold by their parents whilst others were kidnapped. They were allegedly rotated between Johannesburg, Cape Town, Bloemfontein and Durban. Several Nigerian men who are members of a child prostitution syndicate were arrested.¹¹⁵ Drugs were apparently used to keep the girls sedated and dependent on their traffickers.¹¹⁶ A three-year-old boy was allegedly amongst the children found by the police.¹¹⁷ Various manifestations of sex trafficking in South Africa have also been recorded in a number of research reports.¹¹⁸

¹¹² South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.13 - 24.

¹¹³ Trafficking of persons for purposes of forced labour or slavery or practices similar to slavery or servitude may include the trafficking of persons for purposes of subjecting them to exploitative domestic work, work within the agriculture or manufacturing business or using them as drug couriers.

¹¹⁴ It is important to note that foreigners who have been trafficked to South Africa may be re-trafficked within the borders of South Africa.

¹¹⁵ "Ringleaders of child prostitution syndicate arrested" **SABC News** 19 November 2004. See also "Police speak out on exploitation of children" **SABC News** 26 November 2004; "Police rescue another 14 child prostitutes" **SABC News** 25 November 2004; "Police bust national child prostitution syndicate" **SABC News** 18 November 2004.

¹¹⁶ "Police arrest client linked to child sex ring" **SABC News** 19 November 2004.

¹¹⁷ "Three-year-old among those found in prostitution bust" **SABC News** 19 November 2004.

¹¹⁸ These include the following: Molo Songololo **The trafficking of children for purposes of sexual exploitation in South Africa** 2000, Molo Songololo **The trafficking of women into the South African sex industry** 2000, ECPAT International **The Commercial Sexual**

Trafficking of persons for purposes of organ transplant

3.9 Despite great advances in medical science, the reproduction of human body parts has thus far been unsuccessful. While the search for compatible artificial organs and other human body parts continues, transplant surgery has become the most popular alternative choice. The limited number of available organs can no longer meet the high demand for organ transplants. The scarcity of organs has led to the trade of human organs on the black market. Due to its clandestine nature, no documented research could be found on the trafficking of South Africans or other residents for purposes of organ removal to be used in transplantations. However, an international syndicate that trade in human organs has, about two years ago, been exposed when an Israeli man who allegedly bought a kidney from them was arrested moments after his release from a private hospital in Durban.¹¹⁹ Some hospital personnel are also involved in this illegal trade of human organs.¹²⁰

Trafficking of persons for purposes of using their organs or other body parts in muti

3.10 The Issue Paper¹²¹ stated that according to traditional African beliefs, the use of human organs or other body parts increases the power of muti.¹²² An important distinction needs to be made between those who only use plants and herbs for purposes of healing, i.e. traditional healers, and those who also use human organs and other body parts, i.e. witch doctors.¹²³ This paper deals with the latter category. Several instances have been reported about the trafficking of persons within South Africa or from neighbouring countries to South Africa whose organs or other body parts ended up in the muti of witch doctors. Although it could not be established with

Exploitation of Children in Southern Africa 2001, Johns Hopkins University Protection Project **Annual Human Rights Report** 2002, and the International Organisation for Migration **Trafficking in Women and Children for Sexual Exploitation in Southern Africa** 2003.

¹¹⁹ See in this regard Ekron Z and Brits E "Twee in arres oor gesmous met organe" *Beeld* 4 December 2003, p.4.

¹²⁰ Brits E "Mense in mediese beroep glo ook orgaansmouse" *Beeld* 9 December 2003, p.2.

¹²¹ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.23 -24.

¹²² Muti is defined as African medicines, spells and herbs, parts of animals or human bodies, used in traditional therapy or in witchcraft or magic. See in this regard Branford J and Branford W **A Dictionary of South African English** Cape Town: Oxford University Press 1991, p.209.

¹²³ This distinction was made by Superintendent Everton during a presentation on Muti Killings made to the Networking Forum on Commercial Sexual Exploitation of Children on 21 November 2002.

certainty, there appear to be certain organised gangs which provide human organs or other body parts to witch doctors.¹²⁴ Mozambican groups involved in the trafficking of human organs also serve as a source of supply for South African witch doctors involved in this dubious trade. These groups usually kill specifically for the purpose of extracting organs.¹²⁵

3.11 Authorities generally prosecute only the perpetrators of the murder and not the witch doctor who has ordered the organs or other body parts. Unless the organs or other body parts are found in the possession of the witch doctor, the police have no evidence to link the killing to the witch doctor who often denies knowing the perpetrators.¹²⁶ Given the belief that witch doctors possess supernatural powers, it is found that members of the community are often scared to testify against them.¹²⁷

Trafficking of persons across the borders of South Africa: Trafficking of persons to South Africa

Trafficking for purposes of sexual exploitation

3.12 The Commission noted in the Issue Paper¹²⁸ that a survey of research on cross-border trafficking for purposes of sexual exploitation has revealed that children are being trafficked to South Africa from the following African countries: Mozambique, Angola, Zambia, Senegal, Kenya, Tanzania, Uganda, Ethiopia, Swaziland, Namibia, Botswana, Nigeria, Lesotho and Malawi.¹²⁹ Research also shows that the trafficking of women to South Africa takes place from the following African countries: Angola,

¹²⁴ Dispatch Online "Muti murders suspected in 5 deaths" 20 April 1999 Internet <http://www.dispatch.co.za/1999/04/20/southafrica/MUTI.HTM> Date accessed 02/07/2003. See also "Lock your doors – muti killers on loose" **Daily Sun** 9 December 2003, p.2.

¹²⁵ Gastrow P and Mosse M "Mozambique: Threats posed by the penetration of criminal networks" Paper delivered at the Institute for Security Studies Regional Seminar held on 18 and 19 April 2002.

¹²⁶ Information obtained from a presentation on Muti Killings made by Superintendent Everton to the Networking Forum on Commercial Sexual Exploitation of Children on 21 November 2002.

¹²⁷ Ibid.

¹²⁸ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.14 – 15.

¹²⁹ Molo Songololo **The trafficking of children** 2000, p 44 - 49; ECPAT International **The Commercial Sexual Exploitation of Children** 2001, p. 43; Johns Hopkins University Protection Project **Annual Human Rights Report** 2002, p. 490; International Organisation for Migration **Trafficking in Women and Children** 2003, p. 21 - 29.

Zimbabwe, Lesotho, Swaziland, Zambia, Cameroon, Malawi, Sudan and Mozambique.¹³⁰

3.13 Transportation of African women trafficked to South Africa takes place through a variety of modes, including cars, long distance trucks, taxis, boats and on foot.¹³¹

3.14 Women and children are also being trafficked to South Africa from Eastern Europe and South East Asia, especially from Thailand and Taiwan.¹³² They are trafficked primarily to escort agencies in Gauteng, Cape Town and Durban. Recent media reports on the trafficking of persons to South Africa have again highlighted the problem of trafficking.¹³³

Trafficking for purposes of forced labour

3.15 A substantial number of men are being brought to South Africa for purposes of forced labour. These include nationals from Pakistan, India and China. It is, however, not clear whether these men are victims of trafficking.¹³⁴ Persons are also being trafficked for purposes of domestic work, drug couriering and to work within the agriculture sector.¹³⁵

¹³⁰ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 30 – 40; Molo Songololo **The trafficking of women** 2000, p. 20.

¹³¹ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 16.

¹³² Molo Songololo **The trafficking of children** 2000, p 46; Molo Songololo **The trafficking of women** 2000, p. 30 – 32; ECPAT International **The Commercial Sexual Exploitation of Children** 2001, p. 43; Johns Hopkins University Protection Project **Annual Human Rights Report** 2002, p. 491; International Organisation for Migration **Trafficking in Women and Children** 2003, p. 60 - 78.

¹³³ For example, various Thai and Taiwanese women were found during a police raid in Durban. It is reported that some of the women were locked in a house by the brothel owner and were not allowed to leave the premises. See in this regard Chetty K “18 sex workers held” **Daily News** 7 March 2005, p.1.

¹³⁴ This information corresponds with intelligence on the issue.

¹³⁵ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p. 18 -20.

Trafficking for purposes of forced marriages

3.16 Trafficking in women and girls for purposes of forced marriages is becoming a world-wide phenomena and South Africa is no exception. The International Organisation for Migration's Report¹³⁶ reveals the trafficking of Mozambican women to South Africa to be sold as wives on the mines of Johannesburg West Rand. Young Mozambican women usually approach taxi drivers at Maputo's taxi ranks for transportation to South Africa where they hope to find work or to visit relatives. Many Mozambicans rely on these taxis to gain undocumented entry into South Africa as these taxis not only transport them directly to Johannesburg, but the taxi drivers also assist their passengers to gain illegal entry into South Africa. Women are also approached by traffickers at taxi ranks in Maputo who then persuade their potential victims to travel in one of the trafficker's taxis.

3.17 Young Mozambican women are also recruited through job offers in South Africa. Attractive job offers are made to young women working at markets in Maputo where many of them make a living by selling basic commodities. The traffickers also use other women to lure young women with attractive job offers.¹³⁷

3.18 Prior to crossing the border, these women do not suspect that they will be sold in Johannesburg. Until their arrival in Johannesburg, their transportation has the appearance of a smuggling operation.¹³⁸ During the journey, they are rarely separated from the other undocumented (mostly male) migrants travelling with them. The young women and other migrants are taken to transit houses in Soweto and Lenasia. Many of the migrants are free to leave the transit houses and thus simply remain clients who have been smuggled. However, some of the young women are held captive at the houses and are later taken to the mines on the West Rand where they are sold as wives to mineworkers. These women then become the sex slaves of their so-called husbands as well as unpaid domestic servants. They often live under difficult conditions and very rarely are able to escape.¹³⁹

¹³⁶ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 30 – 40.

¹³⁷ Ibid.

¹³⁸ See paragraph 3.2 above for a distinction between trafficking in persons and smuggling in persons.

¹³⁹ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 30 – 40.

Trafficking for purposes of adoption

3.19 Trafficking in children for purposes of adoption is an issue of concern. The adoption of children is usually overseen by government agencies. However, in some countries such as Guatemala mothers can relinquish their new born babies directly to a lawyer who arranges the adoptions. Studies show that children are being trafficked from countries of the Americas, especially Honduras, Ecuador, El Salvador, Venezuela, and Guatemala for the purpose of illegal adoptions.¹⁴⁰ It has been reported that lawyers representing American couples send out brokers to search for potential baby donors in the poorest neighbourhoods of Guatemala. These brokers befriend pregnant women and convince them to give up their babies, even offering to pay for medical costs. It has been reported that 98 percent of all adoptions in Guatemala are international, 62 percent of which go to families in the United States who pay between \$20,000 and \$24,000 for a child.¹⁴¹ The increasing demand for children has sometimes caused husbands to become baby brokers. In some cases, husbands have beaten their wives until they agree to give up their babies in exchange for payment.¹⁴²

3.20 There is a lack of research on the trafficking of children to and from South Africa for the purpose of illegal adoption. However, the Department of Social Development: International Social Services have noticed an increase in the number of South African children going abroad unaccompanied, especially to England. It is not clear how these children have ended up unaccompanied in the destination countries.¹⁴³

Trafficking of persons across the borders of South Africa: Trafficking of South Africans or other residents to other parts of the world

3.21 Apart from sporadic reports, there is no in-depth published research on the trafficking of South Africans or other residents to other parts of the world. The Issue

¹⁴⁰ Smith Linda and Mattar Mohamed "Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges" **Winter** (2004) 28:1 p.163.

¹⁴¹ Smith Linda and Mattar Mohamed **Winter** (2004) 28:1 p.163.

¹⁴² Smith Linda and Mattar Mohamed **Winter** (2004) 28:1 p.163.

¹⁴³ Discussion with Ms Francis Viviers, Affiliated Bureau of International Social Services, on 6 March 2006.

Paper¹⁴⁴ referred to a news paper report which mentioned the trafficking of children from African countries, including South Africa, to Britain. The majority of these children were subjected to slave-like practices and a small number of them were forced into the sex industry.¹⁴⁵ The International Organisation for Migration recently discovered the trafficking of South African women to the East Asian city of Macau, a former Portuguese colony across the Pearl River from Hong Kong which in 1999 became a Special Administrative Region of China. Young South African women are lured to Macau with false job offers before being forced into prostitution. In February 2004, a 23-year old South African woman escaped from her traffickers in Macau and returned to South Africa with the assistance of law enforcement officials in Macau. In an interview with the International Organisation for Migration, she reported encountering nine other black, white and coloured South African victims in Macau, age between 18 and 21, who were forcefully prostituted.¹⁴⁶

Submissions received

3.22 The Issue Paper has posed several questions as to how the law should be reformed in order to address the problem of trafficking in persons within the South African context. Responses to these questions are set out throughout this Discussion Paper under the relevant headings. However, not necessarily in the order posed in the Issue Paper.

With reference to the definition of trafficking in persons as set out in article 3(a) of the Trafficking Protocol, how should the crime of trafficking in persons be defined for purposes of South African legislation on trafficking in persons?

3.23 The majority of respondents supported the definition of trafficking in persons as set out in the Trafficking Protocol.¹⁴⁷

¹⁴⁴ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.11 – 12.

¹⁴⁵ 'S A kinders dalk in smokkelnet' **Rapport** 3 August 2003, p.11.

¹⁴⁶ International Organisation for Migration, Pretoria, 'South African Women Trafficked to Macau' **Eye on Human Trafficking Bulletin** Issue 2, May 2004, p. 1 and 4.

¹⁴⁷ RAPCAN, the Department of Social Development, Molo Songololo, Molo Songololo (Consultative Workshop) the S A Human Rights Commission, Childline, Johannesburg Child Welfare Society, the International Organisation for Migration, the Children's Rights Project, the South African Police Service, Rashid Patel and Company, CSV, Lawyers for Human Rights: Johannesburg, Lawyers for Human Rights: Pretoria, Mr. Masoa and the Department of Foreign Affairs.

3.24 **Childline** suggested that the following changes be made to the Trafficking Protocol's definition of trafficking in persons: "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring and/or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability and/or of the giving or receiving of payments or benefits to achieve the consent of a person trafficked¹⁴⁸ or a person having control or authority over another person, for the purpose of exploitation.

3.25 **Johannesburg (Jhb) Child Welfare Society** suggested that the proposed trafficking legislation should give recognition to the fact that children can be trafficked for purposes of adoption. Hence, the respondent recommended that the following be added at the end of the Trafficking Protocol's definition of trafficking: "...or to facilitate or secure the adoption of a child by a specific person or persons for purposes for gain, and in breach of the regulations pertaining to adoption either in the country of origin or, where applicable, that of destination".

3.26 **Ms Koen** pointed out that the Trafficking Protocol's definition of trafficking in persons neither cover the practice of selling persons nor the trafficking of children for purposes of adoption. She suggested that the following be added to the definition: "... or any act or transaction whereby a person is transferred by any person or group of persons to another for remuneration or any other consideration whether for the purpose of exploitation or not. **Molo Songololo** concurred that the definition of trafficking in persons should cover the sale of persons.

¹⁴⁸ Childline submits that a victim of trafficking sometimes receives payment as well.

3.27 The **Molo Songololo (Consultative Workshop)**¹⁴⁹ submitted that the proposed trafficking legislation should address both inter-country and cross-border trafficking in persons and stated that the scope of the proposed trafficking legislation should not be limited to offences that are transnational in nature and which involve organised criminal groups as provided for in article 4 of the Trafficking Protocol. Furthermore, the definition of trafficking in persons should reflect the South African situation and the terms “forced labour” and “exploitative labour” should be defined.

3.28 The **Western Cape Ministry of Community Safety** mentioned that there is an increase in the practice of giving children to more affluent families and relatives due to poverty-related reasons. The respondent said that children, particularly in rural areas, cannot object to the elderly in this regard.

3.29 **The International Organisation for Migration (IOM)** recommended that the Commission should consider eliminating any requirement to prove any of “the means” listed in the Trafficking Protocol’s definition of trafficking because it may expose prosecutors to “attacks for vagueness” by defendants. Thus, the means used to move someone into an exploitative situation are not important, but the process of moving people from one place to another in order to hold them in forced labour or slavery is essential to the crime. However, the **Children’s Rights Project** suggested that the words “or by any other means” be added after the list of means set out in the Trafficking Protocol’s definition of trafficking.

3.30 The **IOM** stressed the importance of including in the Trafficking Protocol’s definition of trafficking the four elements essential to the trafficking process: (i) the

¹⁴⁹ Molo Songololo has made this submission based on the outcomes from the consultative workshop on the Issue Paper. The workshop were attended by the following organisations: Aids Legal Network, Atlantis Satellite Office (Molo Songololo), Atlantis - School Health, Black Sash, Blouberg Health, Cape Town Child Welfare Society, Cape Town Refugee Centre, Community Law Centre (UWC), Concerned Parents of Missing Children, Congress of South African Trade Unions, Fire and Safety Emergency Services, Haven Night Shelter, Inter – Outreach Ministries, Lawyers for Human Rights, Legal Resources Centre, Mamre Clinic, Molo Songololo, National Association of Democratic Lawyers Human Rights Project, New World Foundation, Protea Park Clinic; Rape Crisis, Resources Aimed at the Prevention of Child Abuse and Neglect, South African Human Rights Commission, UCT Legal Aid Clinic, United Sanctuary Against Abuse, Western Cape Department of Education, Western Cape Directorate of Public Prosecutions. The following organisations supported and endorsed the submission: Congress of South African Trade Union COSATU (Nationally), Cape Town Refugee Centre, National Association of Democratic Lawyers Human Rights Project, Mamre Clinic, Lawyers for Human Rights Stellenbosch, Concerned Parents For Missing Children, Cape Town Child Welfare, Inter-Outreach Ministries, Protea Park Clinic, Haven Night Shelter, Atlantis Children’s Network, South African Human Rights Commission, New World Foundation, Blouberg Health, Molo Songololo Atlantis satellite.

recruitment of persons for purposes of exploitation; (ii) the transportation of such persons, whether by legal or illegal means; (iii) the intention to exploit such persons, and (iv) the irrelevance of the consent of victims of trafficking to their exploitation. The respondent argued that if the trafficking process is not recognised as the crime, trafficking would be legally indistinguishable from the individual activities of smuggling, forced labour or slavery-like practices. The respondent therefore submitted that trafficking should be distinguished from criminal acts such as abduction, kidnapping, rape, or child abuse offences; the definitions of which do not include transportation to an unfamiliar milieu as an essential element. Therefore, for purposes of South African law, trafficking in persons should include the implication that the victim has been relocated to an unfamiliar environment to facilitate his or her exploitation, and that the trafficker derives substantial power over the victim as a result of her relocation. In addition to a clear distinction from other crimes, the definition will: (i) enable the collection of consistent data on human trafficking; (ii) provide police with a clear focus to investigate the crime of trafficking in persons; and (iii) distinguish the special needs of victims of trafficking from the broader range of needs of abused persons so as to target essential services more effectively.

3.31 The respondent submitted that although the same definition should be used for both adults and children, a trafficked child may have more difficulty recovering from his or her experience than an adult. The respondent therefore recommended that a distinction be made between child and adult victims in the provision of social assistance, and/or in sentencing the accused. Furthermore, the South African definition of trafficking should not distinguish between transnational trafficking in persons and in-country trafficking. This is supported by the **Children's Rights Project**.

3.32 Similarly to the IOM, **Anonymous** submitted that the Trafficking Protocol's definition of trafficking establishes too many elements to the crime and thereby increasing the burden of proof on prosecutors. Additionally, some terms used in the definition are undefined or ambiguous, leaving the prosecution open to challenges by the defence. The respondent suggested that this definition should only be used as a basis for drafting domestic legislation. The respondent recommended that the definition be re-phrased in the following manner: "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by any means, for purposes of exploitation including, but not limited to: forced labour or

services, slavery or practices similar to slavery, servitude, adoption, or the removal of organs.”

3.33 The **Children’s Rights Project** suggested that child labour should be mentioned specifically as a form of exploitation to which a child victim of trafficking can be subjected. The respondent further proposed that the following be included in the definition section of the proposed legislation on trafficking in persons -

“sexual exploitation” means –

- (a) sexually molesting or assaulting a person or allowing a person to be sexually molested or assaulted;
- (b) encouraging, inducing, or forcing a person to be used for the sexual gratification of another person;
- (c) using a person in or deliberately exposing a person to sexual activities or pornography;
- (d) procuring or allowing a person to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a person.

“child labour”¹⁵⁰ means

- (a) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (b) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs and
- (c) work which by its nature or circumstances in which it is carried out is likely to harm the health, safety or morals of children.

“forced labour” means work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.¹⁵¹ But excludes compulsory military service, work forming part of normal civic obligations, work flowing from a conviction in a court of law or work flowing from national emergencies.

¹⁵⁰ Article 3 of the Convention on Worst Forms of Child Labour, 1999, Convention 182.

¹⁵¹ Article 2 of the Convention Concerning Forced Labour No 29.

“removal of organs”¹⁵² means the acquisition, use or supply of a body of a deceased person or any tissue, blood or gamete of a living or deceased person in any other manner or for any other purpose than that permitted in the Human Tissue Act 65 of 1983.

“slavery or practices similar to slavery” means the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.¹⁵³ The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.¹⁵⁴

“servitude and/or serfdom” means the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.¹⁵⁵

3.34 The **Department of Foreign Affairs** submitted that it is not necessary that the Trafficking Protocol’s definition be repeated *verbatim* should the Commission wish to propose additions thereto. However, the South African definition on trafficking in persons should be broad enough to give effect to the Protocol.

3.35 The **Sex Worker Education and Advocacy Taskforce (SWEAT)** submitted that the definition of trafficking should focus on forced labour or slave-like practices and not on prostitution or sexual exploitation. The respondent therefore proposed that the following definition as set out in the Human Rights Standards for the Treatment of Trafficked Persons, 2000 be considered:

Trafficking means –

¹⁵² Section 34 of the Human Tissue Act 65 of 1983.

¹⁵³ Article 1(1) of the Slavery Convention 60 L.N.T.S.

¹⁵⁴ Article 1(2) of the Slavery Convention.

¹⁵⁵ Article 1(b).of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 226, U.N.T.S. 3, entered into force April 30 1957.

“(a) all acts and attempted acts involved in the recruitment, transportation, within or across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use of threat or force or the abuse of authority) or debt bondage;

(b) for the purpose of placing or holding such person, whether for payment or not, in involuntary servitude (domestic, sexual or reproductive), forced or bonded labour, or slavery like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.”

3.36 The **Centre for the Study of Violence and Reconciliation (CSVR)** suggested that the word “exploitation” in the Trafficking Protocol’s definition of trafficking should not be defined to include the “exploitation of the prostitution of others or other forms of sexual exploitation” because the terms “forced labour or services, slavery, or practices similar to slavery, servitude or the removal of organs” in the definition cover all scenarios, including forced participation in sex work. The respondent argued that a definition of exploitation that specifically names “sexual exploitation” without defining it will confuse forced prostitution with the issue of free choice to engage in sex work. The respondent therefore suggested that exploitation should be defined as follows: “Exploitation shall include, at a minimum, the exploitation of the forced labour or services, slavery, servitude or the removal of organs”. The respondent further submitted that if the term “sexual exploitation” must be used, then the definition of sexual exploitation should read as follows: “Sexual exploitation means the participation by a person in prostitution, sexual servitude or the production of pornographic materials as a result of being subjected to threats, deception, coercion, abduction, force, abuse of authority, debt bondage or fraud”. The respondent further supported the inclusion of forced marriages in the definition of exploitation.

3.37 **Rashid Patel and Company** suggested that the definition of trafficking should also include the displacement of a person for the purpose of exploitation or to defeat or circumvent the laws of the country.

3.38 **Lawyers for Human Rights, Johannesburg**, suggested that the following be added at the end of the Trafficking Protocol’s definition of trafficking: “and the exploitation under conditions that violate the fundamental human rights of migrants”.

Should certain forms of trafficking in persons be categorised as ‘severe forms of trafficking in persons’¹⁵⁶ If yes, what would constitute severe forms of trafficking in persons? Should higher sentences be imposed on those who are found guilty of a severe form of trafficking in persons? If yes, what would be an appropriate sentence?

3.39 The following respondents were not in favour of categorising certain forms of trafficking as severe forms of trafficking in persons.

3.40 **Childline** argued that it would be difficult to define a severe form of trafficking as such a definition will depend on the vulnerability of and the exploitation to which the victim was subjected. The assessment of the degree of severity of a particular form of exploitation is also very subjective and depends on the vulnerability or resilience of the victim. The respondent therefore suggested that multiple charges should be laid against a perpetrator e.g. a person who has trafficked a child for the purpose of prostitution should be charged with both the crimes of trafficking in persons and child prostitution. The respondent further said that the particular vulnerable position of children should be acknowledged.

3.41 **Jhb Child Welfare Society** said that it would be undesirable for any form of trafficking to be regarded as anything other than severe. The respondent suggested that the nature of the crime, the level of abuse of power, and the scale and consequences of that abuse should be considered for purposes of mitigation or aggravation of sentence.

3.42 The **Children’s Rights Project** submitted that no distinction should be made between trafficking and severe forms of trafficking. However, the seriousness of certain types of trafficking should be reflected through the imposition of onerous sentences where the circumstances of each individual case merit such sentences. This view is supported by **SWEAT** and **Rashid Patel and Company**.

¹⁵⁶ In the USA, in terms of Public Law 106-386, October 28, 2000 (Victims of Trafficking and Violence Protection Act of 2000), severe forms of trafficking in persons means –

- sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- the recruitment, harboring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

3.43 The **S A Human Rights Commission** said that each case must be dealt with individually. Furthermore, the following factors should be considered by the court when determining an appropriate sentence:

- (a) the number of victims;
- (b) the ages of the victims;
- (c) the length of time the victims were held;
- (d) the conditions under which the victims were held;
- (e) the nature of any physical or mental abuse the victims may have suffered and the impact of such abuse;
- (f) whether the perpetrator is a member of an organised criminal group;
- (g) whether there was any profiteering from the crime of trafficking;
- (h) the nature of the exploitation to which the victims were subjected;
- (i) whether the victims are members of a vulnerable group e.g. women and children; and
- (j) any other relevant factor.

3.44 The following respondents, however, agreed that certain forms of trafficking should be categorised as severe forms of trafficking in persons:

3.45 **IOM** proposed that an act of trafficking in persons should be categorised as a severe form of trafficking in persons where one or more of the following has occurred:

- (a) sexual exploitation of the victim;
- (b) permanent or life threatening injury to the victim, or disability;
- (c) exposure of the victim to serious illness;
- (d) death of the victim;
- (e) addiction of the victim to any drug or medication;
- (f) the victim is a child; and
- (g) the crime of trafficking was committed by an organised criminal group.

3.46 **RAPCAN** suggested that higher sentences should be imposed on persons who are found guilty of severe forms of trafficking in persons.¹⁵⁷ Furthermore, the court must take into consideration the following factors when sentencing a person:

- (a) age of the victim;
- (b) nature of abuse;
- (c) psychological effect of the abuse on the victim;
- (d) duration of time the victim was subjected to the abuse;
- (e) conditions in which the victims were kept;
- (f) medical effect of the abuse on the victim; and
- (g) in the case of a child, the impact on his or her education.

3.47 **SAPS** recommended that the following be categorised as severe forms of trafficking in persons:

- (a) trafficking of children;
- (b) trafficking of women for purposes of sexual exploitation;
- (c) trafficking of any person whose life and/or health may be endangered as a result of being a victim of trafficking e.g. persons who are trafficked for purposes of organ removal or transplants; and
- (d) the act of trafficking when committed by an organised criminal group or in an organised fashion.

3.48 **Lawyers for Human Rights, Pretoria** proposed that the following be taken into consideration to determine whether a trafficking case constitute a severe form of trafficking:

- (a) the ages of the victims;
- (b) level of consent of the victims;
- (c) the exploitative situation;
- (d) whether the victims were deceived;
- (e) the treatment the victims received;
- (f) the purpose for which the victims were trafficked.

¹⁵⁷

This is supported by SAPS.

3.49 The respondent said that the sentence imposed for a severe form of trafficking should take into account the severity and frequency of the commission of the offence.

3.50 **Ms Koen** submitted that trafficking which facilitates the exploitation of children should be viewed as a serious offence and sentences should be consistent with sentences provided in existing legislation.

3.51 **Molo Songololo (Consultative Workshop)** submitted that the categorisation of a case of trafficking as a severe form of trafficking should be based on the following criteria:

- (a) ages of the victim;
- (b) nature of the abuse to which the victims were subjected;
- (c) physical and psychological effect of the abuse on the victims;
- (d) length of time the victims were deprived of their freedom;
- (e) conditions in which the victims were held; and
- (f) if the victim is a child, whether he or she was denied an education.

3.52 Furthermore, the above should serve as aggravating circumstances for sentencing. The courts should impose higher sentences where such aggravating circumstances exist.

3.53 **Mr Masoa** suggested that severe forms of trafficking should be limited to the following:

- (a) sex trafficking where a commercial sex act was induced by force, coercion or deception, or where the person induced to perform such an act has not attained the age of 21 years; and
- (b) the recruitment, harbouring, transportation, provision or obtaining of a person through the use of force, fraud or coercion for purposes of labour, involuntary servitude, peonage, debt bondage or slavery.

3.54 The respondent added that higher sentences should be imposed on persons found guilty of a severe form of trafficking and stated that a sentence of 15 years imprisonment would be an appropriate sentence.

Evaluation and recommendations

3.55 The Commission disagrees with Childline that the word “and/” be inserted after the words “harbouring” and “vulnerability” in the Trafficking Protocol’s definition of trafficking in persons. Within the context of this definition, the word “or” does not exclude any of the other mentioned methods or means used to traffic a person. However, the Commission agrees that the words “or authority” be added after the words “a person having control”. “Control” refers only to a person having physical control over another person e.g. a person taking care of a child on behalf of his or her parents. However, “authority” is much broader than just physical control. It also includes a person who has certain rights and responsibilities in respect of another person. The Commission does not support Childline’s argument that a person can consent to being trafficked in return for payment. It is true that traffickers may give or promise victims of trafficking certain benefits as a means of convincing them to accept false employment offers or education opportunities. However, because victims of trafficking may not foresee the brutality to which they may be subjected, it cannot be said that they have consented to the intended exploitation.

3.56 The Commission agrees with the IOM and Anonymous that a requirement to prove that one or more of the means set out in the Trafficking Protocol’s definition of trafficking have been used in order to establish that a person is a victim of trafficking may hamper the successful prosecution of traffickers. The Commission therefore favours the Children’s Rights Project’s suggestion that the words “or by any other means” be added after the list of means set out in the Trafficking Protocol’s definition of trafficking.

3.57 The Commission appreciates the IOM’s submission that the element of transportation is essential to the crime of trafficking in persons. However, in terms of the Trafficking Protocol’s definition of trafficking in persons, it would be possible to establish the crime of trafficking in persons without proving the element of transportation. By requiring an element of transportation before the crime of trafficking can be established would be contrary to the definition as set out in the Trafficking Protocol. The Commission agrees with the IOM that the crime of trafficking in persons should be distinguished from other criminal acts such as child abuse, but is of the view that each case should be considered on its own merits based on the proposed South African definition of trafficking in persons.

3.58 The Commission agrees with Jhb Child Welfare Society and Ms Koen that the proposed trafficking legislation should cover the trafficking of a child for purposes of illegal adoption. It is, however, important to distinguish trafficking of a child for purposes of illegal adoption from baby selling. The former will always involve the exploitation of the child. This is in accordance with the Trafficking Protocol which requires that the trafficking of a person must be for the purpose of exploitation. The latter usually involves the use of deception or the payment of undue compensation to induce the relinquishment of a child. It is often used to circumvent legal adoption proceedings and the purpose is not to exploit the child. The Commission further agrees with Ms Koen and Molo Songololo that the definition of trafficking should cover the sale of persons.

3.59 Article 34(2) of the Convention Against Transnational Organised Crime of 2000 makes it clear that the crime of trafficking in persons can be established in the domestic law of a country irrespective of the transnational nature of the crime or the involvement of an organised criminal group. Furthermore, the provisions of the Trafficking Protocol must be interpreted together with the Convention.¹⁵⁸ The Commission therefore agrees with the suggestion that the South African definition of trafficking in persons should apply to both cross-border and inter-country trafficking. The Commission further submits that whilst the proposed trafficking legislation should be based on the principles set out in the Trafficking Protocol, it must be relevant to the local circumstances. Hence, the Commission agrees with Molo Songololo (Consultative Workshop) that the trafficking definition should reflect the South African situation.

3.60 In response to the submission made by SWEAT and CSV, the Commission would like to point out that the phrase “exploitation of the prostitution of others or other forms of exploitation” is not defined in international law as countries have different laws and policies on prostitution. The Commission has currently on its programme an investigation into adult prostitution. The aim of this investigation is to determine whether adult prostitution should be legalised, regulated, decriminalised or further criminalised.¹⁵⁹ It would therefore be premature to include the above words in

¹⁵⁸ Article 1(1) of the Trafficking Protocol.

¹⁵⁹ See also paragraph 4.17 below.

the definition of trafficking without clearly defining it to exclude voluntary adult prostitution.

3.61 The Commission recommends that, for purposes of South African legislation on trafficking in persons, the Trafficking Protocol's definition of trafficking in persons should be amended as follows:¹⁶⁰

Trafficking means—

(a) the recruitment, sale, supply, procurement, capture, removal transportation, transfer, harbouring or receipt of persons, within or across the borders of the Republic—

(i) by any means, including, the use of threat, force, intimidation or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control or authority over another person; or

(ii) by abusing vulnerability, for the purpose of exploitation; and

(b) includes the adoption of a child facilitated or secured through illegal means

3.62 The Commission further recommends that exploitation be defined as follows:¹⁶¹

“exploitation” includes—

(a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;

(b) sexual exploitation;

(c) servitude;

(d) forced labour;

(e) child labour as defined in section 1 of the Children's Act, ... (Act No. ... of ...) and

¹⁶⁰ The proposed definition is almost similar to the definition of “trafficking” in clause 1 of the Children's Bill. See also clause 1 of the proposed Bill.

¹⁶¹ The proposed definition is similar to the definition of “exploitation” in clause 1 of the Children's Bill. See also clause 1 of the proposed Bill.

(f) the removal of body parts.

3.63 The Commission further recommends that the above forms of exploitation be defined as follows:

“slavery” means the exercise of any or all of the powers attaching to the right of ownership over a person.

“sexual exploitation” means the participation of a person in prostitution or other sexual acts, or the production of pornographic material as a result of being subjected to threat, force, intimidation or other forms of coercion, or any other practise in terms of which it cannot be said that the person participated voluntarily.¹⁶²

“servitude” means a condition in which the labour or services of a person are provided or obtained through threats of serious harm to that person or another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labour or services, that person or another person would suffer serious harm.¹⁶³

“forced labour” means labour or services obtained or maintained through threats, the use of force, intimidation or other forms of coercion, or physical restraint.¹⁶⁴

“removal of body parts” means the removal of any organ or other body part from a living person in contravention of the National Health Act, 2003 (Act No. 61 of 2003).¹⁶⁵

¹⁶² See clause 1 of the Bill.

¹⁶³ See clause 1 of the Bill.

¹⁶⁴ See clause 1 of the Bill. The Basic Conditions of Employment Act, 75 of 1997, prohibits forced labour, but does not define it.

¹⁶⁵ See clause 1 of the Bill. The proposed definition is similar to the definition of “removal of body parts” in clause 1 of the Children’s Bill.

3.64 The Commission has given due consideration to the submissions received as to whether certain forms of trafficking in persons should be categorised as “severe forms of trafficking in persons”. The Commission is of the view that it would be difficult to define severe forms of trafficking given the different forms of exploitation to which victims of trafficking may be subjected, both during the course of the trafficking process and at the place of exploitation. However, cognisance needs to be taken of the degree of the severity of the exploitation to which a victim may be subjected as well as the vulnerability of the victim.

3.65 It is further important to note that certain forms of exploitation such as rape, assault, assault with the intent to do grievous bodily harm, and intimidation are existing criminal offences in South African law.

3.66 The Commission recommends that, in addition to the crime of trafficking in persons, perpetrators should be charged with existing offences in instances where victims were subjected to certain forms of abuse or exploitation such as rape, assault etc. However, where victims were subjected to abuse or exploitation which are not existing offences, such abuse or exploitation should serve as aggravating factors for sentencing. Aggravating factors may include the following:

- (a) causing the victim to become addicted to drugs;**
- (b) the conditions in which the victim was kept;**
- (c) the duration the victim was held captive;**
- (d) the psychological effect the abuse had on the victim;**
- (e) the act of trafficking was part of the activities of an organised criminal group; and**
- (f) the victim is a child**

Causes leading to trafficking in persons

3.67 The Issue Paper¹⁶⁶ highlighted various factors that contribute to the trafficking of persons. These include, but are not limited to the following:

¹⁶⁶ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p. 27 – 31.

A. Primary causes

(i) *Poverty*

3.68 Poverty, coupled with high unemployment rates, is the main factor underlying persons' vulnerability to being trafficked. Because of chronic unemployment, widespread poverty or a lack of economic opportunities, traffickers use promises of higher wages and good working conditions in foreign countries to lure individuals into their schemes.¹⁶⁷ Families seeing no economic opportunities within their communities will sometimes place their children with families and friends in areas where they believe the prospects for gainful employment may be greater. Children in these communities become easy prey for traffickers who promise them trade and work opportunities.¹⁶⁸ Poverty-stricken parents have sometimes sold their children to traffickers to get out of debt and the poverty they face.¹⁶⁹ In poor communities, there is generally a high rate of illiteracy and a lack of marketable skills. Young people are also attracted to the bright lights of the city where they know they can earn more money without fully appreciating the hardship they may suffer in the process of trying to escape from their circumstances. Poverty and hunger may place women and children in situations in which they are forced to exchange sex for food, shelter and survival.¹⁷⁰ Parents are known to even sell their children in order to survive. Poverty is also worsened by the lack of an effective welfare support system for those who are unable to provide for their families' financial needs.

(ii) *Family breakdown*

3.69 Parents sometimes find it difficult to cope with the stress in their lives and may become physically, emotionally or sexually abusive. Divorce and remarriage can also place a strain on family relationships. When families become homeless, or are forced to move from place to place, parents' abilities to care for and protect their

¹⁶⁷ US Department of State **Trafficking in Persons Report** June 2003, p 7.

¹⁶⁸ Salah R "Child trafficking in West and Central Africa: An overview" Paper presented at the First Pan African Conference on Human Trafficking held in Abudja, Nigeria on 19 – 23, February 2001.

¹⁶⁹ Fitzgibbon K "Modern-day Slavery? The scope of trafficking in persons in Africa" **African Security Review** (2003)12(1) Internet: <http://www.iss.co.za/Pubs/ASR/12No1/E2.pdf> Date accessed: 15/8/03.

¹⁷⁰ Shifman Pamela and Franzblau Ken 'Trafficking: Legislative responses' in **Profiting from abuse: An investigation into the sexual exploitation of our children** 2001 UNICEF p.17.

children are often severely limited.¹⁷¹ Abuse of children within the family is one of the reasons why children leave their home to survive on the streets, thereby becoming vulnerable to being trafficked.

(iii) *Gender discrimination*

3.70 In some societies men are held in higher esteem than women. Women and girls are often treated as property and denied a voice and a right to protection against violence. Families who do not value female children may deny them education or give them off into marriage at a young age. This dramatically limits their life opportunities and increases their vulnerability to exploitation and abuse.¹⁷²

(iv) *Culture*

3.71 In some societies cultural values produce the attitude that children should work outside the family to help parents and other siblings. There is also the attitude that a child is obligated to supplement the family income. Attractive job offers are made to the parents of children and in this way children are lured by traffickers. It is also not uncommon for parents and guardians to be witting or unwitting accomplices of the traffickers.¹⁷³

(v) *HIV/AIDS*

3.72 HIV/AIDS has resulted in a massive rise in the number of orphans and child-headed households in which children are compelled to become wage earners. This vulnerability, along with the social stigma associated with HIV/AIDS in many parts of the world, leave these children with few defences against exploitation.¹⁷⁴

(vi) *War, natural disasters and political instability*

¹⁷¹ Shifman P and Franzblau K 2001 p.17.

¹⁷² Shifman P and Franzblau K 2001, p.17. See also US Department of State **Trafficking in Persons Report** June 2003, p 8.

¹⁷³ Information obtained at Internet: <http://www.stopchildtrafficking.info/causes.htm>

¹⁷⁴ Shifman P and Franzblau K 2001, p.17. See also US Department of State **Trafficking in Persons Report** June 2003, p 10.

3.73 Sudden political change, economic collapse, civil unrest, internal armed conflict and natural disasters greatly increase the likelihood of people being displaced who then become vulnerable to exploitation by traffickers.¹⁷⁵ Exploitation of women and children flourishes in situations where norms break down.

(vii) *Ignorance*

3.74 As most persons are ignorant of the risks involved in trafficking such as torture, rape and exposure to HIV/AIDS, they easily accept offers of employment opportunities for themselves or their children made by traffickers.

(viii) *Demand*

3.75 The supply of victims of trafficking is supported by a high demand for the exploitation of these victims in various sectors, especially the sex industry. Men form the biggest proportion of those creating the demand within the sex industry. There is also a high demand for the exploitation of children within the informal economic sector as children provide cheap labour and are vulnerable to abusive situations. Children are often unaware of their rights or are powerless to seek assistance.¹⁷⁶

B. Secondary causes

(i) *Weak laws and corruption*

3.76 Efforts to fight trafficking in persons are usually hampered by inadequate laws which allow traffickers to continue their activities with relative impunity. Trafficking in persons is also facilitated by some corrupt law enforcement officials who turn a blind eye to trafficking operations in return for payment.

(ii) *Migration*

¹⁷⁵ US Department of State **Trafficking in Persons Report** June 2003, p 8; See also Fitzgibbon K **African Security Review** (2003) 12(1) Date accessed: 15/8/03.

¹⁷⁶ Salah R 'Child trafficking in West and Central Africa: An overview' Paper presented at the First Pan African Conference on Human Trafficking held in Abudja, Nigeria on 19 – 23 February 2001.

3.77 As job opportunities are scarce, people are often forced to migrate in order to survive. The main reasons for migration are poverty, discrimination against women, unemployment, lack of education, lack of resources, and political and economic instability.¹⁷⁷ Many women consider migration as the only opportunity for improving their standard of living and that of their families.¹⁷⁸ However, the expectations of migrants are generally shattered by the realities and the experiences they face at their place of destination. Migrant labourers are usually viewed as cheap economic tools and little regard is given to the conditions in which they live and work, their health and safety conditions. This creates conditions in which women migrant workers become particularly vulnerable to sexual exploitation and abuse from employers. Although migration does not necessarily lead to trafficking, it can create conditions which make migrants more vulnerable to being trafficked into different kinds of bonded labour, including sex work.¹⁷⁹ The Southern African region became popular for migrants because of the political transformation that took place in South Africa during the 1990's and the opening up of international trade and regional cross-border activities which led to expansion of economic activities and relative prosperity in the region.¹⁸⁰ The increased movement of people and goods has also made it easier for traffickers to transport women and children across borders. The desire to migrate can seldom be met through legal channels since many countries, especially western countries, have clamped down on immigration. The restrictions encourage the setting up of networks that exploit those who want to migrate.¹⁸¹

Submissions received

What can be done to eliminate or reduce the causes making persons vulnerable to being trafficked? How can your suggestions best be incorporated in legislation?

¹⁷⁷ Musacchio Vincenzo **German Law Journal** (2004) 5 (9), p. 1015.

¹⁷⁸ Barnes-September et al **Child victims of prostitution in the Western Cape** 2000, p. 43.

¹⁷⁹ United Nations HIV and Development Program South and South-West Asia **The nexus of vulnerability: Prevention and trafficking of women and girls and HIV/AIDS in South Asia** 2001, p. 14 - 15.

¹⁸⁰ Umar A "Organised crime links between Southern Africa and West Africa" Paper presented at the Seminar for SADC Countries on the ratification and implementation of the United Nations Convention against Transnational Organised Crime, Mauritius, 23 – 25 September 2003.

¹⁸¹ Musacchio Vincenzo **German Law Journal** (2004) 5 (9), p. 1021.

3.78 The protection of persons from extreme poverty¹⁸² and public awareness campaigns on issues relating to trafficking in persons¹⁸³ were proposed by various respondents.

3.79 **Jhb Child Welfare Society** argued that a basic income grant would be the single most effective measure for protecting people from extreme poverty.

3.80 **RAPCAN** submitted that addressing the issue of poverty will necessarily involve, but is not limited to the following:

- (a) making available a wide range of resources and support services to poor people;
- (b) creating employment opportunities; and
- (c) providing skills training and capacity-building initiatives which encourage economic entrepreneurs and the development of small businesses.

3.81 **SWEAT** submitted that the causes leading to persons being trafficked should be considered within a framework that recognises the agency of women, in particular those who are seeking work opportunities for diverse reasons.

3.82 The **S A Human Rights Commission** suggested the following:

- (a) training of relevant state officials who may come into contact with potential victims e.g. the police, border officials, immigration officials and labour inspectors;¹⁸⁴
- (b) the creation of an inter-sectoral structure to address the issue of trafficking;
- (c) the creation of a toll free hotline to report trafficking.

3.83 The **National Council of Women of South Africa (NCWSA)** proposed the following to reduce the vulnerability of persons to being trafficked:

- (a) persons should ensure that they know the address and telephone number of their country's embassy or consulate closest to where they will be staying;

¹⁸² Jhb Child Welfare Society, RAPCAN and Lawyers for Human Rights, Pretoria.

¹⁸³ RAPCAN, SAPS, the S A Human Rights Commission and Lawyers for Human Rights, Pretoria, Sexual Offences and Community Affairs Unit and Mr Masoa.

¹⁸⁴ See the Commission's recommendations on training in paragraphs 8.24 to 8.34 below.

- (b) persons should obtain the name and contact details of their employers and if possible, verify with the employers where they will be working and what their salaries and living conditions will be;
- (c) enquire from NGOs, especially those concerned with women issues, in the country of destination whether the employer is legitimate or trustworthy;
- (d) persons should report at their embassies once in the country of destination.

3.84 **Network Against Child labour** proposed that the child support grant should be provided to children up to the age of 18 years. Furthermore, the community should be empowered through job creation initiatives and skills Development Programmes should be established.

3.85 **Lawyers for Human Rights, Johannesburg** suggested the adoption of similar measures as provided for in section 106 of the VTVPA.¹⁸⁵

3.86 The **Sexual Offences and Community Affairs Unit** suggested that action should be taken against corrupt border officials.

Evaluation and recommendations

3.87 The Commission is of the view that trafficking in persons will not be combated effectively without addressing the root causes making persons vulnerable to being trafficked.

3.88 Responding to Jhb Child Welfare Society's submission, the issue of a basic income grant has long been a discussion point amongst both government and civil society circles. The Commission agrees that a basic income grant may alleviate extreme poverty, but is of the view that the proposed trafficking legislation is not the

¹⁸⁵ This section provides as follows: "The President shall establish and carry out international initiatives to enhance economic opportunity for potential victims of trafficking as a method to deter trafficking. Such initiatives may include—

- (1) microcredit lending programs, training in business development, skills training, and job counseling;
- (2) programs to promote women's participation in economic decision-making;
- (3) programs to keep children, especially girls, in elementary and secondary schools, and to educate persons who have been victims of trafficking;
- (4) development of educational curricula regarding the dangers of trafficking; and
- (5) grants to nongovernmental organizations to accelerate and advance the political, economic, social, and educational roles and capacities of women in their countries."

appropriate place to deal with such a grant. The question whether a basic income grant should be legislated for, is a task to be undertaken by the Department of Social Development. Furthermore, the appropriate place to deal with such a grant would be in the Social Assistance Act.¹⁸⁶

3.89 In response to the S A Human Rights Commission's suggestion that a hotline for the reporting of trafficking cases should be created, the Commission would like to mention that the IOM has already established such a hotline in South Africa. The IOM is also in regular contact with relevant government departments or agencies in order to ensure that victims of trafficking are provided with the necessary assistance. Creating an additional hotline would be a duplication of existing efforts.

3.90 The Commission agrees with the submissions made by RAPCAN and the NCWSA.

3.91 The Commission recommends that national Departments having poverty alleviation programmes in place, in particular the Department of Social Development, should review their programmes with the view to determining whether these programmes respond to the needs of persons vulnerable to becoming victims of trafficking. These programmes should then be strengthened accordingly. Furthermore, the Department of Labour should focus specifically on the creation of employment opportunities and skills training initiatives. South Africa has made substantial progress in ensuring better access to education. The Commission believes, however, that more can be done to ensure that those at risk of becoming victims of trafficking, especially women and young girls in rural communities, are provided with an education. This will facilitate their participation in economic activities.

3.92 Various other preventative measures could reduce persons' vulnerability to becoming victims of trafficking. Such measures include public awareness campaigns and training of law enforcement officials. See in this regard the Commission's

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recommendations under the chapters on the prevention of trafficking in persons¹⁸⁷ and non-legislative measures¹⁸⁸ respectively.

The trafficking network

3.93 The Issue Paper¹⁸⁹ stated that various role-players are involved in the trafficking of persons, all of whom profit in some way or other. The chain can be quite extensive. A victim might be linked to an abuser, sometimes across borders, through intermediaries which include recruiters, transporters, pimps, brothel owners and sex tourists. Organised criminal networks thrive on this trade in persons and, to a lesser or greater extent, so do many others such as taxi drivers, and relatives, including parents. Individuals within organised criminal networks usually form the link between the network recruiting the persons to be trafficked and the network to which the persons are being trafficked. Victims of trafficking sometimes become traffickers themselves. For example, a victim who has managed to pay off her debt owed to traffickers may agree to work for her traffickers by recruiting other women in her country of origin.

3.94 Trafficking of foreigners to South Africa for purposes of commercial sexual exploitation from Europe, Southeast Asia and the rest of Africa appears to be controlled by organised criminal gangs from Bulgaria, Russia, Thailand, China and Nigeria.¹⁹⁰

3.95 Various criminal groups are involved in the trafficking of South Africans to other parts of the world. A young South African woman who was recently trafficked to Macau¹⁹¹ reported that the trafficking operation between South Africa and Macau is run by two South African nationals involved in the Johannesburg sex industry and two other associates who are connected to at least three Chinese nationals with links to local organised criminal networks in Macau. By offering lucrative employment opportunities abroad, the traffickers target young women in their late teens and early

¹⁸⁷ See paragraph 7.34 – 7.37.

¹⁸⁸ See paragraph 8.24 – 8.34.

¹⁸⁹ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.31.

¹⁹⁰ Fitzgibbon K Modern-day Slavery? **African Security Review** (2003) 12(1).

¹⁹¹ See also paragraph 3.21 above.

twenties who have experience as strip dancers or sex workers. South African women are also lured to Macau through news paper advertisements or sex industry websites.¹⁹²

3.96 Traffickers are often highly successful because of their links with other transnational criminal networks, such as those dealing in arms and drugs that provide them with safe and tested routes, access to cash and known corrupt officials to bribe.

Submissions received

Should a distinction be made in sentencing between those who provide the supply of victims (the traffickers) and those who merely facilitate the act of trafficking in persons? If yes, what would be an appropriate sentence for those who merely facilitate trafficking in persons and who are not part of the trafficking network?

3.97 Most respondents answered the question in the negative.¹⁹³

3.98 **Childline** held the view that both categories of offenders are essential to the crime of trafficking. This is supported by the **Sexual Offences and Community Affairs Unit** who submitted that those who provide the supply of victims should not be treated differently from those who merely facilitate the act of trafficking in persons.

3.99 **SAPS** stated that both categories of offenders form part of the trafficking chain and can be held liable in terms of the common purpose doctrine.

3.100 The **S A Human Rights Commission** suggested that trafficking in persons should be dealt with on a case by case basis and the courts should impose an appropriate sentence on each person depending on his or her role in the act of trafficking

3.101 **Jhb Child Welfare Society** stated that the courts should assess the degree of culpability of an offender. The courts should, for example, examine the extent to

¹⁹² International Organisation for Migration, Pretoria, "South African Women Trafficked to Macau" **Eye on Human Trafficking Bulletin** Issue 2, May 2004, p.1.

¹⁹³ Childline, Mr Masoa, SAPS, Serious and Violent Crimes Unit, the Sexual Offences and Community Affairs Unit and the South African Human Rights Commission.

which the offender may have been acting in ignorance or under duress, in order to determine an appropriate penalty.

3.102 **NCWSA** said that those who merely facilitate the crime of trafficking in persons should be treated as accessories to the crime.

3.103 **Lawyers for Human Rights** answered the question in the affirmative and suggested that a lesser sentence should be imposed on those who merely facilitate trafficking in persons, taking into account the role they have played.

Evaluation and recommendations

3.104 After due consideration of the submissions received, and on a closer analysis of the Trafficking Protocol, the Commission found that the definition of trafficking as set out in the Protocol does not distinguish between those who provide the supply of victims and those who merely facilitate the act of trafficking in persons. Hence, a taxi driver who is not part of the trafficking network, but who knowingly transports the victims to the place of exploitation on a single occasion would be a trafficker within the ambit of this definition.

3.105 **The Commission therefore recommends that no distinction be made between the mentioned categories of offenders and that the severity of a sentence to be imposed on a trafficker should be within the discretion of the courts. Furthermore, the courts' discretion should be guided by the following factors:**

- (a) **whether the perpetrator forms part of a trafficking network;**
- (b) **the significance of the perpetrator's role in the trafficking process; and**
- (c) **previous convictions relating to the crime of trafficking in persons.**

CHAPTER FOUR

TRAFFICKING IN PERSONS, GENDER AND PROSTITUTION

Introduction

4.1 As the trafficking of persons into the sex industry is a global problem, an analysis of trafficking in the South Africa context would be incomplete without an examination of the perceived link between trafficking, gender and prostitution. However, it should be noted that this chapter neither purport to provide a comprehensive analysis of the issue of prostitution nor does it intends to make recommendations regarding the legal status of prostitution in South Africa.

Gender

4.2 It is a general fact that those trafficked into the sex industry are predominantly female. This fact is recognised by the Trafficking Protocol which places a specific focus on women and children. Gender inequality is one of the underlying reasons for the commercial sexual exploitation of women. Traditional beliefs, values and practices which put females second to males are some of the causes for gender inequalities. The historical and cultural acceptance of male authority cause many men to expect obedience and submission from women. Many men expect women to submit on some level to male authority both in everyday life and in sexual relations. Another factor facilitating abuse against women is the widespread use of the image of a woman as an object. The objectification of women is often found in the use of pornography and the use of women's bodies to sell products in advertisements. The underlying socio-economic and cultural factors that increase inequality and discrimination make women and children even more vulnerable to becoming victims of trafficking. It is true that people living in poor communities, particularly women and children, are socially and economically the most vulnerable. Scarce opportunities for employment and education in countries might cause such countries to become countries of origin for trafficking of women and children.

4.3 Both prostitution and trafficking are part of a system of gender-based domination and have their roots in the imbalance of power between women and men in society. Those who facilitate trafficking and prostitution prey on women and children made vulnerable by poverty, discrimination and violence thereby rewarding

predators sexually and financially, strengthening both the demand and criminal operations that ensure the supply.¹⁹⁴

Arguments in favour and against the legalisation or decriminalisation of prostitution

4.4 Two schools of thought exist regarding the link between trafficking and prostitution. On the one hand, it is argued that trafficking in women for prostitution should be de-linked from prostitution itself in that trafficking for prostitution should be regarded as a problem and not prostitution itself. This school of thought believes that an individual has a right to decide to work as a prostitute and that prostitution should be recognised as a form of work. Some of the reasons cited in favour of the legalisation or decriminalisation of prostitution include the following:¹⁹⁵

- (a) Sex workers and legal brothel owners are able to report violations of the law to the police without fear that they themselves will be subjected to criminal prosecution.
- (b) Sex workers enjoy the protection of the law.
- (c) The sex industry becomes more transparent because of the increased regulation and access to the everyday operation of the industry.
- (d) Better access to the sex industry allows criminal activity and abuse within the industry to be detected earlier.
- (e) Regulation of the sex industry provides sex workers with the right to better and safe working conditions.
- (f) The threat to brothel owners of heavy financial loss from losing a license or being shut down is a large financial incentive for owners to ensure that the operations of their clubs or brothels are in compliance with the law.

4.5 It needs to be kept in mind that regulation accompanies the legalisation or decriminalisation of prostitution. This means that brothel owners would have to comply with certain prescribed standards. Some brothel owners may prefer to

¹⁹⁴ Coalition Against Trafficking in Women "Demand and the Debate" 16 October 2003, compiled by Leidholdt Dorchen A.

¹⁹⁵ Butt L and Salazar J "Lifting the Ban: Oldest profession becomes the newest market sector" 2004.

operate illegally in order to prevent effecting improvements to their establishments or to pay tax.

4.6 However, on the other hand, it is argued that the sex industry is one of the root causes of sex trafficking.¹⁹⁶

4.7 Various examples are being used to substantiate the argument that prostitution contributes to the trafficking of persons into the sex industry. In 2000, the Dutch government sought and received a judgment from the European Court recognising prostitution as an economic activity, thereby enabling women from the European Union and former Soviet bloc countries to obtain working permits as sex workers in the Dutch sex industry, if they could prove that they are self employed. However, non-governmental organisations in Europe report that traffickers use these work permits to bring foreign women into the Dutch prostitution industry, masking the fact that these women have been trafficked, by coaching them to describe themselves as independent migrant sex workers.¹⁹⁷ Once prostitution was legalised in the Netherlands, brothel owners began to recruit women into prostitution through government-sponsored job centres for unemployed workers.¹⁹⁸ In the year since lifting the ban on brothels in the Netherlands, eight Dutch victim support organisations reported an increase in the number of victims of trafficking and another twelve victim support organisations reported that the number of victims from other countries have not decreased.¹⁹⁹ This is in contrast with the aims of the lifting of the brothel ban which were: (1) the control and regulation of operations within the prostitution sector, (2) the intensification of the fight against forced prostitution, (3) the protection of minors from sexual abuse, (4) the protection of the position of

¹⁹⁶ Raymond Janice G "Ten Reasons for Not Legalising Prostitution and a Legal Response to the Demand for Prostitution" **Journal of Trauma Practice** (2003)(2); Solidarity Philippines Australia Network "Regulating Prostitution to End the Traffic in Women" **Kasama** (2002) 16 (3), This article can also be access at <http://www.cpcabrisbane.org/Kasama/2002/V16n3/SheilaJeffreys.htm>; Submission made by the Coalition Against Trafficking in Women Australia to the Parliamentary Joint Committee on the Australian Crime Commission: Inquiry into trafficking in women for sexual servitude November 2003.

¹⁹⁷ Raymond Janice G **Journal of Trauma Practice** (2003) (2).

¹⁹⁸ Coalition Against Trafficking in Women 16 October 2003.

¹⁹⁹ Raymond Janice G **Journal of Trauma Practice** (2003) (2).

prostitutes, (5) the disentanglement of prostitution from marginal crime, and (6) the reduction of prostitution by illegal aliens.²⁰⁰

4.8 Prostitution in Germany was recognised as employment in 2002. Consequently, the promotion of prostitution, pimping and the operation of a brothel are legal in Germany. It is said that the sheer volume of foreign women in the German prostitution industry suggest that some of these women were trafficked into Germany, a process euphemistically described as facilitated migration. It is further argued that it is almost impossible for poor women to facilitate their own migration, provide for their own cost of travel and travel documents, and set themselves up in “business” without intervention.²⁰¹

4.9 In the state of Victoria, Australia, brothel prostitution was legalised in 1984. It was said that legalisation would solve problems such as criminal involvement in the industry, unregulated expansion, and the violence done to street prostituted women. Legalisation, it was believed, would diminish the health risks, particularly the risk of sexually transmitted diseases, for either prostituted women or their clients. However, legalisation has led to a massive expansion of the sex industry and an increase of the trafficking of women and children into the sex industry in order to fill new brothels. Child prostitution has grown markedly in the state of Victoria compared to other states in Australia.²⁰²

4.10 In Sweden, the buying of sexual services is a criminal offence. It is contended that this has dissuaded traffickers from trafficking women into Sweden.²⁰³ This has also led to a decrease in the number of men who buy sexual services and a decrease in the recruitment of women into prostitution.²⁰⁴ Europol and national police forces in other European countries have reported that Sweden is no longer an

²⁰⁰ Butt L and Salazar J 2004.

²⁰¹ Raymond Janice G **Journal of Trauma Practice** (2003) (2).

²⁰² Coalition Against Trafficking in Women (Australia) “Legalising prostitution is not the answer: The example of Victoria, Australia”, compiled by Sullivan Mary and Jeffreys Sheila.

²⁰³ Solidarity Philippines Australia Network **Kasama** (2002) 16 (3), This article can also be access at <http://www.cpcabrisbane.org/Kasama/2002/V16n3/SheilaJeffreys.htm>

²⁰⁴ Ministry of Industry, Employment and Communications “Prostitution and Trafficking in Women” January 2004; Coalition Against Trafficking in Women ‘16 October 2003.

attractive market for traffickers.²⁰⁵ Pimps and traffickers are believed to experience the following difficulties in Sweden:²⁰⁶

- (a) Prostitutes must be escorted to the buyers. This means lesser earnings than if the women had been prostituted in brothels or on the streets.
- (b) Swedish men who want to make use of the services of prostitutes express serious fear of being arrested and prosecuted. Hence, they demand absolute discretion from the pimps and traffickers.
- (c) In order to minimise detection, the pimps and traffickers are forced to operate apartment brothels in more than one location and to change locations regularly. This mode of operation is expensive and requires pimps and traffickers to have local contacts.

4.11 However, the Swedish law has been found undesirable in certain respects. A report by the Swedish National Police Board has found the law an obstacle to the prosecution of traffickers. In the past, criminal proceedings against traffickers could be supported by the testimonies of the clients of sex workers. However, these clients are no longer willing to assist since they themselves are now guilty of committing an offence. The report further found that sex workers are placed in a difficult position as they can be forced to appear as witnesses against their clients.²⁰⁷

4.12 The trafficking of persons into the commercial sex industry is primarily to countries in which prostitution and the provision of other sexual services are either tolerated or legal.²⁰⁸ The demand for prostituted women is also great in countries with organised women's movements, where the status of women is high and there are relatively few local women available for commercial sexual exploitation.²⁰⁹

²⁰⁵ Division for Gender Equality: Ministry of Industry, Employment and Communications (Sweden) "Best Practices for Prevention of Prostitution and Trafficking in Women: The Swedish Law that Prohibits the Purchase of Sexual Services" 2003, compiled by Ekberg Gunilla S; Coalition Against Trafficking in Women 16 October 2003.

²⁰⁶ Division for Gender Equality: Ministry of Industry, Employment and Communications (Sweden) 2003.

²⁰⁷ Ostergren Petra "Sexworkers critique of Swedish Prostitution Policy" 2004. This article can be accessed at Internet: <http://www.petraostergren.com>.

²⁰⁸ "Stop Violence Against Women: Demand for Women's Sexual Services" Internet http://www.stopvaw2.extranet.urbanplanet.com/Demand_for_Women_s_Sexual_Services.h.

²⁰⁹ Coalition Against Trafficking in Women 16 October 2003.

4.13 It is argued that the distinction between voluntary prostitution and forced prostitution is of an academic nature as this distinction is meaningless to women under the control of pimps and traffickers. Furthermore, men who make use of the services of prostitutes do not differentiate between those who are willing participants and those who are forced to sell their bodies.²¹⁰ Trying to make a distinction between prostitution by choice and forced prostitution is futile since in practice it is extremely difficult to prove cases of forced prostitution. Traffickers and pimps can easily conceal evidence of coercion and manufacture evidence of consent from the prostitutes themselves.²¹¹ The demand that leads to the trafficking of women and girls into the sex industry is not distinct from the demand for prostitution. The demand to import trafficked women arises from a developing sex industry which is unable to find enough local women who are willing to prostitute themselves to fill brothels profitably and to keep up with the rapid expansion of the sex industry. As trafficked women and children are more vulnerable, they are a profitable source of supply for the sex industry. The sex industry businesses in which trafficked and prostituted women are exploited are often one and the same, with women trafficked for prostitution and those in prostitution by choice working side by side. Local brothels and strip clubs are usually traffickers' destinations and key to their financial success. The injuries that trafficked women and those in prostitution by choice suffer are identical: post-traumatic stress disorder, severe depression, damage to reproductive systems, damage from sexual assaults and beatings and sexually transmitted diseases.²¹²

4.14 It is said that without the demand for prostituted women and children, there would be no trafficking in women and children for prostitution or other forms of commercial sexual exploitation. Furthermore, the demand for prostitution and other forms of commercial sexual services is what make vulnerable women and children such enticing cargo for traffickers.²¹³

²¹⁰ Hughes Donna M and Roche Claire M "Legalising Prostitution Will Not Stop the Harm" Internet <http://www.uri.edu/artsci/wms/Hughes/mhvlegal.htm> Date accessed 30/11/2004.

²¹¹ "Legalising prostitution is legalizing violence" 19 May 2002, Internet <http://www.home.clear.net.nz/pages/wpnz/may19-02prostitution.htm>

²¹² Coalition Against Trafficking in Women 16 October 2003.

²¹³ Statement made at the Forty-seventh Session of the Commission on the Status of Women, Internet <http://www.scienceblog.com/community/older/archives/L/2003/C/un032771.html> See also Division for Gender Equality: Ministry of Industry, Employment and Communications (Sweden) 2003.

4.15 In light of the above, it seems difficult to de-link the demand for prostitution from the trafficking of women and children for purposes of prostitution. The curtailment of trafficking in persons for prostitution seems to go hand in hand with strong measures to eliminate the demand for prostituted women and children. In terms of the Trafficking Protocol, exploitation includes the exploitation of the prostitution of others or other forms of sexual exploitation.²¹⁴ The Protocol thus recognises the link between prostitution and the demand that fosters the exploitation of victims of trafficking.²¹⁵ The Protocol explicitly recognises that one of the forms of exploitation associated with trafficking in persons involves prostitution and related forms of sexual exploitation. Furthermore, by requiring State Parties to adopt measures to discourage the demand that leads to trafficking in persons, the Protocol gives an indication of the seriousness with which the demands that foster exploitation should be regarded.

Evaluation and recommendation

4.16 In addressing adult prostitution, it is clear that South Africa should adopt an approach which will not cause an increase in the trafficking of persons, particularly women and children, into the sex industry.

4.17 The Commission therefore recommends that the link between trafficking in persons for purposes of prostitution and prostitution itself should be further explored in the Commission's investigation into Adult Prostitution. Furthermore, one of the determining factors whether adult prostitution should be legalised, regulated, decriminalised or further criminalised should be the question whether prostitution contributes to the trafficking of persons for purposes of prostitution.

²¹⁴ Article 3 of the Protocol.

²¹⁵ Article 9(5) of the Protocol.

CHAPTER FIVE THE PROSECUTION OF TRAFFICKERS AND OTHER ROLE PLAYERS

SUBSTANTIVE MEASURES

Problems in prosecuting traffickers

5.1 The Issue Paper²¹⁶ stated that since trafficking in persons is not a crime in South Africa at present, traffickers are being charged with common law offences such as kidnapping²¹⁷ or abduction.²¹⁸ They may also be charged in terms of existing statutory laws. They may, for instance, be charged in terms of the Immigration Act²¹⁹ for bringing persons into the country without the necessary documentation, and in terms of the Sexual Offences Act²²⁰ if they have subjected their victims to sexual abuse. It is therefore important that prosecutors are aware of the existing legislative measures that could be used to prosecute traffickers. Where a trafficker has neither subjected his or her victim to abuse during the trafficking process nor has entered the country illegally, the charge will usually be kidnapping only. A lower sentence would generally be imposed for the crime of kidnapping compared to the crime of trafficking in persons.

Criminalising the act of trafficking in persons by persons, natural or juristic, or partnerships

5.2 The crime of trafficking in persons is being committed not only by individuals, whether they are part of an organised criminal group or not, but is also being committed by juristic persons or partnerships²²¹ such as employment agencies, strip clubs, mail-order bride agencies etc. It is therefore important that the prohibition against trafficking in persons should also apply to the latter.

²¹⁶ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.55.

²¹⁷ Kidnapping is the wrongful and intentional deprivation of the liberty of another. See in this regard *S v Levy* 1967 (1) SA 353 (W). This definition makes it clear that it applies to men, women and children.

²¹⁸ Abduction is the unlawful taking of a minor out of the control of his or her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor. See in this regard Burchell J and Milton J **Principals of criminal law** (second edition) Landsdowne: Juta 1997, p. 523. The Children's Bill regulates international child abduction.

²¹⁹ 13 of 2002.

²²⁰ 23 of 1957.

²²¹ Partnerships are mentioned specifically because they are not considered as juristic persons.

Comparative overview

5.3 Article 4 of the Dominican Republic's Law No. 137-03 on Illegal Trafficking of Migrants and Trade in Persons provides for the criminal liability of organisations or corporations that are involved in the trafficking of persons. This provision provides for various penalties, including the imposition of a fine, the revocation of a license, or the closure of a business.²²²

5.4 In the Philippines, it is a criminal offence for a corporation, partnership, association, club, establishment or any other juridical person to be involved in the trafficking of persons. The Republic Act No. 9208 – Anti-Trafficking in Persons Act stipulates that the penalty must be imposed upon the owner, president, partner, manager and or any responsible officer who participated in the commission of the crime or who knowingly permitted or failed to prevent its commission.²²³

Submissions received

Should a minimum sentence be set for persons found guilty of the crime of trafficking in persons? If yes, what would be an appropriate minimum sentence?

5.5 The majority of respondents were not in favour of setting a minimum sentence for the crime of trafficking in persons.²²⁴ The following are the submissions received in this regard.

5.6 **Childline** highlighted that minimum sentences legislation in relation to sexual offences against children has not been applied with a great degree of success in South Africa. The respondent explained that referrals to the High Court for purposes of sentencing once a conviction has been secured by a lower court have resulted in

²²² Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "The birth of a new anti-trafficking legislation: The Dominican Republic's Law Number 137-03 Regarding Illegal Trafficking of Migrants and Trade in Persons" Paper presented at the Conference on New Steps in Path Breaking Strategies in the Global Fight Against Sex Trafficking held in Santo Domingo, Dominican Republic on 8 and 9 December 2003.

²²³ Section 10(e).

²²⁴ Childline, Jhb Child Welfare Society, Ms Koen, the Department of Social Development, the S A Human Rights Commission and Rashid Patel and Company.

delays. These delays have caused additional stress for child victims of sexual offences. Furthermore, officials in the higher courts, having not directly witnessed the distress of child witnesses, are often not in a position to assess the impact of the crime on a child. The respondent envisaged that similar problems could be experienced in cases of trafficking in persons. The respondent suggested that judicial officers should be encouraged to participate in “information sharing opportunities” relating to the crime of trafficking in persons, and to listen to evidence on the impact of the crime on the victim in order to fairly adjudicate sentencing.

5.7 **Ms Koen** stated that given the different role-players that may be involved in the crime of trafficking and the exploitation of a victim, it is undesirable to set a minimum sentence for the crime of trafficking in persons. This view is supported by the **Jhb Child Welfare Society** who further suggested life imprisonment for those involve in the trafficking of persons, especially children, for purposes of sexual exploitation, labour or the removal of body parts.

5.8 The **S A Human Rights Commission** argued that the severity of the crime and its impact on the victim can only be determined on a case-by-case basis. The respondent therefore suggested that sentencing should be left to the domain of the courts. The respondent further recommended that the Criminal Procedure Act²²⁵ should be amended to make trafficking in persons a Schedule 5 offence (making it more onerous for an accused to obtain bail). Furthermore, the proposed trafficking legislation should provide that the crime of trafficking in persons can only be prosecuted at a regional or high court level in order to indicate the seriousness of the offence.

5.9 **Rashid Patel and Company** stated that sentencing should remain the domain of the courts and suggested that the form of sentence imposed on an offender should depend on the following: (a) the degree of the offender’s participation in the crime, (b) the number and ages of the victims, (c) the form of abuse to which the victims were subjected, and (d) the offender’s acts or attempts to defeat or obstruct the course of justice or to circumvent the laws. The respondent highlighted the difficulties being experienced with the Criminal Law Amendment Act on minimum sentences. The respondent pointed out that because of the minimum sentences

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provisions, a court is not able to take into account the personal circumstances of an offender unless certain criteria are met.

5.10 Some respondents welcomed the setting of a minimum sentence for the crime of trafficking in persons.²²⁶ The following are the submissions received in this regard.

5.11 **SAPS** suggested a minimum sentence of ten years imprisonment or a fine of R100 000, whilst the **Serious and Violent Crimes Unit** suggested a minimum sentence of five years imprisonment without the option of a fine.

5.12 **Lawyers for Human Rights, Johannesburg**, stated that the punishment for human trafficking should be commensurate with that of grave crimes such as forcible sexual assault.

5.13 **Mr Masoa** suggested a minimum sentence of 15 years imprisonment without the option of a fine.

5.14 The **Sexual Offences and Community Affairs Unit** submitted that the Minimum Sentences Act should be made applicable to the offence of trafficking in persons. The respondent suggested a minimum sentence of 25 years for trafficking in persons for purposes of sexual exploitation. The respondent suggested that a life sentence be imposed where this offence is coupled with offences such as murder, attempted murder or assault with the intention to commit grievous bodily harm. The psychological effects the crime has on the victim should also be considered.

With reference to article 3(b) of the Trafficking Protocol, should the consent of a victim of trafficking be irrelevant only where any of the actions contemplated in the definition of 'trafficking in persons' have been employed? If not, in what other instances should the consent of a victim of trafficking be irrelevant? Please motivate your answer.

²²⁶

Sweat, SAPS, the Serious and Violent Crime Unit, Lawyers for Human Rights: Pretoria and Mr Masoa.

5.15 **SWEAT**, the **S A Human Rights Commission** and **Mr Masoa** considered consent irrelevant in relation to any of the actions contemplated in the Trafficking Protocol's definition of trafficking. This is supported by **Childline** who added that the consent of a child victim should be irrelevant at all times.

5.16 **IOM**, **SAPS** and the **Serious and Violent Crimes Unit** submitted that the consent of a victim must be irrelevant in all cases of trafficking in persons.

5.17 **Ms Koen** suggested that consent should also be irrelevant in instances where persons consent to being employed in situations where the levels of exploitation and abuse are known to be high such as commercial sex work and domestic work.

5.18 **Anonymous** submitted that once the elements of the crime of trafficking have been proved, any allegations by the defence that the victim of trafficking has consented should be irrelevant.

5.19 **Lawyers for Human Rights, Johannesburg**, submitted that consent should be considered in the case of sex workers or persons who consent to engaging in sex work. However, the element of deception or exploitation should be taken into consideration.

5.20 **Lawyers for Human Rights, Pretoria** said that a distinction should be made between consent and informed consent. The respondent submitted that consent should be irrelevant where persons are deceived to believe that they will be working in a legitimate form of employment, whilst the intention of their trafficker is to subject them to exploitation. The respondent added that the question as to whether consent is relevant should also be dependent on a person's age, mental state, or the conditions under which consent was given e.g. consent obtained under duress or intimidation.

Evaluation and recommendations

5.21 The crime of trafficking in persons is usually committed by organised criminal networks that make use of a variety of persons to assist them in committing the crime. These persons may include family members of victims or a taxi driver who on one occasion knowingly transported victims to the place of exploitation. The

Commission therefore realises that due to the wide range of role-players that may be involved in the crime of trafficking in persons, it would be unadvisable to set a minimum sentence for this crime. The Commission therefore agrees with the S A Human Rights Commission and Rashid Patel and Company that sentencing in relation to the crime of trafficking in persons should remain the domain of the courts. The Commission further believes that given the serious nature of the crime of trafficking in persons, sentences imposed on perpetrators should reflect the seriousness of the crime.

5.22 The Commission would like to reiterate that charging a perpetrator for the crime of trafficking in persons does not mean that he or she cannot be charged for any other offence committed during the trafficking process. For instance, if a perpetrator has raped his victim during the trafficking process, he should be charged with rape in addition to the charge of trafficking in persons.

5.23 The Commission agrees with the S A Human Rights Commission that the crime of trafficking in persons should be made a Schedule 5 offence in terms of the Criminal Procedure Act.²²⁷ This will mean that where an accused is charged with the offence of trafficking in persons, the court would have to order that he or she be detained in custody until he or he is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permits his or her release. In addition, the Commission recommends that the crime of trafficking in persons be included in Schedule 1 and Schedule 2, Part III to the Criminal Procedure Act.²²⁸ The inclusion of the crime of trafficking in persons in Schedule 1 would mean that a peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed the crime of trafficking in persons.²²⁹ The inclusion of the crime of trafficking in persons in Schedule 2, Part III of the Act would mean that a person accused of committing the crime of trafficking in persons may not be released on bail before his or her first appearance in a lower court.²³⁰ Furthermore, if a person is likely to give evidence in criminal proceedings in

²²⁷ See Schedule 1 to the Bill.

²²⁸ See Schedule 1 to the Bill.

²²⁹ See section 40 of the Criminal Procedure Act.

²³⁰ See section 59 of the Criminal Procedure Act.

respect of the crime of trafficking in persons, a judge in chambers would be able to issue a warrant for the detention of such person if—²³¹

- (a) there is a danger that the personal safety of the person concerned may be threatened or that he may abscond or that he may be tampered with or intimidated; or**
- (b) it would be in the interests of the person concerned or of the administration of justice that he be detained in custody.**

5.24 In addition to criminalising the act of trafficking in persons, the Trafficking Protocol obliges State Parties to establish as criminal offences attempting to commit the crime of trafficking in persons, participating as an accomplice in the crime of trafficking in persons, and organising and directing other persons to commit the crime of trafficking in persons.

5.25 Attempt to commit an offence is regulated by section 18 of the Riotous Assemblies Act.²³² This Act further regulates the offences of conspiracy and incitement to commit an offence. The Act provides as follows:

Attempt, conspiracy and inducing another person to commit offence

(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

(2) Any person who-

- (a) conspires with any other person to aid or procure the commission of or to commit; or
- (b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

5.26 Participating as an accomplice in an offence is a common law offence. An accomplice is a person who takes part in the commission of an offence, but who is not a perpetrator or co-perpetrator. An accomplice's liability is accessory which means that there can be no accomplice without a perpetrator or co-perpetrator. An

²³¹ See section 185 of the Criminal Procedure Act.

²³² 17 of 1956.

accomplice is not a perpetrator as he lacks the actus reus of a perpetrator, but he knowingly affords the perpetrator or co-perpetrator the opportunity, means or the information which furthers the commission of the crime²³³

5.27 It is not clear what the drafters of the Trafficking Protocol had in mind with “organising or directing other persons to commit an offence”. The Annotated Guide²³⁴ to the Trafficking Protocol could also not give an explanation in this regard. Directing another person to commit an offence has two different meanings. On the one hand, it could mean providing guidance to a person to commit an offence. On the other hand, it could mean commanding a person to commit an offence. If the latter interpretation is the correct meaning, the act would be covered by article 18(2)(b) of the Riotous Assemblies Act. This means that the perpetrator does not need to commit the crime him or herself, but can do it through another person. The person through whom the crime is committed is also guilty of committing the crime.

5.28 As the provisions of section 18 of the Riotous Assemblies Act are applicable to any offence, the Commission considers it unnecessary to criminalise attempt to commit the crime of trafficking in persons within the proposed trafficking legislation. It is further not necessary to criminalise participating as an accomplice in the crime of trafficking in persons as this can be dealt with as a common law offence.

5.29 Following the approach taken by the Dominican Republic and the Philippines and in order to comply with article 10 of the Convention against Transnational Organised Crime,²³⁵ the Commission recommends that the proposed trafficking legislation should, where appropriate, apply to a juristic person or a partnership in the same way as it applies to an individual. Furthermore, the proposed legislation should criminalise the act of trafficking in persons²³⁶ and should provide for an appropriate sentence.²³⁷

²³³ See in this regard Du Toit *et al* **Commentary on the Criminal Procedure Act** Cape Town: Juta 2004, p. 22:11.

²³⁴ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002.

²³⁵ See also paragraph 2.5 above.

²³⁶ See clause 5 of the Bill. This provision is in line with clause 284 of the Children’s Bill.

²³⁷ See clause 38(1) of the Bill. This provision is in line with clause 305(8) of the Children’s Bill.

5.30 It is not clear why the Trafficking Protocol makes consent irrelevant in relation to adults, only if the means set out in its definition have been used.²³⁸ The Commission has recommended in paragraph 3.61 that “any means, including, the use of threat, force, intimidation or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control or authority over another person” used to move a person into an exploitative situation could serve as an element for establishing the crime of trafficking in persons. Hence, consent would be irrelevant even if means, other than those stipulated in the Trafficking Protocol’s definition, have been used. **The Commission recommends that consent should be irrelevant where any means have been used to move a person into an exploitative situation. Furthermore, it should not be a defence to a charge of trafficking in persons that a person who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking have consented to the exploitation.**²³⁹

Trafficking in persons as part of the activity of an organised criminal group

5.31 Trafficking in persons has become more organised over the years and is often committed by criminal groups. Trafficking in persons in the context of organised crime can be divided into three parts, namely the recruiter’s environment, the transporter’s environment and the exploiter’s environment. These groups are often unrelated, except for informal arrangements to supply victims of trafficking to destination markets. The goal of those operating within the recruiter’s environment is to ensure a constant supply of victims of trafficking and the undetected delivery of such victims to those operating within the transporter’s environment. These criminal groups prey on vulnerable persons such as the poor, the uneducated, the unemployed and those affected by political instability and natural disasters. The goal of those operating within the transporter’s environment is to ensure the undetected delivery of victims of trafficking to those operating within the exploiter’s environment. These criminal groups usually rely on known routes and corrupt border officials. The goal of those operating within the exploiter’s environment is to exploit the victims by selling their services to customers. Criminal groups operating within this environment

²³⁸ A case of trafficking in children can still be establish even if it does not involve any of the means set out in the definition. See in this regard article 3(c) of the Trafficking Protocol.

²³⁹ See clause 5(2)(a) of the Bill.

rely on the demand for the services of victims. All three criminal groups have one goal in common i.e. to make a profit.²⁴⁰

5.32 This raises the question as to whether persons who are part of an organised criminal group and who commit the crime of trafficking in persons whether as a recruiter, transporter or exploiter should be treated differently by the law.

Submissions received

Should a higher sentence be imposed on a person found guilty of the crime of trafficking in persons if the trafficking was part of the activity of an organised criminal group? If yes, what would be an appropriate sentence?

5.33 Various respondents answered the question in the affirmative.²⁴¹

5.34 **Childline** highlighted that not everyone who participate in organised crime have the same level of responsibility and decision-making ability. For example, some young persons who are involved in the drug trade do so as a means of paying off a debt to a drug dealer. The respondent therefore submitted that one should not exclude the possibility that some of those involved in the crime of trafficking in persons as part of an organised criminal group are involved as a result of their own vulnerability. The respondent recommended that both the level of responsibility and the level of the decision making-ability of the offender should be taken into account at the sentencing stage – the higher the decision-making ability and planning power, the higher the sentence should be. Furthermore, those participating in organised trafficking of children should be penalised more heavily due to the greater vulnerability of children.

5.35 **Ms Koen** submitted that it is undesirable to impose higher sentences on traffickers who are part of an organised criminal group as a person's involvement in an organised criminal group might be as a result of deception, coercion or force.

²⁴⁰ See also Albanese J "A Criminal Network Approach to Understanding and Measuring Trafficking in Human Beings" Paper presented at the International Conference on Measuring Human Trafficking: Complexities and Pitfalls held in Courmayeur, Italy on 2 – 4 December 2005.

²⁴¹ The Department of Social Development, NCWSA, the Serious and Violent Crimes Unit, Lawyers for Human Rights: Pretoria and Mr Masoa.

However, consideration should be given to setting a minimum sentence for those who plan, manage, and who are responsible for logistics and execution of organised trafficking operations.

5.36 The **S A Human Rights Commission** suggested that a trafficker's involvement in an organised criminal group should be an additional consideration that the court could take into account at the sentencing stage.

5.37 **Mr Masoa** suggested a sentence of 15 years imprisonment.

Evaluation and recommendations

5.38 In response to the submissions made by Childline and Ms Koen, the Commission would like to point out that it would be within the discretion of the court whether the fact that the offender him or herself was in a vulnerable position should serve as a mitigating circumstance, depending on the merits of each case.

5.39 **The Commission recommends that where the act of trafficking in persons forms part of an activity of an organised criminal group, it should serve as an aggravating circumstance at the sentencing stage.**

The role of prosecutors in the investigation of trafficking in persons cases

5.40 The Issue Paper²⁴² noted that prosecutors carry a heavy workload. It often happens that a prosecutor receives a case docket which does not contain sufficient evidence in order to secure a conviction. In such a case the prosecutor may request the police to conduct a further investigation in order to obtain the required evidence. Due to limited time, this may not be possible where the case has been placed on the court roll for hearing. In this instance the prosecutor would have to approach the court to request for a postponement in order to conduct a further investigation, which may cause a delay in finalising the case. This raises the question as to whether

²⁴² South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.56.

prosecutors should be involved in guiding the collection of evidence during the police investigation.²⁴³

Submissions received

Should prosecutors play an advisory role (guide the collection of evidence) in the investigation of trafficking in persons cases in order to ensure that the necessary evidence is obtained to ensure a conviction? If yes, how should such a provision be formulated in order to ensure that the prosecutor's involvement in the case does not place him or her in the same position as a witness for the state?

5.41 **Lawyers for Human Rights, Pretoria** answered the question in the negative. The respondent submitted that if prosecutors play an advisory role in the investigation of trafficking cases, it would hinder the public's perception of the legal system and the notion that prosecutors are acting on behalf of the state.

5.42 The **Sexual Offences and Community Affairs Unit** submitted that prosecutors should not get involved in the investigation of trafficking cases, but should only provide advice regarding such cases. The respondent proposed that a specialist team of prosecutors be identified to assist the police with the investigation of such cases.

5.43 Various respondents answered the question in the affirmative.²⁴⁴

5.44 **Childline** drew the Commission's attention to the Sexual Offences Discussion Paper: Process and Procedure in which it is recommended that prosecutors should play a greater role in the investigation of sexual offences cases.

5.45 **SAPS** mentioned that most, if not all, trafficking cases will be dealt with by its Organised Crime Component by means of an undercover operation. Such an operation will be registered as a project with the relevant Director of Public Prosecutions in terms of section 252A of the Criminal Procedure Act.

²⁴³ A specific recommendation made at the Seminar for SADC countries on the ratification and implementation of the UN Convention Against Transnational Organised Crime held in Mauritius on 23 – 25 September 2003 was that prosecutors should play a greater role in guiding the collection of evidence in organised crime cases.

²⁴⁴ Childline, Jhb Child Welfare Society, Anonymous and Mr Masoa.

5.46 **Mr Masoa** advised that the advisory role to be played by prosecutors should be passive in nature. In his view, prosecutors should only advise the investigating officers on the kind of evidence that should be collected. This could be done through instructions given in the investigation diary contained in the case docket.

Evaluation and recommendations

5.47 There is no doubt that the investigation of trafficking cases would be conducted more efficiently if prosecutors are to play an advisory role in the investigation of such cases. However, prosecutors should not play an active role in the investigation of trafficking cases, but should only advise the police on the kind of evidence needed for a successful prosecution. Hence, the Commission supports the submission made by Mr Masoa.

5.48 **The Commission therefore recommends that the following be included in the national instructions proposed in paragraph 5.162 below:**

The circumstances in which consultation with the prosecuting authority is required with the view to guiding the investigation of trafficking cases for purposes of obtaining the required evidence and to identify relevant witnesses.²⁴⁵

5.49 It is worth mentioning that the Directorate of Special Operations (also known as the Scorpions) seated in the National Prosecuting Authority has the mandate to investigate organised crime cases. As trafficking cases are usually committed in an organised manner, the Scorpions may investigate such cases. Investigations by the Scorpions are prosecutor driven. The following persons may be involved in the investigation of such cases: officials from any Department seconded to the Scorpions, persons in the service of any public or other body seconded to the Scorpions or any other person whose services are obtained by the head of the Scorpions.²⁴⁶ On the other hand, the organised crime unit of the South African Police Service also has the mandate to investigate organised crime cases. Investigations

²⁴⁵ See clause 44(1)(a)(viii) of the Bill.

²⁴⁶ Section 7(4) of the National Prosecuting Authority Act 32 of 1998.

conducted by this unit are, unlike the investigations by the Scorpions, not conducted in a task team manner. The Khampepe Commission of Inquiry was appointed to consider whether the Scorpions should be incorporated into the South African Police Service. A report completed by the Khampepe Commission is being considered by the President.²⁴⁷

The criminalisation of other acts relating to the crime of trafficking in persons

Conduct facilitating trafficking in persons

5.50 The crime of trafficking in persons is often facilitated by conduct not necessarily seen as criminal in nature. For example, a person who knowingly leases a house or establishment for the purpose of harbouring victims of trafficking is in fact facilitating the crime although he or she does not participate in the commission of the crime. Thus, in order to ensure the effective combating of the crime of trafficking in persons, such conduct should not be allowed.

Comparative overview

5.51 In the Philippines, the Republic Act No. 9208 – Anti-Trafficking in Persons Act makes it an offence to advertise, publish, print, broadcast, distribute, or cause the advertisement, publication, printing, broadcasting or distribution by any means, including the use of information technology and the internet, of any brochure, flyer, or any propaganda material that promotes trafficking in persons.²⁴⁸ In Nigeria, in terms of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act,²⁴⁹ every tour operator and travel agent has the obligation to refrain from utilising messages on printed material, video or the Internet that could suggest or allude to behaviour incompatible with the objectives of the Act.

Evaluation and recommendation

5.52 Apart from criminalising the act of trafficking in persons, the Commission considers it important to criminalise conduct facilitating trafficking in persons.

²⁴⁷ “Mbeki considering Scorpions’ future” **Legalbrief Today** 20 February 2006.

²⁴⁸ Section 5(c).

²⁴⁹ 24 of 2003.

Following the approach taken by the Philippines and Nigeria, the Commission recommends that the proposed trafficking legislation should criminalise the following conduct:

- (a) The intentional and unlawful lease or sublease of any room, house, building or establishment to be used for the purpose of harbouring a victim of trafficking.
- (b) The advertisement, publication, printing, broadcast or distribution of information, by any means, including the use of the Internet or other information technology that suggests or alludes to trafficking in persons.

5.53 The Commission recommends that an Internet service provider operating in South Africa must report to the South African Police Service any site on its server that contains information as contemplated in paragraph (b).²⁵⁰ Furthermore, the proposed trafficking legislation should provide for an appropriate sentence if an Internet service provider fails to comply with this obligation.²⁵¹

Ensnaring victims of trafficking through deception

5.54 As already mentioned,²⁵² persons often fall prey to the schemes of traffickers in that they are deceived into believing that they will be working in a legitimate employment industry. Trying to escape from their circumstances, most persons accept employment offers without questioning their legitimacy.

Submissions received

As deception is the most common means used by traffickers to ensnare their victims, should the act of offering a person an employment or educational opportunity, knowing that that person will be trafficked for purposes of exploitation, be made a criminal offence? If yes, what would be an appropriate sentence for such an offence?

²⁵⁰ See clause 9(2) of the Bill. This provision is in line with clause 285(2) of the Children's Bill.

²⁵¹ See clause 38(6) of the Bill.

²⁵² See paragraphs 3.4 – 3.5 above.

5.55 The majority of the respondents answered the question in the affirmative.²⁵³

5.56 **Ms Koen** pointed out that trafficking is not the only instance in which people are deceived through promises of better educational opportunities. The respondent mentioned that there is a practice in South Africa where urban-based extended family members offer children of a rural-based family a better educational opportunity if they relocate and live with them. In some instances, however, these children are often used to perform reproductive and productive labour in the urban-based families' homes and or businesses. The respondent submitted that criminalising deception as envisaged by the Commission will also criminalise this particular practice, which is not necessarily the same as trafficking. The respondent suggested that the Commission should consider whether this practice should be criminalised or whether it should be the subject of social policy interventions.

5.57 The **Department of Foreign Affairs** stated that if the definition of trafficking includes the recruitment of persons by means of deception, it will not be necessary to make the use of deception a separate criminal offence. This statement is supported by the **Children's Rights Project**.

5.58 **Mr Masoa** believed that an appropriate sentence would be 10 years imprisonment without the option of a fine.

Evaluation and recommendations

5.59 In response to Ms Koen's submission, the Commission realises that the practice of children being cared for by affluent family members, whilst being exploited, will not necessarily constitute a case of trafficking in persons. However, each case should be evaluated on its own merits and where such a practice consists of all the elements of the crime of trafficking in persons, perpetrators should be charged accordingly.

²⁵³ Childline, Jhb Child Welfare Society, SAPS, the Serious and Violent Crimes Unit, the Department of Social Development, the S A Human Rights Commission, NCWSA, Anex Cdw, Lawyers for Human Rights: Pretoria, Sexual Offences and Community Affairs Unit and Mr Masoa.

5.60 Given the Commission's decision to include the use of deception in the proposed definition of trafficking in persons,²⁵⁴ the Commission agrees with the Department of Foreign Affairs and the Children's Rights Project that it would not be necessary to make the use of deception a separate criminal offence.

Profiteering from the crime of trafficking in persons

5.61 Trafficking in persons is becoming a multi-million business, often connected to organised crime and prostitution. Unlike other commodities such as drugs, victims of trafficking in persons can be used over and over again. This makes the trafficking of persons very lucrative.

Submissions received

Trafficking in persons is mostly, if not always, profit driven. In view of this, should the act of profiteering from the crime of trafficking in persons be criminalised? What would be an appropriate sentence for such an offence?

5.62 The majority of the respondents answered the question in the affirmative.²⁵⁵

5.63 **SAPS** stated that profiteering from trafficking in persons should not be made a separate offence. The respondent said that the Prevention of Organised Crime Act²⁵⁶ provides for sufficient means to confiscate the proceeds of any offence.

5.64 The **S A Human Rights Commission** submitted that profiteering from trafficking in persons should be an additional consideration that the court could take into account at the sentencing stage.

5.65 **Lawyers for Human Rights, Pretoria** said that profiteering from trafficking in persons should be criminalised only if a person has knowledge of the fact that the profit is derived from the trafficking of persons.

²⁵⁴ See paragraph 3.61 above.

²⁵⁵ Childline, the Children's Rights Project, the Department of Social Development, Lawyers for Human Rights: Johannesburg, the Serious and Violent Crimes Unit, Mr Masoa and Ms Koen.

²⁵⁶ 121 of 1998.

5.66 **Mr Masoa** suggested a sentence of five years imprisonment. He added that the benefits derived from the crime should be forfeited to the state.

Evaluation and recommendations

5.67 After due consideration of the submissions received, the Commission concludes that it would not be necessary to criminalise the act of profiteering from the crime of trafficking in persons as the law already provides for the confiscation of the proceeds of crime. The Commission therefore supports the submission made by SAPS.

Debt bondage

5.68 In the context of trafficking in persons, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines “debt bondage” as “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”.

5.69 Debt bondage usually occurs when traffickers assist a person to travel to a certain destination, including helping him or her to make illegal border crossings and to find employment, and then require the person to “work off” the debt he or she owe for the services provided. Persons under debt bondage become prisoners as they are unable to ever earn back the amount purportedly owed to the traffickers. The following information from a report by Human Rights Watch, a U.S based NGO, describes the situation of women trafficked into forced prostitution: “Although employers generally promised the trafficked women that they could keep 50 percent of their earnings after they paid off their debt, this rarely occurred in practice. In some cases, owners arbitrarily extended a woman’s period of debt bondage and simply refuse to split her earnings. Through fines, forced purchases of lingerie and food, or outright theft, women found that they have effectively earned no money.”²⁵⁷

²⁵⁷

“Debt bondage and trafficking in women” 2003. Information obtained from [http://www.stopvaw.org/Debt Bondage and Trafficking in Women.html](http://www.stopvaw.org/Debt_Bondage_and_Trafficking_in_Women.html) Date accessed: 20/04 2005.

Comparative overview

5.70 The definition of debt bondage has been adopted in national legislation. In the USA, the Victims of Trafficking and Violence Protection Act of 2000 defines debt bondage substantially in the same language as the Supplementary Convention. Similarly to the Supplementary Convention, in Australia the Criminal Code Amendment (Trafficking in Persons Offences) Act 96 of 2005 defines “debt bondage” as follows:

“debt bondage means the status or condition that arises from a pledge by a person

- (a) of his or her personal services; or
 - (b) of the personal services of another person under his or her control;
- as security for a debt owed, or claimed to be owed, (including any debt incurred, or claimed to be incurred, after the pledge is given) by that person if:
- (ba) the debt owed or claimed to be owed is manifestly excessive; or
 - (c) the reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or
 - (d) the length and nature of those services are not respectively limited and defined.”

5.71 The Act further provides that a person commits an offence of debt bondage if:

- (a) the person engages in conduct that causes another person to enter into debt bondage; and
- (b) the person intends to cause the other person to enter into debt bondage.

Evaluation and recommendations

5.72 As the act of debt bondage does not constitute an element of the crime of trafficking in persons,²⁵⁸ the Commission recommends that debt bondage should be included in the proposed trafficking legislation as a separate offence. Furthermore, a definition and an offence of debt bondage similar to that provided for in the Australian Criminal Code Amendment (Trafficking in Persons Offences) Act²⁵⁹ should be included in the proposed trafficking

²⁵⁸ See the proposed definition of trafficking in persons in paragraph 3.61 above.

²⁵⁹ 96 of 2005.

legislation.²⁶⁰ Furthermore, an appropriate sentence for the crime of debt bondage should be included in the proposed legislation.²⁶¹

5.73 The Commission requests comments as to whether debt bondage should remain a separate offence or whether it should form part of the offence of trafficking in persons by including it in the definition of trafficking as one of the means that could be used to force a person into an exploitative situation.

Destruction, confiscation, possession or concealment of the travel and/or other identification documents of victims of trafficking

5.74 The Issue Paper²⁶² stated that the passports and other travel documents of victims trafficked to South Africa are usually confiscated on their arrival in the country. Separated from their families, country and culture, usually not able to speak any language of the country and illegally resident in the country, deprived of identity documents and closely monitored by their traffickers, victims of trafficking are at the mercy of their exploiters. A similar scenario prevails in other countries.

5.75 The Immigration Act makes it a criminal offence for any person who, without sufficient cause, has in his or her possession any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found. A fine or imprisonment for a period not exceeding four years may be imposed.²⁶³

5.76 The above provision addresses, to a limited extent, the situation of victims of trafficking. It is limited to cross-border movement and does not cover other criminal acts such as the destruction, confiscation or concealment of the mentioned documents.

²⁶⁰ See the definition of debt bondage in clause 1 of the Bill. See also clause 6 of the Bill.

²⁶¹ See clause 38(2) of the Bill.

²⁶² South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.12 - 13.

²⁶³ Section 49(15)(b)(iii).

Comparative overview

5.77 Section 1592 of the US Code stipulates that “whoever knowingly destroys, conceals, removes, confiscates or possesses any actual or purported passport, other immigration document, or any other actual or purported government identification document of another person in furtherance of any of the crimes related to peonage and slavery or in order to prevent or restrict (or attempt to prevent or restrict) the person’s liberty to move or travel in order to maintain the labour or services of that person, is subject to a fine or imprisonment of up to five years or both”.²⁶⁴ This provision is not applicable to victims of trafficking. In the Philippines, it is a criminal offence to confiscate, conceal or destroy the passports, travel documents or personal documents or belongings of victims of trafficking in furtherance of trafficking or to prevent them from leaving the country or from seeking redress from the government or appropriate agencies.²⁶⁵

Submissions received

Should it be a criminal offence to intentionally destroy, confiscate or possess any passport, immigration document or other identification document belonging to a victim of trafficking?²⁶⁶ If yes, what would be an appropriate sentence for such an offence?

5.78 The respondents were in favour of criminalising the mentioned conduct.²⁶⁷

5.79 **Childline** stated that the mentioned conduct increases the vulnerability and powerlessness of victims of trafficking. The respondent suggested that tampering with a victim’s documentation should also constitute an offence. Furthermore, sentencing should be left to the domain of the court.

²⁶⁴ See also section 112 (a) of the Victims of Trafficking and Violence Protection Act of 2000; Smith Linda and Mattar Mohamed **Winter** (2004) 28:1 p.161.

²⁶⁵ Section 5(f) of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

²⁶⁶ Macedonia adopted a new law in 2002 that criminalises trafficking in persons and actions associated with trafficking such as the destruction of identification documents. See in this regard USA Department of State **Trafficking in Persons Report** June 2002, p. 72.

²⁶⁷ Childline, Jhb Child Welfare Society, SAPS, the Serious and Violent Crimes Unit, the Department of Social Development, Lawyers for Human Rights: Johannesburg, the S A Human Rights Commission, Lawyers for Human Rights:Pretoria and Mr Masoa.

5.80 **Jhb Child Welfare Society** submitted that the mentioned conduct should be regarded as very serious crimes regardless of whether they are related to the crime of trafficking in persons. The respondent proposed a prison sentence of, at least, ten years for any person found guilty of such conduct.

5.81 The **Serious and Violent Crimes Unit** suggested a sentence of two years imprisonment without the option of a fine, whilst **Mr Masoa** proposed a sentence of five years imprisonment without the option of a fine.

5.82 **SAPS** pointed out that the mentioned conduct is a problem currently being experienced in practice. The respondent proposed that a provision criminalising such conduct should be inserted into section 49 of the Immigration Act.

5.83 The **S A Human Rights Commission** suggested that consideration be given to whether the proposed offence should be included in trafficking legislation or whether it is a matter to be dealt with by the Department of Home Affairs.

5.84 The **Department of Home Affairs** raised the question as to whether the proposed offence should be addressed in the Immigration Act and prosecuted in the Immigration Courts contemplated in section 37 of the Immigration Act.²⁶⁸ The respondent proposed that a high fine coupled with an option of imprisonment should be imposed at the discretion of the court.

Evaluation and recommendations

5.85 The Commission supports Childline's proposal that the act of tampering with the documentation of a victim of trafficking should form part of the proposed offence.

5.86 Following the approach taken by the US and the Philippines, the Commission recommends that section 49(15) of the Immigration Act be amended as follows:²⁶⁹

Any natural or juristic person, or a partnership who—

²⁶⁸ The Commission like to point out that section 37 of the Immigration Act has been repealed by section 38 of the Immigration Amendment Act, 19 Of 2004.

²⁶⁹ See Schedule 1 to the Bill.

(a) for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use-

(i) any permit, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he, **[or]** she or it is not entitled to use; or

(ii) any fabricated or falsified permit, certificate, written authority or other document; or

(b) without sufficient cause has in his, **[or]** her or its possession-

(i) any stamp or other instrument which is used or capable of being used for purposes of fabricating or falsifying or unlawfully recording on any document any endorsement under this Act or required to be submitted in terms of this Act;

(ii) any form officially printed for purposes of issuing any permit, certificate, written authority or other document under this Act or required to be submitted in terms of this Act, or any reproduction or imitation of any such form;

(iii) any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found; **[or]**

(iv) any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, or

(c) intentionally and unlawfully destroys, confiscates, possesses, conceals or tampers with any actual or purported passport, travel document or identity document of another person in furtherance of a crime.

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding four years.

5.87 Alternatively, the proposed trafficking legislation could provide as follows:²⁷⁰

Any person who intentionally and unlawfully destroys, confiscates, possesses, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in furtherance of the offence of trafficking in persons is guilty of an offence.

5.88 Furthermore, the proposed legislation should provide for an appropriate sentence for a person convicted of the above offence.²⁷¹

²⁷⁰ See clause 7 of the Bill.

²⁷¹ See clause 38(3) of the Bill.

Making use of the services of victims of trafficking

5.89 South Africa's classification as a country of destination for victims of trafficking implies that it has a market for the services of such victims. It is therefore equally important that, apart from addressing the supply of victims of trafficking, to address also the demand for the services of such victims.

Comparative overview

5.90 Legal systems differ as to whether those making use of the services of victims of trafficking should be punished. In countries where prostitution is legalised,²⁷² the buying of sexual services is not criminalised. Swedish law, however, makes it a criminal offence to buy sexual services. In Sweden, the Prohibiting Purchase of Sexual Services Act provides that "a person who obtains casual sexual relations in exchange for payment shall be sentenced for the purchase of such sexual services to a fine or imprisonment for at most six months". The sex workers are, however, not punished.²⁷³ Some countries criminalise the buying of sexual services from sex workers if the buyer of such services knew that those rendering the services are victims of trafficking. In Macedonia, it is a criminal offence if the customer of a prostitute had knowledge that the prostitute is a victim of trafficking. Article 41A of the Criminal Code of Macedonia provides that "a person who uses or enables another person's usage of sexual service knowing that that person is a victim of human trafficking will be punished with imprisonment from six months up to five years". This approach was followed by Croatia.²⁷⁴ In the Philippines, it is a criminal offence to

²⁷² For example Germany, the Netherlands and Turkey.

²⁷³ Mattar Mohammed, "Anti-Trafficking Laws in South Africa: A Comparative and International Perspective" Paper presented at the Next Steps to Path Breaking Strategies in the Global Management and Prosecution of Sex Trafficking in South Africa held in Johannesburg, South Africa on 22 – 24 June 2004; Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "The role of the Government in Combating Trafficking in Persons – A Global Human Rights Approach" Statement made to the Congress of the United States, House of Representatives, Committee on Government Reform and the Subcommittee on Human Rights and Wellness on 29 October 2003; Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "A Comparative Analysis of the Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons" Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003; Smith Linda and Mattar Mohamed **Winter** (2004) 28:1 p.170.

²⁷⁴ Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "The role of the Government in Combating Trafficking in Persons – A Global Human Rights Approach" Statement made to the Congress of the United States, House of Representatives, Committee on Government Reform and the Subcommittee on Human

“knowingly benefit from, financial or otherwise, or to make use of the labour or services of a person held in a condition of involuntary servitude, forced labour or slavery.”²⁷⁵ It is further an offence for a person to buy or engage the services of victims of trafficking for prostitution.²⁷⁶

Submissions received

Women and children are increasingly being trafficked for purposes of sexual exploitation given the high demand set by clients (who are mainly male). Section 20(1)(aA) of the Sexual Offences Act 23 of 1957 criminalises the buying of sexual services by clients by providing that any person who commits an act of indecency with any other person for reward is guilty of an offence. Should knowledge of the fact that the person rendering the sexual service has been trafficked result in a higher sentence? If yes, what would be an appropriate sentence?

5.91 The majority of respondents answered the question in the affirmative.²⁷⁷

5.92 **Jhb Child Welfare Society** argued that customers of prostitutes who are known to have been trafficked create markets and incentives for traffickers and should be punished accordingly.

5.93 The **Children’s Rights Project** suggested that knowledge that a prostitute is a victim of trafficking should serve as an aggravating factor for sentencing. This view was supported by **NCWSA**.

5.94 **SWEAT** submitted that the sex work industry is one of demand and supply. The respondent stated that linking trafficking into the sex industry to demand by clients negates the fact that women are migrating and moving to seek work opportunities and that sex work is one such industry that is available to them. The

Rights and Wellness on 29 October 2003; Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies “A Comparative Analysis of Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons” Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003; Smith Linda and Mattar Mohamed **Winter** (2004) 28:1 p.171.

²⁷⁵ Section 5(g) of the Republic Act No 9208 – Anti-Trafficking in Persons Act.

²⁷⁶ Section 11 of the Republic Act No 9208 – Anti-Trafficking in Persons Act.

²⁷⁷ Jhb Child Welfare Society, Ms Koen, SAPS, the Serious and Violent Crimes Unit, Lawyers for Human Rights Pretoria and Mr Masoa.

respondent cautioned the Commission against the further criminalisation of sex work by penalising the client. The respondent said that although it might seem to be in the interest of sex workers not to sanction them, but their clients, it only results in making the work of sex workers more hazardous.

5.95 **Ms Koen** suggested that, instead of criminalising the clients of those providing sexual services, it should be a criminal offence for persons who knowingly purchase, exploit or use the services of a victim of trafficking. This would then apply equally to a person who knowingly uses the services of a person who has been trafficked for labour purposes. The respondent further expressed the view that those who are responsible for creating the demand for the services of persons trafficked for labour-related purposes should be fined or subjected to community service and/or an awareness-raising course on issues relating to trafficking in persons.

5.96 The **Serious and Violent Crimes Unit** suggested a sentence of two years imprisonment without the option of a fine, whilst **Mr Masoa** proposed a sentence of five years imprisonment without the option of a fine.

5.97 **Lawyers for Human Rights, Johannesburg**, submitted that the demand for the sexual exploitation of women and children should be addressed. The respondent suggested that a strategy whereby the customers of prostitution are penalised, as contained in the Swedish law should be considered.

5.98 The **Sexual Offences and Community Affairs Unit** argued that it would be difficult to prove intent to using the sexual services of a victim of trafficking.

Evaluation and recommendations

5.99 In accordance with principle 2 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking²⁷⁸ and article 9(5) of the Trafficking Protocol, the Commission believes that an effective strategy to combat the crime of trafficking in persons should include measures to address the demand for the services of victims of trafficking.

²⁷⁸

See paragraph 2.3 above.

5.100 The Commission supports Ms Koen's suggestion that not only those who had knowledge of the fact that a person rendering sexual services has been trafficked, but also those making use of the services of victims trafficked for other purposes should be penalised.

5.101 In response to Ms Koen's proposal that those creating the demand for the services of persons trafficked for labour-related purposes should be fined or subjected to community service and/or an awareness-raising course, the Commission believes that it is within the discretion of the court to impose an appropriate sentence and in doing so, the court will be guided by the specific circumstances of each case.

5.102 With regard to Lawyers for Human Rights: Johannesburg's recommendation that the customers of prostitutes should be penalised, the Commission would like to reiterate that it is premature, at this stage, to criminalise those making use of the services of prostitutes given the Commission's investigation into adult prostitution.²⁷⁹ The Commission believes, however, that those making use of the services of prostitutes whilst knowing that they are victims of trafficking should be penalised.

5.103 Following the approach of Macedonia, Croatia and the Philippines, the Commission recommends that it should be a criminal offence for any person who intentionally and unlawfully benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another person's usage of the services of a victim of trafficking.²⁸⁰

5.104 Furthermore, the proposed trafficking legislation should provide for an appropriate sentence for a person convicted of the above offence.²⁸¹

Corruption within government institutions facilitating the crime of trafficking in persons

5.105 The South African borders are relatively easy to cross, with the most common points of entry being Beitbridge and Komatipoort.²⁸² It is believed that the trafficking

²⁷⁹ See also paragraph 3.60 above.

²⁸⁰ See clause 8 of the Bill.

²⁸¹ See clause 38(4) of the Bill.

of persons across borders is sometimes facilitated by certain corrupt officials.²⁸³ These officials include border officials who, for payment, allow persons, including traffickers and their victims, to enter South Africa illegally. Certain officials within the Department of Home Affairs facilitate the trafficking of persons by providing traffickers and their victims with the necessary documentation which will enable them to enter the country. Some immigration officials at airports also assist persons to gain illegal entry into the country.

5.106 The issue of corruption is addressed in the Prevention and Combating of Corrupt Activities Act.²⁸⁴ This Act shifts the focus of the investigation of corruption to include both the corrupted and the corruptor and provides for several offences in respect of corrupt activities. These include (a) a general offence of corruption, (b) offences in respect of corrupt activities relating to public officers, (c) offences in respect of corrupt activities relating to foreign public officials, (d) offences in respect of corrupt activities relating to agents, (e) offences in respect of corrupt activities relating to members of the legislative authority, (f) offences in respect of corrupt activities relating to judicial officers, (g) offences in respect of corrupt activities relating to members of the prosecuting authority, (h) offences of receiving or offering of unauthorised gratification by or to a party to an employment relationship, (i) offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings, and (j) offences of unacceptable conduct relating to witnesses. These offences cover a broad range of corrupt activities.

5.107 In addition, the Immigration Act makes it a criminal offence for anyone who knowingly assists a person to enter or remain in, or depart from South Africa in contravention of the Act.²⁸⁵ The Act further makes it a criminal offence for any civil servant who provides false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner.²⁸⁶ A civil servant is further guilty of an offence if he or she helps an illegal foreigner to disguise his or her identity or status, or accepts any

²⁸² International Organisation for Migration **Trafficking in Women and Children** 2003, p. 16.

²⁸³ The following statement from a Lesotho victim who was trafficked to South Africa illustrates the situation: 'So we just crossed the border ... without a passport, without anything ... through the border post. They just passed; nobody asked them about any passport or anything.' This quote is taken from the International Organisation for Migration's Report on **Trafficking in Women and Children** 2003, p. 24.

²⁸⁴ 12 of 2004.

²⁸⁵ Section 49(2).

²⁸⁶ Section 49(5).

undue financial or other consideration to perform an act or to exercise his or her discretion in terms of the Act.²⁸⁷

5.108 The Department of Public Service and Administration was given the task of establishing a strategy that balanced prevention, action against corruption and sustainable systems of prevention, information and communication. This led to the development of the Public Service Anti-Corruption Strategy. Implementation of the strategy is conducted through the national Anti-Corruption Co-ordinating Committee. This is an inter-departmental group of representatives from various agencies and departments that are involved in the combating and prevention of corruption.²⁸⁸ The Public Service Anti-Corruption Strategy focuses on the following.²⁸⁹

- (a) Implementing new stringent screening mechanisms for employees.
- (b) Presenting draft legislation to regulate post-public sector employment and the employment of corrupt individuals.
- (c) Having a functioning national public service anti-corruption hotline.
- (d) Having adequate capacity in all departments to fight corruption as it occurs in these departments, including accredited ethics officers.
- (e) Establishing capacity-building and orientation programmes aimed at anti-corruption practitioners, including firstly the magistrates and prosecutors responsible for administering the Prevention and Combating of Corrupt Activities Act and secondly employees in general to make them risks and ethics-aware within the context of our service delivery values.
- (f) Commencing with data integration and analysis within the Corruption Management Information System.

5.109 The requirements of the Constitution, the Public Service Anti-Corruption Strategy and the recommendations of the National Anti-Corruption Summit have been translated into a number of anti-corruption measures. These include:

- (a) Various pieces of legislation such as the Financial Intelligence Centre Act,²⁹⁰ and the Prevention and Combating of Corrupt Activities Act.²⁹¹

²⁸⁷ Section 49(5).

²⁸⁸ Country Report to the 11th United Nations Congress on Crime Prevention and Criminal Justice, 2005, p.38.

²⁸⁹ Country Report to the 11th United Nations Congress on Crime Prevention and Criminal Justice, 2005, p.40.

²⁹⁰ 38 of 2001.

²⁹¹ 1 of 2004.

- (b) The establishment of strong institutional capacity at national level to complement basic police work, with institutions such as the Public Protector, the Directorate of Special Operations (also known as the Scorpions), the Asset Forfeiture Unit, the Auditor-General, the Special Investigating Unit and the Financial Intelligence Centre.
- (c) The establishment of dedicated Commercial Crime Courts.
- (d) Government has also commissioned a study into all agencies involved in anti-corruption work with a view to increasing efficiencies and impact. This study was completed in August 2001 and Cabinet approved proposals for a minimum anti-corruption capacity to be established within all government departments.

5.110 Furthermore, South Africa is a party to the Southern African Development Community Protocol against Corruption, and is a signatory to the African Union Convention on Preventing and Combating Corruption. South Africa is in the process of acceding to the Organisation for Economic Co-operation and Development Convention against Bribery of Foreign Public Officials in International Business Transactions and has ratified the United Nations Convention against Corruption.²⁹²

5.111 It is also important to highlight the anti-corruption programmes within the South African Police Service and the Department of Home Affairs as some officials in these departments are known for facilitating the crime of trafficking in persons.

5.112 The South African Police Service Act²⁹³ establishes an Independent Complaints Directorate.²⁹⁴ The Act provides that the Directorate may mero motu or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by any member of the police, and may, where appropriate, refer such investigation to the police for further action.²⁹⁵ In terms of this provision, the Directorate has the power to investigate corrupt activities committed by members of the police.

²⁹² Country Report to the 11th United Nations Congress on Crime Prevention and Criminal Justice, 2005, p.38.

²⁹³ 68 of 1995.

²⁹⁴ Section 50.

²⁹⁵ Section 53(2).

5.113 The Department of Home Affairs has approved a Corruption and Fraud Prevention Plan which has been implemented since January 2005. The Department has also approved a Whistle Blowing Plan. These plans serve as measures to combat corruption within the Department. The Department is currently conducting nation-wide workshops in order to sensitise departmental officials, including border officials, on the content of the mentioned plans and issues relating to corruption in general.²⁹⁶

5.114 However, despite these efforts, the percentage of reported and investigated cases of fraud and corruption remain low for various reasons. These include weaknesses in the internal control systems, bad management, lenient penalties by presiding officers in misconduct cases, and low conviction rates by courts.²⁹⁷

Submissions received

Are the current measures aimed at reducing corruption amongst border officials sufficient? Please motivate your answer. If no, what measures should be taken to eliminate, or at least reduce, corruption amongst border officials?

5.115 The Commission is of the view that the above question should go beyond border officials and should include any public official who is involved in corrupt activities which facilitate trafficking in persons.

5.116 In response to the above question, **Childline** recommended that border officials should be carefully selected and rotated from one border post to another, or in the larger border posts, from one service point to another to make it more difficult for them to be drawn into corrupt activities.

5.117 **SAPS** submitted that corruption amongst border officials should be addressed on a far more co-ordinated and focussed basis. The respondent e.g. mentioned that illegal immigrants are being assisted by some officials to by-pass immigration officials at airports. The respondent further recommended that close-circuit television

²⁹⁶ Telephonic discussions with Mr Nico Botha, Department of Home Affairs: Counter Corruption Chief Directorate, on 6 March 06.

²⁹⁷ Mahlaba P J "Fraud and corruption in the public sector: An audit perspective" 2004 Internet: http://www.dpsa.gov.za/documents/service_delivery_review/Vol3ed2.pdf

Date accessed: 2/02/2005.

cameras should be installed at all major airports and ports of entry in order to detect corruption or the commission of other crimes.

5.118 The **SA Human Rights Commission** stated that corruption appears to be a widespread problem within the Department of Home Affairs and one that is not confined to the issue of trafficking. The respondent submitted that the issue of corruption needs to be dealt with systematically within this department. The respondent further argued that trafficking legislation is not the appropriate place to deal with the broader issue of corruption. However, trafficking legislation should provide a link to the initiatives within the Department of Home Affairs aimed at combating corruption amongst its officials. The respondent suggested that legislative provision be made for liaison between the body that would be responsible for the implementation of the trafficking legislation and the Department of Home Affairs with a view to creating a more comprehensive plan to address the issue of corruption as it relates to trafficking.

5.119 **NCWSA** mentioned that Human Rights Watch has suggested that officials convicted of fraud should be reported publicly. In the respondent's view, this would reduce corruption amongst officials.

5.120 **Lawyers for Human Rights, Pretoria** suggested that tougher disciplinary measures should be taken against corrupt border officials. The respondent believes that corruption will decrease if government is more vigilant about punishing corrupt officials.

5.121 **Mr Masoa** answered the question in the affirmative and submitted that the vigorous investigation and prosecution of cases of corruption will deter others from committing acts of corruption.

5.122 **Network Against Child Labour** submitted that cases of corruption should be dealt with harshly and that the salaries and working conditions of police and border officials should be improved in order to prevent them from engaging in corrupt activities.

Evaluation and recommendations

5.123 After careful consideration of the Prevention and Combating of Corrupt Activities Act and the Immigration Act, the Commission concludes that further legislative provisions on the issue of corruption are not needed.

5.124 It is, however, important that government departments adopt anti-corruption strategies, in line with the Prevention of Corrupt Activities Act, to effectively combat corruption within their own ranks. Such anti-corruption strategies should, at a minimum, include the following:

- (a) Measures on how to detect corrupt activities at an early stage.
- (b) Proactive and preventative measures to deal with corruption.
- (c) Effective disciplinary measures against corrupt officials.
- (d) Harsh penalties for those found guilty of corrupt activities.
- (e) Improved effectiveness and accountability in service delivery.
- (f) Reporting mechanisms on corrupt activities.
- (g) Anonymity and protection of those who report corrupt activities.
- (h) Addressing the underlying factors leading to corruption.
- (i) Procedures to be followed when dealing with an alleged case of corruption.
- (j) Performance indicators to measure the effectiveness of anti-corruption strategies.

Establishing the liability of conveyances

5.125 It is important to determine the liability of conveyances that transport foreigners to South Africa as victims of trafficking could be amongst such persons. Section 35 of the Immigration Act deals with the duties of persons in charge of conveyances. In terms of the Act, a conveyance means any ship, boat, aircraft or vehicle, or any other means of transport. A person in charge of a conveyance must upon demand provide an immigration officer with a list stating the names of all passengers on board the conveyance, classified according to their respective destinations.²⁹⁸ A person in charge of a conveyance must also ensure that any foreigner conveyed to a South African port of entry (a) hold a valid passport and if

²⁹⁸ Section 35(3)(a).

required, a valid transit visa for purposes of transiting through South Africa to a foreign country, and (b) holds a valid passport, and if required, a valid visa for purposes of entering South Africa.²⁹⁹ Any owner or person in charge of a conveyance who through negligence fails to comply with these provisions is liable to an administrative fine not exceeding ten thousand rand.³⁰⁰

Comparative overview

5.126 In Nigeria, the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act³⁰¹ makes it a criminal offence for any commercial carrier that knowingly carries any person in contravention of the Act.³⁰²

Evaluation and recommendations

5.127 A substantial number of victims of trafficking enter South Africa without any or with invalid passports. Section 35 of the Immigration Act is therefore an important step forward in the fight against trafficking in persons. In order to strengthen this provision, **the Commission recommends that the proposed trafficking legislation should provide that an owner or person in charge of a conveyance who contravenes the provisions of section 35(7) of the Immigration Act should be liable to pay the cost incurred by an organ of state or any other body or person for the care, safe-keeping, and repatriation of a passenger who was on board the conveyance, who is a victim of trafficking and who entered the country without a valid passport and, where applicable, a valid visa.**³⁰³

5.128 **The Commission further recommends that section 35(3)(a) of the Immigration Act be amended to provide that a person in charge of a conveyance entering or prior to entering a port of entry must upon demand deliver to an immigration officer a list of unaccompanied children on board the conveyance. Furthermore, if the immigration officer has reason to believe that**

²⁹⁹ Section 35(7).

³⁰⁰ Section 35 of the Immigration Act gives effect to article 11(2) – (3) of the Trafficking Protocol which deals with the liability of commercial carriers.

³⁰¹ 24 of 2003.

³⁰² Section 29(1).

³⁰³ See clause 39 of the Bill.

an unaccompanied child is a victim of trafficking, he or she must forthwith report the matter to the police.³⁰⁴

Trafficking of children by their parents, guardians or other persons who have parental responsibilities and rights in respect of such children

5.129 The question as to how the proposed trafficking legislation should deal with parents, guardians or such other persons who are involved in the trafficking of their children was considered at an inter-departmental meeting on trafficking in persons.³⁰⁵ Special consideration was given to this issue because those tasked with the care of children sometimes sell them to traffickers or allow them to be exploited due to poverty. The meeting agreed that the proposed legislation should not deal with these categories of offenders differently from other offenders, and that it should be within the discretion of the court to impose an appropriate sentence, depending on the circumstances of each case.

5.130 Clause 287 of the Children's Bill provides for the suspension of the parental rights and responsibilities that a person has in respect of a child if a children's court has reason to believe that such person has trafficked the child or allowed the child to be trafficked. The Bill further provides for the placement of the child in temporary safe care, pending an inquiry by a children's court.

Evaluation and recommendation

5.131 The Commission recommends that clause 287 of the Children's Bill be repealed by incorporating it into the proposed trafficking legislation.³⁰⁶ In addition, the proposed legislation should stipulate that action taken by a children's court does not exclude the liability of a parent, guardian or other person who has parental responsibilities and rights in respect of a child for committing the crime of trafficking in persons.³⁰⁷

³⁰⁴ See Schedule 1 to the Bill.

³⁰⁵ See paragraphs 1.6 – 1.8 above.

³⁰⁶ See clause 40(1) of the Bill.

³⁰⁷ See clause 40(2) of the Bill.

Admission of traffickers into the territory of South Africa

5.132 South African law does not provide for the denial of entry of suspected or convicted traffickers into the country. This is primarily because of the fact that trafficking in persons is currently not a criminal offence in South Africa. However, section 29(1) of the Immigration Act classifies certain categories of foreigners as prohibited persons. Of relevance is section 29(1)(b) which provides that a foreigner against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, murder, torture, drug-related charges, money laundering or kidnapping, does not qualify for a temporary or permanent residence permit. Furthermore, the Act provides that any foreigner found in possession of a fraudulent residence permit, passport or identification document is a prohibited person.³⁰⁸

Comparative overview

5.133 A foreigner is not eligible for admission into the United States if there is substantial reason to believe that he or she has committed an act of severe form of trafficking in persons.³⁰⁹ A person is further not eligible for admission into the United States if he or she is known to be, or where there is reason to believe that he or she is or has been a knowing aider, abettor, assister, conspirator, or colluder with a trafficker involved in acts of severe forms of trafficking in persons.³¹⁰ Furthermore, the spouse, son or daughter of an inadmissible person who has obtained any financial or other benefit from the illicit activity committed by the inadmissible person, is also an inadmissible person if he or she knew or reasonably should have known that the benefit was the product of such illicit activity. However, the latter provision does not apply to a son or daughter of an inadmissible person who was a child at the time he or she received the benefit.³¹¹

³⁰⁸ Section 29(1)(f).

³⁰⁹ Section 107 (e)(2) of the Victims of Trafficking and Violence Protection Act of 2000; Smith Linda and Mattar Mohamed **Winter** (2004) 28:1 p.161.

³¹⁰ Section 111(d) of the Victims of Trafficking and Violence Protection Act of 2000.

³¹¹ Section 111 (d) of the Victims of Trafficking and Violence Protection Act of 2000.

5.134 In the Philippines, if the offender is a foreigner, he or she must immediately be deported after serving his or her sentence and be barred permanently from entering the country.³¹²

Submissions received

With reference to article 11(5) of the Trafficking Protocol, should persons found guilty of the crime of trafficking in persons or associated offences, whether convicted in South Africa or any other country, be denied entry to South Africa or have their visas revoked? If yes, should the convicted person's family members be denied entry to South Africa if they have benefited from the unlawful activity for which that person was convicted and knew or reasonably should have known that the benefit was the product of such unlawful activity? If yes, should such a provision also apply to the children (who were under the age of 18 years when the benefit was received) of the convicted person? Please motivate your answer.

5.135 **Childline** submitted that convicted offenders as well as those charged with the crime of trafficking in persons³¹³ should be denied access to South Africa and/or have their visas revoked. The respondent recommended that the denial of entry and/or the revocation of visas should be applicable to all who have been involved, either as a perpetrator or a beneficiary, in the crime of trafficking in persons. However, the special position and vulnerability of children should be assessed on a case by case basis.

5.136 **Jhb Child Welfare Society** suggested that all adults who have knowingly benefited from the trafficking of persons should be denied entry to South Africa, unless they can prove that they were acting under duress, and satisfy the South African authorities that they pose no ongoing danger. However, children should not be held responsible for the actions of their parents. Furthermore, children of traffickers who are detained in South Africa should, where so indicated, be referred to the children's courts as unaccompanied minors.

³¹² Section 10(g) of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

³¹³ The respondent pointed out that some offenders continue their illegal activities whilst the trial is pending.

5.137 The **Department of Foreign Affairs** said that the term “persons implicated” in the commission of trafficking offences in Article 11(5) suggests that there must be a close causal connection between the perpetrator of the offence and the denial of visa privileges. The respondent submitted that if the family members of the perpetrator knew about and assisted in the commission of the offence, they should be prosecuted as accessories or accomplices, as provided for in Article 5(2) of the Trafficking Protocol. However, if the family members are not accessories or accomplices, they should not be punished in any way.

5.138 **SAPS** believed that denying traffickers entry into the country will make the envisaged legislation on trafficking more effective. The respondent suggested that only persons who have been found guilty of the offence should be denied entry into South Africa. The respondent stated that it would be unfair to deny entry to persons who have not been found guilty by a court of law, but who are merely implicated in the commission of the offence.

5.139 The **Serious and Violent Crimes Unit** answered the question in the affirmative and stated that no one involved in the crime of trafficking in persons, including their family members, should be allowed to remain in or enter South Africa.

5.140 The **Western Cape Ministry of Community Safety** answered the question in the affirmative, but stated that children under the age of 18 should neither be denied access to South Africa nor have their visas revoked. This is supported by **Mr Masoa**.

5.141 **Anonymous** answered the question in the affirmative, but submitted that the admission of family members to South Africa should be a matter of discretion. When exercising such discretion, the following should be taken into account: (a) their involvement in the crime of trafficking in persons, and (b) the harm they would suffer if entry into the country is denied.

5.142 The **Department of Home Affairs** submitted that the categories of persons constituting prohibited persons in terms of section 29 of the Immigration Act are limited and that an amendment to section 29(1)(b) would achieve the desired effect. Similarly, section 30 of the Act provides for certain categories of foreigners that may be declared undesirable, and section 10(4) of the Act provides that temporary residence permits may be issued only on condition that the holder is not or does not become a prohibited or undesirable person. The respondent submitted that an

amendment to section 30 would better provide for dealing with convicted or suspected traffickers. The respondent, however, pointed out the need for a process to bring to its attention the fact that a person is a trafficker. In this regard the respondent suggested the establishment of a register of traffickers or a similar data base or system of recordal. With regard to the denial of access to the children and/ or family members of traffickers, the respondent submitted that current measures around the issuing or withdrawal of visas or of visa exemption benefits are sufficient to safeguard the interest of the Republic.

5.143 **Rashid Patel and Company** submitted that persons found guilty of the crime of trafficking should not be denied entry into South Africa as this, in the respondents view, amounts to a “double sentence” which is unconstitutional. The respondent added that the courts should be empowered to make an order which could include denying an offender access to the country after a certain number of offences have been committed.

5.144 **NCWSA** answered the first question in the affirmative, but stated that children should not be penalised.

5.145 **Lawyers for Human Rights, Pretoria** answered the question in the affirmative. The respondent stated that a convicted trafficker should be able to apply for pardon after a certain period of time if no further offences were committed since his or her conviction. The respondent submitted that family members of convicted persons should be denied entry to South Africa only if they knew that the benefit was a product of the crime of trafficking in persons. The respondent does not believe that children should be denied access to the country.

Evaluation and recommendations

5.146 **In complying with article 11(5) of the Trafficking Protocol, the Commission recommends that article 29(1)(b) of the Immigration Act be amended as follows:**

29. (1) The following foreigners are prohibited persons and do not qualify for a visa, admission into the Republic, a temporary or permanent residence permit:

(b) Anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, murder, torture, drug-related charges, money laundering, trafficking in persons, or kidnapping;³¹⁴

5.147 Furthermore, the following provision should be added at the end of section 29(1) of the Immigration Act:

(1A) A visa or temporary residence permit issued to a foreigner before he or she became a prohibited person in terms of subsection (1)(b) shall be revoked.³¹⁵

5.148 Alternatively, the following provision could be included in the proposed trafficking legislation:

A visa or temporary residence permit issued to a foreigner before he or she became a prohibited person, in terms of section 29(1)(b) of the Immigration Act, 2002 (Act No. 13 of 2002), as a result of having been convicted of or having a warrant outstanding for the offence of trafficking in persons, shall be revoked.³¹⁶

5.149 **The Commission requests comments as to whether the amendment of section 29 of the Immigration Act or the above provision is preferable.**

³¹⁴ See Schedule 1 to the Bill.

³¹⁵ See Schedule 1 to the Bill

³¹⁶ See clause 41 of the Bill.

PROCESS AND PROCEDURE

The police investigation

5.150 The Issue Paper³¹⁷ acknowledged that the South African Police Service plays an important role in combating the crime of trafficking in persons. The police are responsible for investigating the case, collecting the evidence, recording the statements of victims and witnesses and arresting the suspects. The successful prosecution of traffickers therefore largely depends on the thoroughness of the police investigation. As the crime of trafficking in persons is often committed by organised criminal networks, the investigation will usually be conducted by the organised crime unit of the police. However, intelligence services, as well as the murder and robbery section within the police service could also be involved in the investigation of trafficking cases.

5.151 Investigating the crime of trafficking in persons is not without problems. The police often find it difficult to communicate with victims trafficked to South Africa as most of these victims do not speak any of the South African languages.

Comparative overview

5.152 Several countries have created specialised units dedicated to the investigation of trafficking cases. Just to name a few, in 2004 the government of Colombia established a unit in the Prosecutor General's Office to investigate and prosecute crimes related to trafficking in persons.³¹⁸ In Costa Rica the Judicial Investigative Police has created a new investigative unit to investigate trafficking and smuggling cases.³¹⁹ In Belgium, a special police unit continues to be responsible for anti-trafficking enforcement.³²⁰ Furthermore, the Australian Federal Police has established a Transnational Sexual Exploitation and Trafficking Team, a 23-person unit dedicated to investigating trafficking cases.³²¹

³¹⁷ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.42.

³¹⁸ USA Department of State **Trafficking in Persons Report** June 2005, p. 85.

³¹⁹ USA Department of State **Trafficking in Persons Report** June 2005, p. 87.

³²⁰ USA Department of State **Trafficking in Persons Report** June 2005, p. 65

³²¹ USA Department of State **Trafficking in Persons Report** June 2005, p. 58.

Submissions received

Given the nature of the crime of trafficking in persons and the fact that different sectors within the police deal with cases of trafficking in persons, should special police units be established to deal with cases of trafficking in persons? Please motivate your answer. If yes, what should be the duties of these units? If no, how can the current police service be improved to deal with the crime of trafficking in persons effectively and to ensure the protection of victims during the police investigation?

5.153 **Childline** suggested that the Family Violence, Sexual Offences and Child Abuse Units should deal with cases of trafficking in persons as these units are experienced in the management of crimes against vulnerable victims. Furthermore, the members of these units should be carefully selected, trained, monitored and debriefed. This suggestion is supported by the **Jhb Child Welfare Society**.

5.154 The **Children's Rights Project** submitted that it is not necessary to create specialised police units to deal with trafficking cases, but that the Serious and Violent Crimes Unit of the South African Police Service should deal with such cases.

5.155 **SAPS** submitted that given the organised crime nature of trafficking cases, such cases would fall within the mandate of its Organised Crime Component. The respondent said that other components such as its Commercial Branch or Serious and Violent Crimes Unit will only be involved if a trafficking case also involves complex commercial transactions or violence against victims. The respondent stated that these components represent high levels of expertise, thus making the requirement of extra guidance and assistance, at the basic level, redundant. Furthermore, there is no need for special police units to deal exclusively with trafficking cases.

5.156 The **S A Human Rights Commission** said that it would be preferable for the policing of trafficking cases to be integrated into the daily policing activities of police officials.

5.157 **Anonymous** suggested that members from the relevant law enforcement components should be trained to investigate trafficking operations. The respondent argued that a task force model would be effective in that it would provide for input

from border authorities, police, customs etc. The respondent stated that the task force model is relatively flexible, allowing for the rotation of personnel on a relatively frequent basis thereby ensuring, after time, a cadre of well trained personnel.

5.158 **Lawyers for Human Rights, Johannesburg**, submitted that due to the complexity of trafficking cases, special units within the police and border agencies should be established to deal with such cases. This was supported by **Lawyers for Human Rights, Pretoria**.

5.159 **Mr Masoa** proposed that specialised police units should be responsible for the investigation of trafficking cases, the collection of evidence, the recording of the statements of victims and witnesses, the arrest of suspects, the protection of victims and witnesses and liaison with informers.

5.160 **Sexual Offences and Community Affairs Unit** mentioned that a Trafficking in Persons Desk has been established in the Organised Crime Unit of the South African Police Service. The respondent suggested that the Trafficking in Persons Desk should be properly resourced and developed in order to investigate trafficking cases.

Evaluation and recommendations

5.161 After due consideration of the submissions received, the Commission is of the view that in stead of creating specialised police units, the existing expertise within the police should be developed to deal with trafficking cases in an appropriate and sensitive manner.

5.162 **The Commission therefore recommends that the National Commissioner of the South African Police Service must issue national instructions regarding the following matters.**³²²

- (a) **The division or divisions within the police to be tasked with the investigation of trafficking cases.**
- (b) **The manner in which trafficking cases are to be investigated.**

³²²

See clause 44(1)(a) of the Bill. See also paragraphs 6.21 – 6.24 below.

- (c) **The manner in which the reporting of an alleged trafficking case is to be dealt with.**
- (d) **The manner in which victims of trafficking should be identified, interviewed and treated, paying particular attention to the vulnerability of child victims.**
- (e) **Measures to be taken in instances where foreign victims of trafficking are not conversant with any of the South African languages.**
- (f) **The referral of victims of trafficking to social and health care services.**
- (g) **Measures to be taken to ensure the safety of victims of trafficking or other potential witnesses if there is a likelihood that harm might result to them as a result of the reporting and consequent investigation of the case.**
- (h) **The circumstances in which consultation with the prosecuting authority is required with the view to guiding the investigation of trafficking cases for purposes of obtaining the required evidence and to identify relevant witnesses.**³²³

5.163 With regard to training on the proposed national instructions, the Commission proposes the following two options respectively:

Option one:

The proposed trafficking legislation should provide that the National Commissioner of the South African Police Service should ensure that all police officials who are tasked with receiving reports of and the investigation of trafficking in persons cases are trained on the proposed national instructions with the view to ensuring that as many police officials as possible are able to deal with trafficking cases in an appropriate manner.³²⁴

³²³ See also paragraph 5.48 above.

³²⁴ See clause 44(1)(b) of the Bill.

Option two:

This option would entail that, instead of providing for training on the national instructions in the proposed trafficking legislation, the South African Police Service should deal with the issue of training in terms of policy.

Obtaining of testimony of victims or other witnesses

5.164 The Issue Paper³²⁵ stated that victims of trafficking often refuse to testify against traffickers due to fear for their safety and the safety of their families. This hampers the effective prosecution of traffickers. It is therefore essential that victims or other witnesses should feel safe when testifying against traffickers.³²⁶ Given the fact that the crime of trafficking in persons is such a clandestine operation, it is not always possible to catch traffickers in the act. The most likely means of prosecution is therefore through the testimony of victims or other witnesses.

5.165 The current system provides for the following protective measures for victims or other witnesses who are scared to testify in criminal proceedings or to face the traffickers in court:

(a) *Witness protection*

Section 7(1) of the Witness Protection Act³²⁷ provides that any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by reason of his or her being a witness, may apply to be placed under protection. The Act defines a “related person” as any member of the family or household of a witness, or any other person in a close relationship to, or in association with, such witness.³²⁸

³²⁵ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.56.

³²⁶ In Lithuania, the Criminal Code and Criminal Process Code allows for separate testimony of a victim of trafficking to a judge in order to provide an alternative for victims who are fearful of testifying in an open court. See in this regard USA Department of State **Trafficking in Persons Report** June 2002, p. 71.

³²⁷ 112 of 1998.

³²⁸ Section 1.

In terms of section 21 of the Act, the Minister for Justice and Constitutional Development may enter into an agreement with any international body, institution, organisation or foreign country to admit a protected person to a witness protection programme in terms of any law applicable to that body, institution or organisation or in that country. This provision can be applied to protect the family of a victim of trafficking in instances where the victim is to testify in criminal proceedings against traffickers in South Africa whilst his or her family is in another country.

The effectiveness of the witness protection programme has, however, been questioned. This may serve as yet another reason why victims of trafficking may refuse to testify against traffickers. Furthermore, victims of trafficking would be entitled to witness protection only if they agree to assist with criminal investigations against traffickers.

(b) *Closed-circuit television*

The Criminal Procedure Act provides that a court may on its own initiative or on application by the public prosecutor order that a witness or accused, if the witness or accused consents thereto, give evidence by means of closed-circuit television or similar electronic media.³²⁹ A court may make a similar order on the application of an accused or a witness.³³⁰

(c) *Intermediary*

Section 170A of the Criminal Procedure Act provides that whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if that witness testifies at such proceedings, the court may appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary. When an intermediary is appointed, no examination in chief, cross-examination or re-examination of the witness can take place in any manner other than through that intermediary. It is only the court that may question the witness without intervention by the intermediary. The witness concerned

³²⁹ Section 158(2)(a).

³³⁰ Section 158(2)(b).

is also in another room and does not hear the original questions as put by the prosecutor or the defence counsel.³³¹

(d) *In camera hearings*

If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he or she testifies at such proceedings, the court may, in terms of section 153(2) of the Criminal procedure Act, direct –

(a) that the person testifies behind closed doors and that no person should be present when such evidence is given unless his or her presence is necessary in connection with such proceedings or is authorised by the court;

(b) that the identity of such person should not be revealed or that it should not be revealed for a period specified by the court.

Furthermore, any person who reveals the identity of a witness in contravention of a direction under section 153(2) is guilty of an offence.³³²

5.166 The issue of withholding the identity of a witness has been discussed in **S v Ntoae** and Others.³³³ In this case the court held that if it is in the interests of justice that the identity of a witness for the state should be withheld from the accused and their representatives, it is entitled and empowered, in terms of section 153(2), to grant such an order to that effect. However, the court should give due consideration to the accused person's right to a fair trial and whether the withholding of the identity of the complainant or witness may render the accused unable to conduct a proper defence. Section 153(2) can therefore be used as a tool to protect victims of trafficking who fear for their safety and/or the safety of their families should their identity be revealed when testifying against traffickers. However, the court in the Ntoae case stated that it may become necessary, in order to ensure that the accused has a fair trial, to reveal the true identity of a witness, even after an initial ruling to the contrary. The defence may also at any time renew a request on substantiated

³³¹ Schwikkard PJ et al **Principles of Evidence** (second edition) Landsdowne: Juta 2002, p351.

³³² Section 154(5).

³³³ 2000 (1) SACR 17.

grounds to have an initial order authorising non-disclosure of the identity of a witness reversed. Non-disclosure of the identity of victims of trafficking or any other witness can therefore not be guaranteed. This may indeed affect the willingness of victims to testify against traffickers.

5.167 The Prevention of Organised Crime Act also makes it an offence to threaten any specific person or persons in general, with retaliation in any manner or by any means whatsoever.³³⁴

Submissions received

Given the risks that victims of trafficking face when testifying against traffickers and taking into account that the current protective measures are not sufficient to ensure the safety of victims or other witnesses, how can the privacy and safety of victims or other witnesses be ensured in order to encourage them to testify against traffickers?

5.168 **Childline** suggested that victims should be afforded “vulnerable witness” status.

5.169 **Jhb Child Welfare Society** proposed that the witness protection programme should be strengthened. This suggestion is supported by **SWEAT**. SWEAT further supported the use safe houses or shelters for victims of trafficking where anonymity and privacy are provided and no screening criteria apply.

5.170 The **IOM** submitted as follows -

- (a) All trafficking victims should be taken to a high security emergency safe-house immediately upon their identification during which time the real risks to their safety should be assessed.
- (b) Trafficking victims assessed to face a high risk of reprisals in South Africa, such as those who agree to assist with the investigation of their traffickers or those

who agree to testify should be provided with high security shelter and/or witness protection.³³⁵

- (c) Measures should be adopted to protect victim-witnesses testifying in court. Such measures may include preliminary deposition of evidence and preliminary hearings,³³⁶ and a guarantee of confidentiality prohibiting publication of the names or other identifying characteristics of anyone who has been trafficked. In cases where victim-witnesses were trafficked for purposes of sexual exploitation, the facilities available in South Africa's Sexual Offences and Children's courts should be made available to them when testifying.
- (d) Victim-witnesses should not be abandoned following completion of the criminal trial,³³⁷ but protective measures should be extended to them post-trial while the risk of reprisal from their traffickers remains high.
- (e) Victim-witnesses should have access to specialised social workers for post-trial counselling to address any further trauma caused by their having testified, and to enable their recovery and reintegration either into their home countries or South Africa.
- (f) Task forces consisting of specially trained police and prosecutors should deal with trafficking cases. Protection of victims of trafficking has been most effective internationally where police and prosecutors were aware of the complex issues and risks facing victims of trafficking.³³⁸

³³⁵ Formal measures should include (i) secure housing, (ii) confidentiality, (iii) change of identity, (iv) police escorts between shelters and the courts, and (v) relocation, if necessary (Anti-Slavery International, "Human Traffic, Human Rights: Redefining Victim Protection", London, 2002, p. 49). Such measures should be provided through the witness protection programme. Due consideration should also be given to the safety of the victim-witness's family.

³³⁶ In Italy, the use of pre-trial hearings, which are closed to the public, seemed successful in reducing the trauma for victims, and enabling them to move on with their lives. There was no indication that this is 'unfair' to the defendant since the trial itself is public.

³³⁷ Anthony Minaar, "'Please protect us and keep us safe': More Effective Utilisation of Witness Protection Programmes – Some Lessons from the South African Experience", paper presented to the Technikon SA Conference: 2nd World Conference – *Modern Criminal Investigation, Organized Crime & Human Rights*. 3 – 7 December, ICC Durban, 2001.

³³⁸ "Human Traffic, Human Rights: Redefining Victim Protection", Anti-Slavery International, London, 2002, p. 49.

5.171 **RAPCAN** suggested that trafficking cases should be dealt with on a regional court level, and witnesses should be protected through closed-circuit television, in-camera proceedings, intermediaries and witness protection programmes.

5.172 **Anonymous** stated that a viable programme for witness protection can address the mentioned concerns from a minimal level of protection to complete change of identity and relocation. The respondent mentioned that both the United States and Austria have experts ready to travel to other countries to discuss and provide technical assistance in developing such programmes.

5.173 **Lawyers for Human Rights, Pretoria** suggested that the State should improve the effectiveness of the existing protective measures such as the witness protection programme. Furthermore, available protective measures such as closed-circuit television, intermediaries and in camera hearings should be used.

How should the criminal justice system deal with children who are to testify in criminal proceedings against traffickers?

5.174 **Childline** recommended that children be afforded “vulnerable witness” status.

5.175 **Jhb Child Welfare Society** proposed that the application of the provisions of section 170A of the Criminal Procedure Act should be mandatory in trafficking cases where evidence is being given by children. The respondent further suggested that the witness protection programme be strengthened and that use should be made of audiovisual linkages as suggested in the Issue Paper. The respondent stated that the Commission should rethink the issue of the possible use of videotaped testimony as this may in some cases be the only possible way to obtain the evidence.

5.176 The **Children’s Rights Project** stated that child victims of trafficking require the same protection as is afforded to other child victims of serious crimes. As such the respondent supported the use of the following in relation to child victims:

- prohibition on disclosure of identity;
- the use of intermediaries;
- the use of closed-circuit television;
- in camera proceedings;

- appointment of support persons; and
- the automatic declaration of all child witnesses, including but not limited to complainants, as vulnerable witnesses.

5.177 **Lawyers for Human Rights, Pretoria** submitted that the age of the child, his or her mental capacity, language and vocabulary should be taken into consideration when testifying in criminal proceedings against traffickers.

Victims trafficked to South Africa often do not speak or understand any of the official languages of South Africa. Given this reality, how can victims be provided with the opportunity to express their views during criminal proceedings against traffickers, taking into account that an interpreter who speaks a language a victim understand may not be available?

5.178 **Childline** stressed the importance of providing victims of trafficking with interpreters who are conversant with their language. The respondent recommended that embassies of foreign countries based in South Africa be actively canvassed to assist with translations. This view is supported by the **Jhb Child Welfare Society**, the **Children's Rights Project**, **SAPS** and **SWEAT**. SWEAT added that a victim's immediate family or friends should be approached in the absence of an interpreter.

5.179 **Lawyers for Human Rights, Pretoria** also stressed the importance of providing victims of trafficking with interpreters that are conversant with a language that they understand. This is supported by **Mr Masoa**.

5.180 **CSVR** submitted that interpretation services should be provided to victims who are unable to communicate meaningfully in any of the 11 official South African languages in order to make informed decisions about their situation. The respondent referred the Commission to section 35(3)(k) of the Constitution in terms of which interpreters would have to be made available to traffickers if they were charged in order for them to have a fair trial. Thus, in light of the importance of readily available interpreters for the prosecution of the crime of trafficking, efforts should be made to build a base of interpreters from primary source countries.

5.181 The **Sexual Offences and Community Affairs Unit** submitted that the matter must be dealt with internally by the Department of Justice and Constitutional Development and other relevant role-players.

Evaluation and recommendations

5.182 Although our current system provides for several protective measures for witnesses who are scared to assist with the police investigation or to testify against perpetrators in criminal proceedings, these measures are not always being applied in practice. Witnesses are often not aware of the fact that they may apply for such protective measures. There is further no obligation on the state to inform witnesses about their right to certain protective measures while giving evidence in criminal proceedings.

5.183 Clause 63(2) of the Criminal Law (Sexual Offences) Amendment Bill³³⁹ attempts to overcome this problem in relation to sexual offences by providing as follows:

(2)(a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health and Social Development, issue and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;
- (ii) the circumstances in which the prosecution must apply to court for an order that a witness give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977;
- (iii) the circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977;
- (iv) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;

³³⁹

As amended by the Portfolio Committee on Justice and Constitutional Development.

- (v) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family;
 - (vi) the information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant; and
 - (vii) the manner in which prosecutors must ensure that an order contemplated in section 48(2)(a) (dealing with an order of a court to include the accused's name in the Register) is forwarded to and received by the Registrar of the National Register for Sex Offenders.
- (b) The National Director of Public Prosecutions must develop training courses, which must –
- (i) include training on the directives referred to in paragraph (a);
 - (ii) include social context training in respect of sexual offences; and
 - (iii) provide for and promote the use of uniform norms, standards and procedures, with a view to ensuring that as many prosecutors as possible are able to deal with sexual offence cases in an appropriate, efficient and sensitive manner.

5.184 The purpose of the above provisions seems to be aimed at ensuring that prosecutors tasked with the institution and prosecution of sexual offences cases are made aware of the existence of these provisions and the circumstances in which they must apply to the court for one or more of these protective measures.

5.184 It is worth mentioning that an earlier version of the Criminal Law (Sexual Offences) Amendment Act created a special category of vulnerable witnesses to whom automatic protective measures should apply. The version provided as follows in clauses 14 and 15 respectively:

“Witness to be notified of protective measures

14. (1) The prosecution must inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is a child, such child, his or her parent, guardian or a person in loco parentis, of the possibility that he or she may be declared a vulnerable witness in terms of section 15 and of the protective measures listed in paragraphs (a) to (g) of section 15(4) prior to such witness commencing with his or her testimony at any stage of the proceedings.

(2) The court must, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in that

subsection and must note the witness's response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.

Vulnerable witnesses

15. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is-

- (a) the complainant in the proceedings pending before the court; or
- (b) a child.

(2) The court may, on its own initiative or on request of the prosecution or any witness, other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of-

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;
- (e) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

(3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before it and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures-

- (a) allowing that witness to give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (b) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977, irrespective of any additional qualifying criteria prescribed by that section;

(c) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977, irrespective of any additional qualifying criteria prescribed by that section;

(d) prohibiting the publication of the identity of the complainant provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once the court has declared a child a vulnerable witness the court must direct that an intermediary referred to in subsection (4)(b) be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.

(6) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court must have regard to all the circumstances of the case, including-

(a) any views expressed by the witness, but the court must accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and sense of safety and to protect the witness from traumatising; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(7) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court must, if such revocation or variation has been made on its own initiative, furnish reasons therefore at the time of the revocation or variation"

5.185 The above provisions would also have been applicable to cases involving the commission of a sexual offence against a victim of trafficking, but would not have applied to persons who have been trafficked for purposes other than sexual exploitation.

5.186 It is unfortunate that the vulnerable witness provisions have been omitted from the latest version of the Criminal Law (Sexual Offences) Amendment Bill as these provisions would have gone a long way in ensuring that victims of sexual offences felt safe enough to testify against their perpetrators in criminal proceedings.

5.187 The Commission is of the view that given the nature of the crime of trafficking in persons, the witness protection programme should be strengthened to cater for the unique needs of victim witnesses and other witnesses assisting with the investigation of alleged traffickers or testifying in criminal proceedings against such traffickers.

5.188 The Commission therefore recommends that the National Director of Public Prosecutions³⁴⁰ should review the witness protection programme in order to determine whether it adequately cater for the needs of trafficked victim-witnesses or other witnesses at risk of harm because of their involvement in the investigation of alleged traffickers or the prosecution of such traffickers. The proposed review of the witness protection programme should, inter alia, consider the following:

- (a) The provision of high security accommodation to witnesses.**
- (b) The extension of the witness protection programme beyond the criminal trial process if witnesses are still at risk of reprisals after the trial.**
- (c) The provision of counselling to victims both during and after the trial process.**
- (d) The extension of the witness protection programme to victims of trafficking who are at risk of harm, but choose not to assist with the investigation of alleged traffickers or to testify against such traffickers.³⁴¹**
- (e) Alternatively to (d) above, provision of alternative protective measures to the mentioned victims.**

5.189 The Commission supports the suggestion that victims of trafficking should be provided with vulnerable witness status. However, in light of the fact that the provisions on vulnerable witnesses were deleted from the latest version of the Criminal Law (Sexual Offences) Amendment Bill, the Commission refrain from including similar provisions in the proposed trafficking legislation.

³⁴⁰ The witness protection programme falls within the mandate of the National Director of Public Prosecutions.

³⁴¹ The Commission recommends in paragraph 6.103 below that victims of trafficking should be provided with a suspension of deportation period, during which time they should not be required to assist with the investigation of and the prosecution of traffickers.

5.190 Responding to the suggestion that victims of trafficking should be provided with safe houses, the Commission has recommended that victims of trafficking should be placed in a centre for adult victims of trafficking (option 1) or an organisation accredited to provide accommodation to adult victims of trafficking (option 2). Such a centre or organisation must secure the safety of adult victims of trafficking who are at risk of retaliation. Child victims of trafficking should be referred to a designated social worker for investigation to determine whether they are in need of care and protection. Furthermore, upon admission of an adult to a centre for adult victims of trafficking or an accredited organisation, an assessment must be made to determine the risk to the safety and life of the victim as well as the short and long term needs of the victim.³⁴²

5.191 With regard to the recommendation that a task force be established to deal with trafficking cases, the Commission has recommended that the National Commissioner of the South African Police Service must issue national instructions, inter alia, regarding (a) the division or divisions within the police to be tasked with the investigation of trafficking cases, and (b) the circumstances in which consultation with the prosecuting authority is required with the view to guiding the investigation of trafficking cases for purposes of obtaining the required evidence and to identify relevant witnesses.³⁴³

5.192 The importance of providing victims of trafficking or any other victims of crime with interpretation services cannot be over emphasised. Providing a victim, who is not able to communicate in any of the South African languages, with interpretation services, forms an integral part of an effective strategy to combat trafficking in persons. Interpretation services must be provided during both the investigation and trial stage.

5.193 The issue of providing victims of trafficking with interpretation services has been discussed with the Department of Justice and Constitutional Development at an inter-departmental meeting.³⁴⁴ As court services are the responsibility of the

³⁴² See paragraphs 6.165 – 6.169 below.

³⁴³ See clause 44(1)(a) of the Bill.

³⁴⁴ See paragraphs 1.6 – 1.8 above.

Department, it must ensure that victims of trafficking are provided with the necessary interpretation services during criminal proceedings against their perpetrators.

5.194 The reality is, however, that the existing departmental interpreters are mostly conversant with South African languages and are seldom able to communicate in foreign languages. The Department of Justice and Constitutional Development often makes use of persons from embassies and universities to assist with interpretation services where the accused, victim or witness is not conversant with any of the South African languages. However, these interpreters are not prepared to provide their services at the prescribed rate and charge very high fees.

5.195 Hence, the Department of Justice and Constitutional Development is in the process of establishing a computerised database on foreign interpreters. Interpreters on this database will be accredited and screened in order to ensure that they are reliable and trustworthy. This computerised system will enable investigating officers and prosecutors to locate, with very little effort and time, an interpreter who can assist them with their case.

5.196 It is worth mentioning that the Telephone Interpreting Service of South Africa (TISSA) was launched in March 2002. TISSA is an initiative of the National Language Service within the Department of Arts and Culture. TISSA enables those present in South African to have access to government services in any of the official South African languages. For example, if a social worker does not understand the language spoken by her client, a toll-free number linked to a call centre can be phoned. At the call centre, the operator will connect the social worker to an interpreter capable of speaking the language of both the social worker and her client. For effective communication, a telephone with a speaker or two telephones plugged into the same socket will be needed.

5.197 The lack of interpretation services during the police investigation and criminal proceedings is not a problem that relates to trafficking cases only. The Commission is therefore of the view that the proposed trafficking legislation is not the appropriate place to address this problem. The Commission believes that the problems being experienced by victims of trafficking will be addressed through the establishment of the computerised database on interpreters.

Obtaining of testimony from victims or other witnesses outside South Africa

5.198 The Issue Paper³⁴⁵ considered the issue of obtaining the testimony of a victim of trafficking or other witness who is abroad to be used in criminal proceedings in South Africa. The necessary expenses to travel to South Africa could be paid to such a witness. This option is undoubtedly expensive. The issue of videotaping the testimony of a witness has been discussed extensively in the Commission's Discussion Paper on Sexual Offences.³⁴⁶ The Discussion Paper highlights various problems regarding the use of video-taped testimony and states that the current circumstances do not allow for the introduction of pre-recorded video-taped testimony as evidence during the trial. A specific disadvantage of video-taped evidence is the fact that the defence is not able to cross-examine the witness. Consequently, the use of video-taped testimony is not posed as an option.

5.199 Besides permitting a witness to give evidence by means of closed-circuit television, the court may also allow the use of similar electronic media which may include the giving of evidence by audiovisual link.³⁴⁷ The court may make an order to this effect only if facilities are readily available or obtainable and if it appears to the court that to do so would –³⁴⁸

- (a) prevent unreasonable delay;
- (b) save cost;
- (c) be convenient;
- (d) be in the interest of the security of the State or of public safety or in the interest of justice or the public; or
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

5.200 Allowing the giving of testimony through audiovisual link will require the installation of audiovisual equipment at the courts. The use of this option will also depend on whether the victim or other witness has access to audiovisual equipment.

³⁴⁵ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.59 - 60.

³⁴⁶ South African Law Reform Commission **Discussion Paper 102: Sexual Offences, Process and Procedure** (Project 107) December 2001, p. 389 – 401.

³⁴⁷ Section 158(2) of the Criminal Procedure Act, 51 of 1977.

³⁴⁸ Section 158(3) of the Criminal Procedure Act, 51 of 1977.

Giving evidence through audiovisual link allows for the cross-examination of witnesses. It is worth mentioning that the Criminal Procedure Amendment Bill of 2003³⁴⁹ provides that criminal cases against accused persons who are in custody awaiting trial should be postponed via audiovisual link.³⁵⁰ In terms of this Bill, the Minister of Justice and Constitutional Development may make regulations to identify courts where there is a need for audiovisual link facilities. Pilot projects where audiovisual link facilities have been installed in court has already commenced in Durban.

5.201 The International Co-operation in Criminal Matters Act³⁵¹ is currently being used to obtain the testimony of a victim or witness who is abroad. The Act provides for the issuing of a letter of request to a foreign State requesting such a State to obtain evidence as stated in the letter for use at proceedings before a court or an investigation related to an alleged offence. Where a letter of request relates to proceedings before a court, any party to such proceedings may, provided that it is permitted by the law of the requested State – (a) submit interrogatories which the court issuing the letter of request may attach to the letter of request, or (b) appear at the examination of a witness in person and may examine, cross-examine and re-examine the witness. Where the letter of request relates to an investigation, the person in charge of the investigation may, provided that it is permitted by the law of the requested State – (a) submit interrogatories which the judge or magistrate issuing the letter of request may attach to the letter of request, or (b) appear at the examination and question the person concerned.³⁵²

Submissions received

Should future legislation on trafficking in persons include provisions on the use of audiovisual link in instances where a victim or other witness is outside South Africa and whose testimony is needed in criminal proceedings against traffickers taking

³⁴⁹ This Bill is currently being considered by the Department of Justice and Constitutional Development.

³⁵⁰ South African Law Reform Commission **Report on the use of Electronic Equipment in Court Proceedings** (Project 113) June 2003. The Bill on Electronic Equipment in Court Proceedings is currently being considered by the Department of Justice and Constitutional Development.

³⁵¹ 75 of 1996.

³⁵² Sections 7 and 8.

place in South Africa? If yes, by what means should such testimony be obtained in instances where the victim does not have access to audiovisual link equipment?

5.202 The majority of those who responded to this question answered affirmatively.³⁵³

5.203 **Childline** suggested that there should be provision for the use of audio-visual linkages as well as resources for victims to travel (accompanied by a support person if this is deemed necessary) to a point at which such facilities are available.

5.204 **Jhb Child Welfare Society** stated that the justice system should equip itself, via diplomatic channels, to set up audiovisual linkages where necessary.

5.205 **SAPS** submitted that the giving of evidence by audiovisual link would enhance the effective prosecution of trafficking cases in that victims will not suffer the same level of fear for their safety. Furthermore, where a victim or witness does not have access to audiovisual link equipment, the provisions of the International Co-operation in Criminal Matters Act should be relied on. This is supported by **Mr Masoa**.

5.206 The **SA Human Rights Commission** submitted that the ordinary rules of procedure and evidence that are applicable in criminal matters should be applied in trafficking cases.

5.207 **Lawyers for Human Rights, Pretoria** said that audiovisual link equipment should be used with caution in order not to deny the accused the opportunity to pose questions to the victim.

Evaluation and recommendations

5.208 The Commission has given due consideration to the submissions received and realises that legislating for the provision of audiovisual link facilities to witnesses who are abroad would contribute to the effective prosecution of traffickers. However, the Commission cannot lose sight of the fact that this will have great cost implications

³⁵³ Childline, Sweat, Jhb Child Welfare Society, SAPS and Mr Masoa.

for an already under-resourced justice system. This does not mean that the effective prosecution of traffickers should be compromised as the court is already in the position to make an order that a witness should give evidence by means of audiovisual link.³⁵⁴ Particularly relating to trafficking cases, the court may do so if harm might result to any person if he or she testifies or is present at the proceedings. Furthermore, audiovisual link facilities installed in courts as contemplated in the Criminal Procedure Amendment Bill of 2003 could be used in trafficking cases where witnesses are abroad.

Jurisdictional issues in matters relating to trafficking in persons

5.209 The Issue Paper³⁵⁵ stated that those charged with committing the crime of trafficking in persons can, depending on the circumstances of each case, also be charged with committing other offences such as rape, indecent assault, forced labour and child abuse. Several courts have concurrent jurisdiction to hear these matters. Rape cases are being heard by both the Magistrates' Courts and Sexual Offences Courts. Matters relating to forced labour are being heard by both the Labour Courts and Magistrates' Courts. Cases of child abuse are being heard by both the Magistrates' Courts and Children's Courts. Given the multiplicity of forums dealing with various aspects, a victim of trafficking may have to appear in more than one court. This may result in delays leaving the victim with uncertainty about his or her future. Victims of trafficking may already have been severely traumatised upon their rescue and requiring them to repeat painful details of their ordeal in various forums, may subject them to secondary systemic abuse.

Submissions received

Should all offences relating to the crime of trafficking in persons be heard in one court? If no, why not? If yes, which court? Please motivate your answer.

5.210 **Childline** submitted that all offences relating to the crime of trafficking should be heard during a single process and in one court in order to minimise time delays for the finalisation of the process as well as to facilitate the giving of evidence. The

³⁵⁴ Section 158(2) of the Criminal Procedure Act, 51 of 1977.

³⁵⁵ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.65 - 66.

respondent explained that the development of trust between victims and those in the criminal justice system is often a slow and difficult process. Furthermore, it is unrealistic to expect victims to cope with changes in physical setting and staffing within the criminal justice process. This is also likely to affect the quality of the victim's evidence.

5.211 **Jhb Child Welfare Society** stated that the sexual offences courts would be the best option as these courts already have some capacity to deal with traumatised victims, and because persons are usually trafficked for purposes of prostitution.

5.212 The **Children's Rights Project** submitted that it would be very difficult to ensure that victims appear only before one court because of the referral nature of our criminal justice system. The respondent proposed that if a perpetrator is charged with more than one offence over and above the trafficking offence, these charges should be joined and the matter tried in the court having the relevant jurisdiction. The respondent stated that as far as crimes in terms of the Child Care Act are concerned, these can be dealt with in the criminal courts. The respondent, however, acknowledged that child victims may have to appear before criminal courts as well as the children's court. The respondent added that court officials should ensure that each court is aware of the proceedings and developments of other courts.

5.213 **SWEAT** and **Lawyers for Human Rights, Pretoria** answered the question in the affirmative. The latter respondent suggested that the Magistrate Court should hear all offences relating to the crime of trafficking in persons because this court deals with a variety of offences. However, the complexity of a particular case and the expertise required should determine which court should deal with the matter.

5.214 **SAPS** mentioned that its Organised Crime Component is requesting the establishment of specialised Organised Crime Courts. The respondent added that should these courts be established, trafficking cases should be heard by them.

5.215 The **SA Human Rights Commission** proposed that criminal matters that are based on the same set of facts should be heard in one court. The respondent stated that depending on the nature of the charges, the criminal cases should be joined. Furthermore, the forum to be used should be dependent on the charges.

5.216 The **Department of Home Affairs** said that consideration should be given to the role and jurisdiction of Immigration Courts in the prosecuting of trafficking cases. The respondent mentioned that in terms of section 37(1) of the Immigration Act, the Immigration Courts have jurisdiction in any matter arising from the application of the Act.³⁵⁶ This is supported by the **Serious and Violent Crime Unit**.

5.217 **Molo Songololo (Consultative Workshop)** submitted that trafficking cases should be heard, at least, in a regional court.

If proceedings relating to the crime of trafficking in persons are instituted in a court, other than the one suggested by you, how and on what grounds should the matter be referred from that court to the court suggested by you?

5.218 **Jhb Child Welfare Society** submitted that there should be good reason to believe that the other court would be in a better position to adjudicate the issue. Furthermore, there need to be a commitment by all concerned to avoid delays and, if possible, to avoid going over grounds which have already been covered in the first court.

5.219 The **Serious and Violent Crime Unit** suggested that the case should be referred to the Immigration Court.

Should the court suggested by you be able to refer an issue in a matter before it to another court for hearing if it is of the opinion that justice would be served by such referral? If yes, what can be done to ensure that the victim is not subjected to secondary abuse by having to repeat his or her ordeal in the court the issue is being referred to?

5.220 The **Western Cape Ministry of Community Safety** answered the question in the affirmative and suggested that the record of proceedings should be referred to the other court in order to ensure that the victim does not repeat his or her ordeal in that other court.

³⁵⁶ The Commission like to point out that section 37 of the Immigration Act which establishes the immigration courts has been repealed by section 38 of the Immigration Amendment Act 19 of 2004.

Evaluation and recommendations

5.221 The Commission believes that where a victim is required to appear in more than one forum, the possibility of being re-victimised by the very system which is supposed to uphold his or her rights is increased. The Commission agrees with the submissions made by the Children's Rights Project and the S A Human Rights Commission. The Commission further notes that if a person is charged with one or more offences in addition to the trafficking in persons offence, the court would be able, in terms of section 81 of the Criminal Procedure Act, to join the charges in the same proceedings against the accused at any time before evidence is led in respect of any particular charge.

Co-operation amongst states in matters relating to trafficking in persons

5.222 The Issue Paper³⁵⁷ noted that because trafficking in persons often occurs across borders, the identification of workable solutions amongst countries may be problematic. Co-operation amongst countries and the continuous exchange of information, experience and expertise are therefore essential in order to combat the crime of trafficking in persons successfully. Bilateral or regional agreements on issues such as the protection of victims of trafficking, extradition and the prosecution of offenders may need to be developed.

5.223 As South has ratified the Trafficking Protocol, it assumes the obligation to adopt legislative or other measures to ensure the protection of victims of trafficking, the prosecution of traffickers and the prevention of trafficking in persons, including assisting other State Parties in this regard. However, co-operation with governments of countries that are not State Parties to the Trafficking Protocol may be problematic.

Submissions received

Given the trans-national nature of the crime of trafficking in persons, should bilateral and/or multilateral agreements relating to the protection of victims of trafficking and the prosecution of traffickers be concluded between South Africa and countries that

³⁵⁷ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.48.

are not Parties to the Trafficking Protocol whose citizens are being trafficked to South Africa and to which South African citizens are being trafficked? If yes, what should be the content of such agreements?

5.224 Those who provided the Commission with comments in response to this question were in favour of establishing such bilateral and/or multilateral agreements.³⁵⁸

5.225 **Jhb Child Welfare Society** proposed that bilateral or multilateral agreements should relate to the content of the Trafficking Protocol and the principles of the Hague Convention on Inter-country Adoption.

5.226 **SAPS** submitted that co-operation between South Africa and States that are not parties to the Trafficking Protocol may enhance the capacity of States to address the problem of trafficking in persons more effectively. The respondent mentioned that some of the police co-operation agreements that have been concluded between South Africa and certain States, expressly refer to co-operation in matters relating to trafficking in persons.

5.227 **Anonymous** submitted that effective strategies aimed at combating transnational crime must, of necessity, include a regional component. The respondent added that the South African government should use its diplomatic presence in neighbouring countries to ensure passage of similar legislation in those countries in order to ensure (a) the lawful exchange of evidence and witnesses, (b) the lawful exchange of information and data, and (c) choreographed joint operations targeting enterprises involved in trafficking and other forms of trans-border crime.

5.228 **Lawyers for Human Rights** suggested that the contents of bilateral and/or multi-lateral agreements relating to trafficking in persons should be similar to that contained e.g. in the Extradition Act.

5.229 **Molo Songololo** suggested that bilateral and/or multi-lateral agreements on trafficking in persons should provide for co-operation in the areas of law enforcement,

³⁵⁸ Childline, Jhb Child Welfare Society, Sweat, NCWSA, the Department of Social Development, SAPS and Anonymous, Lawyers for Human Rights, Pretoria, Molo Songololo, Molo Songololo (Consultative Workshop).

extradition, the prosecution of traffickers and other role-players, and assistance to victims of trafficking, especially children.

5.230 **Molo Songololo (Consultative Workshop)** proposed that bilateral and/or multi-lateral agreements on trafficking in persons should address the following issues: prevention of trafficking in persons, co-operation and mutual assistance during the investigation and prosecution of trafficking cases, the rights of child victims of trafficking, the rights of victims of trafficking in general, especially their right to protection and human dignity.

5.231 **Mr Masoa** proposed that bilateral and multi-lateral agreements on trafficking in persons should deal with the following matters: (a) the protection of victims of trafficking, (b) extradition and the prosecution of offenders, (c) the repatriation of victims of trafficking, and (d) seizure and handing over of property which may be required as evidence or which has been required as a result of the offence of trafficking in persons.

Evaluation and recommendations

5.232 As the crime of trafficking in persons knows no boundaries, the Commission is convinced of the importance of co-operating with other States in respect of issues relating to trafficking in persons. The Trafficking Protocol provides the foundation for co-operation between State Parties to the Protocol. As South Africa is already a State Party to the Protocol, it only needs to ensure co-operation between itself and those States that are not State Parties to the Protocol. The Commission is of the view that the proposed trafficking legislation should lay the foundation for bilateral, regional and multilateral agreements between South Africa and other States. Clause 283 of the Children's Bill provides for international co-operation between South Africa and other States in respect of matters pertaining to trafficking in children. This clause provide as follows:

International co-operation

283. (1) The President may on such conditions as he or she deems fit—
(a) enter into an agreement with a foreign State that is not a State Party to the UN Protocol to Prevent Trafficking in Persons in respect of any matter pertaining to trafficking in children;

(b) enter into an agreement with a foreign State that is a State Party to the UN Protocol to Prevent Trafficking in Persons in respect of any matter pertaining to trafficking in children for the purpose of supplementing the provisions of the Protocol or to facilitate the application of the principles contained therein.

(2) An agreement contemplated in subsection (1) may not be in conflict with the provisions of the UN Protocol to Prevent Trafficking in Persons.

(3) The President may agree to any amendment or revocation of an agreement contemplated in subsection (1).

(4) An agreement contemplated in subsection (1) or any amendment or revocation thereof, shall not be of any force or effect until such agreement, amendment or revocation has been approved by Parliament.

5.233 The Commission recommends that a provision, similar to clause 283 of the Children’s Bill, be included in the proposed trafficking legislation.³⁵⁹

Extradition

5.234 In South Africa, the Extradition Act³⁶⁰ provides for the extradition of persons accused or convicted of certain offences. In terms of this Act, an extraditable offence is an offence which in terms of the law of South Africa and of the foreign State concerned, is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.³⁶¹ The Act provides for the designation of foreign States. A person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State is liable to be surrendered to such designated State.³⁶² The President may also enter into an agreement with any foreign State, other than a designated State, providing for the surrender of persons accused or convicted of extraditable offences specified in such agreement.³⁶³ The Act contains no exemption for South African nationals from being extradited for offences committed abroad.

³⁵⁹ See clause 42 of the Bill. This gives effect to guideline 11 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking.

³⁶⁰ 67 of 1962.

³⁶¹ Section 1.

³⁶² Section 3(3).

³⁶³ Section 2(1)(a).

5.235 South Africa acceded, by ratification on 12 February 2003, to the European Convention on Extradition and the two protocols amending it. In respect of countries to which the Convention applies, it supersedes the provisions of any bilateral treaties, conventions and agreements governing extradition. However, where States Parties to the Convention have laws in force providing for extradition, they are free to regulate their mutual relations in respect thereof exclusively in accordance with such system, notwithstanding the provisions of the Convention. The parties to the Convention must surrender to each other, (a) all persons against whom the competent authorities of the requesting party are proceeding against for an offence or, (b) who are wanted by the said authorities for the carrying out of a sentence or detention order. Furthermore, the requested party must, in so far as its law permits and at the request of the requesting party, seize and hand over property which may be required as evidence or which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently.³⁶⁴

5.236 The Convention against Transnational Organised Crime further provides that if a State Party, that makes extradition conditional on the existence of a treaty, receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the Convention the legal basis for extradition in respect of any offence to which the Convention applies.³⁶⁵

5.237 South Africa's ratification of the above-mentioned Conventions is a positive step in ensuring that those involved in the trafficking of persons are punished. Extradition agreements with countries, other than those which are party to the Convention, would be of particular use in instances where nationals of foreign countries commit the crime of trafficking in persons in South Africa. South Africa would then be able to request that such persons be extradited to South Africa for prosecution.

³⁶⁴ "Extradition" 2003 **De Rebus** p.56 – 58.

³⁶⁵ Article 16(4) of the Convention.

Comparative overview

5.238 In Cyprus, the Extradition of Fugitive Law³⁶⁶ deems trafficking in persons and the sexual exploitation of children as extraditable offences.³⁶⁷ In the Philippines, the crime of trafficking in persons must be regarded as an extraditable offence.³⁶⁸

Submissions received

Are the legal provisions regarding extradition as set out above sufficient to ensure the effective extradition of traffickers for purposes of prosecuting them? If no, how should the problem be addressed?

5.239 **Lawyers for Human Rights, Pretoria** and **Mr Masoa** answered the question in the affirmative.

5.240 The **Department of Foreign Affairs** stated that double criminality (i.e. that the crime should be a criminal offence in both the requesting and the requested State before an extradition can be effected) is a general requirement for extradition. Thus, the existence of bilateral extradition agreements will not assist in an extradition request if the crime of trafficking in persons is not a crime in the requested State. The respondent submitted that in addition to extraditing on the basis of an agreement in terms of section 2 of the Extradition Act,³⁶⁹ it is also possible, in terms of section 3(2) of this Act, for the President to consent to an extradition even in the absence of an agreement.

5.241 **SAPS** submitted that basic structures and legislation are in place to facilitate the extradition of offenders from a foreign State, provided that the crime of trafficking is indeed an extraditable offence in the foreign State or has been specified as such in

³⁶⁶ 97 of 1970.

³⁶⁷ Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "A Comparative Analysis of Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons" Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003; See also article 13 of the Combating of Trafficking in Persons and Sexual Exploitation of Children Law No. 3(1) of 2000.

³⁶⁸ Section 26 of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

³⁶⁹ 67 of 1962.

an extradition agreement with that State. The respondent suggested that the names of countries from where persons are being trafficked to South Africa should be brought to the attention of the Department of Justice and Constitutional Development so as to ensure that South Africa concludes extradition agreements with such States. The respondent added that specific focus should be placed on South American States, China, Asian States and African States.

Evaluation and recommendations

5.242 The Commission agrees with the Department of Foreign Affairs that the requirement of double criminality forms the basis for an extradition request. This means that the act of trafficking in persons would have to be a criminal offence in both the requesting and receiving state before a person can be extradited. However, various countries have not criminalised the act of trafficking in persons yet. This means that if nationals from one of these countries commit the crime of trafficking in persons in South Africa, we will not be able to request that they be extradited to South Africa. It is also not possible to include in an extradition agreement that a person be extradited to South Africa for an offence which is not a crime in the country from where the person is to be extradited.

5.243 After careful consideration of the Extradition Act,³⁷⁰ the Commission is of the view that the provisions of this Act are adequate for ensuring the effective extradition of traffickers, provided that the double criminality requirement is complied with. Furthermore, the Commission would like to encourage those States that have not yet ratified the Trafficking Protocol to do so as a matter of urgency and to criminalise the act of trafficking in persons within their domestic laws.

Extra-territorial application of anti-trafficking legislation

5.244 The Issue Paper³⁷¹ stated that, given the global nature of the crime of trafficking in persons, it is important to ensure that it is possible to prosecute South African citizens as well as those with only permanent residency, if they commit the crime of trafficking in persons in another country, especially in a country where

³⁷⁰ 67 of 1962.

³⁷¹ South African Law Reform Commission **Issue Paper 25: Trafficking in Persons** (Project 131) 2004, p.69.

trafficking in persons is not a criminal offence. Where foreign nationals commit the crime of trafficking in persons in South Africa, they will be prosecuted in terms of the relevant South African law based on the doctrine of national sovereignty.

Comparative overview

5.245 The extra-territorial application of anti-trafficking legislation is essential as the crime of trafficking in persons knows no boundaries. Various countries have taken cognisance of this in their laws against trafficking in persons. For instance, the Penal Code Amendment Act of Thailand has expanded the territorial jurisdiction of courts to cover “indecent sexual acts” and “trafficking offences” irrespective of where such offences are committed. In New Zealand, the Crimes Amendment Act of 1995 applies to offences concerning sexual conduct with children committed by nationals abroad.³⁷² In Canada, article 135 of the Immigration and Refugee Protection Act of 2002 provides that the act of trafficking may be tried and punished in Canada if committed outside Canada. In Ireland, nationals or residents of Ireland may be prosecuted for sexual offences committed against children abroad. This also applies to a person who attempts to commit such an offence; aids, abets, counsels, or procures the commission of such an offence; or conspires with or incites another person to commit such an offence.³⁷³

Submissions received

Should extra-territorial operation be given to the envisaged legislation on trafficking in persons to make it possible to prosecute South African citizens as well as temporary or permanent residents in South Africa for the crime of trafficking in persons committed abroad?

³⁷² Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies “A Comparative Analysis of Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons” Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003.

³⁷³ Sexual Offences (Jurisdiction) Act of 1996; See also the Protection Project **A Human Rights Report on Trafficking in Persons, Especially Women and Children** March 2002, p.265.

5.246 This question did not elicit much response from respondents. Those who did comment answered the question in the affirmative.³⁷⁴

Evaluation and recommendations

5.247 The Commission recommends that the proposed trafficking legislation should provide for extra-territorial jurisdiction in respect of an act committed outside South Africa which would have constituted an offence in terms of the proposed trafficking legislation had it been committed inside South Africa.³⁷⁵

However, the issue of double jeopardy needs to be taken into account. It is therefore essential to keep in mind that a person, who has been acquitted or convicted for an offence in the country where the offence was committed, may not be prosecuted again in South Africa.

³⁷⁴ Childline, and Jhb Child Welfare Society, SWEAT, SAPS, the Department of Social Development, Anonymous, NCWSA, Lawyers for Human Rights, Pretoria, the Western Cape Ministry for Community Safety and Mr Masoa.

³⁷⁵ See clause 43 of the Bill.

CHAPTER SIX THE PROTECTION OF VICTIMS OF TRAFFICKING IN PERSONS

SUBSTANTIVE MEASURES

Identification of victims of trafficking

6.1 Victim identification forms an essential part of victim protection. Identifying victims of trafficking is very difficult as the crime of trafficking in persons is a hidden phenomenon and its victims are isolated and intimidated into secrecy and silence. Victims are constantly monitored by their traffickers which make it very difficult for them to reach out to the authorities for help. When identifying victims of trafficking, it is important to ensure that children are not mistakenly identified as adults, denying them services specifically designed for children. Even when placed in the child care system, if they are not identified as being trafficked, they will not receive appropriate services and could be moved into unsecured placements, causing them further trauma. Victims' first point of contact may be with a variety of role-players, including immigration officials, police officials, labour inspectors, social workers and medical service providers. All of these should be able to identify victims of trafficking.

Comparative overview

6.2 Some countries have taken steps to ensure the early identification of victims of trafficking. In co-operation with NGOs, the Government of the Czech Republic has formalised its victim screening process by creating a list of ten questions for police to use in order to determine whether a person is a victim of trafficking. The government has further established an intranet site for police on how to identify and assist victims of trafficking.³⁷⁶ In Colombia, the Department of Administrative Security is authorised to identify and approach travellers at airports that appear to be potential victims of trafficking before they board international flights. These persons are informed about the risks of become a victim of trafficking and fraudulent job offers. This has convinced various persons that their employment offers were fraudulent.³⁷⁷ The government of Albania has begun work on a national referral mechanism involving law enforcement, social services and NGO partners to improve the initial

³⁷⁶ US Department of State **Trafficking in Persons Report** June 2005, p. 34.

³⁷⁷ US Department of State **Trafficking in Persons Report** June 2004, p.33; International Rescue Committee **Trafficking Watch** Issue No. 5, Summer 2004; USA Department of State **Trafficking in Persons Report** June 2005, p.85.

identification, reception, protection and reintegration procedures for returnee victims.³⁷⁸ State Border Service Agents in Bosnia and Herzegovina refer potential victims of trafficking encountered at border crossings to the International Organisation for Migration for screening.³⁷⁹ In the United Kingdom, police and immigration authorities have started with a screening process at Heathrow airport to systematically identify children entering the United Kingdom who may be at risk. And after an initial three-month collaborative monitoring and referral programme to social services, a full-time child protection officer was assigned to Heathrow airport.³⁸⁰ Japan is in the process of improving the screening of travellers arriving in Japan from key source countries for victims of trafficking³⁸¹ and Japan's National Police Agency has provided guidelines on victim identification and treatment to local police forces.³⁸² The Croatian Ministry of Interior has also developed instructions that included guidelines on identification and treatment of victims for law enforcement officials who come into contact with potential victims of trafficking.³⁸³

Submissions received

Should guidelines be established for the police regarding the manner of identification and interviewing of victims of trafficking? If yes, what should be the content of these guidelines?

6.3 The majority of respondents answered the question in the affirmative.³⁸⁴

6.4 **Childline** stated that the content of such guidelines should be developed in conjunction with the Directorate of Public Prosecutions to ensure that the SAPS management is congruent with effective criminal justice management as well as empathic management of vulnerable victims. Furthermore, the guidelines should

³⁷⁸ USA Department of State **Trafficking in Persons Report** June 2005, p.52.

³⁷⁹ US Department of State **Trafficking in Persons Report** June 2004, p.127.

³⁸⁰ US Department of State **Trafficking in Persons Report** June 2004, p.185; US Department of State **Trafficking in Persons Report** June 2005, p.222.

³⁸¹ US Department of State **Trafficking in Persons Report** June 2004, p.96.

³⁸² US Department of State **Trafficking in Persons Report** June 2004, p132 - 133.

³⁸³ USA Department of State **Trafficking in Persons Report** June 2005, p. 90.

³⁸⁴ Childline, Jhb Child Welfare Society, the Serious and Violent Crimes Unit, the Department of Social Development, Anonymous, CSV, IOM, the Children's Rights Project, the SA Human Rights Commission, and Lawyers for Human Rights, Pretoria.

make reference to the referral of victims to resources other than the criminal justice processes. These might include health services, social services, etc. The respondent submitted that the guidelines should be made available to those tasked with the implementation thereof. The respondent mentioned that the guidelines for the management of sexual offences have had little impact at the level of interaction of SAPS offices with victims of sexual offences because the guidelines are not available or used at the victim service delivery interface.

6.5 The **Department of Social Development** suggested that a resource directory for referral purposes should be established.

6.6 The **IOM** submitted as follows -

- (a) Guidelines for law enforcement officials should explain what trafficking in persons is and should indicate key differences between trafficking in persons and migrant smuggling.
- (b) Guidelines should state that all police officials have a responsibility to identify potential cases of trafficking in persons based on a *prima facie* screening procedure. Screening indicators may include an individual's age, gender, nationality, documentation, last location, and signs of abuse.³⁸⁵ For example, it is an indication that a foreign person may be a victim of trafficking if found in physically or sexually exploitative conditions in South Africa, is either not in possession of a passport or is in possession of a new passport obtained solely for entry into South Africa, is unable to show evidence of any monies earned while working in an exploitative employment sector and/or indicates that a third party is in possession of such earnings. A combination of several of these, or similar indicators should be sufficient grounds to establish a *prima facie* case of trafficking in persons. As victims of trafficking often do not tell the truth when first identified, a police interview with a victim should not be a requirement before a *prima facie* determination of a suspected case of trafficking in persons can be made.³⁸⁶

³⁸⁵ IOM offers detailed training in procedures of screening for trafficking persons.

³⁸⁶ Women who are trafficked suffer the same, or often worse, injuries, infections and traumas as those suffered by women who are sexually assaulted or raped. Traffickers exert brutal and manipulative control over their victims, both from a physical and psychological perspective.

- (c) Following a *prima facie* identification of a victim of trafficking, law enforcement officials should immediately transfer such persons to an emergency safe house, and notify relevant immigration officials and service providers.
- (d) Victims of trafficking should not be assessed or interviewed in proximity to persons that may have trafficked them.
- (e) Police guidelines for interviewing suspected victims of trafficking should be structured along the following lines:³⁸⁷
- *Do no harm*: Treat each woman and the situation as if the potential for harm is extreme until there is evidence to the contrary. Do not undertake any interview that will make a woman's situation worse in the short or longer term.
 - *Know your subjects and assess the risks*: Learn the risk associated with trafficking and each woman's case before undertaking an interview.
 - *Prepare referral information – do not make promises that you cannot fulfil*: Be prepared to provide information in a women's native language and the local language (if different) about appropriate legal, health, shelter, social support and security services, and to help with referral, if requested.
 - *Adequately select and prepare interpreters, and co-workers*: Weigh the risks and benefits associated with employing interpreters, co-workers or others, and develop adequate methods for screening and training.
 - *Ensure anonymity and confidentiality*: Protect a respondent's identity and confidentiality throughout the entire process – from the moment she is contacted through the time that details of her case are made public.
 - *Get informed consent*: Make certain that each respondent clearly understands the content and purpose of the interview, the intended

They use rape, beating, torture, starvation, physical exhaustion, isolation, deception, and death threats to force the victim to obey their rules and orders. See in this regard IOM, "Special Issue: Trafficking in Human Being and Public Health," *Migration and Health Newsletter*, March 2003.

³⁸⁷

World Health Organization (WHO), "WHO Ethical and Safety Recommendations for Interviewing Trafficked Women", London, 2003.

use of the information, her right not to answer questions, her right to terminate the interview at any time, and her right to put restrictions on how the information is used.

- *Listen to and respect each woman's assessment of her situation and risks to her safety:* Recognise that each woman will have different concerns, and that the way she views her concerns may be different from how others might assess them.
- *Do not re-traumatise a woman:* Do not ask questions intended to provoke an emotionally-charged response. Be prepared to respond to a woman's distress and highlight her strengths.
- *Be prepared for emergency intervention:* Be prepared to respond if a woman says she is in imminent danger.
- *Put information collected to good use:* Use information in a way that benefits an individual woman or that advances the development of good policies and interventions for trafficked women generally.

- (f) Guidelines should be evaluated and reviewed regularly to take into account the experience of law enforcement in dealing with cases of trafficking in persons, and their co-operation with immigration authorities, government departments and service providers, to ensure that best practices become institutionalised.

6.7 IOM further submitted that the proposed trafficking legislation or its supporting regulations should provide for mandatory training of immigration officials in the procedures by which they may identify, document and process victims of trafficking, and ensure that the human and legal rights of victims of trafficking are upheld according to international standards.

6.8 The **Children's Rights Project** suggested that the guidelines should be compiled as regulations to the proposed trafficking legislation after research and consultation have taken place between the police and various other disciplines such as social workers and psychologists.

6.9 **SAPS** submitted that the need for guidelines can be determined only once an idea is formed as to the content and requirements of the envisaged trafficking legislation.

6.10 The **SA Human Rights Commission** submitted that there are a number of reasons why the police should consider drafting guidelines to assist their members in dealing with the crime of trafficking in persons. These include:

- (a) The disempowerment of victims through threats, coercion, deception and use of violence.
- (b) The link to organised crime of many traffickers.
- (c) The targeting of vulnerable groups such as women and children.
- (d) The inability of victims to speak the local or regional language.
- (e) The victims lack of knowledge regarding where to go for help.
- (f) The crime of trafficking in persons can involve other areas of policing such as child abuse, forced labour, assault, border control, organised crime, drug trafficking etc.

6.11 **Lawyers for Human Rights, Pretoria** suggested that the state, age and language of victims are factors that should be taken into account when identifying and interviewing victims of trafficking.

6.12 **Network Against Child Labour** submitted that child victims of trafficking are often not identified as such and may enter the welfare system as children reported to be abandoned, neglected or abused. This often happens in cases of cross-border trafficking where language barriers prevent social workers from developing a clear understanding of the children's situation. The respondent is of the view that this may affect the decision as to whether these children should be returned to parental care and whether such cases should be investigated for purposes of prosecuting the offenders.

Should guidelines be drawn up for the police on how to deal with unaccompanied children who have no documents allowing them to be in South Africa? If yes, what should be the content of these guidelines?

6.13 **Childline** recommended that police officials should be educated on issues relating to trafficking in persons, the investigation of this crime and the management of the victims. Furthermore, the guidelines should refer to the humane treatment of victims and the need to assess victims in order to provide them with appropriate services.

6.14 Various respondents answered the question in the affirmative.³⁸⁸ **Jhb Child Welfare Society** mentioned that the guidelines developed by the National Consortium of Refugee Affairs (“Protecting the Most Vulnerable”, by Mayer, Van Garderen, Handmaker and de la Hunt, 2000) and the UNHCR’s documents “Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum” (1997) and “Working with Unaccompanied Children – A Community-Based Approach” (1996) are relevant to the police and other sectors involved.

6.15 The **Department of Social Development** said that it is important for the police to know that unaccompanied children must be referred to a social worker who should initiate children’s court proceedings. The respondent added that in the case of foreign children, a referral to International Social Services may be necessary in order to investigate the circumstances of the child in his or her country of origin.

6.16 The **SA Human Rights Commission** submitted that guidelines on how to deal with unaccompanied children should not only pertain to those who are victims of trafficking. The respondent proposed that this matter be addressed by the Department of Home Affairs and SAPS.

6.17 **Anonymous** suggested that the guidelines should encourage the police to seek medical and psychiatric examinations of child victims of trafficking.

6.18 The **Department of Home Affairs** proposed that the guidelines should not be drawn up for the police only, but also for immigration officials and officials of the Department of Home Affairs who deal with and come into contact with minors and other vulnerable persons.

6.19 **Lawyers for Human Rights, Johannesburg** mentioned that in terms of the Child Care Act all children, regardless of their legal status, are to be given care and protection. The respondent pointed out that government agencies responsible for the care of unaccompanied minors often refuse to offer shelter and other services to these children. The respondent said that the severe trauma experienced by children who have fallen victim to trafficking surely guarantees their need for social and legal

³⁸⁸ Jhb Child Welfare Society, SAPS, Anonymous, the Department of Social Development, the Department of Home Affairs and Lawyers for Human Rights, Pretoria.

services. The respondent said that the police and other officials working with unaccompanied minors need to know how to work with such cases. Whether it is a lack of knowledge of current legislation or defiance of it, police and other government agencies have poorly handled cases regarding unaccompanied minors. Education and enforcement of legislation must occur to ensure that unaccompanied minors receive proper care and protection.

6.20 **Lawyers for Human Rights, Pretoria** proposed that the guidelines should contain information on available resources, the applicable laws and the international conventions ratified by South Africa.

Evaluation and recommendations

6.21 The Commission has recommended in paragraph 5.162 that the South African Police Service must issue national instructions, inter alia, regarding the manner in which victims of trafficking should be identified, interviewed and treated, paying particular attention to the vulnerability of child victims.

6.22 The Commission realises, however, that besides the police, immigration officials are usually the first point of contact for foreign victims of trafficking. **Hence the Commission recommends that the Minister of Home Affairs must issue national directives regarding the following matters:**³⁸⁹

- (a) **the manner in which the reporting of an alleged trafficking case is to be dealt with;**
- (b) **the manner in which victims of trafficking should be identified, interviewed and treated, paying particular attention to the vulnerability of child victims;**
- (c) **measures to be taken in instances where foreign victims of trafficking are not conversant with any of the South African languages;**
- (d) **the referral of victims of trafficking to social and health care services; and**

³⁸⁹ See clause 44(2)(a) of the Bill.

- (e) **the referral of victims of trafficking or other potential witnesses to the South African Police Service or other relevant institutions or organisations if there is a likelihood that they may be harmed or killed.**

6.23 Similarly to the training proposed for the police in paragraph 5.163 above, the Commission proposes the following two options in respect of training on the national directives:

Option one:

The proposed trafficking legislation should provide that the Minister of Home Affairs should ensure that all immigration officials who are likely to come into contact with victims of trafficking in the execution of their duties are trained on the proposed national directives with the view to ensuring that as many immigration officials as possible are able to deal with trafficking cases in an appropriate manner.³⁹⁰

Option two:

This option would entail that, instead of providing for training on the national directives in the proposed trafficking legislation, the Department of Home Affairs should deal with the issue of training in terms of policy.

6.24 **The Commission recommends that the above national instructions and directives be reviewed regularly.** This will ensure the relevance of such national instructions and directives, taking into account new developments regarding trafficking in persons.

6.25 The Commission agrees with IOM that law enforcement officials should know what trafficking in persons entails and how it differs from migrant smuggling. The Commission is of the view that this should form part of the training curricula for law enforcement officials. **Furthermore, the Commission recommends that training for law enforcement officials should include lessons on indicators that could be used to identify whether a person is a victim of trafficking.**

³⁹⁰ See clause 44(2)(b) of the Bill.

6.26 The Commission finds the World Health Organisation's Guidelines for the interviewing of trafficked women very helpful and recommends that these guidelines be taken cognisance of when determining the manner in which victims of trafficking should be interviewed.

6.27 The Commission wants to reiterate the importance of ensuring that those who usually come into contact with victims of trafficking are trained on how to identify such victims. **Hence, the Commission recommends that the proposed trafficking legislation should provide for broad guiding principles to determine whether a person is a victim of trafficking.** These guiding principles could be used as a basis for the drafting of the proposed national instructions and directives regarding the identification of victims of trafficking.

6.28 **In order to facilitate the identification of victims of trafficking, the Commission recommends that the Minister for Justice and Constitutional Development may declare a country as a country of (a) origin from where persons are being trafficked to South Africa, and (b) destination to which persons present in South Africa are being trafficked. Furthermore, the Minister of Home Affairs must, in consultation with the Minister for Justice and Constitutional Development, develop a screening mechanism in order to determine whether the following persons are victims of trafficking:**

- (i) **persons who travel to South Africa from a country declared as a country of origin as contemplated in (a) above; and**
- (ii) **persons who travel from South Africa to a country declared as a country of destination as contemplated in (b) above.**³⁹¹

6.29 The Commission supports the suggestion made by the Department of Social Development that a resource directory be established. Such a directory will facilitate the referral of victims of trafficking to needed assistance. **In this regard, the Commission recommends that the Department of Social Development be tasked with the development of such a directory. The proposed directory should indicate the following:**

³⁹¹ See clause 10 of the Bill.

- (a) **the names, telephone and fax numbers and physical, postal and electronic addresses of government institutions, international and non-governmental organisations providing assistance to victims of trafficking; and**
- (b) **a brief description of the nature of services provided by them.**

6.30 The Commission agrees with the Department of Social Development that the police should be made aware of their obligation in terms of the Child Care Act to refer unaccompanied children to a social worker who should bring the child before the Children's Court for a determination as to whether the child is in need of care and protection. Hence, the Commission has recommended that, in the context of trafficking in children, the proposed trafficking legislation should provide for the referral of child victims of trafficking to a designated social worker to be dealt with in terms of section 155(2) of the Children's Bill.³⁹²

Reporting and referral of victims of trafficking

6.31 The Children's Bill makes provision for the reporting and referral of children who are victims of trafficking. The Bill identifies certain categories of professional persons who must refer child victims of trafficking to a designated social worker.³⁹³ A similar process for the reporting and referral of adult victims of trafficking does not exist.

6.32 Another issue to consider is whether the reporting of cases of trafficking in persons should be made mandatory. The mandatory reporting of trafficking in persons needs to be balanced with adequate resources in order to investigate each reported case. Currently, limited resources do not allow for the proper investigation of each reported case. The investigation of unsubstantiated cases generated by such a mandatory reporting provision can also have massive cost implications at the expense of preventative and protective services. Thus, mandatory reporting is only useful to the extent that it gives rise to effective services.

³⁹² See paragraph 6.42 below.

³⁹³ See clause 288 of the Children's Bill.

Submissions received

Should provision be made for the reporting of cases of trafficking in persons? If yes, should reporting be mandatory or voluntary? Please motivate your answer. Should the current Child Protection Register be used to record cases of trafficking in children? Please motivate your answer.

6.33 **Jhb Child Welfare Society** stated that an approach could be taken similar to that provided for in the Children's Bill, which compels certain practitioners to report abuse, whilst allowing for any other person to do so voluntarily. This is supported by **Childline. Molo Songololo (Consultative Workshop)** also submitted that the reporting of trafficking cases should be voluntary for the general public.

6.34 **Childline** recommended that protection should be provided to those who do report cases of trafficking because the crime of trafficking in persons is often committed by powerful syndicates who may effectively intimidate those who come to know of their activities. This is supported by **Jhb Child Welfare Society** who suggested that those who have made a report in good faith should be provided with immunity from any legal action that could be instituted against them.

6.35 **Childline** suggested that cases of child trafficking should be recorded in the child protection register as trafficking is a form of child abuse.³⁹⁴ Access to the register should be limited to role-players in the child care system who require the information for child protection and/or bona fide research purposes. Furthermore, the purpose for recording the name of child victims in the child protection register should be to –

- (a) ensure that child victims of trafficking receive the necessary services;
- (b) track the progress of the child through the various systems and processes that are required for the management of the case and the rehabilitation of the child;
- (c) enable the measurement of the extent of the problem to facilitate the planning, resourcing and implementation of services to child victims of trafficking; and
- (d) provide opportunities for research that will contribute to the prevention and management of the trafficking of children.

³⁹⁴ This is supported by Mr Masoa.

6.36 **RAPCAN** supported mandatory reporting of trafficking cases, provided that adequate and appropriate resources are available.³⁹⁵ However, **Lawyers for Human Rights, Pretoria** submitted that due to the lack of adequate resources to investigate each reported case, reporting of trafficking cases should not be mandatory.

6.37 **SAPS** submitted that if the purpose of reporting trafficking cases is to detect cases of trafficking, normal procedures such as questioning by immigration and police officials, guidelines on how to deal with victims etc. would be equally, if not more, effective.

6.38 The **Serious and Violent Crimes Unit** mentioned that in a lot of cases border control have notice suspicious foreigners entering the country accompanied by young Asian women. However, border officials do not report these cases if the foreigners' travel documentation are in order.

6.39 **Anonymous** submitted that the reporting of cases of trafficking in children is imperative in order to assess the extent of the problem and the danger it poses to the citizenry. Reporting further allows for a quantitative measuring of the efficiency of legislation and supporting services.

6.40 **Mr Masoa** suggested that the reporting of cases of trafficking in persons should be voluntary to avoid a situation where persons report unsubstantiated cases in order to avoid the sanction for failing to report such cases.

Evaluation and recommendations

6.41 The Commission agrees with Jhb Child Welfare Society and Childline that it should be mandatory for certain categories of professionals to report cases of trafficking in persons, whilst it should be voluntary for the general public to do so.

6.42 **The Commission therefore recommends that the proposed trafficking legislation should provide for the reporting of cases of trafficking in persons to the South African Police Service. Reporting of such cases should be**

³⁹⁵ This view is supported by the Serious and Violent Crimes Unit and Anonymous.

mandatory for certain categories of professional persons. Such categories of professional persons should include those who usually come into contact with victims of trafficking in the execution of their duties. It should further be a criminal offence if such persons fail to report cases of trafficking in persons. Reporting of cases of trafficking in persons should be voluntary for the general public. Furthermore, if the victim is a child, he or she should be referred to a designated social worker for investigation as contemplated in section 155(2) of Children’s Bill. If the victim is an adult, he or she should be referred to a centre for adult victims of trafficking (option1) or an accredited organisation providing assistance to victims of trafficking (option 2).³⁹⁶

6.43 The Commission agrees with Childline and Jhb Child Welfare Society that those reporting cases of trafficking in persons should be protected from intimidation. **The Commission therefore recommends that the identity of a person who has reported a case of trafficking in persons must be kept confidential, unless the interests of justice require otherwise.**³⁹⁷

Providing victims of trafficking with immunity against prosecution

6.44 Apart from dealing with the trauma of being trafficked, victims are also faced with arrest and prosecution for offences committed as a direct result of their situation as victims of trafficking. South Africa is no exception when it comes to the arrest and prosecution of these victims. This is because they are not identified as victims of trafficking, but are dealt with as illegal immigrants. In South Africa, victims of trafficking may be prosecuted for prostitution, even though they were forced into prostitution by their traffickers.³⁹⁸ Victims of trafficking may also be prosecuted for illegal entry in terms of the Immigration Act. Arresting and prosecuting victims of trafficking for such offences may discourage them from reaching out to the authorities

³⁹⁶ See clause 12 of the Bill.

³⁹⁷ See clause 12(5) of the Bill.

³⁹⁸ Sweden, for example, has adopted a unique strategy that explicitly penalises “customers” of prostitution, and not the prostitutes themselves. See in this regard Shifman P and Franzblau K 2001, p.16. In Egypt, in terms of the Suppression of Prostitution Act 10 of 1961, it is the man seeking to buy sexual favours that is considered the criminal despite the age of the prostitute. See in this regard ECPAT (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes) International **The Fourth Report on the Implementation of the Agenda for Action adopted at the First World Congress against Commercial Exploitation of Children in Stockholm, Sweden, 28 August 1996** 2000, p.13.

for aid thereby making the combating of the crime of trafficking in persons extremely difficult.

Comparative overview

6.45 Despite several instances of prosecuting victims of trafficking, the international community seems to be well sensitised to the fact that victims of trafficking should not be punished for offences committed as a direct result of their situation as victims of trafficking. The United Nations Kosovo Regulation No. 2002/4 on the Prohibition of Trafficking in Persons in Kosovo provides that prostitution, illegal entry and unauthorised work do not give rise to a crime, provided that there is a reasonable belief that the person who committed such acts is a victim.³⁹⁹ In the USA, the Victims of Trafficking and Violence Protection Act of 2000 explicitly decriminalises acts of victims who have entered the country illegally if that conduct is caused by or incidental to their being victims of trafficking.⁴⁰⁰ Article 165(4) of the Moldovian anti-trafficking law decriminalises acts committed by victims of trafficking. In the Philippines, victims are not penalised for crimes directly related to their being trafficked or for obeying any order made by traffickers in relation thereto.⁴⁰¹ However, the Dominican Republic⁴⁰² and Spain⁴⁰³ make immunity from prosecution dependent on the victims' willingness to co-operate with law enforcement authorities.

Submissions received

*Should a person who has been trafficked to South Africa be provided with immunity from prosecution for any offences committed as a direct result of being trafficked?*⁴⁰⁴

³⁹⁹ Mattar Mohammed, "Anti-Trafficking Laws in South Africa: A Comparative and International Perspective" Paper presented at the Next Steps to Path Breaking Strategies in the Global Management and Prosecution of Sex Trafficking in South Africa held in Johannesburg, South Africa on 22 – 24 June 2004.

⁴⁰⁰ Section 112(a)(2); Smith Linda and Mattar Mohamed **Winter** (2004) 28:1 p.161.

⁴⁰¹ Section 17 of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

⁴⁰² See in this regard Law No. 137-03.

⁴⁰³ See in this regard section 54b of Immigration Law 8 of 2000.

⁴⁰⁴ The Commission in its investigation into sexual offences has recommended that child prostitutes should be seen as victims and not as perpetrators. See in this regard South African Law Reform Commission **Discussion Paper 85: Sexual Offences, the Substantive Law** (Project 107) August 1999, par. 3.7.10.2.

6.46 The majority of the respondents answered this question in the affirmative.⁴⁰⁵

6.47 **IOM** submitted that, in order to be consistent with Principle 7 of the United Nations High Commissioner for Human Rights' Recommended Principles and Guidelines on Human Rights and Human Trafficking, victims of trafficking should not be incarcerated, fined, deported or otherwise penalised for any offences under any national laws which are directly related to their being trafficked. These include offences such as illegal entry, overstay, working without a permit and prostitution. The respondent stated that one of the purposes of the Trafficking Protocol is to protect and assist victims of trafficking, with full respect for their human rights. According to the respondent, South African legislation on trafficking in persons would be inconsistent with this purpose if it allows the prosecution of victims for offences directly related to their being trafficked. The respondent suggested that the proposed trafficking legislation should protect victims of trafficking from prosecution in order to (i) shield them from multiple victimisation, (ii) encourage them to cooperate with the state in the investigation of and the prosecution of traffickers, (iii) expedite access to the necessary social services they may require, and (iv) be consistent with article 2(b) of the Trafficking Protocol.

6.48 The **SAPS** argued that victims of trafficking should not automatically be provided with immunity from prosecution for offences committed as a direct result of their being trafficked because anyone who e.g. is arrested for prostitution or an illegal work permit may claim to be a victim of trafficking. The respondent recommended that the provision of immunity from prosecution should be done only on the instructions and in accordance with the guidance of the Director of Public Prosecutions within the context of the application of sections 252A and 204 of the Criminal Procedure Act. However, the **Serious and Violent Crimes Unit** submitted that victims of trafficking should not be provided with immunity from prosecution.

6.49 Similar to the view expressed by SAPS, the **S A Human Rights Commission** said that the provision of immunity from prosecution should be determined on a case-by-case basis⁴⁰⁶ and the Director of Public Prosecutions

⁴⁰⁵ Childline, SWEAT, the Western Cape Ministry of Community Safety, Anonymous, CSVR, Jhb Child Welfare Society, IOM, S A Human Rights Commission, Lawyers for Human Rights: Johannesburg, Sexual Offences and Community Affairs Unit and Mr Masoa.

⁴⁰⁶ This is supported by Molo Songololo (Consultative Workshop).

should be authorised to exercise his or her discretion in this regard. The respondent stated that where an offence was committed under threat or duress, it is highly unlikely that the person had the necessary intention to commit a crime and prosecution in such a case would therefore not be appropriate. The respondent suggested that where a victim of trafficking is willing to testify against traffickers, consideration should be given to providing him or her with immunity from prosecution.

6.50 The **Department of Home Affairs** cautioned that automatic immunity from prosecution may lead to abuse. Hence, the respondent recommended that suitably skilled officials should be authorised to decide whether or not to prosecute a victim of trafficking and that clear guidelines should be established regarding the factors that may be taken into account in making such a decision. Furthermore, a decision should only be taken once a victim of trafficking has had the benefit of appropriate support and counselling.

6.51 **NCWSA** submitted that immunity from prosecution should not be given for murder.

6.52 **Lawyers for Human Rights, Pretoria** submitted that the provision of immunity from prosecution should depend on the type of crime committed as well as the circumstances that existed when the crime was committed. Furthermore, victims of trafficking should be provided with immunity from prosecution if they were coerced to commit crimes. However, if a victim e.g. commits theft in order to support his or her drug addiction, he or she should be prosecuted.

6.53 The **Sexual Offences and Community Affairs Unit** said that providing victims of trafficking with immunity from prosecution will facilitate the prosecution of trafficking cases in that victims will be more willing to assist with the investigation of such cases. It will further enhance the reporting of trafficking cases by victims.

Evaluation and recommendations

6.54 The Commission is of the view that victims of trafficking should not be criminally liable for any migration-related offence, prostitution or any other criminal offence that is a direct result of their situation as victims of trafficking. However, the Commission agrees with SAPS, the S A Human Rights Commission and the

Department of Home Affairs that automatic immunity from prosecution may lead to abuse of the criminal justice system. The Commission wants to avoid a situation where anyone who is arrested for a trafficking-related offence such as illegal entry could claim to be a victim of trafficking in order to avoid arrest and prosecution.

6.55 The issue of providing victims of trafficking with immunity from prosecution has been debated at an interdepartmental meeting on trafficking in persons.⁴⁰⁷ The meeting was in agreement that victims of trafficking should not be provided with automatic immunity from prosecution, but that the decision whether to prosecute or not should rest with the National Director of Public Prosecutions. The Commission endorses this view.

6.56 The Commission realises that the co-operation of a victim of trafficking might be more readily obtained if under threat of possible criminal prosecution. However, the Commission would not want to follow the approach of countries such as the Dominican Republic and Spain by making immunity from prosecution dependent on a victim's willingness to co-operate with law enforcement authorities. Doing so would be in conflict with the spirit of the Trafficking Protocol as the Protocol does not make victim protection dependent on co-operation with law enforcement authorities.

6.57 The Commission recommends that the decision as to whether criminal proceedings should be instituted against a victim of trafficking for an offence committed as a direct result of his or her situation as a victim of trafficking should rest with the National Director of Public Prosecutions.⁴⁰⁸

6.58 The Commission further recommends that no prosecution for an offence referred to above may be instituted without the written authority of the National Director of Public Prosecutions.⁴⁰⁹

Immigration status of victims of trafficking

6.59 The successful prosecution of traffickers is most likely through the testimony of victims of trafficking. This requires that victims should stay in South Africa for the

⁴⁰⁷ See paragraphs 1.6 – 1.8 above.

⁴⁰⁸ See clause 11(1) of the Bill.

⁴⁰⁹ See clause 11(2) of the Bill.

duration of criminal proceedings against traffickers and may require that victims be granted some kind of residency status.⁴¹⁰

6.60 Allowing victims to stay in South Africa for the duration of criminal proceedings against traffickers may also require that the victim's family be allowed to join him or her. This will help to strengthen the support provided to victims, especially child victims.

6.61 Another option to explore is the possibility of applying for refugee status. In terms of section 3 of the Refugees Act,⁴¹¹ a person qualifies for refugee status if that person "owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it". However, it is not clear from the wording of section 3 whether a person who has been trafficked to South Africa would be able to apply for refugee status.

Comparative overview

Introduction

6.62 Legal systems differ as to the basis of granting victims of trafficking residency status. Several countries provide for some kind of temporary residency status allowing victims of trafficking to stay in their territories, at least, for the duration of

⁴¹⁰ In the Netherlands, Italy, Belgium and Austria, if the victim agrees to co-operate with law enforcement and judicial authorities, her residence permit and services are extended for the duration of the criminal proceedings. The victim is also entitled to shelter, legal, financial and medical assistance. See in this regard ECPAT International **The Fourth Report on the Implementation of the Agenda for Action adopted at the First World Congress against Commercial Exploitation of Children in Stockholm, Sweden, 28 August 1996** 2000, p.119. See also USA Department of State **Trafficking in Persons Report** June 2002; US Department of State **Trafficking in Persons Report** June 2003; USA Department of State **Trafficking in Persons Report** June 2004, p.160; USA Department of State **Trafficking in Persons Report** June 2005, p.66; In Canada, victims of trafficking are eligible to apply for permanent residency status. See in this regard USA Department of State **Trafficking in Persons Report** June 2002, p.38.

⁴¹¹ 130 of 1998.

criminal proceedings against traffickers. A detail analysis of a few selected countries that provide residency status to victims of trafficking is outlined below.⁴¹²

The Netherlands

6.63 The Netherlands was the first country to adopt a specific policy providing temporary residency rights to persons trafficked into the sex industry. This policy is contained in regulation B9 (2000). The aim of regulation B9 is to facilitate the investigation and prosecution of trafficking cases and to offer support and protection to victims of trafficking. If there is a slight indication that a person is a victim of trafficking, he or she is offered a three-month “reflection delay” period. This enables victims to recover from their ordeal and to make informed decisions as to whether they want to press charges against their traffickers. During this period, victims are provided with appropriate housing, medical assistance, legal assistance and counselling.⁴¹³ There is no specific specialised shelter for victims of trafficking. The Stichting Tegen Vrouwenhandel Foundation against Trafficking in Women (STV)⁴¹⁴ is of the view that specialised shelters would put victims of trafficking and staff at risk of reprisals and could interfere with their ability to recover from their experiences if they are constantly confronted with people who have suffered similar abuse.⁴¹⁵ The police have a legal obligation to inform victims of their right to a “reflection delay” period. The “reflection delay” period is available only once to each individual and cannot be extended. The decision to grant a “reflection delay” period is taken by a police officer or a lawyer interviewing the victim. However, the ultimate decision is made by a senior police officer. The police officer notifies the Immigration and Naturalisation

⁴¹² Other countries include Germany, Portugal, Austria, Canada, Spain, the Czech Republic, Hungary, Lithuania, Bulgaria, Norway, Denmark, Turkey, Romania, Sweden, France, Hong Kong, and Switzerland.

⁴¹³ Anti-Slavery International **Human traffic, human rights: redefining victim protection** 2002, p. 65 – 67, compiled by Elaine Pearson; US Department of State **Trafficking in Persons Report** June 2004, p.160; Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies “A Comparative Analysis of Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons” Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003; See also Permanent Representation of the Kingdom of the Netherlands to the Organisation for Security and Co-operation in Europe (OSCE) **Trafficking in Human Beings** 27 August 2002, Information obtained at Internet http://www.osce.org/documents/odihhr/2002/09/1745_en.pdf Date accessed: 2 October 2004. See also USA Department of State **Trafficking in Persons Report** June 2005, p.164.

⁴¹⁴ STV is a non governmental organisation and is officially designated to provide support services to trafficked persons.

⁴¹⁵ Anti-Slavery International **Human traffic, human rights** 2002, p.78.

Service (IND) and the STV that the victim has a suspension of deportation order for three months. The victim must report to the IND office, and STV is responsible for coordinating reception and accommodation as well as arranging a case manager for the case. This person also ensures medical assistance and legal aid for the victim.⁴¹⁶ In terms of regulation B9, trafficked persons are not allowed to take up education or training opportunities.⁴¹⁷ Victims of trafficking with a B9 permit were previously not allowed to work.⁴¹⁸ In April 2005, the government enacted regulations to allow B9 permit holders the right to work and eligibility for benefits and education assistance.⁴¹⁹

6.64 Victims are not obliged to make use of the “reflection delay” period and can immediately decide to press charges against their traffickers. If a victim decides to press charges against the traffickers before the expiry of the “reflection delay” period, he or she is entitled to a temporary residence permit allowing him or her to stay in the Netherlands for the duration of the investigation, prosecution and trial.⁴²⁰ According to regulation B9, the pressing of charges against traffickers must be considered as an application for a temporary residence permit. However, the issuing of a temporary residence permit is not dependent on the prosecutor’s decision to prosecute the case. The IND office, in principle, must make a decision within 24 hours whether to grant the permit. This permit can be withdrawn if the prosecutor decides not to instigate criminal proceedings. In practice, however, the IND office often considers the issuing of a temporary residence permit dependent on the prosecutor decision to initiate criminal proceedings against the traffickers.⁴²¹

6.65 A permanent residence permit may be issued to a victim of trafficking upon the conclusion of criminal proceedings. Such a permit would be granted on humanitarian grounds, taking into account the risk of reprisals against the victim and

⁴¹⁶ Anti-Slavery International **Human traffic, human rights** 2002, p. 65 – 67.

⁴¹⁷ Anti-Slavery International **Human traffic human rights** 2002, p.80.

⁴¹⁸ Anti-Slavery International **Human traffic, human rights** 2002, p.80.

⁴¹⁹ USA Department of State **Trafficking in Persons Report** June 2005, p. 164.

⁴²⁰ Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies “A Comparative Analysis of Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons” Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003; The Protection Project **Report on Trafficking of Persons, Especially Women and Children** March 2002, p. 388.

⁴²¹ Anti-Slavery International **Human traffic, human rights** 2002, p.67.

his or her family, risk of prosecutions in the country of origin for example for prostitution, and lack of possibility of reintegration into society in the country of origin.⁴²² Victims of trafficking may bring their children to the Netherlands in order to protect them during the criminal trial and in some cases afterwards.⁴²³ Victims who are not willing to co-operate with law enforcement authorities are repatriated voluntarily.⁴²⁴

Belgium

6.66 Similar to the Netherlands, Belgium (in terms of the Circular regarding the issuing of residence documents and work permits to migrant victims of trafficking in human beings dated 7 July 1994) provides victims of trafficking with a “reflection delay” period allowing them to stay in the country for 45 days.⁴²⁵ Subsequent government protection is linked to a victim’s willingness to testify in criminal proceedings against perpetrators.⁴²⁶ The government financially supports and refers victims of trafficking to three specialised non-governmental shelters.⁴²⁷ A shelter accommodating a victim of trafficking may apply to the Immigration Office for a “reflection delay” period. During this period, victims of trafficking are not allowed to work, but are entitled to all basic services such as shelter, education, medical care and financial assistance. The duration of the permit can be extended in special circumstances such as for medical reasons or the need to inform relatives for reasons of safety or with the view to voluntary repatriation.

6.67 The Immigration Office provides victims of trafficking with a three-month residency document called a “declaration of arrival” if they decide to press charges against traffickers. One month before the expiry of the “declaration of arrival”, the

⁴²² The Protection Project **Report on Trafficking of Persons, Especially Women and Children** March 2002, p. 388 – 389; Anti-Slavery International **Human traffic, human rights** 2002, p.68.

⁴²³ Anti-Slavery International **Human traffic, human rights** 2002, p.68.

⁴²⁴ US Department of State **Trafficking in Persons Report** June 2004, p.160.

⁴²⁵ US Department of State **Trafficking in Persons Report** June 2004, p.124; USA Department of State **Trafficking in Persons Report** June 2005, p. 66; Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies “A Comparative Analysis of the Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons” Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003.

⁴²⁶ USA Department of State **Trafficking in Persons Report** June 2005, p. 66.

⁴²⁷ US Department of State **Trafficking in Persons Report** June 2004, p.124.

Immigration Office contacts the Prosecutor's Office for further information on the nature of the complaint. If the Prosecutor's Office confirms that the complainant is a victim of trafficking, the Immigration Office may approve a second permit to stay called a *Bewijs van Inschrijving in het Vreemdelingenregister (BIVR)*⁴²⁸ temporary permit. The BIVR is valid for six months and may be extended at a six-month interval until the end of the criminal proceedings against traffickers. Persons issued with the "declaration of arrival" permit or the BIVR temporary permit are allowed to work on the condition that the employer has obtained an authorisation of employment from the Regional Authorities.⁴²⁹ If victims of trafficking fail to adhere to the conditions of the assistance programme offered by the specialised shelters, their residence permits can be revoked.⁴³⁰

6.68 Victims of trafficking can apply for a permanent residence permit at the end of criminal proceedings against traffickers. In considering such application, the Immigration Office takes into account the significance of the information provided by the victim of trafficking (based on the information received from the Prosecutor's Office) and the degree to which the victim of trafficking has adapted into the Belgium society.⁴³¹ If the complaint has led to the conviction of the trafficker, then permanent residency is generally always granted. However, if the criminal case against the trafficker is suspended and the victim of trafficking has been residing in Belgium for two years or more, he or she may apply for permanent residency on humanitarian grounds.⁴³² Under the "declaration of arrival" and the BIVR, trafficked persons with children under the age of 18 may bring them to Belgium at their own cost. If severe reprisals occur, trafficked persons could be relocated within Belgium.⁴³³

⁴²⁸ Certificate of Registration in the Immigration Register.

⁴²⁹ Anti-Slavery International **Human traffic, human rights** 2002, p.89 – 90; US Department of State **Trafficking in Persons Report** June 2004, p.124; Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "A Comparative Analysis of Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons" Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003.

⁴³⁰ Anti-Slavery International **Human traffic, human rights** 2002, p.96.

⁴³¹ Anti-Slavery International **Human traffic, human rights** 2002, p.90.

⁴³² Anti-Slavery International **Human traffic, human rights** 2002, p.97; US Department of State **Trafficking in Persons Report** June 2004, p.124. See also USA Department of State **Trafficking in Persons Report** June 2005, p. 66.

⁴³³ Anti-Slavery International **Human traffic, human rights** 2002, p.97.

Italy

6.69 Italy is the only country in Europe that provides temporary residence permits to victims of trafficking who are not willing to testify against their traffickers in criminal proceedings.⁴³⁴ However, in practice, there is a clear tendency to grant permits only to those who are willing to testify against their traffickers.⁴³⁵ Victims of trafficking are required to participate in social assistance and integration programmes organised by local NGOs and community groups. Victims are afforded access to social services, educational institutions, enrolment with the State's employment bureau, and employment. The NGO taking care of a victim usually takes responsibility for the victim's education and training as part of the integration programme.⁴³⁶ The temporary residence permit is renewable after the initial six months for another year if the permit holder is assisting the prosecution or is enrolled in an education programme or is employed at the date of expiry of the initial permit. In order to obtain a temporary permit, victims of trafficking must provide the authorities with an identity document. This is problematic as victims often do not have identity documents as these might have been confiscated or destroyed by their traffickers. However, a temporary document proving victims' identity may be obtained from their embassies.⁴³⁷ A high number of victims report their traffickers because of an increased feeling of security. Those who have not pressed charges against their traffickers are often more willing to do so towards the end of the six-month initial stay because they have recovered in part from their trauma. Additionally, they have spoken to other victims in a similar position who have testified or are testifying against their traffickers.⁴³⁸

⁴³⁴ Article 18 of the Immigration Law No. 286 of 1998.

⁴³⁵ Anti-Slavery International **Human traffic, human rights** 2002, p.143 – 144.; See also Schatzer Peter, Director: Regional Office Italy, IOM "Trafficking in Human Beings in an enlarging EU – towards a European approach?" 13 November 2003, Information obtained at Internet http://www.cicerofoundation.org/lectures.schatzer_nov03.html; See also European Network Against Child Trafficking (ENACT) **A report on Child Trafficking** March 2004, p. 50 - 51, compiled by Italia Onlus, Save the Children.

⁴³⁶ Anti-Slavery International **Human traffic, human rights** 2002, p.152.

⁴³⁷ Anti-Slavery International **Human traffic, human rights** 2002, p.146.

⁴³⁸ Anti-Slavery International **Human traffic, human rights** 2002, p.145.

United States of America

6.70 The United States does not provide for a “reflection delay” period. However, the Victims of Trafficking and Violence Protection Act states that a federal law enforcement official may grant “continued presence” to a victim of trafficking.⁴³⁹ Continued presence allows a victim to stay in the United States and may be granted only if the trafficked person is a victim of a severe form of trafficking⁴⁴⁰ and is willing to co-operate with law enforcement authorities in the investigation and prosecution of traffickers.⁴⁴¹ Continued presence entitles victims of trafficking to support and assistance on the same basis as refugees, as well as the opportunity to work.⁴⁴² Victims may also apply for T visas⁴⁴³ at the Bureau of Citizenship and Immigration Services within the Department of Homeland Security. These visas are available to victims who have complied with reasonable requests for assistance to investigate or prosecute acts of trafficking. A child under 18 years of age is not required to show willingness to assist in a reasonable request to investigate and prosecute a case of trafficking before he or she is entitled to receive an immigration status.⁴⁴⁴ Victims who receive T non-immigration status may remain in the United States for three years and can then apply for permanent residency.⁴⁴⁵ The government assists in the repatriation process of victims who request repatriation by liaising with foreign

⁴³⁹ Section 107(c)(3).

⁴⁴⁰ In terms of section 103(8), severe forms of trafficking in persons means –
“(a) sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age;
(b) the recruitment, harbouring, transportation, provision or obtaining of a person for labour or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery”.

⁴⁴¹ Section 107(c)(3);

⁴⁴² Section 107(b)(1)(A); Anti-Slavery International **Human traffic, human rights** 2002, p.122.

⁴⁴³ A visa in terms of section 101(a)(15)(T) of the Immigration and Nationality Act of 1952.

⁴⁴⁴ Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies “Examining U.S efforts to combat human trafficking and slavery: An assessment of the United States’ recent legal responses to the problem of trafficking in persons on the federal, state and international levels” Statement made to the Senate Committee on the Judiciary, and the Subcommittee on the Constitution, Civil Rights and Property Rights on 7 July 2004.

⁴⁴⁵ Section 107(f) of the Victims of Trafficking and Violence Protection Act of 2000; US Department of State **Trafficking in Persons Report** June 2004, p.258; USA Department of State **Trafficking in Persons Report** June 2005, p. 243; Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies “A Comparative Analysis of Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons” Statement made to the (USA) House Committee on International Relations, and the Subcommittee on International Terrorism, Non-proliferation and Human Rights on 25 June 2003.

governments to facilitate the victim's return and to try to ensure that the victim is not re-trafficked.⁴⁴⁶

United Kingdom

6.71 Victims of trafficking are granted exceptional leave to remain in the country only if they agree to testify against traffickers in criminal proceedings. Those who obtain exceptional leave to remain are granted a stay of four years. After this period they can apply for permanent residency if the same factors e.g. fear are still prevalent.⁴⁴⁷

6.72 Victims of trafficking who are unwilling to co-operate with the British authorities are usually send back to their countries of origin within 48 hours. In most cases victims are too traumatised and fearful of their traffickers to consider remaining in the United Kingdom to testify against their traffickers. However, the summary deportation of victims and the absence of a "reflection delay" period leave victims of trafficking vulnerable to be re-trafficked.⁴⁴⁸ Victims of trafficking who are granted exceptional leave to remain in the country has the right to work.⁴⁴⁹

Australia

6.73 On 1 January 2004, the Australian government amended its immigration law to establish two new visa subclasses. A Witness Protection (Trafficking) (Temporary) visa is available to a person who holds a Criminal Justice Stay Visa (30 days) where-

- (a) a person has made a significant contribution to and co-operated closely with the prosecution or investigation of a trafficker;
- (b) the person is not the subject of any related prosecutions; and
- (c) the person would be in danger if he or she returns to his or her home country.

6.74 A Witness Protection (Trafficking) (Permanent) visa is available to persons who has held the corresponding temporary visa for at least two years and who

⁴⁴⁶ US Department of State **Trafficking in Persons Report** June 2004, p.258.

⁴⁴⁷ US Department of State **Trafficking in Persons Report** June 2004, p.185.

⁴⁴⁸ Anti-Slavery International **Human traffic, human rights** 2002, p.110.

⁴⁴⁹ Anti-Slavery International **Human traffic, human rights** 2002, p.114.

continue to meet the criteria for the temporary visa. Members of a victim of trafficking's immediate family who are in the country are eligible for both visas.⁴⁵⁰

Thailand

6.75 In Thailand, the granting of a stay of deportation depends on a victim of trafficking's willingness to testify in criminal proceedings. Victims of trafficking are not entitled to stay in Thailand after finalisation of the criminal proceedings against traffickers.⁴⁵¹

Cyprus

6.76 Unlike the countries providing victims of trafficking with a right to temporary residency, Cyprus provides victims of trafficking with only reasonable protection and support including, to the extent that this is feasible and reasonable, temporary shelter, medical care and psychiatric support until the victims are considered as having recovered from any traumatic experience.⁴⁵²

Submissions received

Should temporary residence permits be issued to victims of trafficking? If yes, should the issuing of such permit be dependent on the victim's willingness to testify against traffickers in criminal proceedings?

6.77 Various respondents⁴⁵³ answered the question in the affirmative. These respondents recommended that the provision of temporary residence permits to victims of trafficking should not depend on their willingness to assist with the

⁴⁵⁰ Australian Government, Department of Immigration and Multicultural and Indigenous Affairs "New visas for witnesses in trafficking cases" 11 March 2004, Information obtained at Internet http://www.immi.gov.au/legislation/amendments/1c01012004_5.htm Date accessed: 2 October 2004; See also Jackson Andra "Visas for sex victims who help nail traffickers" 25 October 2003, Information obtained at Internet <http://www.theage.com.au/articles/2003/10/24/1066974316603.html?oneclick=true> Date accessed: 7 October 2004.

⁴⁵¹ Anti-Slavery International **Human traffic, human rights** 2002, p.178.

⁴⁵² Section 7(1) of the Combating of Trafficking in Persons and Sexual Exploitation of Children Law No. 3(1) of 2000.

⁴⁵³ Childline, Jhb Child Welfare Society, SWEAT, NCWSA and CSV, Lawyers for Human Rights, Pretoria, Molo Songololo.

investigation of and the prosecution of traffickers. Some respondents⁴⁵⁴ felt that victims of trafficking should, while present in South Africa, be provided with supportive and rehabilitative services such as social security and psychological services.

6.78 **IOM** suggested that before victims of trafficking are offered temporary residence permits, they should be provided with a “reflection delay” period. In this regard the respondent submitted as follows:

- (a) The proposed trafficking legislation should provide for a non-renewable 90-day reflection delay period.⁴⁵⁵ Once a person has been identified as a victim of trafficking, he or she should immediately be informed of his or her right to a reflection delay period. An offer of a reflection delay should not be conditional upon the willingness of victims of trafficking to assist with the investigation of or the prosecution of traffickers.⁴⁵⁶ Furthermore, immigration officials should have the exclusive power to grant a reflection delay period. Immigration officials should nonetheless be encouraged to consult with relevant non-governmental organisations to assist in assessing cases of trafficking.

An unconditional reflection delay period recognises that victims of trafficking may decide to co-operate with law enforcement authorities only after a period of recovery,⁴⁵⁷ while a conditional reflection delay period force victims to make the decision to cooperate immediately when many are still heavily influenced by their traffickers⁴⁵⁸;

⁴⁵⁴ Childline and SWEAT.

⁴⁵⁵ This model has been adopted successfully in the Netherlands and Belgium.

⁴⁵⁶ Anti-Slavery International, “Human traffic, Human Rights: Redefining Victim Protection”, London, 2002, pp. 41 - 47.

⁴⁵⁷ In Italy’s experience of assisting victims, victims of trafficking who have not yet reported their traffickers are often more willing to testify towards the end of the six-month reflection delay period because they have recovered in part from their trauma, and want to seek justice. Furthermore, the stability offered by the combination of safe housing, counselling, and the company of women who have shared similar experiences and who may be testifying against their traffickers gives victims of trafficking who have not reported their traffickers the encouragement to do so. See in this regard Anti-Slavery International, “Human Traffic, Human Rights: Redefining Victim Protection”, London, 2002.

⁴⁵⁸ In the United Kingdom, which does not offer an unconditional reflection delay period, the majority of rescued victims who are made to choose immediately whether to co-operate with law enforcement authorities, or to return home, choose not to co-operate. This represents a lost opportunity for law enforcement to use the victims as sources of intelligence. See in this regard Anti-Slavery International, “Human traffic, Human Rights”, London, 2002, p. 42.

A reflection delay period has proven benefits to law enforcement – it allows victims who are unwilling to co-operate with law enforcement authorities to reconsider their position, while those who may be willing to cooperate, but unable to do so because of the trauma they have suffered, are given the opportunity to recover physically and emotionally.

- (b) At the conclusion of the reflection delay period, victims may be provided with temporary residence permits if they (i) are willing to assist with the investigation and/or prosecution of their traffickers; or (ii) can establish that they face a real risk of reprisals, prosecution or re-trafficking upon return to their countries of origin.⁴⁵⁹

6.79 IOM's suggestion that a temporary residence permit should be issued only to victims of trafficking who agree to co-operate with the investigation of and the prosecution of traffickers is supported by **SAPS**, the **Serious and Violent Crimes Unit**, and **Anonymous**.

6.80 The **Department of Foreign Affairs** pointed out that the issuing of residence permits, temporary or permanent, is not a legally binding obligation in that article 7(1) of the Trafficking Protocol oblige State Parties only to consider the issuing of such permits to victims of trafficking. The respondent, however, cautioned that making the issuing of temporary residence permits conditional on a victim's willingness to testify against traffickers in criminal proceedings would be contrary to the spirit of the Trafficking Protocol.

6.81 Similar to the suggestion made by IOM, **Ms Koen** recommended that victims of trafficking should be allowed to stay in South Africa for a period of at least three months in order to come to terms with their experiences and to decide what they would like to do. The respondent further stated that if a temporary residence permit was granted to a victim, he or she should be provided with an extended stay on humanitarian ground on expiration of such permit.

⁴⁵⁹ A 10-country survey of counter-trafficking and victim-assistance measures published by Anti-Slavery International found that "countries that fared better in prosecuting traffickers for various crimes (Belgium, Italy, Netherlands, and United States) were the four countries which also had the most comprehensive measures for assisting victims, including temporary residency permits. See in this regard Anti-Slavery International, "Human Traffic, Human Rights: Redefining Victim Protection", London, 2002, p. 2.

6.82 The **Department of Home Affairs** submitted that provision already exists for the issuing of appropriate temporary residence permits.

6.83 The **University of Cape Town Legal Aid Clinic** suggested that victims of trafficking should qualify for one of the following permits:

(a) An asylum permit if the victim qualifies for refugee status.

(b) A temporary residence permit. This would legalise the victim's presence in the Republic while enabling the police and other relevant officials to do a full investigation into the nature of the case. It will further assist the police in cases where they need the victim to testify in criminal proceedings.

(c) A humanitarian visa. For instance, if a child was trafficked to South Africa at a young age and is only found by the authorities at the age 21 years. It might be in the best interests of that person to remain in the country if e.g. he or she cannot remember much about his or her country of origin.

6.84 **Anonymous** mentioned that in the United States, victims of trafficking are provided with temporary residence permits through an arrangement with the immigration authorities.

6.85 The **Department of Home Affairs** submitted that the current provisions of the Immigration Act for the issuing of temporary residence permits are sufficient.

6.86 **Mr Masoa** submitted that temporary residence permits should be issued to victims of trafficking on the condition that they testify against traffickers in criminal proceedings.

Should permanent residence permits be provided to victims of trafficking if there is a real risk that they may be trafficked again, harmed or killed when returned to their countries of origin?

6.87 Various respondents answered the question in the affirmative.⁴⁶⁰

⁴⁶⁰ Jhb Child Welfare Society, SWEAT, Anonymous, Childline, Lawyers for Human Rights, Pretoria, IOM and Mr Masoa.

6.88 The **IOM** recommended that permanent residence permits should be issued to victims of trafficking where they (i) have remained in the Republic for a significant amount of time in order to assist the authorities with the investigation of and the prosecution of traffickers, and in doing so have established real and substantial ties with the Republic; (ii) have a well-founded fear of reprisals in their countries of origin as a result of assisting the authorities with the investigation of and the prosecution of traffickers; (iii) are likely to be trafficked again should they return to their countries of origin.

6.89 The **Serious and Violent Crimes Unit** proposed that where victims of trafficking have testified in syndicate related cases or where evidence given by them has led to a criminal conviction, consideration should be given to granting them permanent residence permits.

6.90 The **Department of Home Affairs** submitted that section 31(2)(b) of the Immigration Act permits the Minister, in consultation with the Immigration Advisory Board, to grant “permanent resident rights” to a person in special circumstances. Such rights may be granted on certain conditions and for a certain period. The respondent said that it may be helpful for the Ministry or the Department of Home Affairs to develop guidelines on what would constitute special circumstances for purposes of section 31(2)(b) of the Immigration Act.

6.91 **Molo Songololo (Consultative Workshop)** stated that victims for whom it will be unsafe to return to their countries of origin should have the option of applying for a humanitarian visa which will allow them to stay in South Africa. The same consideration should be extended to victims who are witnesses in cases against traffickers.

Should a victim's immediate family be able to join him or her in South Africa for the duration of criminal proceedings against traffickers? Please motivate your answer.

6.92 The majority of respondents answered the question in the affirmative.⁴⁶¹ **Jhb Child Welfare Society** submitted that victims may have been seriously traumatised and that the availability of family support is likely to help in their recovery. In addition, a family member may be able to cast light on the tactics which were used to ensnare the victim. **SWEAT** added that the family members of an adult victim of trafficking should only be allowed to join him or her if the victim so request.

6.93 **Childline** cautioned that where a victim's family member has benefited from the victim's trafficking, he or she should not be allowed to act as a support person, especially if the victim is a child. This is supported by **Lawyers for Human Rights, Pretoria**.

6.94 **SAPS** submitted that South African courts have a huge case backlog and that cases are being postponed for long periods. Practical problems such as when and for how long a victim's family should be allowed to stay in the country may therefore arise.

6.95 The **Serious and Violent Crimes Unit** submitted that allowing a victim's family to join him or her should solely depend on the duration of the criminal trial.

6.96 **Mr Masoa** submitted that the victim's family should carry their own cost for visiting the victim.

Should a victim who has been trafficked to South Africa have a right to apply for refugee status?

6.97 **Jhb Child Welfare Society** and **SWEAT** answered the question in the affirmative.

⁴⁶¹ Anonymous, NCWSA, CSV, Jhb Child Welfare Society, Childline, Lawyers for Human Rights, Pretoria, SWEAT and Mr Masoa.

6.98 **Childline** submitted that victims of trafficking should have a right to apply for refugee status if this would facilitate access to justice, services and assistance during the trial process in which they were to testify.

6.99 The **IOM** stated that victims of trafficking should not be barred from applying for refugee status solely on the ground that they have been trafficked. The respondent mentioned that it has interviewed a number of trafficked women in South Africa who were *bona fide* asylum-seekers to the extent that they have fled their countries of origin owing to a well founded fear of persecution. In the process of fleeing their countries, they became victims of trafficking. The respondent submitted that victims of trafficking should not, however, qualify for refugee status solely on the ground that they have been trafficked because the risks they face are typically more individual in nature than those which face refugees, and are often present both in the country of destination and the country of origin. The respondent argued that both victims of trafficking and the state benefit from a protection regime that remains distinct from refugee protection. For the trafficking victim, the provision of a reflection delay period allows him or her to evaluate his or her position in a secure environment where he or she receives services tailored to his or her specific needs that can speed up the process of recovery. For the state, victims who have recovered from their experiences are likely to be more willing to assist in the investigation of and the prosecution of their traffickers.

6.100 The **Department of Foreign Affairs** submitted that the right to apply for refugee status is available to any foreigner who meets the requirements for refugee status, including victims of trafficking. This is supported by **Lawyers for Human Rights, Johannesburg** and **Mr Masoa**.

6.101 The **Department of Home Affairs** mentioned that section 6(1)(b) of the Refugees Act provides that the Act “must be interpreted and applied with due regard to ... any other relevant convention or international agreement to which the Republic is or becomes a party.” The respondent further mentioned that Canada has adopted a wider definition of “refugee” which allows for the protection of persons to whom the Canadian government owes a duty of protection by virtue of an international convention it has ratified aside from international conventions dealing with refugees.

6.102 **NCWSA** submitted that refugee status should be granted to victims of trafficking on a case by case basis.

Evaluation and recommendations

6.103 The issue of whether victims of trafficking should be provided with a suspension of deportation period (also known as a “reflection delay” period) was discussed at an inter-departmental meeting.⁴⁶² This meeting agreed that it would be contrary to the spirit of the Trafficking Protocol to provide protection only to victims who are willing to co-operate with the authorities. The meeting was of the view that although victims of trafficking may refuse to co-operate with the authorities, they should be allowed to remain in the country for a non-renewable period. Such a period will allow them to come to terms with what has happened to them and to make informed decisions as to whether they want to assist in the investigation of and the prosecution of their traffickers. The meeting further agreed that if victims of trafficking decide to lay a criminal charge against the perpetrators, they should be provided with a temporary residence permit, at least for the duration of the criminal trial. The Commission endorses the above views of the inter-departmental meeting. Accordingly, the Commission supports the suggestion made by IOM and Ms Koen that the proposed trafficking legislation should provide for a non-renewable period, during which period victims of trafficking may not be deported. The Commission further supports IOM’s proposal that this period should not depend on the willingness of victims to assist in the investigation of and the prosecution of traffickers. **Hence, the Commission recommends that foreign victims of trafficking should be entitled to apply for a non-renewable suspension of deportation period not exceeding 60 days, regardless of whether they are in the country legally.**⁴⁶³ The decision whether to grant such a period should rest with the Director-General of the Department of Home Affairs. As the purpose of the suspension of deportation period is to allow victims of trafficking to recover from their ordeal, during which time they can make informed decisions as to whether they want to press criminal charges against the perpetrators, the Commission recommends that a suspension of deportation period should be granted on the condition that an adult victim of trafficking be placed in the care of a centre for adult victims of trafficking (option 1), an accredited organisation (option 2) or any other person, organisation or institution so authorised. However, a child victim of trafficking should be referred to a designated social worker for

⁴⁶² See paragraphs 1.6 – 1.8 above.

⁴⁶³ This is in line with the position in the Netherlands, Belgium and Italy.

investigation as contemplated in clause 155(2) of the Children's Bill, or should be placed in the care of any other person, organisation or institution so authorised.⁴⁶⁴ A centre for adult victims of trafficking or an accredited organisation in whose care a victim of trafficking was placed should offer various programmes aimed at facilitating the recovery of the victim.⁴⁶⁵ Furthermore, victims of trafficking should be informed of their right to apply for a suspension of deportation period.⁴⁶⁶

6.104 The Commission agrees with the respondents that victims of trafficking should be provided with temporary residence permits. **The Commission is however of the view that, in light of its recommendation that victims of trafficking should be provided with a non-renewable suspension of deportation period, temporary residence permits should be provided only to victims of trafficking who are willing to co-operate with law enforcement and prosecuting authorities.**⁴⁶⁷ The Immigration Act provides for various types of temporary residence permits that could be issued to non-South Africans. Of particular relevance is the visitor's permit. The Act provides that a visitor's permit may be issued in respect of a foreigner who holds a valid visa and who provides the financial or other guarantees prescribed in respect of his or her departure.⁴⁶⁸ Given the peculiar position of victims of trafficking, they might not be able to comply with prescribed terms and conditions for obtaining a visitor's permit. It is further important to note that a visitor's permit cannot be issued to an illegal foreigner who is present in South Africa. However, an illegal foreigner could be authorised by the Director-General of the Department of Home Affairs to remain in the country pending his or her application for a status.⁴⁶⁹

6.105 **The Commission finds it unnecessary to create a separate type of temporary residence permit for victims of trafficking and is of the view that the proposed trafficking legislation should stipulate that a victim of trafficking who has agreed to co-operate with law enforcement and prosecuting authorities in**

⁴⁶⁴ See clause 15(1) of the Bill.

⁴⁶⁵ See clauses 21 and 25 of the Bill.

⁴⁶⁶ See clause 15(3) of the Bill.

⁴⁶⁷ This view is supported by the submissions of IOM and Mr Masoā.

⁴⁶⁸ Article 11(1).

⁴⁶⁹ Article 32(1)

the investigation and prosecution of a case of trafficking in persons is entitled to apply for a visitor's permit, notwithstanding the provisions of section 11(1) of the Immigration Act, provided that the victim is placed in the care of a centre for adult victims of trafficking or any other person, organisation or institution so authorised (option 1) or is placed in the care of an accredited organisation or any other person, organisation or institution so authorised (option 2). The issuing of a visitor's permit should not be restricted to victims of trafficking who are in the country legally and should be issued to such victims regardless of whether a suspension of deportation period was granted or has expired.⁴⁷⁰

6.106 The Commission takes cognisance of the fact that some victims of trafficking may never be able to return to their countries of origin or the countries from where they have been trafficked because they may be harmed, killed or trafficked again by their traffickers or the associates of their traffickers. Hence, consideration should be given to providing such victims with some kind of permanent residency status. Such victims do not qualify for refugee status in terms of the Refugees Act as the fear of being harmed, killed or trafficked again because of their being victims of trafficking is not a ground for obtaining refugee status. The Commission does not wish to recommend that all victims of trafficking should be entitled to apply for asylum in terms of the Refugees Act. However, if a victim of trafficking qualifies for refugee status based on one of the grounds set out in section 3 of the Refugees Act, he or she would be entitled to apply for asylum. Nonetheless, the Commission finds it necessary to amend section 3 of the Refugees Act in order to provide for the situation where a victim of trafficking may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked. **The Commission accordingly recommends that section 3 of the Refugees Act be amended as follows:**

3 Refugee status

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social

⁴⁷⁰ See clause 16 of the Bill.

- group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b).
- (d) is a victim of trafficking and proves to the satisfaction of the Director-General of the Department of Home Affairs that he or she may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked.

6.107 Consideration should further be given to the following options relating to permanent residency for victims of trafficking:

Option one

6.108 By adding paragraph (d) to article 3 of the Refugees Act as proposed above, victims of trafficking who fear for their safety if returned to their countries of origin or the countries from where they have been trafficked would be entitled to apply for refugee status. Such victims would be able to apply for a permanent residence permit in terms of section 27(d) of the Immigration Act which states that the Director-General of the Department of Home Affairs may issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the Refugees Act. Section 27(c) of the Refugees Act provides that a refugee is entitled to apply for an immigration permit after five years continuous residence in the country from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely. Thus, a victim of trafficking would be entitled to apply for a permanent residence permit if the risk of being harmed, killed or trafficked again still exists after a period of five years from the date on which he or she was granted asylum. Thus, in terms of this option, victims of trafficking should first apply for refugee status with the view to apply for a permanent residence permit after a period of five years.

Option two

6.109 Instead of first applying for refugee status, whereafter an application for a permanent residence permit may be made, the proposed trafficking legislation could alternatively provide that a victim of trafficking is entitled to apply for a permanent residence permit in terms of the Immigration Act, after five years continuous residence in the country from the date on which he or she was granted a visitor's permit. This should, however, be on the condition that the victim of trafficking proves to the satisfaction of the Director-General of the Department of Home Affairs that he or she may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked.⁴⁷¹ Furthermore, section 27 of the Immigration Act should be amended accordingly.⁴⁷² A victim of trafficking who has been in the country for a period of less than five years upon finalisation of criminal proceedings in which he or she was a complainant or a witness, and who might be harmed, killed or trafficked again if returned back to his or her country of origin or the country from where he or she has been trafficked would be entitled to apply for refugee status in terms of the first proposed option.

Option three

6.110 Instead of providing victims of trafficking with some kind of permanent residency status, the proposed trafficking legislation could provide that the Director-General of the Department of Home Affairs may, on humanitarian grounds, extend a visitor's permit granted to a victim of trafficking. The Director-General's decision should further be guided by the likelihood that the person may be harmed, killed or trafficked again.

6.111 The Commission agrees that allowing the family members of victims of trafficking to join them in South Africa is advisable in that it would greatly assist already traumatised victims. However, due to limited resources, this cannot be done at state expense.⁴⁷³ The Commission is further of the view that should the family members or friends of victims of trafficking wish to join them in South Africa, they should comply with the provisions of the Immigration Act. The Commission further

⁴⁷¹ See clause 17 of the Bill.

⁴⁷² See Schedule 1 to the Bill.

⁴⁷³ This view is supported by Mr Masoa.

agrees with Childline and Lawyers for Human Rights, Pretoria that family members who have benefited from a victim's trafficking should not be allowed to act as a support person.

The provision of services to victims of trafficking

6.112 Victims of trafficking, especially those trafficked for purposes of sexual exploitation, face various problems. These include physical abuse, emotional trauma, health problems such as HIV/AIDS, the effects of forced and unsafe abortions, social isolation, drug and alcohol abuse, injuries from assault and post-traumatic stress disorders. These victims also experience intense feelings such as guilt, fear, anger, shame, betrayal, depression, low self-esteem, disorientation and lack of trust in others, including those offering assistance.⁴⁷⁴ Victims of trafficking therefore need to be treated sensitively and with the necessary understanding in order to help them pick up the threads of their lives when they return home. Furthermore, various services need to be provided to such victims which should include, at a minimum, the following:⁴⁷⁵ health care, psychological support and shelter.

6.113 South Africa lacks a proper system in terms of which assistance can be provided to victims of trafficking. Various shelters for women who are victims of gender-based violence exist throughout the country. Most of these shelters are able to accommodate up to 15 women and their children. However, a select number of shelters are able to provide accommodation to larger groups of women such as Usindiso Sanctuary in Marshalltown which provides accommodation to up to 80 women and their children. The majority of these shelters do not charge for the provision of accommodation and other services such as counselling. Others, however, require a minimum fee from those who are employed. Accommodation provided is usually for a period of up to six months. The needs of trafficked women admitted to these shelters to a certain extent differ from the needs of other victims of gender-based violence. As the crime of trafficking in persons is often committed by organised criminal groups, the safety of victims of trafficking is usually at risk. These

⁴⁷⁴ See also Barnes-September et al **Child victims of prostitution in the Western Cape** 2000, p. 51.

⁴⁷⁵ In Cyprus, Article 7(1) of the Combating of Trafficking in Persons and Sexual Exploitation of Children Law of 2000 provides for the protection and support of victims of trafficking, including providing arrangements for maintenance, temporary shelter, medical care and psychiatric support.

criminal groups will not hesitate to silence a victim before he or she can testify in criminal proceedings against them. Existing shelters are also not able to provide foreign victims of trafficking with counselling in a language that they understand. Hence, the need to provide victims of trafficking with secure accommodation and translation services during counselling sessions can not be over emphasised.

6.114 Most shelters do not admit teenage boys. This is because most, if not all, shelters cater for the needs of women and young children only. Teenage boys under the age of 18 can, however, be brought before the Children's Court for a determination as whether they are in need of care and protection. They will then be placed within the child care system if the court finds that they are in need of care and protection. Furthermore, it may be problematic to find temporary shelter for men 18 years of age and older who are victims of trafficking.

6.115 The provision of accommodation to adult victims of trafficking was discussed at an inter-departmental meeting.⁴⁷⁶ The meeting agreed that the Department of Social Development should be responsible for the provision of accommodation to adult victims of trafficking. The Department of Social Development, however, raised the following concerns:

- (a) No shelters for adult victims of trafficking exist, except those established for abused women.
- (b) Exercising control over adult victims of trafficking may be difficult.
- (c) Finding shelters for male victims of trafficking may be difficult.
- (d) Providing translation services to foreign victims of trafficking may be costly.

6.116 Victims of trafficking, particularly those who have been subjected to sexual exploitation, are often in need of medical care. The right to have access to health care services is enshrined in our Constitution.⁴⁷⁷ Unlike political rights and the right relating to freedom of trade, occupation and profession, the right to have access to health care services is not limited to South African citizens. Hence, any restrictions as to the category of persons that would be entitled to this right have to be justified under the general limitations clause of the Bill of Rights.

⁴⁷⁶ See paragraphs 1.6 – 1.8 above.

⁴⁷⁷ Constitution of the Republic of South Africa, 1996.

6.117 The right to basic education, including adult basic education, is also enshrined in our Constitution⁴⁷⁸ and similar to the right to have access to basic health care services, any restriction of this right must be justified under the general limitation clause of the Bill of Rights.

6.118 In addition to providing victims of trafficking with appropriate housing, health care and education, the Trafficking Protocol encourages State Parties to provide victims with counselling and information in a language that they can understand, psychological and material assistance as well as employment and training opportunities. As a substantial number of victims trafficked to South Africa are not able to communicate in any of the South African languages, the services of translators will be required when providing counselling, information and psychological assistance to such victims. The Protocol is not clear as to the kind of material assistance victims of trafficking should be provided with. The Commission assumes, however, that such material assistance relates to the basic needs of victims. The provision of employment and training opportunities to victims of trafficking is definitely a policy decision to be made by government. Such a decision as far as it relates to foreign victims will most probably be informed by the high unemployment rate in the country and the government's responsibility to empower its own citizens.

6.119 The provision of assistance to victims of trafficking may be hampered by the fact that service providers may not be able to communicate with a victim in a language understood by the victim. The Department of Social Development: International Social Services has submitted that it is almost impossible to make a comprehensive assessment of the circumstances and needs of children trafficked to South Africa as most of these children do not understand any of the South African languages.⁴⁷⁹

Comparative overview

6.120 NGOs play a pivotal role in the provision of support services to victims of trafficking in most, if not all, countries faced with the problem of trafficking in

⁴⁷⁸ Constitution of the Republic of South Africa, 1996.

⁴⁷⁹ Submission submitted to the Commission on 31 July 2003.

persons.⁴⁸⁰ Developed countries usually provide financial support to NGOs for the delivery of crucial services to victims. However, although developing countries encourage the involvement of NGOs in the protection of victims, many are not in a position to provide financial assistance to NGOs.

6.121 Various NGOs are actively involved in the provision of support services to victims of trafficking. Just to mention a few, in Italy, NGOs supporting victims of trafficking provide them with accommodation. The type of shelter available is dependent upon the NGO. Often it is a women's shelter or a shelter within a religious community. Some NGOs have a range of shelters available to suit the needs of different victims of trafficking. For example, an NGO called Associazione On the Road has different types of housing available for trafficked women, depending on their needs and wishes — a flight (escape) house providing accommodation for a very short period immediately upon leaving the abusive situation, a second shelter providing accommodation for a longer period, also with a high level of physical protection for those who are at risk, an autonomy shelter for those not considered at risk, and independent housing for those living with friends.⁴⁸¹ The government of the People's Republic of China funds programmes operated by an NGO to reintegrate trafficked women into their local communities and to relieve the stigma attached to victims of trafficking.⁴⁸² The government of Burundi engages local and international organisations to demobilise and re-integrate trafficked child soldiers into their families.⁴⁸³ In Cameroon, NGOs provide most of the assistance and protection for victims of trafficking. The government of Mali works closely with local NGOs and international organisations to co-ordinate the repatriation and re-integration of victims of trafficking.⁴⁸⁴

6.122 In the Philippines, the Department of Social Welfare and Development is responsible for the implementation of rehabilitation and protection programmes for

⁴⁸⁰ These include countries such as Austria, Benin, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Germany, Greece, Guinea, Indonesia, Italy, Mali, New Zealand, Macedonia, Nigeria, Norway, Taiwan, Tanzania, Thailand and Uganda.

⁴⁸¹ Anti-Slavery International **Human traffic, human rights: redefining victim protection** 2002, p.151, compiled by Elaine Pearson.

⁴⁸² US Department of State **Trafficking in Persons Report** June 2004, p.92; USA Department of State **Trafficking in Persons Report** June 2005, p. 84.

⁴⁸³ US Department of State **Trafficking in Persons Report** June 2004, p.48; USA Department of State **Trafficking in Persons Report** June 2005, p. 75-76.

⁴⁸⁴ US Department of State **Trafficking in Persons Report** June 2004, p.65; USA Department of State **Trafficking in Persons Report** June 2005, p. 152.

victims, for the provision of counselling and temporary shelter to victims and for the development of a system of accreditation among NGOs for purposes of establishing centres and programmes for intervention on various levels of the community.⁴⁸⁵ Government agencies are further obliged to make available the following services to victims of trafficking.⁴⁸⁶

- (a) emergency shelter or appropriate housing;
- (b) counselling;
- (c) free legal services, including information about the victims rights and the procedure for filing complaints, claiming compensation and such other legal remedies available to them, in a language understood by the victims;
- (d) medical or psychological services;
- (e) livelihood and skills training; and
- (f) educational assistance.

6.123 Furthermore, the progress of recovery, rehabilitation and reintegration of victims of trafficking must be supervised and tracked.⁴⁸⁷

Submissions received

What services should be provided to persons who have been trafficked to South Africa? What Department(s) or institution(s) should be responsible for the provision of such services? Please motivate your answer.

6.124 **Childline** stated that it is essential that children should not be returned to their place or country of origin without investigating the circumstances that contributed to their being trafficked in the first instance. The respondent recommended that an assessment of the victim and of his/her present and past circumstances should be completed before decisions are made about their future placement/repatriation etc. Such an assessment would also determine the necessity and nature of any necessary rehabilitation services. The respondent submitted that the Departments and NGO's involved should be dictated by a victim's needs and circumstances i.r.o rehabilitation and treatment. For example, some victims of sexual

⁴⁸⁵ Section 16(b) of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

⁴⁸⁶ Section 23 of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

⁴⁸⁷ Section 23 of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

exploitation may need health, welfare and psycho-therapeutic services. Furthermore, a mechanism to coordinate these services must be established – possibly in one of the existing service structures.

6.125 **Jhb Child Welfare Society** submitted that trafficked persons should be granted refugee status and be dealt with in terms of the Refugees Act, and not as “illegal foreigners” in terms of the Immigration Act as is currently happening. And trafficked children should, in terms of the Refugees Act, be brought before the children’s court to determine whether they are in need of care. Furthermore, the Department of Foreign Affairs, the United Nations High Commissioner for Refugees, the Department of Social Development and International Social Services need to cooperate in arranging for the proper reception of both children and adults if repatriation appears to be the appropriate course of action, and to ensure that the services outlined in clause 3.53 of the Issue Paper are as far as possible provided.

6.127 The **IOM** submitted as follows:

- (a) Trafficked persons should be appropriately accommodated (including secure shelter, food and clothing) for the duration of their ‘reflection delay’ period, and while such persons are assisting in the investigation and prosecution of their traffickers. The Department of Social Development (DSD), in cooperation with the DJCD, should create emergency safe houses and shelters for trafficked persons and protect trafficked persons from being held in detention centres, jails or prisons.
- (b) The DSD and the DJCD should jointly establish emergency safe houses where victims can be securely accommodated, the real risks to their safety assessed, and their most urgent needs met for up to 7 days. DSD should also establish shelters for the psychosocial recovery of victims during the reflection delay period.⁴⁸⁸ The DJCD should consider the witness protection programme for victims who decide to assist in the investigation and prosecution of their traffickers.

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Shelters should be able to claim subsidies available through the DSD to support and assist persons verified by the DHA as trafficked.

- (c) Victims of trafficking should have access to public health and social services, including emergency medical and counselling services.⁴⁸⁹ Access to these services should be available to victims for the duration of a 3-month reflection delay period and for as long as a victim is assisting in the investigation and prosecution of his/her trafficker.
- (d) Should trafficked persons be permitted to remain in South Africa following the reflection delay period, they should have the right to seek employment for the duration of their stay in the country.
- (e) DSD should ensure the provision of appropriate care and support to meet the developmental and psychosocial needs of children who are trafficked, including accommodation in a place of safety, counselling services, health care assistance, educational assistance, and basic necessities such as food and clothing.⁴⁹⁰

6.128 **SWEAT** suggested that the following services should be provided to victims of trafficking:

- (a) Psychological and medical services where requested.
- (b) Access to HIV-testing, including pre-and post test counselling where requested
- (c) Access to a competent translator during all court proceedings and access to all documentation in relation to the case.
- (d) Free legal services.
- (e) Information regarding compensation and redress for damage suffered.

6.129 **Ms Koen** submitted that service provision to victims of trafficking should be based on a framework that is integrated, multi-disciplinary and based on the principles of non-discrimination, safety, fair treatment and access to justice. The

⁴⁸⁹ The state may consider using assets confiscated from traffickers to create a fund to support the capacity of government institutions and relevant organisations to provide appropriate assistance and services to trafficked persons.

⁴⁹⁰ The Child Care Act, 1983, provides for the protection of all children, including those who are temporarily within the country. It further imposes a general duty on every local Authority to safeguard and promote the welfare of children who are in need through the provision of a range of and level of services.

respondent suggested that a programme should be mainstreamed throughout all government departments and should involve non-governmental organisations. Furthermore, the oversight and implementation for such a programme should be based in the Presidency and responsibility for the programme should be placed with the Office on the Status of Women and Children and the Disability Desks.

6.130 **RAPCAN** submitted that the needs of victims of trafficking include access to medical treatment, (especially for those who are trafficked for sexual exploitation as they face problems like physical abuse, emotional trauma, health problems, unsafe abortions etc.), shelter, food and legal representation. Furthermore, an inter-sectoral approach (which should involve the relevant government departments, the relevant NGO's as well as International Social Services) is necessary to ensure that adequate protection is provided to victims of trafficking.

6.131 **SAPS** suggested that the provision of support services for victims of trafficking should be the responsibility of a single department to prevent the process from being too long and onerous. The respondent said that since the Department of Home Affairs is responsible for the admission in and departure of foreigners from South Africa, it should take primary responsibility for the provision of services to victims of trafficking, alternatively it should be the link between the victim and the Department of Social Development.

6.132 The respondent further submitted that social services should only be rendered to victims of trafficking who had legal travel documents to enter the country. Whilst those who have entered the country illegally should be provided with limited social services and should not be allowed to stay in the country in order to prevent that the country becomes a haven for victims of trafficking.

6.133 The **Department of Social Development** suggested that the Department of Home Affairs should issue humanitarian visas to victims in order to allow them to stay in the country until the end of criminal proceedings.

6.134 **Anex Cdw** said that it has experienced many problems with shelters, who due to their strict criteria, do not wish to house women and girls who have been trafficked for domestic purposes. The respondent submitted that shelters are not the most nurturing environments for those who have been trafficked. This is because

victims of trafficking are often traumatised and require comfort, counselling and a safe environment. The respondent said that social services need to be equipped to deal with this problem both in terms of resources, capacity and training. Furthermore, the Department of Labour needs to provide skills training to the victims of trafficking.

6.135 **CSV** submitted that victims of trafficking should be provided with access to medical care, psychological counselling specific to their needs, safe emergency housing and food. Furthermore, any provisions for providing basic material assistance to victims should not be made contingent on the willingness of victims to give evidence in criminal proceedings. The respondent submitted that because victims of trafficking are often raped, beaten and severely physically abused, they should be given access to medical care including, but not limited to emergency contraception, HIV testing, PEP, and treatment for S.T.I.s. Furthermore, there should not be a time limit on the use of medical care as trafficking victims often suffer health problems long after the exploitation has ended.

6.136 **Lawyers for Human Rights, Johannesburg**, suggested the following:

- (a) Victims of trafficking should be detained in facilities appropriate to their status as crime victims.
- (b) Medical assistance, social services and counselling services.
- (c) Protection including measures to protect trafficked persons and their family members from intimidation, threats of reprisals from traffickers and their associates, and enhanced witness protection programs.
- (d) Access to information about their rights and translation services.
- (e) Permission for continued presence within South Africa such as a temporary visa for victims of crime.
- (f) Access to legal services.

6.137 **Lawyers for Human Rights, Pretoria** suggested the following:

- (a) Department of Home Affairs should issued temporary permits to the victims to legalise their stay in SA while the case is being investigated.
- (b) Department of Health should provide medical assistance to victims.
- (c) Department of Social Development should provide victims with counselling, shelters and grants.

- (d) The International Organisation for Migration should assist with the investigation of the case
- (e) International Social Services should assist with safe passage between countries
- (f) The South African Police Service should be responsible for the investigation of the case
- (g) NGOs should provide social services

6.138 **Molo Songololo** submitted that child victims of trafficking should have access to basic services and should particularly be provided with (a) adequate and safe housing, (b) public health care and social services, (c) counselling and de-briefing in their mother tongue, (d) adequate and appropriate financial assistance, and (e) and educational and training opportunities.

6.139 **Molo Songololo (Consultative Workshop)** proposed that victims of trafficking should have the right to medical treatment, shelter, food, legal representation and the right to communicate in their own language. Furthermore, South African citizens or permanent residents trafficked to other countries should be assisted by South African embassies or other diplomatic staff in those countries.

6.140 **Mr Masoa** suggested that the Departments of Social Development and Home Affairs and non-governmental organisations should be responsible for providing victims of trafficking with temporary residence permits, shelter and adequate nutrition.

6.141 **Network Against Child Labour** highlighted the shortages of staff within all sectors of services delivery as well as the lack of training on trafficking resulting in inefficient service delivery. The respondent mentioned that there are few shelters or care facilities for both adult and child victims of trafficking. Children who have been sexually exploited are often placed in residential care facilities that are ill-equipped to address their special needs. The respondent said that many NGOs and CBOs are willing to assist child victims of trafficking, but do not have the financial resources to expand their existing services.

How can interaction and co-operation between the government and non-governmental organisations be fostered in order to ensure effective provision of services to victims of trafficking?

6.142 **Childline** highlighted the need for a co-ordinating body to ensure the integration and coordination of services.

6.143 **Jhb Child Welfare Society** suggested that the relevant government departments should, in conjunction with the relevant NGOs, conduct a situation analysis and develop a plan of action for the provision of services to victims of trafficking. According to the respondent, this should be done within the framework of the Strategic Plan for the Management of Child Abuse, Neglect and Exploitation.

6.144 Similar to the suggestion made by the Jhb Child Welfare Society, the **Department of Social Development** proposed that an action plan should be developed by all stakeholders. Based on this plan, a Memorandum of Agreement should be signed by the relevant government departments. Furthermore, government should budget for the services rendered by specialised non-governmental organisations.

6.145 The **S A Human Rights Commission** suggested that the proposed trafficking legislation should provide for the establishment of an inter-sectoral committee to coordinate the implementation of the legislation. The respondent recommended that NGOs should be represented on this Committee. Furthermore, the Department of Social Development should take the lead in establishing a database of service providers and should facilitate the provision of services that are available within the NGO sector.

6.146 **Molo Songololo (Consultative Workshop)** submitted that a number of organisations already provide for services that cater for some of the needs of victims of trafficking. The respondent suggested that non-governmental organisations should be part of a multi-sectoral strategy to ensure greater co-operation and co-ordination of efforts.

6.147 **Lawyers for Human Rights, Pretoria** submitted that government and the NGO sector should agree on their respective mandates.

6.148 **Mr Masoa** suggested that the Department of Social Development should liaise with non-governmental organisations in this regard.

What can be done to overcome the problem of language in relation to the provision of services to persons trafficked to South Africa?

6.149 The respondents to this question recommended that interpretation services should be provided to foreign victims of trafficking who are not conversant with any of the South African languages.⁴⁹¹

6.150 **Jhb Child Welfare Society** suggested that the UN High Commission for Refugees and the various embassies should be approached to assist with interpretation services. This is supported by **RAPCAN**.

6.151 **IOM** submitted as follows:

- (a) The Department of Justice and Constitutional Development (DJCD), in conjunction with the Department of Home Affairs (DHA), should consider the establishment of a national roster of interpreters from which *inter alia* relevant government departments, law enforcement agencies, and the judiciary will be able to draw translation services. Given the shortage of professionally qualified interpreters of languages common to victims of trafficking, a two-tier system should be established. Tier 1 could be managed by the DJCD and could include a short schedule of accredited interpreters able to function at a highly professional level, for instance, in court cases involving victims of trafficking. Tier 2 could be managed by the DHA and could include a schedule of interpreters able to communicate with victims of trafficking at an operational level, such as facilitating communication between such victims and immigration officials, medical staff or shelter managers.
- (b) The rosters of interpreters should be kept strictly confidential and measures should be put in place to ensure, to the extent possible, that the identities of interpreters participating in investigation of and the prosecution of traffickers remain confidential.

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Childline, Lawyers for Human Rights, Johannesburg, Jhb Child Welfare Society, IOM, RAPCAN, S A Human Rights Commission and Lawyers for Human Rights, Pretoria.

- (c) Interpreters who are part of a roster system should be trained to deal with cases of trafficking in persons, in particular, techniques for conducting interviews with victims of trafficking and ethical issues relevant to cases of trafficking.

6.152 The **S A Human Rights Commission** pointed out that the issue of language could also be an inter-country problem where persons are trafficked from one province to another. The respondent suggested that legislative provisions on the provision of interpreters should be couched in terms such as “where possible”. The respondent submitted that article 6(2) of the Trafficking Protocol implies that interpretation services must be provided to victims of trafficking.

6.153 **Mr Masoa** suggested that the Department of Social Development should employ interpreters.

Child care facilities have been known to refuse admission to children who have been involved in commercial sex work because they may be uncontrollable and may have a bad influence on the other children.⁴⁹² Should children who have been trafficked for purposes of sexual exploitation, especially those who were voluntary involved in commercial sex work before being trafficked, be placed in residential care facilities with other children in care? Please motivate your answer. If no, how should these children be reintegrated with other children in care in instances where family reunification is not possible?

6.154 **Childline** submitted child victims of trafficking who have been involved in commercial sex work should not be denied appropriate institutional and protective care, but staff at child care facilities should be trained on how to manage such victims. Where appropriate and necessary such children should be separated from other children.

6.155 **Jhb Child Welfare Society** submitted that children who have been involved in commercial sex work require specialised care. The respondent emphasised the need for facilities which are specifically designed to meet the needs of such children. The respondent said that children who have been subjected to ongoing traumatic sexual experiences may pose a danger to other children, as some of them are likely

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ECPAT International **The Psychosocial Rehabilitation of Children who have been Commercially Sexually Exploited** compiled by Cotterill C and Delaney Stephanie 2001, p 20.

to victimise other children as a means of dealing with their own trauma. The respondent mentioned that children's homes in general are often poorly equipped to even manage children who have been subjected to sexual abuse in their own homes or communities. The respondent further mentioned that there are no children's homes which are equipped to deal with children who have been involved in prostitution.

6.156 **RAPCAN** stated that because child victims of trafficking are traumatised children, they need to be provided with specialised care in a place of safety. The respondent is, however, of the view that these children should not be kept separately from other children for extended periods as this might result in stigmatisation and further trauma. The respondent added that a strategy to reintegrate child victims of trafficking is required.

6.157 **Lawyers for Human Rights, Pretoria** answered the question in the affirmative, but added that the children could be separated from other children without it being obvious. The respondent suggested that the children be provided with counselling and supervision.

6.158 **Molo Songololo** submitted that legislation should not provide for separate institutional care for child victims of commercial sexual exploitation, but should provide for a specific focus on treatment and rehabilitation programmes which cater for the needs of these children.

6.159 **Molo Songololo (Consultative Workshop)** stated that children who have been subjected to commercial sexual exploitation should receive special attention and their care-givers should be provided with specialised training.

6.160 **Mr Masoa** submitted that children who have been subjected to commercial sex work should be placed in separate residential care facilities. The respondent argued that if they are placed in the same residential care facility with other children, they might commit indecent acts with the other children. The respondent suggested that the reintegration with other children should be done gradually after a thorough assessment of the children.

Reintegration of child victims of trafficking, especially those who have been trafficked by their families, will not be successful unless their families are equipped to receive them back. How can the family be empowered to receive and parent the child?

6.161 **Jhb Child Welfare Society** emphasised the need for special programmes designed to deal with the complex issues involved. The respondent suggested that an organisation like UNICEF should be involved in the establishment of such programmes, where children are being returned to families in specific foreign countries. The respondent added that special programmes should be established for the reintegration of South African children into their families and communities.

6.162 **RAPCAN** submitted that child victims of trafficking should be reunited with their families and counselling should be provided to their families. This is supported by **Lawyers for Human Rights, Pretoria** and **Mr Masoa**. Mr Masoa argued that a child victim of trafficking should not be reintegrated with his or her family if the family was involved in his or her trafficking.

6.163 The **Department of Social Development** suggested that a social worker should evaluate the circumstances of the child's family and the ability of the family to resume the care of the child once reunited with them. The respondent suggested that follow-up services should be rendered to the family for an appropriate period of time.

Evaluation and recommendations

6.164 The Commission is of the view that various services, including accommodation, health care and counselling, should be provided to victims of trafficking. The provision of services to victims of trafficking is the responsibility of the State. However, the State may accredit non-governmental organisations to provide certain services to victims of trafficking, provided that the necessary funds are made available to such organisations. **The Commission therefore recommends that the proposed trafficking legislation should provide for the following options.**

Option one

6.165 In terms of this option, the Department of Social Development should have the responsibility to establish centres for adult victims of trafficking.⁴⁹³ The establishment of such centres are important as victims of trafficking are often deported because of the lack of temporary shelter. Centres for adult victims of trafficking should offer a programme suited for the needs of such victims. Such a programme should be aimed at the provision of counselling and rehabilitation services to victims as well as the reintegration of victims into their families and communities. It is further important that centres for adult victims of trafficking should ensure the safety of victims at risk of retaliation by their traffickers. Centres for adult victims of trafficking should further have the option to offer programmes that focus on the long term needs of such victims. This may include programmes aimed at the provision of education and skills development training to victims of trafficking. The Commission took note of the fact that woman victims of trafficking are often subjected to sexual exploitation and could as a result thereof fall pregnant. It is therefore important that centres for adult victims of trafficking should offer a programme aimed at the reception, care and development of children in the care of such victims. It is further essential that an investigation as contemplated in section 155(2) of the Children's Bill be conducted in order to determine whether such children are in need of care and protection.⁴⁹⁴

6.166 The above option may pose a security risk because perpetrators will know where to search for a victim of trafficking, particularly if a victim has agreed to testify in criminal proceedings against them. Consequently, measures to ensure the safety of victims will have to be comprehensive.

Option two

6.167 In terms of this option, the Director-General of the Department of Social Development should accredit organisations to provide accommodation to adult

⁴⁹³ There is no need to establish similar centres for child victims of trafficking as such children enjoy the protection of the Child Care Act, 1983 (Act No. 74 of 1983). In terms of this Act, if a children's court is satisfied that a child victim of trafficking is in need of care and protection, the court may order that the child be placed in the custody of a suitable foster parent or in the care of a children's home. The Children's Bill also makes provision for the placement of children who are in need of care and protection.

⁴⁹⁴ See clause s 18 - 22 of the Bill.

victims of trafficking.⁴⁹⁵ The programmes to be offered by accredited organisations should be similar to those proposed in option one.⁴⁹⁶ The Department should, however, ensure that accredited organisations receive the necessary funding in this regard.⁴⁹⁷

6.168 The Commission is of the view that the pool of organisations that should be allowed to apply for accreditation should not be limited to organisations that cater exclusively for the needs of victims of trafficking. Existing organisations such as those providing services to battered women could as part of their overall programme apply for accreditation, provided that they comply with prescribed minimum norms and standards.

6.169 The Commission recommends that, upon admission of an adult victim of trafficking to a centre for adult victims of trafficking as proposed in option 1 or to an accredited organisation as proposed in option 2, an assessment must be made to determine the following:⁴⁹⁸

- (a) the risks to the safety and life of the victim; and**
- (b) the immediate and long term needs of the victim.**

6.170 As the effective provision of services to victims greatly depends on their ability to communicate with service providers, the Commission recommends that service providers should have access to the services of interpreters to be listed on the computerised database currently being developed by the Department of Justice and Constitutional Development. Service providers would also be able to make use of the translation services being provided by the Telephone Interpreting Service of South Africa (TISSA).⁴⁹⁹

⁴⁹⁵ See clause 23 of the Bill.

⁴⁹⁶ See clause 25 of the Bill.

⁴⁹⁷ The Government of Lithuania provide financial assistance to more than half of the NGOs in its territory that provide assistance or temporary shelter to victims of trafficking. See in this regard the USA Department of State **Trafficking in Persons Report** June 2005, p. 145.

⁴⁹⁸ See clauses 22 and 26 of the Bill.

⁴⁹⁹ See paragraphs 5.92 – 5.197 above.

6.171 **The Commission considers it important that the proposed trafficking legislation should provide that child victims of trafficking must be assisted in applying for asylum in terms of the Refugees Act. Hence, the Commission recommends that section 289 of the Children’s Bill should be incorporated into the proposed trafficking legislation.**

6.172 Globally, women and children are often the victims of trafficking in persons. However, a significant number of men also fall prey to the schemes of traffickers. In South Africa in the last few years the spotlight has been on the trafficking of women and children. This does not mean that men are not being trafficked to South Africa or within its borders. **The Commission invites comments as to how the proposed trafficking legislation should deal with the provision of accommodation to men over the age of 18 years and older.**

6.173 Child care facilities do not cater specifically for the needs of children who have been involved in commercial sex work. This may be one of the reasons why these facilities sometimes refuse to admit such children. The Children’s Bill, however, provides that a child and youth care centre must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for the reception and safe care of:⁵⁰⁰

- (a) trafficked and commercially sexually exploited children; and
- (b) children for the purpose of assisting them to reintegrate with their families and communities.

Compensation for damage suffered

6.174 Compensation is an important part of the criminal justice process. Where it is possible to compensate a victim for damage sustained through the criminal conduct of another, it is desirable that it should be done.⁵⁰¹ Although the Commission supports the idea that victims of trafficking should be compensated for damage suffered, the Commission is of the view that the emotional and physical damage suffered by victims of trafficking cannot be measured in monetary terms.

⁵⁰⁰ Clause 191(2) of the consolidated Children’s Bill as certified by the office of the chief state law advisor.

⁵⁰¹ Du Toit *et al* **Commentary on the Criminal Procedure Act** Cape Town: Juta 2004, p. 28:45.

6.175 Victims of trafficking could be compensated through the following means:

- (a) a state compensation fund;
- (b) by enabling the criminal courts to order an offender to pay compensation for damage suffered to a victim of trafficking upon convicting that person for the crime of trafficking or a related offence; and
- (c) by providing victims of trafficking with legal representation to claim compensation for damage suffered through civil proceedings.

6.176 The above options are discussed in more detail below.

Proposed legislation on compensation

6.177 The Victims of Crime Bill⁵⁰² establishes a Fund for the assistance of victims of crime.⁵⁰³ Money allocated to or standing to the credit of the Fund may be utilised or allocated to organs of state, private organisations, institutions and agencies with the objective of –⁵⁰⁴

- (a) developing, establishing and co-ordinating the delivery of services to and assistance programmes for victims of crime;
- (b) promoting the participation of communities and non-governmental organisations in the development of legislation, policies, programmes and projects regarding the delivery of services to and assistance programmes for victims of crime;
- (c) promoting the implementation of the Victims' Charter of Rights;
- (d) creating awareness of and providing information to victims of crime and criminal justice practitioners regarding the impact of victimisation and new developments relating to services to and assistance programmes for victims of crime and existing as well as new legislation;
- (e) developing and implementing appropriate mechanisms and procedures to refer victims of crime to relevant organs of state, private organisations,

⁵⁰² South African Law Reform Commission **Report on a Compensation Fund for Victims of Crime** (Project 82) April 2004.

⁵⁰³ Clause 11.

⁵⁰⁴ Clause 13(2).

institutions and agencies providing services to and assistance programmes for victims of crime; and

- (f) providing training for and developing the skills of persons, organisations, institutions and agencies providing services to and assistance programmes for victims of crime.

6.178 The initial idea was that the Fund should provide for the provision of services to victims of crime as outlined in the preceding paragraph as well as monetary compensation.⁵⁰⁵ However, due to limited resources, it was decided to limit assistance to victims of crime to the provision of services only. The Bill, however, makes provision for emergency financial assistance to a victim of crime by allocating money to him or her if –⁵⁰⁶

- (a) he or she is a victim of crime and has directly suffered harm through an act or omission that is a crime in terms of criminal law;
- (b) no appropriate service, support or assistance can immediately be rendered to him or her;
- (c) without financial assistance, a delay in providing a service, assistance or support would cause him or her to suffer irreparable harm; and
- (e) the financial assistance which is provided is the minimum necessary to prevent irreparable harm.

6.179 Unfortunately, the Victims of Crime Bill has not yet been introduced into Parliament and is still being considered by the Department of Justice and Constitutional Development.

6.180 The Sentencing Framework Bill⁵⁰⁷ provides that a sentence of reparation may be imposed for any offence and must be considered in every case.⁵⁰⁸ The court may sentence any person convicted of an offence to make appropriate reparation in the form of restitution and compensation to any victim of the offence for damage suffered. Damage suffered is –

⁵⁰⁵ This was the thinking of the Commission's Project Committee on Sentencing.

⁵⁰⁶ Clause 15(4).

⁵⁰⁷ South African Law Reform Commission **Report on a New Sentencing Framework** (Project 82) November 2000.

⁵⁰⁸ Clause 37(1).

- (a) damage to or the loss or destruction of property, including money;
- (b) physical, psychological or other injury; or
- (c) loss of income or support.⁵⁰⁹

6.181 In assessing the reparation that a person convicted of an offence may be ordered to pay, the court must consider the means of the offender as well as the reparation appropriate for purposes of restitution and compensation.⁵¹⁰ A sentence of reparation may be imposed on its own or combined with any other sentence.⁵¹¹ In cases where the amount of the damage, injury or loss exceeds an award made, an additional civil action may be instituted.⁵¹² The court may, when making an order for reparation, order the employer of the convicted person to deduct a specified amount from the salary or wages of the convicted person and to pay over such amount to the court or registrar in question.⁵¹³ The court making an order for reparation may authorise the sheriff or messenger of the court to recover the amount of the reparation by attachment and sale of any moveable property belonging to the convicted person. The amount to be recovered must be sufficient to cover, in addition to the amount of the reparation, the cost and expenses of the warrant and of the attachment and sale of the property.⁵¹⁴ If a convicted person fails to make reparation in full or if such reparation is not recovered in full, the court that has made the order may warn such person to appear before it or issue a warrant directing that such person should be arrested and brought before the court.⁵¹⁵ When such person is brought before court, the court may impose such other sentence that may have been imposed if the court was considering sentence (other than a sentence for reparation) after conviction. The court must, however, take into consideration any part of the reparation that may have been made or recovered.⁵¹⁶

⁵⁰⁹ Clause 37(2).

⁵¹⁰ Clause 37(4).

⁵¹¹ Clause 37(8).

⁵¹² Clause 37(9).

⁵¹³ Clause 38(1).

⁵¹⁴ Clause 39.

⁵¹⁵ Clause 40(1).

⁵¹⁶ Clause 40(2).

6.182 The Sentencing Framework Bill was submitted to the Department of Justice and Constitutional Development in December 2000 and has unfortunately not been introduced into Parliament yet.

Current legal position

6.183 Section 300 of the Criminal Procedure Act provides that where a person is convicted of an offence which has caused damage to or loss of property, including money, belonging to another person, the court in question may on application of the injured person or of the prosecutor acting on the instructions of the injured person award the injured person compensation for such damage or loss.⁵¹⁷ For purposes of determining the amount of the compensation or the liability of the convicted person, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.⁵¹⁸ Where money belonging to the convicted person was taken from him or her upon his or her arrest, the court may order that payment be made from such money.⁵¹⁹ If the injured person does not renounce an award within a period of sixty days, civil proceedings may not be instituted against the convicted person in respect of the injury for which the award was made.⁵²⁰ Section 300 is, however, limited as it refers only to damage to or loss of property and is unfortunately of little use to victims of trafficking as they would not be able to claim for physical or psychological damage suffered. A criminal court will usually not grant a compensation order for the latter forms of damage as such damage is not easily quantifiable in financial terms. A victim may, however, claim such damage by instituting a civil action against the offenders.

6.184 Section 297 of the Criminal Procedure Act stipulates that where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may postpone for a period not exceeding five years the passing of sentence or suspend a sentence in whole or in part on the condition that payment of compensation or the rendering of some specific benefit or service in lieu of compensation for damage or pecuniary loss is made to the person aggrieved. This section differs from section 300 in that a convicted person

⁵¹⁷ Section 300(1).

⁵¹⁸ Section 300(2).

⁵¹⁹ Section 300(4).

⁵²⁰ Section 300(5)(b).

has an interest in ensuring that the payment of compensation or the rendering of services is made to the aggrieved person. If the convicted person fails to do so, the court may pass sentence or cancel the order of suspension and recommit the person concerned to serve the balance of the sentence. In terms of this section, payment of compensation is linked to postponement of the passing of sentence or suspension of sentence. This may not be appropriate in all cases of trafficking in persons as some cases may be of such a severe nature that imprisonment is the only appropriate option.

6.185 A compensatory order in terms of section 300 or section 297 would be inappropriate if the accused is not in a financial position to meet the requirements thereof.

6.186 Section 30 of the Prevention of Organised Crime Act also provides for a mechanism in terms of which persons who have suffered damage to or loss of property or injury as a result of an offence or related activity may approach the High Court for an order directing that they be compensated out of property confiscated in terms of the Act. If the court is satisfied that the person is likely to be affected directly by the confiscation order or has suffered damage to or loss of property or injury, it may allow that person to make representations in connection with the realisation of that property.⁵²¹ If the person has already instituted civil proceedings or intends to institute such proceedings or has obtained a judgment against the defendant in respect of that damage, loss or injury, the court may order that the realisation of the whole or part of the property be suspended for a specified period in order to satisfy such claim or judgment and related legal expenses.⁵²² The remedy provided for in terms of this Act is inaccessible to many, if not all, victims of trafficking because of the high cost for bringing an application to the High Court.

6.187 The Act further provides for property and money allocated to or standing to the credit of the Criminal Assets Recovery Account to be allocated to (a) specific law enforcement agencies, and (b) any institution, organisation or fund established with the object to render assistance in any manner to victims of crime.⁵²³ This would

⁵²¹ Section 30(4).

⁵²² Section 30(5).

⁵²³ Section 69A.

include the rendering of assistance to a law enforcement agency, an institution or an organisation providing assistance to victims of trafficking

6.188 The Service Charter for Victims of Crime in South Africa reiterates the right of victims of crime to compensation in terms of sections 297 and 300 of the Criminal Procedure Act. The Charter makes it clear that “compensation” refers to an amount of money that a criminal court awards a victim who has suffered loss or damage to property, including money, as a result of a criminal act or omission by the person convicted of committing the crime. Hence, compensation referred to in the Charter does not include money or any other form of remuneration for physical or psychological damage suffered.

Comparative overview

6.189 Many countries have realised the need to compensate victims of trafficking for damage suffered or, at a minimum, enable such victims to claim compensation for damage suffered from offenders.

6.190 In the United Kingdom, the courts may order that a person convicted of an offence pay compensation for any personal injury, loss or damage resulting from that offence, subject to certain conditions.⁵²⁴ Victims of trafficking may also institute civil proceedings against their traffickers. However, there is no specific statutory right to stay in the country for the duration of such proceedings.⁵²⁵ Victims of trafficking may further claim compensation from the Criminal Injuries Compensation Scheme⁵²⁶ for criminal injuries which include physical injuries, post-traumatic stress disorder, depression and other psychological symptoms.

6.191 In the United States of America, criminal courts are compelled to order offenders to compensate victims of trafficking for the full amount of their losses, including wages for labour or services.⁵²⁷ The Trafficking Victims Protection

⁵²⁴ Section 130 of the Powers of Criminal Courts (Sentencing) Act 2000.

⁵²⁵ Anti-Slavery International **Human traffic, human rights: redefining victim protection** 2002, p.115, compiled by Elaine Pearson.

⁵²⁶ This scheme is established in terms of the Criminal Injuries Compensation Act of 1995.

⁵²⁷ Section 1593 of the US Code. See also section 112 (a) of the Victims of Trafficking and Violence Protection Act of 2000.

Reauthorization Act of 2003 also enables victims of trafficking to institute civil proceedings against offenders for damage suffered.⁵²⁸

6.192 In Nigeria, victims of trafficking, irrespective of their immigration status, have the right to institute civil proceedings against traffickers and any other person, including a public official, who has exploited or abused them. Victims of trafficking are further entitled to compensation for economic, physical and psychological damage suffered which should be met from the assets of convicted traffickers.⁵²⁹

6.193 In the Dominican Republic, the proceeds of the crime of trafficking are used to compensate victims for damage suffered and to establish programmes for the provision of protection and assistance to victims of trafficking.⁵³⁰

6.194 Cyprus is more advanced in its approach regarding compensation for damage suffered in that both the victim and the State can claim compensation from a convicted trafficker. The trial court may order that, in addition to any other sentence or measure, the accused should pay all or part of the expenses which the State has incurred, incurs or can reasonable anticipate to incur in respect of the provision of shelter, maintenance, medical and psychiatric support for victims.⁵³¹ Victims have a right to claim special and general damages from any person who is responsible for their exploitation. In awarding general damages, the court may take into account the following: (a) the extent of the exploitation and the benefit that was derived from such exploitation, (b) the future prospects of the victim and the extent to which such prospects were affected by the exploitation, (c) the culpability of the offender, and (d) the relationship or the dominating position or influence of the offender with regard to the victim. In awarding special damages, the court must take into consideration every item of expense which resulted from the exploitation, including the cost of repatriation in the case of foreigners. The court may also award punitive damages when the

⁵²⁸ Section 4(a)(4).

⁵²⁹ Section 38 of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 24 of 2003.

⁵³⁰ Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "The birth of a new anti-trafficking legislation: The Dominican Republic's Law Number 137-03 Regarding Illegal Trafficking of Migrants and Trade in Persons" Paper presented at the Conference on New Steps in Path Breaking Strategies in the Global Fight Against Sex Trafficking held in Santo Domingo, Dominican Republic on 8 and 9 December 2003.

⁵³¹ Section 7(2) of the Combating of Trafficking in Persons and Sexual Exploitation of Children Law No. 3(1) of 2000.

degree of the exploitation or the degree of the relationship or the dominating position of the offender with regard to the victim so require.⁵³²

6.195 In the Philippines the court must, in addition to the penalty imposed for the crime of trafficking in persons, order the confiscation and forfeiture, in favour of the government, of all the proceeds derived from the commission of the crime. However, the court must order that the offender pay an amount equal to the value of the proceeds of the crime, if the proceeds have been destroyed, diminished in value or otherwise rendered worthless by any act or omission of the offender, or it has been concealed, removed, converted or transferred to prevent it from being found or to avoid confiscation or forfeiture. Unlike other countries, an award for damages must be taken from the personal and separate properties of the offender. Only if such properties are insufficient may the balance be taken from the confiscated and forfeited properties.⁵³³

6.196 Several countries⁵³⁴ allow victims of trafficking to join a civil action for damages to criminal proceedings against their traffickers.⁵³⁵

Submissions received

Are the legal remedies provided for in section 300 of the Criminal Procedure Act and section 30 of the Prevention of Organised Crime Act adequate to enable victims of trafficking to claim for damage suffered by them? If not, how should these provisions be amended in order to ensure that victims of trafficking are able to claim for damage suffered by them? What kind of damage should victims of trafficking be able to claim from their perpetrators?

6.197 **Childline** suggested that the proposed Sentencing Framework Bill should be revisited in order to ensure that it adequately covers compensation for victims of trafficking.

⁵³² Section 8 of the Combating of Trafficking in Persons and Sexual Exploitation of Children Law No. 3(1) of 2000.

⁵³³ Section 14 of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

⁵³⁴ For example, the Netherlands, Belgium and Italy.

⁵³⁵ Anti-Slavery International **Human traffic, human rights: redefining victim protection** 2002, p.81, 82, 100 and 153, compiled by Elaine Pearson.

6.198 **Jhb Child Welfare Society** recommended that the sentence imposed on a person found guilty of the crime of trafficking in persons must automatically include some form of restitution, including payment for the costs of rehabilitation and therapy. The respondent stressed the need for special programmes for children removed from prostitution and various other forms of child labour as a result of which they have suffered physical, emotional and social damage. The respondent said that programmes for adults affected in related ways would be desirable and added that offenders could be required to make payments towards the costs of running such programmes.

6.199 The **Department of Foreign Affairs** stated that both section 300 of the Criminal Procedure Act and section 30 of the Prevention of Organised Crime Act require victims to make representations to court before they can claim compensation. The respondent questioned the feasibility of requiring victims of trafficking to approach a court for compensation, except in exceptional circumstances. The respondent suggested that consideration should be given to developing an appropriate mechanism or fund to enable victims of trafficking to benefit from the Criminal Assets Recovery Account provided for in the Prevention of Organised Crime Act. However, **SAPS** submitted that the provisions of the mentioned Acts are sufficient to enable victims of trafficking to claim compensation for damage suffered.

6.200 **SWEAT** recommended that victims of trafficking should be able to claim compensation for loss of earnings and physical and psychological trauma suffered.

6.201 The **SA Human Rights Commission** stated that although the Criminal Procedure Act and the Prevention of Organised Crime Act do not provide for the full spectrum of damage suffered, victims are not precluded from claiming damages by way of a civil action against perpetrators. Such damages would include damages for pain and suffering, past and future medical expenses, loss of earning etc. The respondent pointed out that the Issue Paper does not address the question as to whether provision should be made for the State to claim compensation from offenders for expenses incurred relating to the care, repatriation and transportation of victims of trafficking to their countries of origin.

6.202 **Lawyers for Human Rights, Pretoria** answered the question in the negative and added that victims should be able to claim for inter alia psychological, emotional and physical injuries. This is supported by **Mr Masoa**.

Evaluation and recommendations

6.203 The Commission endorses the provisions relating to reparation as set out in the Sentencing Framework Bill. These provisions have also been endorsed by the Commission in its Report on Sexual Offences.⁵³⁶ The Commission further supports the establishment of a compensation fund for victims of crime as contemplated in the Victims of Crime Bill.

6.204 **In complying with article 6(6) of the Trafficking Protocol, the Commission recommends that provisions similar to those relating to reparation in the Sentencing Framework Bill should be included in the proposed trafficking legislation.**⁵³⁷ It could be argued that the inclusion of such provisions in the proposed trafficking legislation would be discriminatory to victims of other forms of crime who will not be able to rely on a criminal court sentence for reparation. However, the inclusion of the proposed provisions could be justified by the following:

- (a) Unlike other victims of crime, victims of trafficking are usually subjected to abuse over a long period of time.
- (b) The abuse often takes place in an environment unfamiliar to them which increase their vulnerability.
- (c) The psychological harm inflicted on them may be greater because of the factors mentioned in paragraphs (a) and (b) above.
- (d) The extent of intimidation suffered may be greater because of the fact that organised criminal groups are usually involved in the crime of trafficking in persons.
- (e) Those involved in the trafficking of persons usually have the financial resources to compensate their victims.
- (f) The Trafficking Protocol places a duty on State Parties to ensure that their legal systems contain measures that offer victims of trafficking the possibility to obtain compensation for damage suffered.

⁵³⁶ South African Law Reform Commission **Report on Sexual Offences** (Project 107) December 2002.

⁵³⁷ See clauses 27 - 30 of the Bill.

6.205 Furthermore, if the Sentencing Framework Bill is introduced into Parliament before the proposed trafficking in persons legislation, the provisions relating to compensation in the trafficking legislation can be deleted. However, if the Sentencing Framework Bill is introduced into Parliament after the proposed trafficking legislation, the provisions relating to compensation in the latter legislation can be repealed.

6.206 Furthermore, victims of trafficking may institute civil proceedings for damage suffered. However, the majority of victims would not have the financial resources to do so. The Legal Aid Board currently provides, at state expense, legal representation in civil proceedings. Such legal representation is subject to a means test. Furthermore, the person instituting the civil proceedings must be ordinarily resident in South Africa and there must be a reasonable prospect that the civil action will be successful. However, foreign victims of trafficking present in South Africa for the duration of the proposed suspension of deportation period⁵³⁸ or the duration of criminal proceedings against traffickers would not qualify as being ordinarily resident in South Africa. **The Commission therefore recommends that the Department of Justice and Constitutional Development, in consultation with the Legal Aid Board, should give due consideration to providing victims of trafficking with legal representation in civil proceedings in order to enable them to claim compensation for damage suffered.**

6.207 In response to the submission made by Childline, the Commission is of the view that the provisions relating to reparation in the Sentencing Framework Bill cover compensation for victims of trafficking adequately. The Commission, however, realises that these provisions will only be beneficial to victims of crime in instances where offenders are able to pay compensation or have property that can be attached.

6.208 The Commission supports the submission of Jhb Child Welfare Society that special programmes should be established for children who have been removed from prostitution and other forms of child labour. In this regard the Children's Bill⁵³⁹ provides that a child and youth care centre must offer a therapeutic programme which may include a programme designed for –

⁵³⁸ See paragraph 6.103 above.

⁵³⁹ Section 191(2) of the consolidated Children's Bill as certified by the office of the chief state law advisor.

- (a) the reception and temporary safe care of child victims of trafficking or commercially sexually exploited children; and
- (b) the reception and temporary safe care of children for the purpose of -
 - (i) observing and assessing those children;
 - (ii) providing counselling and other treatment to them; and
 - (iii) assisting them to reintegrate with their families and communities.

6.209 The Commission agrees that similar programmes for adults would be desirable. In this regard, the Commission has recommended that programmes suited for the needs of adult victims of trafficking should be offered by centres for adult victims of trafficking or accredited organisations providing accommodation to such victims.⁵⁴⁰

6.210 Responding to the submission of the Department of Foreign Affairs, the Commission believes that similar provisions relating to reparation as those provided for in the Sentencing Framework Bill would be the most convenient method for obtaining compensation for damage suffered in that victims of trafficking would not need to institute a separate action for such damage. Furthermore, victims of crime are able to benefit from the Criminal Assets Recovery Account established in terms of the Prevention of Organised Crime Act in that property and money allocated to or standing to the credit of the Account can be allocated to any institution, organisation or fund established with the object to render assistance to victims of crime. Victims are, however, not able to claim monetary compensation from the fund. Furthermore, the Commission does not support the establishment of a separate compensation fund for victims of trafficking. This is in view of the fact that the Department of Justice and Constitutional Development is currently considering the Victims of Crime Bill which provides for the establishment of a compensation fund.

6.211 The Commission is thankful to the South African Human Rights Commission for pointing out that the Issue Paper does not address the issue as to whether the State should be able to claim compensation from offenders for expenses incurred by the State in respect of victims of trafficking. **In this regard, the Commission recommends that a court convicting a person for the crime of trafficking in persons should be able to, in addition to any punishment which it may impose**

⁵⁴⁰ See in this regard paragraphs 6.165 and 6.167 above.

in respect of the offence and upon application of the prosecutor, make an order for payment to the State of an amount in compensation for expenses incurred or reasonably expected to be incurred for the care, accommodation, transportation and repatriation of a victim of trafficking.⁵⁴¹ This recommendation mirrors the position in Cyprus.

PROCESS AND PROCEDURE

Legal representation of victims

6.212 In South Africa, the State acts on behalf of the victim of a criminal offence. The function of the prosecutor in a criminal case is to prove the guilt of the accused beyond reasonable doubt. The victim is therefore not entitled to separate legal representation.

6.213 However, a child is in certain circumstances entitled to legal representation in proceedings before the Children's Court. In terms of section 8A(1) of the Child Care Act, a child may have legal representation at any stage of a proceeding under the Act.⁵⁴² Regulation 4A(1) to the Child Care Act provides, *inter alia*, that legal representation, at state expense, must be provided for a child in the following circumstances:

- (a) Where it is requested by the child who is capable of understanding the proceedings.
- (b) Where it is recommended in a report by a social worker or an accredited social worker.
- (c) Where any party besides the child will be legally represented in the proceedings.
- (d) Where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill-treated or abused.
- (e) Where the child is capable of understanding the nature and content of the proceedings, but cannot communicate directly with the court because of language differences – a legal representative who speaks both languages

⁵⁴¹ See clause 31 of the Bill.

⁵⁴² This provision still needs to be put into operation by proclamation.

must be provided. Where such a legal representative cannot be provided, an alternative arrangement must be made including the provision of an interpreter for the child.

6.214 Furthermore, the Children's Bill provides that where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board.⁵⁴³

6.215 The provision of separate legal representation to victims of trafficking would have several benefits. The legal representative could inter alia ensure that the victim is –

- (a) kept up to date regarding the progress of the investigation of the case;
- (b) provided with information on available protective measures for witnesses; and
- (c) informed in advance of the date on which the accused is to appear in court;

6.216 Furthermore, due to high case loads, prosecutors are often not well prepared for trial. A legal representative for the victim would therefore be able to assist the prosecutor in preparing for the trial by e.g. identifying the kind of evidence that would be required for a conviction.

Submissions received

Should victims of trafficking be provided with separate legal representation in criminal proceedings against traffickers, taking into account the role of the prosecutor? If yes, on what grounds should such separate legal representation be provided?

6.217 **Childline** held the view that if trafficking cases are handled by experienced prosecutors, trained in issues relating to trafficking in persons, the need for further legal representation would be minimised.

6.218 The **Sexual Offences and Community Affairs Unit** submitted that if prosecutors are trained to prosecute trafficking cases, there would be no need to provide separate legal representation for victims of trafficking.

⁵⁴³

Clause 55.

6.219 **Jhb Child Welfare Society** submitted that it is difficult to envisage how a trial could be conducted properly without legal representation in instances where a victim is frightened, vulnerable, not conversant in a local language, and is unfamiliar with the South African legal system. The respondent added that a prosecutor alone will not be in a position to provide the necessary safeguards.

6.220 **SAPS** and the **Children's Rights Project** supported the provision of legal representation to victims of trafficking. **Mr Masoa** submitted, however, that given the role of prosecutors in criminal proceedings, victims of trafficking should not be provided with legal representation.

6.221 The **Department of Foreign Affairs** submitted that in terms of Article 6(2) of the Trafficking Protocol, States Parties are obliged to ensure that their domestic legal systems contain measures to provide assistance to victims to enable their views and concerns to be heard at appropriate stages in criminal proceedings. The respondent said that separate legal representation is one of the options that could be considered in this regard. However, other factors such as the practicality and financial feasibility of this option would have to be considered.

6.222 **SWEAT** submitted that adult victims should have access to free legal representation and a competent interpreter where necessary.

6.223 **Anonymous** suggested that victims of trafficking should be provided with separate legal representation in the following circumstances: (a) where the person may be prosecuted for activities whether related to trafficking or not; and (b) if the victim is entitled to restitution from traffickers.

6.224 **Lawyers for Human Rights, Pretoria** submitted that providing victims of trafficking with legal representation against traffickers would be a good idea given the fact that prosecutors have a heavy workload. This would also be helpful in instances where the victims are children because different issues pertaining to children may arise.

Evaluation and recommendations

6.225 After due consideration of the submissions received as well as the question as to whether victims of trafficking should be provided with separate legal representation in criminal proceedings against traffickers, **the Commission is of the view that the best approach would be to ensure that those tasked with the prosecution of trafficking cases are well trained to do so. Prosecutors should further be educated on the importance of explaining the following to a victim-witness before the trial:**⁵⁴⁴

- (a) **The process and procedures of the trial and who the various role-players in the court are and their respective roles.**
- (b) **The structure and layout of the court room.**
- (c) **Where to go and what to do on arrival at the court on the day of the trial;**
- (d) **The evidence that the victim will be expected to give and why.**
- (e) **Potential differences between the police statement and the evidence that the victim will give in the courtroom, and what the consequences of such differences are likely to be.**
- (f) **The kind of questions to be expected from the defence and what the purpose of cross-examination is.**
- (g) **The available protective measures for persons who testify in criminal proceedings.**
- (h) **The likely time frames of the trial.**
- (i) **What the process will be if the accused is convicted.**
- (j) **The victim's role in sentencing.**

6.226 **Likewise, the police should be educated on the importance of keeping the victim up to date regarding the progress of the investigation and measures relating to witness protection.**

6.227 The above will ensure that victims are more prepared for the trial in that they will know what to expect and what will be expected from them. This will greatly improve the quality of the testimony of the victims.

⁵⁴⁴

South African Law Reform Commission **Discussion Paper 102: Sexual Offences: Process and Procedure** (Project 107).

6.228 The Commission believes that the concerns raised by the Jhb Child Welfare Society would be addressed by the above proposed measures.

6.229 The Commission agrees with the Department of Foreign Affairs that the financial feasibility of providing victims of trafficking with separate legal representation should be considered carefully. Although the provision of separate legal representation to victims would have contributed greatly to witness protection and the effectiveness of the criminal justice system in general, limited resources do not permit this.

6.230 The issues raised by Anonymous have been addressed in paragraphs 6.44 – 6.58 and paragraphs 6.174 – 6.211 respectively.

The Children's Court process

6.231 The children's court process has extensively been dealt with in the Commission's investigation into the review of the Child Care Act. Issues addressed in that investigation are therefore not considered in this Discussion Paper.

6.232 However, a few problems which have not been addressed in the Children's Bill⁵⁴⁵ are being experienced with regard to foreign children who are in the country illegally, including those trafficked to South Africa. Children trafficked to South Africa usually enter the country without the necessary documentation such as birth certificates. Although a children's court enquiry may be opened in the absence of a child's birth certificate, the children's court proceedings cannot be finalised without such certificate. This is because of the 13-digit identification document requirement which will allow the court to place the child within the child care system.

Submissions received

What can be done to address the problems being experienced with placing foreign children, who are in the country illegally, in the child care system?

⁵⁴⁵ The Children's Bill is a result of the Commission's investigation into the review of the Child Care Act.

6.233 **Childline** suggested that the following solutions should be investigated as to their appropriateness:

- (a) application should be made to the country of the child's birth for a birth document, where feasible;
- (b) If the child is a refugee or a victim of trafficking, the requirement for a birth document should be waived; and
- (c) an age assessment should be done and an application should be made for an identity document from the Department of Home Affairs.

6.234 **Jhb Child Welfare Society** pointed out that a children's court enquiry cannot be finalised without a birth certificate with regard to foster care only. The respondent said that the problem does not arise with residential care placements because children's homes are subsidised via a per capita grant which does not require that a birth certificate be produced. The respondent mentioned that section 54 of the Child Care Act gives the court the power to estimate the age of a child. However, some commissioners of child welfare are reluctant to use this power. The respondent further mentioned that the Department of Social Development made an undertaking some years ago to come up with a system in terms of which a computer-generated identity number could be produced for a child for whom e.g. a foster care grant is needed and who has no South African identification document.

6.235 The **Children's Rights Project** proposed that regulations be enacted which would empower the Children's Court to deal with a foreign child on the basis of relevant documents obtained from the Department of Home Affairs.

6.236 The **SA Human Rights Commission** submitted that the question posed raises a broader question, namely what rights contained in the constitution are to be recognised and given effect to in respect of illegal foreigners. In particular, which economic and social rights, such as the right of a child to social services, are not subjected to the limitations clause. The respondent submitted that to the extent that some of the rights contained in section 28 of the Bill of Rights are non-derogable, an argument can be made that social services should be extended to children who are illegally in the country. The respondent argued that the problem of being unable to do so due to the fact that the child does not have a 13 digit identification document is a practical obstacle that would have to be resolved between the relevant government departments. The matter should therefore be resolved on a principled human rights

basis and not on the inability of a child victim to obtain an identity document in a specified format.

Evaluation and recommendations

6.237 The Commission is grateful to the Jhb Child Welfare Society for pointing out that the lack of a birth certificate is a problem in relation to foster care only. As this problem does not relate only to child victims of trafficking, the proposed trafficking legislation is not the appropriate place to deal with it. **Hence, the Commission recommends that the Department of Social Development should give due consideration to establishing a mechanism in terms of which children who have no identification documents will be able to access the foster care grant.** The Commission supports the suggestion that, in the absence of a birth or other identification document, the court should estimate the age of a child on the basis of which an application should be made for an identity document from the Department of Home Affairs.

Repatriation of victims of trafficking

6.238 Persons who are in South Africa illegally are usually taken to the Lindela Detention Centre from where they are deported. Victims of trafficking are often amongst the persons so deported. This is because they are not identified as victims, but labelled as illegal immigrants. However, because of training provided by organisations such as IOM, ECPAT International and Molo Songololo, law enforcement officials are better able to identify victims of trafficking.

6.239 Victims of trafficking are being returned to their countries of origin without an investigation being done into their circumstances in order to establish whether protective systems are in place in their countries so as to ensure that they are not returned to the same circumstances that made them vulnerable to being trafficked in the first instance. The lack of investigation into the circumstances victims are likely to face when returned to their countries may have serious consequences. For example, child victims of trafficking might be returned to the very parents who sold them or to a home where they were abused. As international social services are the responsibility of the Department of Social Development, this Department through International Social Services would be responsible for investigating the circumstances of victims of trafficking. The South African Red Cross Society is also available to assist with the

tracing of and investigation of the circumstances of such victims. However, both institutions do not have the capacity to deal with a large volume of such cases.

6.240 Although the terms repatriation and deportation are being used interchangeably, a clear distinction should be made between the two. Repatriation is the process of returning a person back to his or her own country. The person to be repatriated either chooses to leave the country voluntary or is forced to do so. Forced repatriation of a person is, however, not the same as deportation. In terms of the Immigration Act, “deportation” means the action or procedure aimed at causing an illegal foreigner to leave the Republic in terms of the Act. The purpose of deportation is achieved when the illegal foreigner leaves the deporting State’s territory and the well-being of the deportee in the country to which he or she is to be deported is of no concern to the deporting State. An illegal foreigner so deported may be declared an undesirable person.⁵⁴⁶ Furthermore, an illegal foreigner found in possession of a fraudulent residence permit, passport or identification document is a prohibited person.⁵⁴⁷ The repatriation of victims of trafficking as understood in the context of the Trafficking Protocol is not the same as deportation. The Protocol sets the following conditions for the repatriation of victims of trafficking:⁵⁴⁸

- (a) Due regard should be given to the safety of victims during the repatriation process.
- (b) The repatriation of victims should
 - (i) be without undue or unreasonable delay;
 - (ii) preferably be voluntary; and
 - (iii) be facilitated through the issuing of travel documents or other authorisations as may be necessary.

6.241 Clause 290 of the Children’s Bill deals with the repatriation of child victims of trafficking and provides as follows:

290. (1) The Director-General may not return a child contemplated in section 289(2) to his or her country of origin or the country from where the child has been trafficked without giving due consideration to—

⁵⁴⁶ Section 30(1)(e) of the Immigration Act.

⁵⁴⁷ Section 29(1)(f) of the Immigration Act.

⁵⁴⁸ Article 8 of the Protocol.

- (a) the availability of care arrangements in the country to which the child is to be returned;
 - (b) the safety of the child in the country to which the child is to be returned;
 - (c) the possibility that the child might be trafficked again, harmed or killed.
- (2) (a) If it is essential in the best interests of a child who has been trafficked, the Director-General must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.
- (b) The Director-General may not act in terms of paragraph (a) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

6.242 Although the repatriation of foreigners is the responsibility of the Department of Home Affairs, the Department of Social Development argued that they should be entrusted with the repatriation of foreign child victims of trafficking because they are responsible for the protection, care and well-being of children. Hence, clause 290 of the Children's Bill gives the responsibility to repatriate foreign child victims of trafficking to the Department of Social Development. It obviously follows that the Department of Home Affairs should be responsible for the repatriation of foreign adult victims of trafficking.

Comparative overview

6.243 The safe repatriation of victims of trafficking forms an important part of victim protection. However, not many countries ensure the protection of victims during the repatriation process. Those who do, provide minimum protection only. Just to name a few, the government of Guinea contacts the embassies of non-Guinean victims to process the necessary travel documents to enable such victims to return home. In 2003, the government of Burma has established a repatriation centre on the Thai-Burmese border and provides reintegration support for victims returning from Thailand and Malaysia. The embassies and consulates of the Slovak Republic assist victims of trafficking by providing them with travel documents and bringing them in contact with their relatives.⁵⁴⁹ According to the Danish Government's Action Plan to Combat Trafficking in Women, support to victims of trafficking includes the

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US Department of State **Trafficking in Persons Report** June 2004, p.173.

development of a model for improved repatriation of women who find themselves in Denmark after being victimised through trafficking, including:

- (a) the establishment of co-operative agreements regarding the repatriation of victims between relevant parties;
- (b) the development of international networks between relevant NGOs;
- (c) the development of co-operation between embassies; and
- (d) drop-in centres for victims of trafficking.⁵⁵⁰

6.244 The stay of victims in the drop-in centres is normally up to 15 days, whereafter they are repatriated.⁵⁵¹

6.245 In the Philippines, the Department of Foreign Affairs is responsible for the repatriation of victims of trafficking. However, if the repatriation would expose the victim to greater risks, the Department must arrange for the extension of appropriate residence permits and protection.

Submissions received

What services should be provided to South African citizens or persons holding permanent residency in South Africa who have been trafficked to other parts of the world (including those still abroad)? What Department(s) or institution(s) should be responsible for the provision of such services? Please motivate your answer.

6.246 **Jhb Child Welfare Society** submitted that the Departments of Foreign Affairs, Home Affairs and Social Development should co-operate in the repatriation and reintegration of victims of trafficking.

6.247 **IOM** submitted as follows:

- (a) In cases of trafficking of South African nationals, the Department of Foreign Affairs (DFA) should, through its diplomatic channels, ensure that basic rights,

⁵⁵⁰ European Network Against Child Trafficking (ENACT) **A report on Child Trafficking** March 2004, p. 40, compiled by Italia Onlus, Save the Children.

⁵⁵¹ European Network Against Child Trafficking (ENACT) **A report on Child Trafficking** March 2004, p. 41.

protections and services due to victims of trafficking in terms of international and South African law are met, regardless of whether the destination country is a signatory to the Trafficking Protocol.⁵⁵²

- (b) The DFA, through its embassies abroad and in cooperation with relevant international organisations such as IOM, should facilitate the dignified return of South African victims to the Republic.⁵⁵³
- (c) The Department of Social Development should be responsible for co-ordinating the safe reception and reintegration of returning victims. Specific duties may include:
 - (i) assessing the safety of a victim;
 - (ii) making arrangements for a secure reception for the victim at a South African port of entry in co-ordination with relevant social service providers abroad and the South African embassy concerned;
 - (iii) tracing victims' family members in South Africa, where appropriate; and
 - (iv) ensuring immediate access to medical and psychosocial services upon arrival.

6.248 The **Department of Foreign Affairs** acknowledged that it does have a role to play in providing support to South Africans who are victims of trafficking, albeit of a supporting nature. In this regard the respondent provides agency services for Departments that do not have representation abroad, especially the Department of Home Affairs. The respondent submitted that it can assist a principal Department in its duty to provide support services, but will rely on that Department for a mandate and guidance. The respondent mentioned that the provisions of the Vienna Convention on Consular Relations, 1963 empower consular officials to perform certain functions in terms of which assistance can be rendered to South Africans abroad. This includes the right to be informed if a national has been arrested, the right to visit nationals in prison, custody or detention and the right to arrange for their

⁵⁵² In particular, South African embassies should liaise to protect victims from punishment for any offences related to their having been trafficked, and ensure that such persons have access to legal advice and basic necessities.

⁵⁵³ In this regard, embassies should assess the risk of reprisals faced by a returning victim prior to her return, and involve the victim, South African law enforcement officials, and the International Social Services (ISS) unit of the Department of Social Development in this process.

legal representation.⁵⁵⁴ The respondent conceded that there is scope for improving the co-ordination and collaboration between the Department of Foreign Affairs and other relevant Departments. The respondent, however, argued that improved co-operation is not a subject matter to be legislated, but should rather be facilitated through practical co-operation.

6.249 The **Department of Social Development** submitted that it can, through International Social Services, provide services to South African victims of trafficking abroad. The respondent further suggested that the Department of Home Affairs should provide victims of trafficking with humanitarian visas.

6.250 **Lawyers for Human Rights, Pretoria** proposed that South African citizens or permanent residents trafficked to other parts of the world should be assisted through International Social Services and organisations such as IOM.

6.251 **Molo Songololo** submitted that in respect of children trafficked from South Africa to other parts of the world, the South African government should provide immediate assistance to those children, in co-operation with the governments of the countries to which they have been trafficked. Furthermore, the Department of Foreign Affairs should be mandated to take measures to ensure that its embassies and diplomatic personnel abroad are familiar with the laws of the countries in which they are situated as it pertains to support and assistance to foreign victims of child trafficking.

What measures should be put in place to ensure the safety of victims of trafficking when repatriated to their countries of origin or returned to the place from where they have been trafficked?

6.252 **Childline** recommended that service providers in a victim's country of origin should be informed of the arrival of the victim in order to ensure some monitoring of the re-adjustment process as well as to offer further services if necessary and available.

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Article 36.

6.253 **Jhb Child Welfare Society** suggested that there should be a social service investigation into the circumstances of whoever has been identified as a potential care-giver or provider of support. Furthermore, the desirability of returning a person to his or her country of origin, particularly if he or she is a child, should be investigated.

6.254 **IOM** submitted as follows -

- (a) The Department of Home Affairs (DHA) should establish a fund to provide for the voluntary return and reintegration of victims of trafficking to their countries of origin.⁵⁵⁵ The respondent suggested that DHA should make every effort to ensure that victims of trafficking are returned in a safe and dignified manner to avoid unnecessary stigmatisation or punishment in their home countries.
- (b) Once a person has been identified as a victim of trafficking, the Department of Foreign Affairs (DFA) should co-operate with international organisations such as IOM and the International Committee for the Red Cross (ICRC) for purposes of investigating the circumstances of the victim in her home country in order to determine the risks of her returning home.
- (c) Escorts should be provided for victims travelling to a country where they may face threats from traffickers on route, or upon arrival at a port of entry and/or where arrangements have not been made for a secure reception with local law enforcement agencies.
- (d) The Departments of Foreign Affairs and Social Development should establish links with relevant government departments and/or organisations in countries known to be major points of origin for persons trafficked to South Africa to ensure that victims of trafficking who have returned home enjoy a comprehensive response to their physical and other needs, and are not trafficked again. The return of victims of trafficking to their countries of origin should be with their consent and victims should be made aware of the

⁵⁵⁵ IOM currently offers victims of trafficking in South Africa the option of an Assisted Voluntary Return (AVR) should they wish to return to their countries of origin. If a victim chooses the AVR option, she will also receive a reintegration grant and regular follow up upon arriving home.

arrangements that have been made for their reception and reintegration in their home countries.

- (e) Those responsible for the return of victims of trafficking should not be permitted to reveal to officials in a victim's country of origin that he or she has been trafficked without the express consent of that victim.

6.255 The **Department of Social Development** submitted that International Social Services can be a helpful resource in utilising social workers in other countries to undertake social service investigations in preparation of repatriation. This is supported by **SWEAT** who added that victims should not be repatriated against their will.

6.256 **The University of Cape Town Legal Aid Clinic** submitted that if victims of trafficking are seen as victims of human rights abuses, in terms of international human rights conventions, they cannot be returned to a country where they might suffer harm. The respondent suggested the following provisions for inclusion in the proposed trafficking legislation:

“An immigration officer shall if he or she reasonably suspects a person who is at a port of entry to be a victim of trafficking, detain or cause such person to be detained in a safe area for the purpose of ascertaining as to whether or not that person has been trafficked and to assist them accordingly.

A person who is known to be a victim of trafficking cannot be repatriated to his or her country of origin if there is reason to believe that he or she might possibly suffer harm or intimidation upon return.

Any person who has been a victim of trafficking and is known as such to the authorities must be returned to their country of origin in safety and dignity if there is no reason to believe that such person will suffer harm upon return thereto.”

6.257 **NCWSA** submitted that children should not be repatriated unaccompanied.

6.258 **CSVR** stated that it may not be safe for a victim of trafficking to be repatriated to his or her country of origin. The respondent suggested that victims of trafficking should be screened prior to repatriation to determine whether they can apply for

asylum or other legal measures. Furthermore, if a victim of trafficking can return home safely, co-ordinated efforts should be made with the country of origin to ensure that the victim arrives home safely and with adequate support systems in place.

6.259 **Lawyers for Human Rights, Pretoria** suggested that an investigation should be done into the circumstances of victims of trafficking before they are repatriated. The respondent said that consideration should be given to factors such as whether a victim's family was involved in his or her trafficking and the dangers the victim may face when send back.

What measures should be taken in instances where there is no protective system in place in the victim's country of origin?

6.260 **Jhb Child Welfare Society** proposed that the lack of protective measures in a victim's country of origin should be a ground for granting asylum to the victim if he or she wishes to stay in South Africa.

6.261 **Childline** suggested that the repatriation of child victims should be reconsidered in consultation with the child. Furthermore, adult victims should be given pre- repatriation counselling to prepare them for the kind of re-adjustment problems and solutions that may be anticipated.

6.262 **SWEAT** cautioned against any approach to repatriate a victim without ensuring that the necessary support systems are in place in the country to which he or she is to be returned. The respondent suggested that International Social Services should, with the victim's explicit permission, contact the victim's family, friends or any other support system in the country of origin to provide a safety net on the victim's return.

6.263 The **SA Human Rights Commission** suggested that victims of trafficking should be informed of their right to apply for refugee status should they have a well founded fear of persecution if they are returned to their countries of origin. Furthermore, the South African authorities in considering the asylum application should also consider whether the country to which the person is to be returned has services available to ensure his or her safety.

6.264 **Lawyers for Human Rights, Pretoria** proposed that victims of trafficking should be allowed to apply for permanent residence permits.

6.265 **Mr Masoa** proposed that the victims should be accommodated in a place of safety until protective systems are in place in their countries of origin.

Evaluation and recommendation

6.266 The immediate deportation of victims of trafficking often denies them essential services such as health care and counselling. It further deprives the authorities of the opportunity to obtain information about the operation of cross-border criminal networks and to prosecute traffickers as the testimony of the victims is often needed to secure a conviction. **Hence, the Commission recommends that the proposed trafficking legislation should prohibit the summary deportation of victims of trafficking prior to an investigation being done into their circumstances.**⁵⁵⁶ **Victims of trafficking should therefore be repatriated in terms of a process that take cognisance of their safety not only during the repatriation process, but also in the countries to which they are to be returned as well as the possibility that they might be harmed, killed or trafficked again.**⁵⁵⁷

6.267 **With regard to child victims of trafficking, due consideration should be given to the availability and suitability of care arrangements in the country to which a child is to be returned.**⁵⁵⁸ **Furthermore, the Director-General of the Department of Social Development must take reasonable steps to find an institution or organisation that renders assistance to victims of trafficking in the country to which they are to be returned and that is willing to provide assistance to such victims.**⁵⁵⁹

6.268 **Unlike children who are sometimes not capable of making decisions in their best interests, the decision of adult victims of trafficking to return to their home countries, whether it is safe or not to do so, should be respected. Adult**

⁵⁵⁶ See clause 32 of the Bill.

⁵⁵⁷ See clause 33(1) and (2)(a) of the Bill.

⁵⁵⁸ See clause 33(1)(b) of the Bill.

⁵⁵⁹ See clause 34(a) of the Bill.

victims of trafficking should therefore not be forbidden to leave the country just because an investigation into their circumstances has not commence or been completed.⁵⁶⁰

6.269 As the Department of Social Development is the principal department tasked with investigating the circumstances of victims of trafficking, the Commission recommends that it should capacitate its International Social Services Division in order to deal with large volumes of trafficking cases. The International Organisation for Migration and the International Committee for the Red Cross could also be approached for assistance in this regard.

6.270 The Commission agrees with IOM that victims of trafficking should be informed of any arrangements that have been made for their reception in the country to which they are to be returned.⁵⁶¹

6.271 The Commission gave due consideration to the argument that victims of trafficking should voluntary return to their countries of origin or the countries from where they have been trafficked. However, the Commission could find no compelling reasons for allowing victims to stay in South Africa if an investigation into their circumstances found that it is safe for them to return to their home and that there is no possibility that they may be harmed, killed or trafficked again. Furthermore, victims of trafficking should not be allowed to stay in the country merely because of economic reasons.

6.272 The Commission recommends that clause 290 of the Children's Bill should be incorporated into the proposed trafficking legislation and be amended as follows:⁵⁶²

Repatriation of [child who is] victim of trafficking from Republic

290. (1) The Director-General: Social Development may not return a foreign child who is a victim of trafficking **[child contemplated in section 288(2)]** to his or

⁵⁶⁰ See clause 33(3) of the Bill.

⁵⁶¹ See clause 33(2)(b)(ii) of the Bill.

⁵⁶² Words in bold type in square brackets indicate omissions and words underlined indicate insertions.

her country of origin or the country from where he or she **[the child]** has been trafficked without giving due consideration to—

(a) the safety of the child during the repatriation process;

(b)**[(a)]** the availability and suitability of care arrangements in the country to which the child is to be returned; **[and]**

(c)**[(b)]** the safety of the child in the country to which the child is to be returned; and

(d)**[(c)]** the possibility that the child might be trafficked again, harmed or killed.

[(2) (a) If it is essential in the best interests of a child who has been trafficked, the Director-General must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.

(b) The Director-General may not act in terms of paragraph (a) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.]

6.273 Furthermore, the deleted subclause (2) above should be included in a separate section and should read as follows.⁵⁶³

Escorting of child victim of trafficking

X. (1) If it is considered to be in the best interests of a child who has been trafficked, the Director-General of the Department of Social Development must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.

(2) The Director-General may not act in terms of subsection (1) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

6.274 The Commission does not recommend that a similar provision relating to the repatriation of adult victims of trafficking be included in the proposed trafficking

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See clause 36 of the Bill. This clause is in accordance with the submission made by NCWSA.

legislation. This is because adult victims of trafficking are not as vulnerable as child victims of trafficking.

6.275 The Commission agrees with Childline that service providers in the country to which a victim is to be returned should be informed of the victim's return. This is important in order to ensure that victims are not sent back to the same circumstances that made them vulnerable to become victims of trafficking in the first place.

6.276 With regard to the submission made by the Department of Foreign Affairs, the Commission would like to point out that the Children's Bill has placed an explicit obligation on the Department of Foreign Affairs to facilitate the return of child victims of trafficking to South Africa.⁵⁶⁴ Obviously, the Department of Foreign Affairs will have to be informed of such cases. Hence, the Commission recommends that a similar provision relating to both children and adults be included in the proposed trafficking legislation.

6.277 The Commission agrees with the IOM that the Department of Foreign should through its diplomatic channels ensure that South African citizens or permanent residents who are victims of trafficking abroad should be provided with the necessary assistance.

6.278 With regard to the repatriation of victims of trafficking to South Africa, the Commission recommends that the Department of Foreign Affairs should be tasked with—⁵⁶⁵

- (a) in co-operation with the Department of Social Development, assessing the risk to the safety and life of a victim of trafficking who is a citizen or permanent resident of South Africa, if returned to South Africa;**
- (b) facilitating the return of a person referred to in paragraph (a) and advising the Department of Home Affairs on measures to be taken for the secure reception of such person at a South Africa port of entry.**

⁵⁶⁴ See clause 286(1)(a) of the Children's Bill.

⁵⁶⁵ See clause 35(1)(a) of the Bill.

6.279 The Commission furthermore recommends that the Department of Home Affairs should be tasked with—⁵⁶⁶

- (a) facilitating and accepting the return of South African citizens or permanent residents who are victims of trafficking, and where necessary, secure their reception at a South African Port of entry;
- (b) issuing such travel documents or other authorisations as may be necessary to enable them to travel to and enter the country;
- (c) at the request of another state that is a party to the Trafficking Protocol or to an agreement relating to trafficking in persons, verifying whether a person who is a victim of trafficking is a citizen or permanent resident of South Africa;
- (d) upon entry into South Africa, referring a child who is a victim of trafficking to a designated social worker for investigation as contemplated in the Children's Bill;
- (e) referring a person who is an adult victim of trafficking to a centre for adult victims of trafficking (option 1) or an accredited organisation (option 2) for an assessment to determine the risks to the safety and life of the victim and the immediate and long term needs of the victim.

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See clause 35(1)(b) of the Bill.

CHAPTER SEVEN

PREVENTION OF TRAFFICKING IN PERSONS

SUBSTANTIVE MEASURES

Preventative measures

7.1 Although the rescuing and re-integration of victims of trafficking is important, a preventative approach is also needed. Trafficking in persons has its roots in the social and economic conditions in the countries of origin. These conditions often make persons vulnerable to becoming victims of trafficking.

7.2 From the discussions in the previous chapters, it is clear that persons, especially women and children, are being lured by traffickers mostly by means of false promises. Making persons aware of this should form a central part of any anti-trafficking strategy.

Comparative overview

7.3 Several countries have preventative measures in place against trafficking in persons. Just to name a few, in Moldova a country of origin for the trafficking of women, the Centre for the Prevention of Trafficking in Women, a local NGO, uses a variety of media and training tools to educate the public, particularly at risk groups. The Centre broadcasts radio programmes and has created several TV documentaries. It further publishes newspaper articles and trains youth volunteers across Moldova to conduct seminars with teenage youth, warning them about the dangers of trafficking.⁵⁶⁷ Brazil conducts poster campaigns at Brazil's major airports.⁵⁶⁸ In October 2004 the Brazilian Government launched an information campaign for women travelling abroad in order to alert potential victims of trafficking to the dangers of international trafficking. Each female Brazilian passport applicant between the ages of 18 and 35 receives a leaflet stating "First they take your

⁵⁶⁷ Mattar Mohamed, The Protection Project: Johns Hopkins University School of Advanced International Studies "The role of the Government in Combating Trafficking in Persons – A Global Human Rights Approach" Statement made to the Congress of the United States, House of Representatives, Committee on Government Reform and the Subcommittee on Human Rights and Wellness on 29 October 2003.

⁵⁶⁸ US Department of State **Trafficking in Persons Report** June 2005, p.72.

passport, then your freedom". The leaflet includes a list of key human trafficking indicators and provides a national federal police contact number for filing complaints.⁵⁶⁹ In the Czech Republic, the Ministry of Foreign Affairs provide information regarding trafficking in persons to applicants for Czech visas from identified source countries for victims of trafficking.⁵⁷⁰ German embassies and consulates conduct outreach activities by distributing brochures available in 13 languages warning persons about the risk of becoming a victim of trafficking.⁵⁷¹ In Kenya, the Ministry of Labour inspects employment agencies that facilitate overseas employment for Kenyans and provides mandatory pre-departure counselling to citizens departing for work abroad.⁵⁷² The government of Malawi has conducted a number of public awareness-raising campaigns which included workshops for teachers and traditional authorities and meetings for rural families with young children in order to increase understanding of the root causes of trafficking in persons.⁵⁷³

Submissions received

What measures can be taken to reduce the trafficking of persons to South Africa?

7.4 **Childline** suggested the following measures:

- (a) The development of -
 - (i) policies aimed at reducing poverty in a meaningful way, and which particularly target poor women and children;
 - (ii) policies and services which target specific vulnerable groups of children, e.g. children affected by HIV/AIDS where the absence of a care-giver has made them vulnerable to exploitation.
- (c) The provision of training on issues relating to trafficking in persons to -
 - (i) all role-players involved in cross-border movement of persons;
 - (ii) all government officials and NGOs involved in the management of refugees and undocumented children (many children who access

⁵⁶⁹ US Department of State **Trafficking in Persons Report** June 2005, p.36.

⁵⁷⁰ US Department of State **Trafficking in Persons Report** June 2005, p.94.

⁵⁷¹ US Department of State **Trafficking in Persons Report** June 2005, p.112.

⁵⁷² US Department of State **Trafficking in Persons Report** June 2005, p.136.

⁵⁷³ US Department of State **Trafficking in Persons Report** June 2005, p.150.

services for refugees on further probing appear to have been trafficked); and

- (iii) the judiciary.
- (d) Corruption amongst border and police officials should be reduced.
- (e) Greater co-operation between countries, relevant officials and NGO's, particularly in the Southern African Development Region should be established.
- (f) Greater monitoring of international adoptions should take place.

7.5 **Jhb Child Welfare Society** recommended that border control officials should be better trained to recognise and deal with trafficking cases. Furthermore, corruption amongst border officials should be dealt with severely.

7.6 **IOM** submitted as follows:

- (a) Provisions in trafficking legislation aimed at preventing trafficking in persons should recognise the demand for exploitative labour and services as a root cause of the phenomenon. Furthermore,
 - (i) trafficking legislation should criminalise the knowing purchase of the labour or services of victims of trafficking;
 - (ii) government, in partnership with relevant organisations, should develop information campaigns for the general public aimed at promoting awareness of the trafficking of persons to South Africa.
- (b) The state should co-ordinate data collection on trafficking in persons.
- (c) The capacity of law enforcement agencies should be strengthened to identify, arrest and prosecute those involved in trafficking as a preventive measure. Specifically, the Department of Justice and Constitutional Development, in partnership with relevant organisations and where appropriate, should
 - (i) Anticipate and remove obstacles to the successful prosecution of traffickers. Such obstacles may include: corruption, legal uncertainty, lack of resources, lack of understanding of the trafficking phenomenon and relevant legislation by police officials, ineffectiveness of the judiciary in applying the law, and failure to exchange information between law enforcement agencies.

- (ii) Create an inter-sectoral task team to combat trafficking. Specialised task teams may include police, immigration and customs officials, assets forfeiture experts, labour inspectors, prosecutors, and relevant international organisations, and should consist of a significant number of female members. In many countries, specialised counter-trafficking task teams have proved important in enhancing co-operation between immigration officials and the police.
- (iii) Provide training on trafficking in persons to all relevant officials involved in the activities of a task team mandated to investigate and prosecute traffickers, and to provide assistance to victims of trafficking.
- (iv) Encourage information exchange between law enforcement, immigration and other relevant officials as well as civil society groups.

7.7 **SWEAT** suggested that labour-related protective measures should be put in place in respect of those forms of illegal and/ or unregulated work into which most victims are being trafficked. According to the respondent, this would provide victims access to protective services and the relevant authorities would be able to intervene when necessary. The respondent further proposed that information regarding work opportunities for women must be distributed through the relevant government departments and non-governmental organisations. Such information should be distributed internationally as well as at border posts and transit areas. Furthermore, communication must take place with membership-based organisations such as sex worker led projects and domestic work organisations in order to enable them to inform their constituencies about the situation in South Africa with regard to work opportunities and the areas where exploitative labour practices are prevalent.

7.8 **SAPS** submitted that severe penalties, public awareness campaigns, both nationally and internationally, sufficient and trained SAPS personnel at ports of entry and monitoring of the movements of both residents of and visitors to the South Africa will reduce the trafficking of persons.

7.9 The **Serious and Violent Crimes Unit** suggested that visa control should be made stricter for countries whose citizens are known to be trafficked to South Africa.

The respondent added that the problems relating to border control between South Africa, Lesotho and Swaziland should be addressed.

7.10 The **Department of Social Development** recommended that the underlying causes of trafficking such as poverty and unemployment should be addressed.

7.11 The **S A Human Rights Commission** submitted that consideration should also be given to what measures could be taken to reduce trafficking within the borders of South Africa. The respondent emphasised the need for public education and awareness-raising on issues relating to trafficking in persons.

7.12 **Anonymous** suggested that awareness on matters relating to trafficking should be raised amongst the public, police officials, custom officials and border officials. Furthermore, a toll free number should be established for victims of trafficking.

7.13 **Lawyers for Human Rights, Pretoria** suggested the following measures:

- (a) stronger border control;
- (b) crack down on corruption;
- (c) harsher sentences; and
- (d) public awareness.

7.14 **Mr Masoa** proposed that more police officials be made available at ports of entry and that specialised training be provided to them. Furthermore, the South African Police Service should liaise with the police service of neighbouring countries.

7.15 The **Sexual Offences and Community Affairs Unit** suggested that effective prosecution of trafficking cases (initially by a team of specialist prosecutors) should be conducted. The respondent said that the proposed trafficking legislation should provide for the establishment and implementation of a special victim assistance programme to address the peculiar needs of victims of trafficking. Furthermore, a linkage between the proposed trafficking legislation and the Witness Protection Act⁵⁷⁴ must be made to provide victim protection in high-risk cases. A determination of

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112 of 1998.

which victims would be admitted to the witness protection programme would then be made according to the set existing criteria.

With reference to article 9 of the Trafficking Protocol, what policies, programmes or other measures should be established in order to educate potential victims of trafficking about the risks of becoming a victim, and to prevent trafficking in persons? What should be the content of such policies, programmes or other measures? Which Department(s) or institution(s) should be responsible for establishing such policies, programmes or other measures?

7.16 **Childline** submitted that, due to the fact that most persons become victims of trafficking in an attempt to escape from poverty, educational strategies must be combined with poverty reduction programmes, access to educational opportunities and the development of a children's and human rights culture. The respondent added that the above should be seen as inter-sectoral responsibilities.

7.17 **Jhb Child Welfare Society** emphasised the need for a Basic Income Grant. The respondent further stated that thorough law enforcement serves as a preventative measure in that the arrest and successful prosecution of a few traffickers, combined with good media coverage, would serve as a deterrent for others.

7.18 The **Department of Foreign Affairs** stated that it, in collaboration with the South African Police Services and Intelligence Services, has a role to play in preventing the trafficking of persons, by monitoring trends, practices and developments relating to trafficking in persons, especially in countries identified as "hot spots" from where or to which persons are being trafficked.

7.19 **SWEAT** suggested that, in consultation with relevant non-governmental organisations, the relevant government bodies must:

- (a) develop curricula on and conduct training for relevant government bodies regarding the rights of victims, the prevalence of and the risks of being trafficked;
- (b) develop awareness-raising and education campaigns regarding trafficking in persons which should be conducted through the mass media and community education programmes;

- (c) distribute materials describing the potential risks of being trafficked, including information on the rights of victims in foreign countries and the names of support and advocacy organisations in countries of origin, transit and destination;
- (d) take measures to ensure that women have viable economic opportunities to support themselves and their families in their home countries;
- (e) ensure that anti-trafficking legislation is gender sensitive and provide protection for the human rights of women;
- (f) provide training for diplomats and foreign service employees on issues relating to trafficking in persons;
- (g) establish labour information centres to provide up-to-date information on all aspects relating to labour migration.

7.20 **SAPS** submitted that the SAPS's Crime Prevention Division, the Departments of Justice and Constitutional Development, Social Development, Home Affairs and Education could play an important role in educating the public about trafficking in persons. The respondent stated that education campaigns should also be conducted in foreign countries since more persons are being trafficked to South Africa than those trafficked from South Africa. Furthermore, embassies, diplomatic personnel and foreign liaison officers in source countries could play an invaluable role in educating persons from these countries about trafficking in persons.

7.21 The **Department of Social Development** submitted that child victims of trafficking should be targeted by the Family Policy and Moral Regeneration Programme of government.

7.22 **Anex Cdw** said that various preventative measures, including the radio, drama and education programmes in schools, could be used to reach rural communities. Parents in rural communities should be thought how to value their children and should be made aware of the dangers that face their children in urban areas such as forcing them to work as domestic servants. Furthermore, urban communities should be made aware of issues relating to trafficking in persons and should be mobilized to assist and to report such instances. Contact details of the police and organisations assisting victims of trafficking should be provided to such victims. Continuous radio inputs on issues relating to trafficking in persons and how to access help need to be advertised.

7.23 **Lawyers for Human Rights, Pretoria** suggested that public awareness on trafficking in persons should be conducted, particularly in poverty stricken areas, rural and disadvantaged communities. The respondent proposed that families at risk should receive counselling as a preventative measure. The respondent added that awareness-raising workshops or programmes could be conducted at schools, community centres, churches and through TV and radio programmes.

7.24 **Mr Masoa** suggested that use be made of radio and television programmes to educate potential victims of trafficking and that SAPS and the Department of Social Development be responsible for the establishment of such programmes.

Given the fact that persons are also being trafficked from rural areas where little, if any, use is being made of television or radio, what is the most effective method to reach these persons through information campaigns?

7.25 **Childline** suggested that information campaigns should be promoted through baby and immunisation clinics, schools, rural retail outlets such as spaza shops, pension payout points, churches and traditional leaders. Furthermore, any opportunity in which groups of people gather together – both formal and informal - should be seen as an opportunity to disseminate information.

7.26 **Jhb Child Welfare Society** said that it would be useful if *Soul City* could be persuaded to use trafficking as a theme for one of their multimedia series. The respondent added that *Soul City's* approach has shown to be extremely successful, and their radio productions do reach the rural areas. Also, their print material could be disseminated in rural schools and clinics.

7.27 **SWEAT** suggested that use should be made of informal communication networks and existing community-based organisations.

7.28 **RAPCAN** submitted that greater awareness in rural areas can be created through the following:

- (a) faith-based organisations;
- (b) schools;
- (c) chiefs and traditional leaders;

- (d) community and non-governmental organisations;
- (e) community radio stations;
- (f) information brochures;
- (g) the media; and
- (h) bill boards.

7.29 **Lawyers for Human Rights, Pretoria** suggested that workshops or awareness-raising programmes should be conducted in community centres, schools and churches in the area.

7.30 **Mr Masoa** proposed that information on trafficking in persons should be conveyed to rural communities through churches, schools and local non-governmental organisations.

What measures can be taken to ensure that victims of trafficking in South Africa are provided with information on, inter alia, their rights, measures in place to ensure their safety, and how to contact appropriate law enforcement authorities?

7.31 **Childline** recommended that victims of trafficking in South Africa should be provided with information by way of television, radio, posters in public places, including transit points such as railway stations, bus stops, and taxi ranks. Furthermore, staff and volunteers who work at existing toll free helplines that offer crisis intervention and assistance to children and adults should be well informed about issues relating to trafficking and rescue and rehabilitative assistance that may be offered to victims of trafficking.

7.32 **SWEAT** recommended that standards for the treatment of victims of trafficking should be developed and integrated into the proposed trafficking legislation. Furthermore, these standards should outline the duties and responsibilities of the State, in partnership with non-governmental organisations, to ensure that victims are fully informed and offered due protections and support services.

7.33 **Lawyers for Human Rights, Pretoria** submitted that campaigns, workshops and pamphlets should be used to provide victims of trafficking with the necessary information. The respondent added that the information should reach key areas such as schools, hospitals, churches, airports and ports of entry.

Evaluation and recommendations

7.34 After due consideration of the submissions received, the Commission recommends as follows:⁵⁷⁵

Public awareness programmes or other measures should be established in order to-

- (a) inform and educate persons at risk of becoming victims of trafficking on issues relating to trafficking in persons, including
 - (i) common recruitment techniques used by traffickers;
 - (ii) tactics used to keep victims of trafficking in exploitative situations;
 - (iii) the forms of abuse to which victims of trafficking are subjected; and
 - (iv) organisations, institutions or law enforcement agencies in South Africa that may be approached for assistance or information.
- (b) inform and educate victims of trafficking on-
 - (i) their rights as victims;
 - (ii) legal or other measures in place to ensure their safety, recovery and repatriation; and
 - (ii) organisations, institutions or law enforcement agencies that may be approached for assistance or information.
- (c) discourage the demand that fosters the exploitation of victims of trafficking, especially women and children.⁵⁷⁶

⁵⁷⁵ See clause 37 of the Bill.

⁵⁷⁶ The Commission has also recommended that the intentional use of the services of victims of trafficking be criminalised. This will help to discourage the demand for the services of victims of trafficking. See in this regard paragraph 5.103 above.

7.35 Furthermore, the proposed public awareness programmes or other measures must include appropriate measures aimed at reaching rural communities and should be reviewed biennially in order to determine their effectiveness.

7.36 It is further important that educational and economic opportunities be improved and expanded for those at risk of becoming victims of trafficking.

7.37 As an additional preventative measure, the Commission has recommended that the Minister for Justice and Constitutional Development may declare a country as a country of origin or destination for victims of trafficking. Persons travelling to and from such countries can then be screened in order to determine whether they are victims of trafficking.⁵⁷⁷ As suggested by the Serious and Violent Crimes Unit, visa control can be made stricter for persons travelling to and from such countries. Furthermore, South African embassy staff situated in countries declared as countries of origin from where persons are being trafficked to South Africa should co-operate with anti-trafficking institutions or organisations in those countries in order to make the public aware about issues regarding trafficking in persons.

Database on trafficking in persons

7.38 South Africa does not have a database for the recording of information on trafficking in persons. However, with regard to children, the National Child Protection Register established in terms of the Children's Bill makes provision for the recording of abuse and deliberate neglect inflicted on specific children and the circumstances surrounding such abuse or neglect. Information on child victims of trafficking who have been abused or deliberately neglected will be recorded in this register. However, information on child victims of trafficking who have not been abused or deliberately neglected will not be recorded.⁵⁷⁸

⁵⁷⁷ See paragraph 6.28 above.

⁵⁷⁸ For example, if a child victim of trafficking is rescued before he or she is transported to the place of exploitation, information regarding the child will not be recorded.

7.39 The United States of America, in terms of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) as amended by the Trafficking Victims Protection Reauthorization Act of 2003, requires that governments of the countries listed in the annual U.S Department of State Trafficking in Persons Report should provide certain data on trafficking in persons in order to be considered as being in full compliance with the minimum standards in order to be rated as a tier 1 country. This Act lists inter alia the following factors that should be considered as indicia of serious and sustained efforts to eliminate trafficking in persons:⁵⁷⁹

(a) Whether the government of the country vigorously investigates and prosecutes acts of trafficking in persons and convicts and sentences persons responsible for such acts, taking place wholly or partly within the territory of the country. After reasonable request from the Department of State for data regarding investigations, prosecutions, convictions and sentences, a government which does not provide such data, consistent with the capacity of such government to obtain such data, shall be presumed not to have vigorously investigated, prosecuted, convicted or sentenced such acts.

(b) Whether the government of the country vigorously investigates, prosecutes, convicts and sentences public officials who participate in or facilitate trafficking in persons, and takes all appropriate measures against officials who condone such trafficking. After reasonable request from the Department of State for data regarding investigations, prosecutions, convictions and sentences, a government which does not provide such data, consistent with its resources shall be presumed not to have vigorously investigated, prosecuted, convicted or sentenced such acts.

(c) Whether the government of the country, consistent with the capacity of such government, systematically monitors its efforts to comply with the minimum standards for the elimination of trafficking as provided for in section 108 of the VTVPA.

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Section 108. See also the discussion under paragraphs 1.11 – 1.13.

Submissions received

*Should a register for victims of trafficking be established? If yes, what should be the purpose of such register? Which Department or institution should be responsible for the administration of such register? Who should have access to such register?*⁵⁸⁰

7.40 The majority of respondents to this question agreed that a register for victims of trafficking should be established in order to –

- (a) record statistical information on trafficking in persons;⁵⁸¹
- (b) monitor trafficking in persons;⁵⁸²
- (c) evaluate whether strategies for the combating of trafficking in persons are effective;⁵⁸³
- (d) identify trafficking “hot spots”;⁵⁸⁴ and
- (e) develop the necessary interventions and programmes.⁵⁸⁵

7.41 **RAPCAN** proposed that the Departments of Social Development, Home Affairs and Health be responsible for the administration of the register. The **Serious and Violent Crimes Unit** suggested that the Department of Home Affairs should keep a record of victims who have been trafficked to South Africa. **Jhb Child Welfare Society** thought it good to assign the SA Human Rights Commission the task of collecting and analysing data on trafficking in persons and to establish whether appropriate “follow-ups” have occurred. Alternatively, a “beefed-up” International Social Services unit should gather the data, and monitor action taken with regard to persons trafficked within South Africa and across its borders.

7.42 **RAPCAN** suggested that it should be mandatory for officials from the Department of Health to report cases of trafficking as they may be the first point of contact with victims of trafficking. The **SA Human Rights Commission** agrees with

⁵⁸⁰ The Commission is of the view that consideration should rather be given to the establishment of a database on trafficking in persons because the establishment of a register for victims of trafficking is a narrower concept. The Commission’s recommendations will therefore focus on the establishment of a database on trafficking in persons.

⁵⁸¹ RAPCAN.

⁵⁸² RAPCAN and the S A Human Rights Commission.

⁵⁸³ S A Human Rights Commission.

⁵⁸⁴ S A Human Rights Commission.

⁵⁸⁵ Jhb Child Welfare Society.

this, but is of the view that the reporting of trafficking cases should be mandatory in general, especially where the victims are children. The respondent stressed the need to back-up mandatory reporting provisions with broad education and awareness-raising programmes.

7.43 **SAPS** did not support the establishment of a register for victims of trafficking. In the respondents view, such a register will have no substantive value in practice.

7.44 **Anonymous** said that a register for victims of trafficking should not be accessible to the public. **Lawyers for Human Rights, Pretoria** stated that only the police and social workers dealing with the case should have access to the register. However, the Department of Home Affairs should be provided with limited access in instances where information is required in order to determine whether victims should be provided with residence permits or other documentation.

7.45 **The Department of Home Affairs** supported the establishment of a register and stated that such a register will help them to better police the movement of traffickers across national borders.

7.46 **Jhb Child Welfare Society** argued that it would be more logical to collect information regarding all trafficking cases and have subsets of data relating to children, than to collect it only for children via the Child Protection Register.

Evaluation and recommendations

7.47 The Commission is, at this stage, not in a position to make recommendations regarding the recording of information on trafficking in persons. This is because the question posed to the respondents was restricted to information on victims of trafficking and did not enquire whether information on offenders should also be recorded.

7.48 Responding to RAPCAN's and the S A Human Rights Commission's suggestions regarding mandatory reporting, the Commission has made recommendations for the reporting of trafficking cases.⁵⁸⁶ The Commission is further

⁵⁸⁶ See paragraphs 6.41 – 6.43 above.

of the view that only certain categories of professional persons should be obliged to report cases of trafficking in persons. Reporting of trafficking cases should be voluntary for the general public.

7.49 The Commission is of the view that a database on trafficking in persons could inter alia contain the following information:

- (a) the countries from which victims are being trafficked to South Africa;
- (b) the countries to which South Africans and other residents are being trafficked;
- (c) the nationality of victims transiting South Africa and the countries to which they are being trafficked;
- (d) the purposes for which the above categories of persons are being trafficked;
- (e) the profiles of the traffickers and their victims;
- (f) the methods and routes used by traffickers to enter South Africa;
- (g) the methods used by traffickers to recruit and transport their victims;
- (h) the types of travel documents that traffickers and their victims have used or attempted to use to cross the borders of South Africa;
- (i) statistics on the number of victims trafficked annually within South Africa and across its borders; and
- (j) the number of trafficking investigations, prosecutions, convictions and the form of sentences imposed on perpetrators.

7.50 The Commission agrees with the respondents on the purposes for which the database (register) on trafficking in persons could be used. In addition to the purposes identified by the respondents, the database could also be used —

- (a) to determine the budget to be allocated for the fight against trafficking in persons;
- (b) to assess the impact and adequacy of measures against trafficking in persons;
- (c) to determine whether there is an increase or decrease in the trafficking of persons;
- (d) to develop co-operation between practitioners in the field of prevention, victim assistance and criminal justice responses; and
- (d) for statistical purposes.

7.51 The establishment of a database on trafficking in persons was discussed at an inter-departmental meeting on trafficking in persons.⁵⁸⁷ At this meeting a representative of the South African Police Service strongly argued for the recording of information on trafficking in persons in the existing register on missing persons. The Commission has investigated this possibility and has found that the register on missing persons is not the appropriate place to record information on trafficking in persons. This register makes provision only for identifying information on missing persons such as the name and identification number of a missing person. A photo of the missing person, if available, is always placed on the register. Consequently, the Commission has requested the South African Police Service to provide it with information regarding the feasibility of recording information relating to trafficking in persons into one of the police databases such as the one used for the recording of crime statistics. The South African Police Service indicated that information relating to trafficking in persons is not being recorded into one of its existing databases. This is because trafficking in persons is currently not a criminal offence in South Africa. They are, however, of the view that the existing Crime Administration System will be feasible to record information relating to trafficking in persons and to provide statistics relating to this crime.⁵⁸⁸

7.52 The Commission invites comments as to whether the existing Crime Administration System of the South African Police Service should be used to record information on trafficking in persons or whether a separate database on trafficking in persons should be established.

7.53 If a separate database on trafficking in persons is to be established, should it be established in terms of the proposed trafficking legislation or be dealt with in terms of policy and which department or institution should be responsible for the establishment and administration of such a database?

7.54 Whether information on trafficking in persons is recorded in the Crime Administration System of the South African Police Service or a separate database established for this purpose, it will be important to establish a process prescribing the method by which the relevant information should reach the Crime Administration

⁵⁸⁷ See paragraphs 1.6 – 1.8 above.

⁵⁸⁸ Information received from the Crime Intelligence Division of the South African Police Service on 28 February 2006.

System or the database. In this regard the Commission invites comments on the following proposals:

7.55 The Department or institution that will be responsible for recording the information must be provided with the following information:

- (a) The South African Police Service must provide information on reported cases of trafficking in persons as well as those under investigation.⁵⁸⁹**
- (b) The National Director of Public Prosecutions must provide information regarding all prosecutions, convictions and sentences imposed relating to trafficking cases.**
- (c) All non-governmental and international organisations that work with or provide services to victims of trafficking and that receive any form of funding from the South African government must provide information on victims of trafficking they have come in contact with.**
- (d) The Department of Home Affairs must provide information regarding the travel documents issued to victims of trafficking repatriated back to South Africa as well as those repatriated to their countries of origin or the countries from where they have been trafficked.**

7.56 Furthermore, guidelines should be established regarding the kind of information to be provided by each of the above institutions.

7.57 The Commission invites comments on which departments, institutions or organisations should have access to the recorded information.

PROCESS AND PROCEDURE

Border control

7.58 The Department of Home Affairs through its National Immigration Branch controls entry to and from South Africa at the following types of locations: land border posts, airports and harbours (sea ports). Co-operation amongst the departments

⁵⁸⁹ It may not always be possible to reveal information regarding trafficking cases still under investigation as this could compromise the police investigation. However, such information should be provided where possible.

responsible for border control is established through a national Border Control Operational Co-ordination Committee (BCOCC).⁵⁹⁰ The Department of Home Affairs is chairing the BCOCC. Amongst the tasks of the BCOCC are the development of infrastructure and the improvement of the appalling conditions and state of the South African border posts.⁵⁹¹ The BCOCC is to operate on a national, provincial and local level. The following committees play a pivotal role to the work of the BCOCC: Aviation, Maritime, and Land and Rail Committees.⁵⁹²

7.59 The South African Police Service has also established a new division called the Protection and Security Services Division. This division is responsible for policing key strategic points in South Africa. Amongst these are certain ports of entry. Pilot projects in this regard have already been established at Johannesburg International Airport, Durban Harbour and Beit Bridge border post.⁵⁹³

7.60 The police, in general, play a significant role in border control. In terms of section 13(6) of the South African Police Service Act,⁵⁹⁴ any member of the South African Police Service may, where it is reasonably necessary for purposes of control over the illegal movement of people or goods across the borders of South Africa, without a warrant search any person, premises, other place, vehicle, vessel or aircraft or any receptacle at any place within 10 kilometres or any reasonable distance from any border between South Africa and any foreign state. Such a search may also be conducted in the territorial waters of South Africa, or inside South Africa within 10 kilometres or any reasonable distance from such territorial waters, or at any airport or within any reasonable distance from such airport. A member is authorised to seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle which may lawfully be seized.

⁵⁹⁰ This Committee has replaced the National Inter-Departmental Structure on Border Control which was created in 1980 through a Cabinet decision and resolved in 2001 through a Cabinet decision.

⁵⁹¹ Address by Honourable Nosiviwe N Mapisa-Nqakula, Minister of Home Affairs, on the occasion of the presentation of the Home Affairs Budget Vote (Vote 4) to the National Council of Provinces on 25 May 2005.

⁵⁹² Briefing of the Department of Home Affairs to the Parliamentary Portfolio Committee on Home Affairs, September 2005.

⁵⁹³ Steinberg Johny "An overview of South African border control: 1994-2004" **Institute for Security Studies Paper 103** April 2005.

⁵⁹⁴ 68 of 1995.

7.61 The South African National Defence Force plays a supporting role in crime prevention and, for the moment, monitors and patrol border lines.⁵⁹⁵

7.62 Despite current measures to control the movement of persons across the borders of South Africa, a significant number of victims of trafficking are being moved across the borders of South Africa without detection. One of the reasons for this is the fact that those tasked with border control are not able to identify possible victims of trafficking. Another reason is corrupt officials who facilitate the crime of trafficking in persons in exchange for payment.

Submissions received

How can border control be strengthened in order to prevent and detect trafficking in persons effectively?

7.63 **Childline** suggested that cases of corruption at border posts should be actively investigated, prosecuted and heavy sanctions should be imposed on perpetrators. Furthermore, staff at border posts should be monitored in the management of their duties.

7.64 The **IOM** submitted as follows -

- (a) Police units with counter-trafficking expertise should be established at all air, land, and sea ports of entry. Such units should consist of police officials already working at various South African ports of entry who are grouped together under a special mandate to monitor trafficking and other irregular movements. Amongst them should be trained detectives to investigate trafficking operations suspected to be active around a port of entry. One such unit already exists at a key international airport with the purpose of monitoring migrant smuggling to or via South Africa – such units and operations could have their mandates expanded to encompass a counter-trafficking function.
- (b) Law enforcement intelligence gathering systems in place at some ports of entry that are being used to inter alia collect data on migrant smuggling should have a

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broader focus to include the collection of data on human trafficking. Such intelligence systems could, for example, be used to analyse arrivals from countries known to be points of origin for victims of trafficking, or profiles of persons arriving in South Africa that fit the profile of a victim of trafficking.

- (c) Law enforcement and immigration officials, particularly those at key ports of entry, should receive specialised training on trafficking in persons. The training should distinguish between the phenomena of trafficking in persons and migrant smuggling, trafficking trends in Southern Africa, common profiles of victims and traffickers, intelligence gathering, identification of victims, victim assistance and referral. Training should have a particular focus on facilitating co-operation between actors with port of entry functions, particularly border police, immigration and customs officials, and the South African National Defence Force. Regular refresher courses should be offered, backed by the latest findings on trafficking operations ongoing within the region, and profiles of victims and traffickers. Where appropriate, training should be offered simultaneously to South African and neighbouring country officials and encourage the participation of female officials. The training should be offered by a combination of port-of-entry policing specialists within South African law enforcement agencies, relevant government departments (especially DHA and DSD), and inter- and non-governmental organisations with expertise in the area of counter-trafficking.
- (d) Immigration and law enforcement officials at key ports of entry should co-operate with relevant government departments and international or non-governmental organisations to conduct information campaigns in border towns, villages, and farms to raise public awareness of the problem of trafficking in persons. Information campaigns should also offer the general public an official channel to supply information on suspected or existing trafficking operations in their communities.
- (e) Law enforcement officials at South African land border posts should conduct joint counter-trafficking operations with officials from neighbouring countries and regularise data collection and information exchange on issues relating to trafficking in persons.

7.65 **SWEAT** suggested that border police should be trained on the following:

- (a) understanding the prevalence and the risks of being trafficked and the rights of victims;
- (b) information on resources and organisations to which victims can be referred;
- (c) training on gender issues;
- (d) networking and communication with other officials and sharing of information; and
- (e) contents of relevant legislation.

7.66 **RAPCAN** recommended that border control should be strengthened as follows:

- proper training should be provided to officials at the borders;
- international agreements on trafficking in persons should be concluded;
- Interpreters should be made available; and
- an independent investigative unit for corruption should be established.

7.67 **SAPS** submitted that border control should not only be the responsibility of the Department of Home Affairs, but should be a concerted effort by all law enforcement agencies, intelligence structures and the S A National Defence Force. The respondent further stressed the importance of co-ordination between itself and the Department of Home Affairs.

7.68 **Lawyers for Human Rights, Pretoria** suggested that border officials should be trained on issues pertaining to trafficking in persons.

7.69 **Molo Songololo (Consultative Workshop)** proposed that the Ministry for Safety and Security should be obliged to implement stricter border control measures to enable the detection of trafficking of foreigners into South Africa.

What measures could be put in place to detect whether children travelling unattended are victims of trafficking?

7.70 **Jhb Child Welfare Society** proposed that children travelling unattended should be interviewed by trained persons in order to establish whether such children are victims of trafficking.

7.71 The **Western Cape Ministry of Community Safety** proposed that children suspected of being trafficked should be interviewed or those travelling with them should prove that they are their parents or guardians.

7.72 The **SA Human Rights Commission** submitted that the Department of Home Affairs should review its legislation to determine whether current legislative measures are sufficient for the protection of unaccompanied minors who travel to South Africa. The respondent mentioned that in the Philippines the Special Protection of Children against Child Abuse, Exploitation and Discrimination Act provides that any child travelling outside the country without his or her parents must obtain a travel clearance document from the Department of Social Welfare and Development. The respondent further mentioned that in the United Kingdom, a private members bill called the Children (Safeguards for Unaccompanied Travel) Bill creates a tracking system for children who travel without their parents into the United Kingdom. The Bill also ensures that social and education services are provided to the children.

7.73 The **Ministry of Home Affairs** recommended that the Immigration Act should address the issue of travel documents or other documentation that should be required when unaccompanied minors exit or enters South Africa or do so with persons other than their parents.

7.74 **NCWSA** suggested that it should be a requirement for children to have their own passports when travelling.

7.75 **Mr Masoa** suggested that guidelines be established on the interviewing of children travelling unattended. This will help to establish whether such children are victims of trafficking.

Evaluation and recommendations

7.76 After due consideration of the submissions received, the Commission is of the view that it is not appropriate to address issues relating to border control in the proposed trafficking legislation. This is because the detection of victims of trafficking is just but one of the purposes of effective border control. Legislative measures on border control will be better addressed in the Immigration Act. The Commission has, however, recommended in paragraph 5.162 and paragraph 6.22 above that national instructions and directives should be issued for police and immigration officials

respectively. One of the matters to be covered by such national instructions or directives relates to the identification, interviewing and treatment of victims of trafficking.

7.77 With regard to IOM's suggestion that police units with counter-trafficking expertise be established at all air, land and sea ports of entry, the Commission proposes that the monitoring of trafficking in persons across the borders of South Africa should form part of the mandate of the Protection and Security Services Division of the South African Police Services. Furthermore, such divisions should be established at all major points of entry.

7.78 With regard to the protection of children travelling unaccompanied, the Commission recommends that section 35 of the Immigration Act be amended as follows:⁵⁹⁶

Duties with regard to conveyances

(1) Save for extraordinary circumstances necessitating otherwise, no person in charge of a conveyance shall cause that conveyance to enter the Republic at any place other than a port of entry.

(2) An immigration officer or other authorised person employed by the Director-General may-

(a) board any conveyance which is entering or has entered into any port of entry and for good cause prohibit or regulate disembarkation from, or the offloading of, such conveyance in order to ascertain the status or citizenship of its passengers; and

(b) request the person in control of a port of entry or any person acting under his or her authority to order the person in charge of a conveyance to park, moor or anchor that conveyance in such port of entry at such distance from the shore or landing place or in such position as he or she may direct.

(3) The person in charge of a conveyance entering or prior to entering a port of entry shall upon demand deliver to an immigration officer-

(a) a list stating-

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See Schedule 1 to the Bill.

- (i) the names of all passengers on board the conveyance, classified according to their respective destinations; and
- (ii) such other details as may be prescribed;
- (b) a list of stowaways, if any have been found;
- (c) a list of the crew and all other persons, other than passengers and stowaways, employed, carried or present on the conveyance; and
- (d) a return, under the hand of the medical officer of that conveyance or, if there is no such medical officer, under the hand of the person in charge of a conveyance himself or herself, stating-
 - (i) any cases of disease, whether infectious or otherwise, which have occurred or are suspected to have occurred upon the voyage;
 - (ii) the names of the persons who have suffered or are suffering from such disease;
 - (iii) details of any birth or death which occurred upon the voyage between such port of entry and a previous port; and
 - (iv) any other prescribed matter or event:

Provided that such immigration officer may-

(aa) exempt from the requirements of this subsection the master of a ship destined for any other port in the Republic, subject to compliance with the duty to deliver such lists or return at such port and with any directive such immigration officer may issue to the master; and

(bb) if satisfied that a name should be added to or deleted from any of such lists, authorise such addition or deletion.

(e) a list of unaccompanied children on board of the conveyance.

(3A) If an immigration officer has reason to believe that an unaccompanied child listed on the list referred to in section 3(e) is a victim of trafficking, he or she must forthwith report the matter, in terms of section 12 of the Combating of Trafficking in Persons Act, ... (Act No. ... of ...) to a police official.

(4) If a conveyance arrives at a port of entry with a passenger on board bound for a destination outside the Republic who is not on board when the conveyance leaves such port of entry and has not been admitted, the person in charge or the owner of that conveyance shall forfeit a sum fixed by the immigration officer within a prescribed limit.

(5) An immigration officer may require the person in charge of a conveyance to muster the crew of such conveyance on the arrival of such conveyance in any port of entry and again before it leaves such port of entry.

(6) The competent officer of customs at any port of entry may refuse to give to the person in charge of a conveyance clearance papers to leave that port of entry, unless he or she has complied with this Act and produced a certificate of an immigration officer to that effect.

(7) A person in charge of a conveyance shall ensure that any foreigner conveyed to a port of entry-

(a) for purposes of travelling to a foreign country, holds a valid passport and transit visa, if required; and

(b) holds a valid passport and visa, if required.

(8) A person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission in the prescribed manner, as well as for any costs related to such detention and removal incurred by the Department.

7.79 The Commission recommends that immigration officials should be trained on how to interview unaccompanied children in order to determine whether they are victims of trafficking.

7.80 The Commission's views and recommendations regarding corruption and training are set out in paragraphs 5.105 – 5.124 and paragraphs 8.24 – 8.34 respectively.

Security and control of travel and other identification documents

Current position

7.81 The crime of trafficking in persons is often facilitated by the production and supply of forged and/or fraudulently acquired documentation. Air tickets may be altered by removing the details on the ticket with a soft eraser or chemical and then re-type new details on the ticket. These tickets are sold on the black market at a nominal fee. Local criminals have mastered the ability to alter air tickets. For example, on 13 January 2004, check-in staff at Angola Airlines detected that flight codes and fare details were altered in three Angolan citizens' air tickets departing from Johannesburg International Airport to Angola.⁵⁹⁷ Some syndicates use "cloned

⁵⁹⁷ This information corresponds with intelligence on the issue.

passports". Cloned passports are genuine, but stolen passports. The details in the passport are copied by printing it in a passport with an illegal immigrant's photo. Such passports are difficult to detect depending on the quality of the printing used.⁵⁹⁸

7.82 South Africa is in possession of advanced equipment to determine whether travel documents have been forged. However, given the high cost of this equipment, it is not available at all ports of entry. Training is also being provided to immigration officials to facilitate the detection of forged documents. Immigration officials have less than 30 seconds to scan travel documentation at ports of entry such as airports where large number of persons arrive simultaneously. It is therefore possible that some persons succeed in entering the country with forged travel documentation without being detected.

7.83 South African law deals with the problem only to a limited extent. The Immigration Act makes it an offence for any civil servant to (a) provide false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner, (b) facilitate such illegal foreigner to disguise his or her identity or status, or (c) accept any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of the Act. Any person, other than a civil servant, who manufactures or provides or causes the manufacturing or provision of a document purporting to be a document issued or administered by the Department of Home Affairs, is guilty of an offence.⁵⁹⁹ Also, any person who through offers of financial or other consideration or threats, compels or induces an officer to contravene the Act or to breach such officer's duty, is guilty of an offence.⁶⁰⁰

Measures to improve the security of identification documents and passports

7.84 South Africa is making significant efforts to improve the security of identification documents and passports. The introduction of smart identification (ID) cards was approved by Cabinet on 25 July 2001. The Department of Home Affairs is currently in the process of introducing smart identification cards which will replace the green bar-coded identification books. The smart ID cards will form part of the Home Affairs National Identification System (HANIS) which consists of an Automated

⁵⁹⁸ Ibid.

⁵⁹⁹ Section 49(9).

⁶⁰⁰ Section 49(10).

Fingerprint Identification System (AFIS) and the System Integration. The Department has started to implement the AFIS and System Integration components of HANIS with the introduction of the Electronic Document Management System as well as a Back Record Convention process to convert all fingerprint records into electronic format to allow for online biometric verification.

7.85 The smart ID card will be based on integrated chip technology. The bearer's personal information such as the bearer's name, date of birth, photo and fingerprint will be stored encrypted on a chip. The smart ID card will cater for at least the following three levels: (a) visual inspection, (b) off-line verification and (c) on-line verification. Because of these characteristics, it would be very difficult and expensive to forge the smart ID cards.⁶⁰¹

7.86 In addition to the smart ID cards; the Department of Home Affairs plans to issue passports which will, similarly to the smart ID cards, be based on integrated chip technology.

Comparative overview

7.87 False or altered travel and/or other identification documents allow traffickers and their victims' virtually free passage from country to country. Recognising this, various countries have taken measures to improve the security of their documents. Germany is currently in the process of producing electronic passports with highly secure chips which will make counterfeiting and unauthorised use virtually impossible. In the new German electronic passport, the printed information about the bearer's identity such as the bearer's name, date of birth, and photo, as well as the passport's validity period and number will be stored encrypted on a chip. Germany also plans to store the fingerprint of each of the bearer's index finger in encrypted form as from March 2007. The data stored on the chip would be accessible only when the passport is opened, and when transmitted contactlessly to an authorised and certified read-write device. More than 50 individual security features burned deep inside the chip using state-of-the-art technology will help ensure that personal data is protected against unauthorised read-out and manipulation. The security features integrated into the chips also include active protective shields on the surface of the

⁶⁰¹ Telephonic discussion with Mr Reynecke from the Department of Home Affairs on 26 July 2005.

chip and sensors that prevent hackers from being able to read out the chip by applying different voltages.⁶⁰² The Czech Republic uses new visa foil with increased security features.⁶⁰³ In the Philippines, the Department of Foreign Affairs is responsible for taking the necessary measures to ensure the efficient implementation of machine readable passports to protect the integrity of Philippine passports, visas and other travel documents.⁶⁰⁴

Submissions received

What can be done to improve the detection of forged travel documents at ports of entry?

7.88 The **University of Cape Town Legal Aid Clinic** said that immigration officials should always bear in mind the rights enshrined in the Bill of Rights regarding freedom of movement, privacy, search and seizure. Thus, there must be a reasonable suspicion that a travel document is forged or fraudulent before it can be seized. The respondent suggested that highly advanced equipment that can detect forged documents must be installed, at least, at the main ports of entry which are high risk areas.

7.89 **NCWSA** mentioned that several countries are using biometric documentation in order to improve the detection of forged travel documents.

7.90 **Lawyers for Human Rights, Pretoria** suggested that immigration officials should be provided with training and the necessary equipment which will enable them to detect forged documents.

7.91 **Mr Masoa** proposed that the number of immigration officials should be increased and that the necessary training should be provided to them.

With reference to article 12 of the Trafficking Protocol, how can the Department of Home Affairs ensure that travel or identity documents issued by it are of such quality

⁶⁰² Smart Card Alliance “New German Passport to Contain Contactless Secure Chips from Infineon” Industry News: Alliance News 9 June 2005.

⁶⁰³ US Department of State **Trafficking in Persons Report** June 2004, p.134.

⁶⁰⁴ Section 16(a) of the Republic Act No. 9208 – Anti-Trafficking in Persons Act.

that they cannot easily be misused, readily falsified, unlawfully altered, replicated or issued?

7.92 The **Western Cape Ministry for Community Safety** suggested that travel and other identification documents should be equipped with film cover, similar to that used in the Australian dollar which will make it difficult to forge.

7.93 **Lawyers for Human Rights, Pretoria** proposed that the Department of Home Affairs should make use of the latest technology to improve the security of its documents.

Evaluation and recommendations

7.94 As smart ID card technology is widely recognised as the best choice for improving the security of identification documents and passports, the Commission endorses the Department of Home Affairs' efforts to improve the security of South African identification documents and passports. The Commission would like to urge the Department to finalise the process of introducing smart ID cards as soon as possible.

7.95 The Commission further urges the Department of Home Affairs to ensure that all ports of entry are provided with the necessary equipment to detect forged travel and other identification documents and that immigration officials at ports of entry are provided with the necessary training to detect forged documents.

7.96 **The Commission further recommends that the Director-General of the Department of Home Affairs must, at the request of another state that is a party to the Trafficking Protocol or to an agreement relating to trafficking in persons, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued by the department and suspected of being used for the commission of the offence of trafficking in persons.**⁶⁰⁵

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See clause 45 of the Bill.

CHAPTER EIGHT

NON-LEGISLATIVE MEASURES

Training of law enforcement officials

8.1 In order to ensure the effective implementation of the proposed trafficking legislation, the training of those tasked with the implementation thereof is crucial. Various government departments have a role to play in the implementation of the proposed legislation. These include inter alia the Departments of Justice and Constitutional Development, Home Affairs, Social Development, Education, Health and the South African Police Service. The role that non-governmental organisations play in the provision of services to victims of trafficking is also of utmost importance. Hence, training on issues relating to trafficking in persons should be targeted at not only government departments directly responsible for the implementation of the proposed legislation, but also at those who usually come into contact with victims of trafficking in the course of their work.

Comparative overview

8.2 Various countries have programmes in place to train those tasked with the implementation of measures against trafficking in persons. Just to mention a few,⁶⁰⁶ in Turkey, the Ministry of Interior has compiled a training programme on trafficking in persons for several officials, including judges and prosecutors.⁶⁰⁷ In 2004, the Government of Croatia incorporated anti-trafficking training into the police academy curriculum.⁶⁰⁸ Hong Kong provides training on how to deal with witnesses and victims of trafficking to police officials and social workers.⁶⁰⁹ In the Republic of Korea, the Ministry of Justice Training Institute conducts 10 classes annually on various aspects of detecting and handling trafficking cases.⁶¹⁰ In January 2005, the Austrian Ministry of Justice held a training conference on trafficking for approximately 75 judges, public

⁶⁰⁶ Other countries providing training to law enforcement officials include Bosnia and Herzegovina, Croatia, Denmark, Macedonia, Poland, Uzbekistan, Qatar, Pakistan, and Suriname.

⁶⁰⁷ Information received from the Embassy of the Republic of Turkey on 20 June 2003.

⁶⁰⁸ USA Department of State **Trafficking in Persons Report** June 2005, p. 90.

⁶⁰⁹ US Department of State **Trafficking in Persons Report** June 2004, p.93; USA Department of State **Trafficking in Persons Report** June 2005, p. 121.

⁶¹⁰ US Department of State **Trafficking in Persons Report** June 2004, p.100.

prosecutors, police and officials from the Ministries of Interior and Justice.⁶¹¹ Latvia provides annual training to consular officers assigned abroad on how to recognise trafficking cases and to assist victims in obtaining the necessary travel documents to return to Latvia.⁶¹² In Bosnia and Herzegovina in 2004, the State Co-ordinator's Office provided four training seminars addressing trafficking-related investigations and prosecutions for judges, prosecutors and police. The State Border Service further provided training to its officers on victim identification, interviewing techniques and referral procedures.⁶¹³ In 2004, the Swiss Ministry of Foreign Affairs provided specialised training to its consular staff and distributed trafficking awareness information to visa applicants in local languages, directed especially at those applying for entertainer visas.⁶¹⁴

Submissions received

Should provisions on training for law enforcement officials on the issue of trafficking in persons be included in the envisaged legislation on trafficking in persons? If yes, what should be the content of the training programme for the police, immigration officers, social workers and the judiciary respectively?

8.3 **Childline** stated that it is highly desirable to provide in legislation for specialised training of personnel involved in the management of crimes relating to trafficking in persons. The respondent suggested that the following be included in the training programme:

- (a) The content of anti-trafficking legislation.
- (b) The process to be followed in investigating cases of trafficking in persons.
- (c) The methods used by traffickers to ensnare their victims and understanding the psycho-social functioning of victims.
- (d) Possible rehabilitation needs and available resources for such rehabilitation.
- (e) Self care and debriefing.

⁶¹¹ USA Department of State **Trafficking in Persons Report** June 2005, p. 59.

⁶¹² US Department of State **Trafficking in Persons Report** June 2004, p.154; See also USA Department of State **Trafficking in Persons Report** June 2005, p 142.

⁶¹³ US Department of State **Trafficking in Persons Report** June 2005, p.70.

⁶¹⁴ USA Department of State **Trafficking in Persons Report** June 2005, p. 207.

8.4 With regard to point (e), the respondent stated that the management of crimes, especially crimes relating to the exploitation of children, may have a profound impact on the psyche of the professional managing the case or providing services to the victim. Debriefing and the knowledge to know when one must use debriefing opportunities are thus essential components of self care.

8.5 **Jhb Child Welfare Society**, the **SA Human Rights Commission** and **Mr Masoa** answered the question in the affirmative. Jhb Child Welfare Society submitted that the content of training programmes should be based on the inputs received from organisations specialised in dealing with trafficking and commercial sexual exploitation cases. Mr Masoa proposed that training should focus on the protection of the rights of victims of trafficking, the prosecution of traffickers, the means and methods used by traffickers and measures for detecting trafficking cases.

8.6 The **Children's Rights Project** suggested that the legislation should oblige the relevant Departments, namely, Safety and Security, Home Affairs, Social Development and Justice to provide for training of their officials. Furthermore, provision for training must be made a component of each of the department's budgets.

8.7 **SWEAT** recommended that the content of training programmes should be based on the following:

- (a) The principle of non-discrimination.
- (b) Safety and fair treatment.
- (c) Access to justice.
- (d) Right to institute civil action and claim reparation.
- (e) Residency status.
- (f) Health and other services.
- (g) Repatriation and reintegration.
- (h) Government co-operation.

8.8 **Ms Koen** submitted that legislation should mandate the training of law enforcement officials, but should not specify the content of training programmes. The respondent suggested that law enforcement officials should be trained on how to (a) identify a case of trafficking in persons, (b) identify a victim of trafficking, and (c)

interview victims of trafficking and other witnesses.⁶¹⁵ The respondent added that model strategies such as the Model Strategies and Practical Measures on the Elimination of Violence against Women⁶¹⁶ that have been developed at the international level should also be considered.

8.9 The **Western Cape Ministry for Community Safety** suggested that training programmes should include the protection of the rights of victims, counselling of victims and the prosecution of traffickers.

8.10 **UCT Legal Aid Clinic** suggested that all immigration officials must undergo mandatory training on trafficking. Furthermore, training programmes must deal with trafficking as a human rights issue.

8.11 The **Immigration Law Committee of the Law Society of the Northern Provinces** suggested that officials from the Department of Home Affairs, particularly immigration officials, should undergo training to sensitise and to familiarise them with the international instruments addressing trafficking in persons and the Bill of Rights.

8.12 **Anex Cdw** suggested that the police, social workers and volunteers should be provided with training by experienced non profit organisations.

8.13 **Molo Songololo** answered the question in the affirmative. The respondent proposed that social workers, mental health professionals and other health professionals who work with children at risk, particularly in rural areas, should receive mandatory training on trafficking in persons. Such training should focus on the consequences of trafficking in persons, intervention, reintegration and treatment. Furthermore, law enforcement officials in rural areas, areas near ports of entry, border police and immigration officials should receive mandatory training. Such training should focus on the following:

- (a) the manifestation of the crime of trafficking in persons;
- (b) the detection and investigation of trafficking cases;

⁶¹⁵ This suggestion is supported by the Western Cape Ministry of Community Safety.

⁶¹⁶ **Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice** Annex to General Assembly Resolution A/RES/52/86 (February 1998)

- (c) interviewing and de-briefing;
- (d) statement taking;
- (e) referral of victims to relevant social assistance agencies;
- (f) legislative measures addressing trafficking in persons;
- (g) the interviewing of child victims of trafficking and their needs; and
- (h) social crime prevention strategies in respect of trafficking in persons.

8.14 **Molo Songololo (Consultative Workshop)** suggested that police officials should receive training on issues relating to trafficking in persons and officials working at ports of entry should receive compulsory training. Furthermore, the South African Police Service should be obliged to provide such training to new recruits through Police Training Colleges.

8.15 **Lawyers for Human Rights, Pretoria** answered the question in the affirmative. The respondent submitted that the content of training programmes should be broad and should inter alia deal with the identification of victims of trafficking, the prevention of trafficking in persons, the protection of victims of trafficking and the prosecution of traffickers.

Are there any other categories of persons which in your view should be provided with training on the issue of trafficking in persons? If yes, who, and what should be the content of such training programmes?

8.16 **Childline** suggested that training should be provided to health professionals and non-governmental organisations providing psycho-social services to victims of trafficking. The respondent added that it may be helpful for correctional services staff and parole board members to have some basic training on trafficking.

8.17 **Jhb Child Welfare Society** proposed that all the sectors involved in the National Strategic Plan for the Management of Child Abuse, currently being drafted by the Department of Social Development, should have information about trafficking included in their training programmes. The respondent suggested that each sector should have some guidelines for the management of actual or suspected trafficking cases in its internal protocol. The respondent identified the relevant sectors, in addition to those already mentioned, to be the Departments of Health, Labour, Education and Correctional Services.

8.18 **SWEAT** suggested the inclusion of childcare workers, embassy personnel, relevant labour and health officials.

8.19 **SAPS** suggested that intelligence officials, immigration officials, and officials from the Defence Force should be included in the list of persons who will require training on the envisaged legislation.

8.20 The **SA Human Rights Commission** submitted that non-governmental organisations such as those that work with children, women, sex workers and refugees would also benefit from training programmes.

8.21 **Anonymous** suggested that the following categories of persons should be provided with training: NGOs, prosecutors, police officials, shelter operators, social services, border police, customs and airport personnel. The respondent mentioned that annual meetings comprised of police officials, prosecutors and NGOs to discuss the outcome of trafficking cases have proved to be useful.

8.22 **Lawyers for Human Rights, Pretoria** suggested that any person or organisation that usually comes into contact with victims of trafficking should be provided with training. The respondent added that although training programmes should be broad, such programmes should focus on preventative measures and support services to victims.

8.23 **Mr Masoa** proposed that traffic police officials should also benefit from training programmes.

Evaluation and recommendations

8.24 Although the respondents agreed that training on trafficking in persons should be provided for in the proposed trafficking legislation, the Commission, after due consideration, concludes that the issue of training will best be addressed in policy. Policy is more flexible to amend should the need arise to revisit and change any aspect relating to training on trafficking in persons.

8.25 The Commission is pleased to note that various organisations have commenced with training courses on issues relating to trafficking in persons. The IOM has been conducting training seminars at all major border crossing points and

ports of entry. This training was directed primarily at border police and immigration officials. The IOM is also providing training to non-governmental organisations and the Department of Social Development. This training focuses mainly on the provision of appropriate services to victims of trafficking. The Organised Crime Unit of the South African Police Service conducts five training sessions on the issue of trafficking per annum. Furthermore, Molo Songololo, a non-governmental organisation based in Cape Town, has conducted a number of two-day training sessions for members of the South African Police Service in Cape Town.⁶¹⁷

8.26 In terms of an agreement between the South African government and the European Union, the Tea Cegos Consortium has compiled a Report on a Programme of Assistance to the South African Government to Prevent and React to Human Trafficking and to Provide Support to the victims of the crime (hereafter referred to as “the Report”). One of the result areas of the report is capacity building and training. The Report identifies the training needs of the following institutions as a priority:

- The South African Police Service.
- The Department of Home Affairs: National Immigration Branch and Refugee Affairs.
- The National Prosecuting Authority: Directorate of Special Operations, the National Prosecutors’ Service and the Asset Forfeiture Unit.
- The Department of Labour.
- The Department of Social Development.
- Non-governmental organisations providing services to victims of trafficking.

8.27 The Report recommends that the Regional Office of the IOM, based in Pretoria, be responsible for co-ordinating the proposed training. The Report further recommends that a training needs analysis be conducted in respect of the above-mentioned institutions in order to ensure that training is directed at the appropriate persons.

⁶¹⁷

Report on a Programme of Assistance to the South African government to Prevent and React to Human Trafficking and to Provide Support to the victims of the crime June 2005, compiled by the Tea Cegos Consortium, p. 19 -20.

8.28 The Commission believes that resources should be utilised optimally and does not wish to reinvent the wheel by making recommendations for training on trafficking in persons, separately from those recommended in the Report.

8.29 Given the IOM's expertise on issues relating to trafficking in persons and the active role it has been playing in conducting training courses on the issue, the Commission endorses the Report's recommendation that the IOM should be responsible for co-ordinating the training component of the programme.

8.30 In addition to the institutions identified to receive training on trafficking in persons, the Commission recommends that the following institutions should also receive training:

- Officials from the National Intelligence Agency dealing with cases of trafficking in persons.
- Officials from the Defence Force responsible for border control.
- South African embassies abroad.

8.31 As the IOM has branches in most countries, the training of relevant South African embassy staff could be done with little effort. Educating embassy staff on issues relating to trafficking in persons will enable them to identify potential victims of trafficking applying for South African visas. Embassies could inter alia do the following:

- (a) Inform young women about the risks of becoming a victim of trafficking.
- (b) Report unaccompanied children travelling to South Africa to the authorities for purposes of monitoring such children until they have reached their destination.⁶¹⁸
- (c) Keeping themselves informed regarding the trafficking situation within the countries where they are based.

8.32 The Commission recommends that training of border officials should, where possible, include the training of border officials of countries sharing a border with South Africa. This will facilitate the identification of traffickers and their victims prior to

⁶¹⁸ This is in line with guideline 8 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking which provides that special protective measures for children must include the rapid identification of child victims of trafficking. See in this regard paragraph 2.4 above.

entering South Africa. Furthermore, training should also be provided to health care workers who may come into contact with victims of trafficking.

8.33 The Commission recommends that, in addition to the training needs within a particular institution, training on issues relating to trafficking in persons should in general focus on the following:

- International and regional instruments, especially the Trafficking Protocol, relating to trafficking in persons.
- Legislation and policy relating to trafficking in persons.
- Causes making persons vulnerable to becoming victims of trafficking.
- The investigation of trafficking cases, including investigation techniques and the kind of evidence needed for a successful prosecution.
- The prosecution of traffickers.
- Means and methods used by traffickers, including the recruitment and transportation of victims, routes and links between and amongst individuals and groups engaged in trafficking operations, and possible measures for detecting them.
- Common profiles of traffickers and victims of trafficking in persons.
- The protection of victims, including the identification, referral, needs, care, treatment of and resources available for victims of trafficking.
- The prevention of trafficking in persons, including educational and awareness-raising campaigns.
- The rights of victims of trafficking, including their rights as set out in the Victim's Charter.
- The various purposes for which persons may be trafficked and the industries into which they may be trafficked.
- The distinction between trafficking in persons and human smuggling.
- The need for co-operation and the exchange of information amongst law enforcement officials.
- The benefits of partnership between law enforcement officials and non-governmental organisations providing services to victims of trafficking.

8.34 The Commission would like to emphasize that the European Union's programme of assistance to the South African government should not be seen as discharging those departments responsible for implementing the proposed trafficking

legislation from training their personnel on the content and implementation of the proposed legislation. These departments should ensure that provision for training is included in their respective budgets. **The Commission therefore recommends that the relevant departments, including the Departments of Justice and Constitutional Development, Home Affairs, Social Development and the South African Police Service, should ensure that they have policies in place regarding training on the content and implementation of the proposed trafficking legislation.**

ANNEXURE A

REPUBLIC OF SOUTH AFRICA

COMBATING OF TRAFFICKING IN PERSONS BILL

(As introduced in the National Assembly)
(The English text is the official text of the Bill)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B ... -2006]

BILL

To give effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime, 2000; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for measures to protect victims of trafficking in persons and to prevent trafficking in persons; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING that poverty and unemployment are the main causes making persons vulnerable to becoming victims of trafficking;

CONCERNED by the increase of trafficking in persons, especially women and children, and the increasing role played by organised criminal networks in trafficking in persons;

WHEREAS the South African common law and statutory law do not deal with the problem of trafficking in persons adequately;

AND WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 enshrines the right to human dignity, the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause, the right not to be subjected to slavery, servitude or forced labour, and the right of children to be protected from maltreatment, neglect, abuse or degradation;

MINDFUL of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000, and other international instruments which place obligations on the Republic of South Africa towards the combating and, ultimately, eradication of trafficking in persons,

B **E IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

DEFINITIONS, OBJECTS AND IMPLEMENTATION OF ACT

Definitions

1. (1) In this Act, unless the context indicates otherwise—

“abuse of vulnerability” for purposes of the definition of trafficking, means such physical or psychological abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to taking advantage of the vulnerabilities of that person resulting from—

- (a) the person having entered the Republic illegally or without proper documentation;
- (b) pregnancy;
- (c) any disability of the person;
- (d) addiction to the use of any substance; and
- (e) reduced capacity to form judgements by virtue of being a child;

“accredited organisation” means an organisation accredited in terms of section 23 to provide accommodation to adult victims of trafficking;

“centre for adult victims of trafficking” means a facility described in section 18;

“child” means a person under the age of 18 years;

“children’s court” means a children’s court referred to in section 42 of the Children’s Act, ... (Act No. ... of ...);

“debt bondage” means the status or condition that arises from a pledge by a person—

- (a) of his or her personal services; or
- (b) of the personal services of another person under his or her control;

as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given, by that person if:

- (i) the debt owed or claimed to be owed is manifestly excessive;
- (ii) the value of those services as reasonably assessed is not applied toward the liquidation of the debt or purported debt; or

- (iii) the length and nature of those services are not respectively limited and defined;

“exploitation” includes—

- (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;
- (b) sexual exploitation;
- (c) servitude;
- (d) forced labour;
- (e) child labour as defined in section 1 of the Children’s Act, ... (Act No. ... of ...); and
- (f) the removal of body parts;

“forced labour” means labour or services obtained or maintained through threats, the use of force, intimidation or other forms of coercion, or physical restraint;

“guardian” means a person as defined in section 1 of the Children’s Act, ... (Act No. ... of ...);

“illegal foreign child” means a child who is present in the Republic in contravention of the Immigration Act, 2002 (Act No. 13 of 2002);

“Minister” means the Cabinet member responsible for the administration of justice, or where the context indicates another Minister, that Minister;

“National Director of Public Prosecutions” means the person contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 and appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

“parent” means a person as defined in section 1 of the Children’s Act, ... (Act No. ... of ...);

“parental responsibilities and rights” in relation to a child, means the responsibilities and rights referred to in section 18 of the Children’s Act, ... (Act No. ... of ...);

“person” for purposes of this Act includes a natural person, a juristic person and a partnership, unless the context indicates otherwise;

“removal of body parts” means the removal of any organ or other body part from a living person in contravention of the National Health Act, 2003 (Act No. 61 of 2003);

“Republic” means the Republic of South Africa;

“servitude” means a condition in which the labour or services of a person are provided or obtained through threats of serious harm to that person or another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person does not perform such labour or services, that person or another person would suffer serious harm;

“sexual exploitation” means the participation of a person in prostitution or other sexual acts, or the production of pornographic material as a result of being subjected to threat, force, intimidation or other forms of coercion or any other practice in terms of which it cannot be said that the person participated voluntarily;

“slavery” means the exercise of any or all of the powers attaching to the right of ownership over a person;

“social worker” means a person who is registered or deemed to be registered as a social worker in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978);

“trafficking” means—

(a) the recruitment, sale, supply, procurement, capture, removal, transportation, transfer, harbouring or receipt of persons, within or across the borders of the Republic—

(i) by any means, including the use of threat, force, intimidation or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control or authority over another person; or

(ii) by abusing vulnerability,

for the purpose of exploitation;

(b) includes the adoption of a child facilitated or secured through illegal means;

and “trafficks” or “trafficked” has a corresponding meaning;

“UN Protocol to Prevent, Suppress and Punish Trafficking in Persons” means the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000, the English text of which is replicated in Schedule 2;

“victim of trafficking” means any person who is a victim of the offence of trafficking in persons.

Objects of Act

2. The objects of this Act are—
- (a) to give effect to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons;
 - (b) to provide for the protection of victims of trafficking and the prevention of trafficking in persons; and
 - (c) generally to combat trafficking in persons.

Implementation of Act

3. (1) This Act must be implemented in an integrated, co-ordinated and uniform manner, by organs of state in the national sphere of government subject to any specific provision of this Act allocating roles and responsibilities.

(2) Recognising that competing social and economic needs exist, organs of state in the national sphere of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act.

CHAPTER 2

GUIDING PRINCIPLES

Guiding principles when deciding the question whether person is victim of trafficking

4. When deciding the question as to whether a person is a victim of trafficking in terms of this Act, regard must be had to all the circumstances of the particular case, including such of the following guiding principles as may be relevant in a particular case:

- (1) Whether the person is in an exploitative situation through one or more of the following means—

- (a) violence, force, coercion, intimidation or threats;
 - (b) threats of violence against the person's family members or friends;
 - (c) threats of witchcraft to prevent the person from escaping or to keep control over him or her;
 - (d) forcing the person to use drugs or causing the person to be addicted to drugs as a means of controlling him or her or to make him or her dependent on the traffickers;
 - (e) photographing or video-taping the person while participating in sexual activities or other illegal activities for the purpose of threatening him or her with exposure to friends, family members or the authorities if he or she fails to submit to the demands of the traffickers;
 - (f) forcing the person to witness the beating, rape or even murder of another person as a demonstration of what will happen to the person if he or she fails to obey the traffickers; or
 - (g) threatening the person with arrest by the police for being illegally in the country or for offences committed as a direct result of his or her situation as a victim of trafficking.
- (2) Whether the movement of the person is restricted through one or more of the following means—
- (a) keeping the person under surveillance when taken to a doctor, hospital or clinic for treatment;
 - (b) not allowing a person working at a brothel or similar establishment to leave the premises unless accompanied by the traffickers or their associates;
 - (c) transporting the person between his or her place of employment and living quarters under the surveillance of a guard; or
 - (d) keeping the person behind closed doors, under guard or electronic surveillance.

- (3) Whether the person suffers from one or more of the following health conditions—
- (a) signs of rape or other forms of sexual exploitation;
 - (b) emotional distress or psychological manifestations of trauma such as depression, anxiety, post-traumatic stress and self-inflicted injuries;
 - (c) bruises, burns, broken bones or other signs of physical abuse;
 - (d) forced abortions;
 - (e) untreated illnesses or infections; or
 - (f) malnutrition and poor personal hygiene.
- (4) Whether the passport, identity document or other travel document of the person has been destroyed by or is in the possession of another person.
- (5) Whether the person is in possession of a fraudulent passport, identity document or other travel document.
- (6) Whether evidence exists that the person has been forced to lie to his or her family or friends about his or her safety, well being and whereabouts.
- (7) Whether the person has been subjected to debt bondage.
- (8) Whether the person has been forced to work whilst earning little, if any, money.
- (9) Whether the person has been required to do work that is different than originally promised to him or her.

CHAPTER 3**OFFENCES****Trafficking in persons¹**

5. (1) Any person who intentionally and unlawfully trafficks another person or allows another person to be trafficked is guilty of the offence of trafficking in persons.

(2) It is no defence to a charge of contravening subsection (1) that—

(a) a person who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to—

(i) the intended exploitation; or

(ii) the adoption of the child facilitated or secured through illegal means; or

(b) the intended exploitation or adoption of a child referred to in paragraph (a) did not occur.

(3) In order to establish the liability, in terms of subsection (1), of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting—

(a) within the scope of his or her employment;

(b) within the scope of his or her actual or apparent authority; or

(c) with the express or implied consent of a director, member or partner of the employer or principal.

(4) Subsection (3) does not exclude the liability of an employee or agent of or any other person acting on behalf of the employer or principal for committing the offence of trafficking in persons.

(5) A finding by a court that an employer or principal has contravened subsection (1) serves as a ground for revoking the licence or registration of the employer or principal to operate.

¹ This clause gives effect to article 5(1) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (hereafter referred to as “the Trafficking Protocol”).

Debt bondage

6. Any person who intentionally and unlawfully engages in conduct that causes another person to enter into debt bondage is guilty of an offence.

The Commission requests comments as to whether debt bondage should remain a separate offence or whether it should form part of the offence of trafficking in persons by including it in the definition of trafficking as one of the means that could be used to force a person into an exploitative situation.

Destruction, confiscation, possession and concealment of documents

7. Any person who intentionally and unlawfully destroys, confiscates, possesses, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in furtherance of the offence of trafficking in persons is guilty of an offence.²

The Commission requests comments as to whether the above provision or the proposed amendment to section 49(15) of the Immigration Act, 2002 (Act No. 13 of 2002) is preferable.

Using the services of victims of trafficking³

8. Any person who intentionally and unlawfully benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another person's usage of the services of a victim of trafficking is guilty of an offence.

² This provision is an alternative to the amendment of section 49(15) of the Immigration Act, 2002 (Act No. 13 of 2002). See in this regard Schedule 1 to the Bill, p 311.

³ This clause is in line with article 9(5) of the Trafficking Protocol.

Conduct facilitating trafficking in persons

- 9.** (1) Any person who—
- (a) intentionally and unlawfully leases or subleases or allows any room, house, building or establishment to be used for the purpose of harbouring a victim of trafficking; or
 - (b) advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology,
- is guilty of an offence.
- (2) An Internet service provider operating in the Republic must report to the South African Police Service any site on its server that contains information in contravention of subsection (1)(b).
- (3) An Internet service provider who fails to comply with the provisions of subsection (2) is guilty of an offence.

CHAPTER 4

IDENTIFICATION AND PROTECTION OF VICTIM OF TRAFFICKING

Declaring country as country of origin or destination

- 10.** (1) The Minister may, in the prescribed manner, declare a country as a country of—
- (a) origin from where persons are being trafficked to the Republic; or
 - (b) destination to which persons present in the Republic are being trafficked.
- (2) The Minister of Home Affairs must, in consultation with the Minister and the Minister for Safety and Security, develop a screening mechanism in order to determine whether the following persons are victims of trafficking—

- (a) persons who travel to the Republic from a country declared as a country of origin in terms of subsection (1)(a); and
- (b) persons who travel from the Republic to a country declared as a country of destination in terms of subsection (1)(b).

National Director of Public Prosecutions to decide whether victim of trafficking should be prosecuted

11. (1) The decision as to whether criminal proceedings should be instituted against a victim of trafficking for an offence committed as a direct result of his or her situation as a victim of trafficking, shall rest with the National Director of Public Prosecutions.
- (2) No prosecution for an offence referred to in subsection (1) may be instituted without the written authority of the National Director of Public Prosecutions.

Reporting and referral of victim of trafficking

12. (1) An immigration official, labour inspector, social worker, social service professional, medical practitioner or registered nurse who believes that a person is a victim of trafficking must report that belief to a police official.
- (2) Any person who believes that another person is a victim of trafficking may report that belief to a police official.
- (3) A person referred to in subsection (1) or (2) must substantiate that belief to a police official.
- (4) A police official who believes that a person is a victim of trafficking or to whom a report has been made in terms of subsection (1) or (2)—
- (a) must—
 - (i) make an initial assessment of the report;
 - (ii) unless the report is frivolous or materially unfounded, without delay, investigate the truthfulness of the report or cause it to be investigated; and

- (iii) if the report is substantiated by such investigation, without delay, ensure the safety of the victim of trafficking if his or her safety is at risk.
- (b) must, upon substantiation of the report, refer the victim of trafficking—
 - (i) if he or she is a child, to a designated social worker for investigation in terms of section 155(2) of the Children’s Act, ... (Act No. ... of ...); and
 - Option1*(ii) if he or she is an adult, to a centre for adult victims of trafficking.
 - Option2*(ii) if he or she is an adult, to an accredited organisation.
- (5) The identity of a person who has made a report in terms of subsection (1) or (2) shall be kept confidential, unless the interests of justice require otherwise.
- (6) A person who fails to comply with the provisions of subsection (1) is guilty of an offence.

Child who is victim of trafficking found in Republic

- 13. (1) A child who is a victim of trafficking may be placed in temporary safe care, pending an investigation in terms of section 155(2) of the Children’s Act,... (Act No. ... of ...).
- (2) If, after an investigation contemplated in subsection (1), an illegal foreign child is brought before the children’s court, the court may order that the child be assisted in applying for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998).
- (3) A finding in terms of section 156 of the Children’s Act,... (Act No. ... of ...), that an illegal foreign child who is a victim of trafficking is a child in need of care and protection serves as authorisation for allowing the child to remain in the Republic for the duration of the children’s court order.

Provision of health care service⁴

- 14. A victim of trafficking is entitled to the same public health care services as those to which the citizens of the Republic have access.

⁴ This clause is in line with article 6(3)(c) of the Trafficking Protocol.

CHAPTER 5

STATUS OF VICTIM OF TRAFFICKING⁵**Suspension of deportation**

15. (1) Notwithstanding the provisions of the Immigration Act, 2002 (Act No. 13 of 2002), the Director-General of the Department of Home Affairs may, in the prescribed manner and subject to the prescribed conditions, allow a foreign victim of trafficking, regardless of his or her status, to remain in the Republic for a non-renewable period not exceeding 60 days, provided that—

Option (1)

- (a) if the victim is an adult, he or she is placed in the care of a centre for adult victims of trafficking or any other person, organisation or institution so authorised; or
- (b) if the victim is a child, he or she is referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act, ... (Act No. ... of ...), or placed in the care of any other person, organisation or institution so authorised.

Option (2)

- (a) if the victim is an adult, he or she is placed in the care of an accredited organisation or any other person, organisation or institution so authorised;
- (b) if the victim is a child, he or she is referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act, ... (Act No. ... of ...), or placed in the care of any other person, organisation or institution so authorised.

(2) The non-renewable period referred to in subsection (1) shall not depend upon the willingness of a victim of trafficking to co-operate with law enforcement and prosecuting authorities in the investigation and prosecution of a case of trafficking in persons.

⁵ This chapter gives effect to article 7 of the Trafficking Protocol.

(3) An immigration official, police official, labour inspector, social worker, social service professional, medical practitioner or registered nurse who has identified a person as a victim of trafficking must inform that person of his or her right to apply for a non-renewable period referred to in subsection (1).

Temporary residency

16. (1) Notwithstanding the provisions of section 11(1) of the Immigration Act, 2002 (Act No. 13 of 2002), a visitor's permit may, subject to the prescribed conditions, be issued to a victim of trafficking who—

- (a) is present in the Republic;
- (b) has agreed to co-operate with law enforcement and prosecuting authorities in the investigation and prosecution of a case of trafficking in persons;
- (c) is an adult and is placed in the care of a centre for adult victims of trafficking or any other person, organisation or institution so authorised; *(option 1)*
is an adult and is placed in the care of an accredited organisation or any other person, organisation or institution so authorised; and *(option 2)*
- (d) is a child and who has been referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act, ... (Act No. ... of ...) or placed in the care of any other person, organisation or institution so authorised.

(2) A visitor's permit referred to in subsection (1) may be issued to a victim of trafficking regardless of—

- (a) his or her status; or
- (b) whether a non-renewable period contemplated in section 15(1) was granted or has expired.

Permanent residency*Option one*

See the proposed amendment to section 3 of the Refugees Act, 1998 (Act No. 130 of 1998), in Schedule 1 to the Bill, p.312.

By adding paragraph (d) to article 3 of the Refugees Act as proposed, victims of trafficking who fear for their safety if returned to their countries of origin or the countries from where they have been trafficked would be entitled to apply for refugee status. Such victims would be able to apply for a permanent residence permit in terms of section 27(d) of the Immigration Act which states that the Director-General of the Department of Home Affairs may issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the Refugees Act. Section 27 (c) of the Refugees Act provides that a refugee is entitled to apply for an immigration permit after five years continuous residence in the country from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely. Thus, a victim of trafficking would be entitled to apply for a permanent residence permit if the risk of being harmed, killed or trafficked again still exists after a period of five years from the date on which he or she was granted asylum. Thus, in terms of this option, victims of trafficking should first apply for refugee status with the view to apply for a permanent residence permit after a period of five years.

Option two

Instead of first applying for refugee status, whereafter an application for a permanent residence permit may be made, this Bill could alternatively provide as follows:

17. A victim of trafficking is entitled to apply for a permanent residence permit in terms of section 27(h) of the Immigration Act, 2002 (Act No. 13 of 2002), after five years continuous

residence in the Republic from the date on which he or she was granted a visitor's permit referred to in section 16, provided that he or she proves to the satisfaction of the Director-General of the Department of Home Affairs that he or she may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked.⁶

Option three

In terms of this option, the following subsection could be added at the end of section 16:

(3) For purposes of this Act, the Director-General of the Department of Home Affairs may, on humanitarian grounds, extend a visitor's permit referred to in subsection (1), taking into account the likelihood that the holder of such permit may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked.

CHAPTER 6

CENTRES FOR ADULT VICTIMS OF TRAFFICKING⁷

Option 1

Centre for adult victims of trafficking

18. A centre for adult victims of trafficking is a facility for the provision of temporary accommodation in accordance with a programme contemplated in section 21 suited for the needs of victims of trafficking admitted to the facility.

⁶ This provision should be read with the proposed amendment to section 27 of the Immigration Act, 2002 (Act No. 13 of 2002) in Schedule 1 to the Bill, p.306.

⁷ This chapter is in line with article 6(3) of the Trafficking Protocol.

Establishment of centres for adult victims of trafficking

- 19.** The Minister for Social Development must—
- (a) from money appropriated by Parliament, establish and operate centres for adult victims of trafficking; and
 - (b) ensure an appropriate spread of such centres throughout the Republic.

Minimum norms and standards

- 20.** A centre for adult victims of trafficking must comply with the norms and standards as prescribed.

Programme offered by centre for adult victims of trafficking

- 21.** (1) A centre for adult victims of trafficking—
- (a) must secure the safety of adult victims of trafficking at risk of retaliation;
 - (b) must offer a programme aimed at—
 - (i) the provision of counselling to adult victims of trafficking;
 - (ii) the provision of rehabilitation services to adult victims of trafficking; and
 - (iii) the reintegration of adult victims of trafficking into their families and communities.
 - (c) may, in co-operation with the Department of Education, offer a programme aimed at the provision of education to adult victims of trafficking;
 - (d) may, in co-operation with the Department of Labour, offer a programme aimed at the provision of skills development training to adult victims of trafficking.
- (2) A centre for adult victims of trafficking that provides accommodation to an adult victim of trafficking who has a child in her care must offer a programme aimed at the reception, care and development of such a child.
- (3) Subject to subsection (4), a child referred to in subsection (2) may be cared for at any other premises only with the explicit consent of the adult victim.

(4) A child referred to in subsection (2) must be referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act, ... (Act No. ... of ...), to determine whether the child is in need of care and protection.

Assessment of adult victim of trafficking

22. Upon admission of an adult victim of trafficking to a centre for adult victims of trafficking, an assessment must be made by a social worker to determine—

- (a) the risks to the safety and life of the victim;
- (b) the immediate needs of the victim; and
- (c) the long term needs of the victim.

Option 2⁸

Accreditation of organisation to provide accommodation

23. The Director-General of the Department of Social Development may on application by an organisation accredit such organisation, in terms of a prescribed process, to provide accommodation to adult victims of trafficking in accordance with a programme contemplated in section 25 suited for the needs of such victims.

Minimum norms and standards

24. An accredited organisation qualifies for funding from money appropriated by Parliament only if it complies with the norms and standards as prescribed.

Programme offered by accredited organisation

25. (1) An accredited organisation—

⁸ This option is preferred by the Commission.

- (a) must secure the safety of adult victims of trafficking at risk of retaliation;
- (b) must offer a programme aimed at—
 - (i) the provision of counselling to adult victims of trafficking;
 - (ii) the provision of rehabilitation services to adult victims of trafficking; and
 - (iii) the reintegration of adult victims of trafficking into their families and communities.
- (b) may offer a programme aimed at the provision of education and skills development training to adult victims of trafficking.
- (2) An accredited organisation that provides accommodation to an adult victim of trafficking who has a child in her care must offer a programme aimed at the reception, care and development of such a child.
- (3) Subject to subsection (4), a child referred to in subsection (2) may be cared for at any other premises only with the explicit consent of the adult victim.
- (4) A child referred to in subsection (2) must be referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act, ... (Act No. ... of ...), to determine whether the child is in need of care and protection.

Assessment of adult victim of trafficking

- 26.** Upon admission of an adult victim of trafficking to an accredited organisation, an assessment must be made by a social worker to determine—
- (a) the risks to the safety and life of the victim;
 - (b) the immediate needs of the victim; and
 - (c) the long term needs of the victim.

CHAPTER 7

COMPENSATION⁹**Compensation to victim of trafficking**

27. (1) The court may, in addition to any punishment which it may impose in respect of any offence under this Act, order a person convicted of such offence to pay appropriate compensation to any victim of the offence for —

(a) damage to or the loss or destruction of property, including money;

(b) physical, psychological or other injury; or

(c) loss of income or support;

resulting from the commission of such offence.

(2) The awards made by regional or district magistrates' courts in terms of subsection (1) may not exceed a fine that such courts may impose.

(3) In assessing the compensation that a person convicted of any offence under this Act may be ordered to pay, the court must consider the means of the offender.

(4) The court may suspend the sentence imposed for any offence under this Act on condition of the payment of appropriate compensation to the victim of the offence provided that the court finds it appropriate to do so.

(5) In cases where the amount of the damage, injury or loss exceeds an award made in terms of subsection (1), an additional civil action may be instituted.

⁹ This chapter gives effect to article 6(6) of the Trafficking Protocol. Furthermore, the Discussion Paper states that victims of trafficking may institute civil proceedings for damage suffered. However, the majority of victims of trafficking would not have the financial resources to do so. The Legal Aid Board currently provides, at state expense, legal representation in civil proceedings. Such legal representation is subject to a means test. Furthermore, the person instituting the civil proceedings must be ordinarily resident in South Africa and there must be a reasonable prospect that the civil action will be successful. However, foreign victims of trafficking present in South Africa for the duration of the proposed suspension of deportation period or the duration of criminal proceedings against traffickers would not qualify as being ordinarily resident in South Africa. **In addition to this chapter, the Commission proposes that the Department of Justice and Constitutional Development, in consultation with the Legal Aid Board, should give due consideration to providing victims of trafficking with legal representation in civil proceedings in order to enable them to claim compensation for damage suffered.** See in this regard paragraph 6.206 of the Discussion Paper.

(6) Where the court determines the compensation in terms of this section, it must also determine the time within which payment is to be made and the method of payment.

Payment of compensation

28. (1) Where a person is required to pay compensation, the court may in its discretion enforce the payment of compensation whether in whole or in part—

(a) by allowing the accused to pay compensation on the conditions and in instalments at the intervals it deems fit; or

(b) if money is due or is to become due as salary or wages from any employer of the person concerned, by ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk or registrar of the court.

(2) The clerk or registrar of the court may, subject to the approval of a magistrate or judge in chambers, vary the conditions and instalments according to which compensation is to be made.

(3) A court that has acted in terms of subsection (1), whether differently constituted or not, or any court of equal or superior jurisdiction may, on good cause shown, reconsider any decision that it has made on the making of compensation and replace it with a new order.

Recovery of compensation

29. (1) Where a person is required to pay compensation, the court making the order may issue a warrant addressed to the sheriff or messenger of the court authorising him or her to recover the amount of the compensation by attachment and sale of any property belonging to such person.

(2) The amount which may be recovered in terms of subsection (1) must be sufficient to cover, in addition to the amount of the compensation, the costs and expenses of the warrant and of any attachment and sale of property.

Failure to make compensation

30. (1) Where a court has ordered a person to pay compensation and such compensation is not made in full or is not recovered in full, the court that passed sentence may—

- (a) warn such person to appear before it; or
- (b) issue a warrant directing that such person be arrested and brought before the court.

(2) When a person referred to in subsection (1) is brought before court, the court may impose such other sentence as may have been imposed if the court were considering sentence after conviction, except that the court must take into consideration any part of the compensation that may have been made or recovered.

Compensation to State

31. The court may—

- (a) in addition to any punishment which it may impose in respect of any offence under this Act;
- (b) in addition to any order for compensation to a victim in terms of section 27; and
- (c) upon application of the prosecutor,

make an order for payment to the State of an amount in compensation for expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim of the offence.

CHAPTER 8

DEPORTATION AND REPATRIATION OF VICTIM OF TRAFFICKING¹⁰**Deportation of victim of trafficking prohibited**

32. Subject to section 33, the summary deportation of a victim of trafficking is prohibited.

Repatriation of victim of trafficking from Republic

33. (1) The Director-General: Social Development may not return a foreign child who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to—

- (a) the safety of the child during the repatriation process;
- (b) the availability and suitability of care arrangements in the country to which the child is to be returned;
- (c) the safety of the child in the country to which he or she is to be returned; and
- (d) the possibility that the child might be harmed, killed or trafficked again.

(2) The Director-General: Home Affairs—

(a) may not return a person who is an adult victim of trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to—

- (i) the safety of the person during the repatriation process;
- (ii) the safety of the person in the country to which he or she is to be returned;
- (iii) the possibility that the person might be harmed, killed or trafficked again.

(b) must—

- (i) before returning a person referred to in subsection 2(a) to his or her country of origin or the country from where he or she has been trafficked, request the

¹⁰ This chapter gives effect to article 8 of the Trafficking Protocol.

Director-General of the Department of Social Development to take reasonable steps as contemplated in section 34(a).

- (ii) inform a person referred to in subsection 2(a), in the prescribed manner, of any arrangements that have been made for his or her reception in the country to which he or she is to be returned.
- (3) This section does not prohibit the return of a person who is an adult victim of trafficking to his or her country of origin or the country from where he or she has been trafficked and who freely elects to do so.

Assistance to foreign victim of trafficking

- 34.** The Director-General of the Department of Social Development must—
- (a) take reasonable steps to find an institution or organisation that renders assistance to victims of trafficking in the country to which a person referred to in section 33(1) or (2) is to be returned and that is willing to provide assistance to such a person;
 - (b) without undue delay, provide the Director-General of the Department of Home Affairs with information in respect of a request made in terms of section 33(2)(b)(i).

Repatriation of victim of trafficking to Republic

- 35.** (1) With due regard to the safety of a person and without delay—
- (a) the Director-General: Foreign Affairs must—
 - (i) in co-operation with the Director-General: Social Development assess the risks to the safety and life of a person who is a citizen or permanent resident of the Republic and who is a victim of trafficking, if returned to the Republic;
 - (ii) facilitate the return to the Republic of a person referred to in subparagraph (i);
 - and
 - (iii) advise the Department of Home Affairs on measures to be taken for the secure reception of a person referred to in subparagraph (i) at a South African port of entry;

- (b) the Director-General: Home Affairs must—
- (i) facilitate and accept the return of a person contemplated in paragraph (a);
 - (ii) where necessary, take measures to secure the reception of a person contemplated in paragraph (a) at a South African port of entry;
 - (iii) issue such travel documents or other authorisations as may be necessary to enable such a person to travel to and enter the Republic;
 - (iv) at the request of another state that is a party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons or to an agreement relating to trafficking in persons, verify that a person who is a victim of trafficking is a citizen or permanent resident of the Republic.
 - (v) upon entry into the Republic of a child who is a victim of trafficking refer the child to a designated social worker for investigation in terms of section 155(2) of the Children's Act, ...(Act No. ...of ...).
 - (vi) upon entry into the Republic of a person who is an adult victim of trafficking refer the person to a centre for adult victims of trafficking for an assessment in terms of section 22 (*option 1*)
upon entry into the Republic of a person who is an adult victim of trafficking refer the person to an accredited organisation for an assessment in terms of section 26 (*option 2*)

Escorting of child victim of trafficking

36. (1) If it is considered to be in the best interests of a child who has been trafficked, the Director-General of the Department of Social Development must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.

(2) The Director-General may not act in terms of subsection (1) unless he or she is satisfied that the parent, guardian or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

CHAPTER 9

PREVENTION OF TRAFFICKING IN PERSONS¹¹**Public awareness**

37. (1) The Minister must, in consultation with the Ministers for Safety and Security, Education, Social Development and Home Affairs, and where appropriate, after consultation with relevant non-governmental organisations, establish public awareness programmes or other measures designed to—

(a) inform and educate persons at risk of becoming victims of trafficking on issues relating to trafficking in persons, including—

- (i) common recruitment techniques used by traffickers;
- (ii) tactics used to keep victims of trafficking in exploitative situations;
- (iii) the forms of abuse to which victims of trafficking may be subjected; and
- (iv) organisations, institutions or law enforcement agencies that may be approached for assistance or information;

(b) inform and educate victims of trafficking on—

- (i) their rights as victims;
- (ii) legal or other measures in place to ensure their safety, recovery and repatriation; and
- (iii) organisations, institutions or law enforcement agencies that may be approached for assistance or information;

(c) discourage the demand that fosters the exploitation of victims of trafficking, especially women and children.

(2) The programmes or other measures contemplated in subsection (1) must—

- (a) include appropriate measures aimed at reaching rural communities; and
- (b) be reviewed biennially in order to determine their effectiveness.

¹¹ This chapter is in line with article 9 of the Trafficking Protocol.

(3) The Director-General of the Department of Justice and Constitutional Development must take all reasonable steps to ensure that the programmes or other measures contemplated in subsection (1) are implemented across the country.

CHAPTER 10

ENFORCEMENT OF ACT

Penalties

38. (1) A person convicted of an offence in terms of section 5 is, in addition to a sentence for any other offence of which he or she may be convicted, liable to a fine or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment.¹²

(2) A person convicted of an offence in terms of section 6 is liable to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment.

(3) A person convicted of an offence in terms of section 7 is liable to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment.

(4) A person convicted of an offence in terms of section 8 is liable to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(5) A person convicted of an offence in terms of section 9(1) is liable to a fine or imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.¹³

¹² This provision is in line with clause 305(8) of the Children's Bill.

¹³ This provision is in line with clause 305(6) of the Children's Bill. The Children's Bill further provides that if a person is convicted of the offence more than once, he or she will be liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment. **The Commission invites comments as to whether a similar provision should be included in this Bill.**

(6) An Internet service provider who is convicted of an offence in terms of section 9(3) is liable to a fine as may be prescribed from time to time.

(7) A person convicted of an offence in terms of section 12(6) is liable to a fine or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

CHAPTER 11

GENERAL PROVISIONS

Liability¹⁴

39. An owner or person in charge of a conveyance who contravenes the provisions of section 35(7) of the Immigration Act, 2002 (Act No. 13 of 2002), shall be liable to pay the cost incurred by an organ of state or any other body or person for the care, safe-keeping, and repatriation of a passenger who—

- (a) was on board the conveyance;
- (b) is a victim of trafficking; and
- (c) entered the Republic without a valid passport and, where applicable, a valid visa.¹⁵

Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

40. (1) If a children's court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child or allowed the child to be trafficked, the court may—

- (a) suspend all the parental responsibilities and rights of that parent, guardian, or other person; and

¹⁴ This clause is in line with article 11(2) – (3) of the Trafficking Protocol.

¹⁵ See also the proposed amendment to section 35 of the Immigration Act, 2002, (Act No. 13 of 2002) in Schedule 1 to the Bill, p.308.

- (b) place that child in temporary safe care, pending an inquiry by a children's court.
- (2) Action taken by a children's court in terms of subsection (1) does not exclude a person's liability for committing the offence of trafficking in persons as contemplated in section 5.

Revocation of visa or temporary residence permit¹⁶

41. A visa or temporary residence permit issued to a foreigner before he or she became a prohibited person in terms of section 29(1)(b) of the Immigration Act, 2002 (Act No. 13 of 2002), as a result of having been convicted of or having a warrant outstanding for the offence of trafficking in persons, shall be revoked.¹⁷

The Commission requests comments as to whether the above provision or the proposed amendment of section 29 of the Immigration Act, 2002 (Act No. 13 of 2002) is preferable.

International co-operation

- 42.** (1) The President may on such conditions as he or she deems fit—
- (a) enter into an agreement with a foreign State that is not a State Party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons in respect of any matter pertaining to trafficking in persons;
 - (b) enter into an agreement with a foreign State that is a State Party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons in respect of any matter pertaining to trafficking in persons for the purpose of supplementing the provisions of the Protocol or to facilitate the application of the principles contained therein.

¹⁶ This clause gives effect to article 11(5) of the Trafficking Protocol.

¹⁷ This provision must be read with the proposed amendment to section 29(1)(b) of the Immigration Act, 2002 (Act No. 13 of 2002) in Schedule 1 to the Bill, p.308. This provision is also an alternative to the amendment of section 29 of the Immigration Act, 2002 (Act No. 13 of 2002) by the addition of subsection (1A). See in this regard Schedule 1 to the Bill, p.308.

(2) An agreement contemplated in subsection (1) may not be in conflict with the provisions of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.

(3) The President may agree to any amendment or revocation of an agreement contemplated in subsection (1).

(4) An agreement contemplated in subsection (1) or any amendment or revocation thereof, shall not be of any force or effect until such agreement, amendment or revocation has been approved by Parliament.

Extra-territorial jurisdiction

43. (1) A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence in terms of this Act had it been committed inside the Republic, regardless of whether the act constitutes an offence at the place of its commission, if the person to be charged—

- (a) is a citizen of the Republic;
- (b) is ordinarily resident in the Republic;
- (c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed; or
- (d) is a juristic person or a partnership registered in terms of any law in the Republic.

(2) A person who commits an offence referred to in subsection (1) is liable on conviction to the penalty prescribed for that offence.

National instructions and directives

44. (1) The National Commissioner of the South African Police Service must—

- (a) after consultation with the Minister for Safety and Security and the National Director of Public Prosecutions, issue and publish in the *Gazette* national instructions regarding the following matters which must be adhered to by all police officials who

are tasked with receiving reports of and the investigation of trafficking in persons cases—

- (i) the division or divisions within the police to be tasked with the investigation of trafficking cases;
 - (ii) the manner in which the reporting of an alleged trafficking case is to be dealt with;
 - (iii) the manner in which trafficking cases are to be investigated;
 - (iv) the manner in which victims of trafficking should be identified, interviewed and treated, paying particular attention to the vulnerability of child victims;
 - (v) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the South African languages;
 - (vi) the referral of victims of trafficking to social and health care services;
 - (vii) measures to be taken to ensure the safety of victims of trafficking or other potential witnesses if there is a likelihood that harm might result to them as a result of the reporting and consequent investigation of the case; and
 - (viii) the circumstances in which consultation with the prosecuting authority is required with the view to guiding the investigation of trafficking cases for purposes of obtaining the required evidence and to identify relevant witnesses.
- (b) ensure that all police officials who are tasked with receiving reports of and the investigation of trafficking in persons cases are trained on the national instructions referred to in paragraph (a) with the view to ensuring that as many police officials as possible are able to deal with trafficking cases in an appropriate manner.
- (2) The Minister of Home Affairs must—
- (a) issue and publish in the *Gazette* national directives regarding the following matters which must be adhered to by all immigration officials who come into contact with victims of trafficking in the execution of their duties—
 - (i) the manner in which the reporting of an alleged trafficking case is to be dealt with;

- (ii) the manner in which victims of trafficking should be identified, interviewed and treated, paying particular attention to the vulnerability of child victims;
 - (iii) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the South African languages;
 - (iv) the referral of victims of trafficking to social and health care services; and
 - (v) the referral of victims of trafficking or other potential witnesses to the South African Police Service or other relevant institutions or organisations if there is a likelihood that they may be harmed or killed.
- (b) ensure that all immigration officials who are likely to come into contact with victims of trafficking in the execution of their duties are trained on the national directives referred to in paragraph (a) with the view to ensuring that as many immigration officials as possible are able to deal with trafficking cases in an appropriate manner.
- (3) The national instructions and directives as contemplated in this section, must be—
- (a) submitted to Parliament within two years after the commencement of this Act, before publication in the *Gazette*; and
 - (b) published in the *Gazette*.
- (4) Subsection (3) applies to any new or amended national instructions or directives issued under this section.

Alternative to subsection 1(b) and subsection 2(b):

Training on the national instructions and directives could be dealt with in terms of policy with in the South African Police Service and the Department of Home Affairs respectively.

Legitimacy and validity of documents¹⁸

45. The Director-General of the Department of Home Affairs must, at the request of another State that is a party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons or to an agreement relating to trafficking in persons, verify within a reasonable

¹⁸ This provision gives effect to article 13 of the Trafficking Protocol.

time the legitimacy and validity of travel or identity documents issued or purported to have been issued by the department and suspected of being used for the commission of the offence of trafficking in persons.

CHAPTER 12

ADMINISTRATION OF ACT

Regulations

- 46.** The Minister may make regulations regarding—
- (a) any matter prescribed in terms of this Act;
 - (b) the operation and management of centres for adult victims of trafficking; and
 - (b) generally, any matter which the Minister deems necessary to be prescribed in order to achieve the objects of this Act.

CHAPTER 13

MISCELLANEOUS MATTERS

Laws repealed or amended

- 47.** The laws referred to in the second column of Schedule 1 are hereby repealed or amended to the extent indicated in the third column of the Schedule.

Short title and commencement

- 48.** This Act is called the Combating of Trafficking in Persons Act, 2006, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE 1
Laws repealed or amended

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.
 _____ Words underlined with a solid line indicate insertions in existing enactments.

No. and year	Title	Extent of repeal or amendment
... of ...	Children's Act	<p>1. The following are repealed:</p> <p>(a) The definitions of removal of body parts, trafficking, and UN Protocol to Prevent Trafficking in Persons.</p> <p>(b) Chapter 18</p> <p>(c) Sections 305(1)(r) -(s) and (8).</p>
13 of 2002	Immigration Act	<p>1. The amendment of section 27 by the addition of subparagraph (h).</p> <p>27 Residence on other grounds</p> <p>The Director-General may issue a permanent residence permit to a foreigner of good and sound character who-</p> <p>(a) has received an offer for permanent employment, provided that-</p> <p>(i) such foreigner has proven to the satisfaction of the Director-General that the position exists and that the position and related job description was advertised in the prescribed form and no suitably qualified citizen or permanent resident was available to fill it;</p> <p>(ii) the application falls within the yearly limits of available permits prescribed for each sector of industry, trade and commerce, after consultation with the Departments of Trade and Industry, Labour and Education; and</p> <p>(iii) the permit may be extended to such foreigner's spouse and children younger than 21 years of</p>

		<p style="text-align: center;">age;</p> <p>(b) taking into account any prescribed requirement, has demonstrated to the satisfaction of the Director-General that he or she possesses extraordinary skills or qualifications, and to those members of such foreigner's immediate family determined by the Director-General under the circumstances or as may be prescribed;</p> <p>(c) intends to establish or has established a business in the Republic and investing in it or in an established business the prescribed financial contribution to be part of the intended book value, and to the members of such foreigner's immediate family, provided that-</p> <p style="padding-left: 40px;">(i) the Director-General may waive or reduce such capitalisation requirements for businesses prescribed to be in the national interest or when so requested by the Department of Trade and Industry; and</p> <p style="padding-left: 40px;">(ii) the permit shall lapse if the holder fails to prove within two years of the issuance of the permit and three years thereafter, to the satisfaction of the Director-General, that the prescribed financial contribution to be part of the intended book value is still invested as contemplated in this paragraph;</p> <p>(d) is a refugee referred to in section 27 (c) of the Refugees Act, 1998 (Act 130 of 1998), subject to any prescribed requirement;</p> <p>(e) intends to retire in the Republic, provided that such foreigner proves to the satisfaction of the Director-General that he or she-</p> <p style="padding-left: 40px;">(i) has the right to a pension or an irrevocable annuity or retirement account which will give such foreigner a prescribed minimum payment for the rest of his or her life; or</p> <p style="padding-left: 40px;">(ii) has a minimum prescribed net worth;</p> <p>(f) has proven to the satisfaction of the Director-General that he or she has a prescribed minimum net worth and has paid a prescribed amount to the Director-General;</p> <p>[or]</p>
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		<p>(g) is the relative of a citizen or permanent resident within the first step of kinship; <u>or</u></p> <p>(h) <u>is a victim of trafficking referred to in section 17 of the Combating of Trafficking in Persons Act, ... (Act No. ... of ...), subject to any prescribed requirements.</u></p> <p>2. The amendment of section 29 as follows:</p> <p>“Prohibited persons</p> <p>29 (1) The following foreigners are prohibited persons and do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit:</p> <p>(a) Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;</p> <p>(b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, murder, torture, drug-related charges, money laundering, <u>trafficking in persons</u> or kidnapping;</p> <p>(c) anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;</p> <p>(d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;</p> <p>(e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends; and</p> <p>(f) anyone found in possession of a fraudulent residence permit, passport or identification document.</p> <p><u>(1A) A visa or temporary residence permit issued to a foreigner before he or she became a prohibited person in terms of subsection (1)(b) shall be revoked.</u></p> <p>(2) The Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person.”</p> <p>3. The amendment of section 35 by the addition of paragraph (e) and subsection (3A).</p> <p>Duties with regard to conveyances</p>
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		<p>(1) Save for extraordinary circumstances necessitating otherwise, no person in charge of a conveyance shall cause that conveyance to enter the Republic at any place other than a port of entry.</p> <p>(2) An immigration officer or other authorised person employed by the Director-General may-</p> <p>(a) board any conveyance which is entering or has entered into any port of entry and for good cause prohibit or regulate disembarkation from, or the offloading of, such conveyance in order to ascertain the status or citizenship of its passengers; and</p> <p>(b) request the person in control of a port of entry or any person acting under his or her authority to order the person in charge of a conveyance to park, moor or anchor that conveyance in such port of entry at such distance from the shore or landing place or in such position as he or she may direct.</p> <p>(3) The person in charge of a conveyance entering or prior to entering a port of entry shall upon demand deliver to an immigration officer-</p> <p>(a) a list stating-</p> <p>(i) the names of all passengers on board the conveyance, classified according to their respective destinations; and</p> <p>(ii) such other details as may be prescribed;</p> <p>(b) a list of stowaways, if any have been found;</p> <p>(c) a list of the crew and all other persons, other than passengers and stowaways, employed, carried or present on the conveyance; and</p> <p>(d) a return, under the hand of the medical officer of that conveyance or, if there is no such medical officer, under the hand of the person in charge of a conveyance himself or herself, stating-</p> <p>(i) any cases of disease, whether infectious or otherwise, which have occurred or are suspected to have occurred upon the voyage;</p>
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		<p>(ii) the names of the persons who have suffered or are suffering from such disease;</p> <p>(iii) details of any birth or death which occurred upon the voyage between such port of entry and a previous port; and</p> <p>(iv) any other prescribed matter or event:</p> <p>Provided that such immigration officer may-</p> <p>(aa) exempt from the requirements of this subsection the master of a ship destined for any other port in the Republic, subject to compliance with the duty to deliver such lists or return at such port and with any directive such immigration officer may issue to the master; and</p> <p>(bb) if satisfied that a name should be added to or deleted from any of such lists, authorise such addition or deletion; and</p> <p><u>(e) a list of unaccompanied children on board of the conveyance.</u></p> <p><u>(3A) If an immigration officer has reason to believe that an unaccompanied child listed on the list referred to in section 3(e) is a victim of trafficking, he or she must forthwith report the matter, in terms of section 12 of the Combating of Trafficking in Persons Act, ... (Act No. ... of ...) to a police official.</u></p> <p>(4) If a conveyance arrives at a port of entry with a passenger on board bound for a destination outside the Republic who is not on board when the conveyance leaves such port of entry and has not been admitted, the person in charge or the owner of that conveyance shall forfeit a sum fixed by the immigration officer within a prescribed limit.</p> <p>(5) An immigration officer may require the person in charge of a conveyance to muster the crew of such conveyance on the arrival of such conveyance in any port of entry and again before it leaves such port of entry.</p> <p>(6) The competent officer of customs at any port of entry may refuse to give to the person in charge of a conveyance clearance papers to leave that port of entry, unless he or she has complied with this Act and produced a certificate of an immigration officer to that effect.</p> <p>(7) A person in charge of a conveyance shall ensure that</p>
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		<p>any foreigner conveyed to a port of entry-</p> <ul style="list-style-type: none"> (a) for purposes of travelling to a foreign country, holds a valid passport and transit visa, if required; and (b) holds a valid passport and visa, if required. <p>(8) A person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission in the prescribed manner, as well as for any costs related to such detention and removal incurred by the Department.</p> <p>4. The amendment of section 49(15) as follows:</p> <p>Any <u>natural or juristic person, or a partnership</u> who—</p> <ul style="list-style-type: none"> (a) for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use- <ul style="list-style-type: none"> (i) any permit, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he, [or] she <u>or it</u> is not entitled to use; or (ii) any fabricated or falsified permit, certificate, written authority or other document; or (b) without sufficient cause has in his, [or] her <u>or its</u> possession- <ul style="list-style-type: none"> (i) any stamp or other instrument which is used or capable of being used for purposes of fabricating or falsifying or unlawfully recording on any document any endorsement under this Act or required to be submitted in terms of this Act; (ii) any form officially printed for purposes of issuing any permit, certificate, written authority or other document under this Act or required to be submitted in terms of this Act, or any reproduction or imitation of any such form; (iii) any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose
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		<p>possession it is found; [or]</p> <p>(iv) any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, <u>or</u></p> <p><u>(c) intentionally and unlawfully destroys, confiscates, possesses, conceals or tampers with any actual or purported passport, travel document or identity document of another person in furtherance of a crime.</u></p> <p>shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding four years.</p>
130 of 1998	Refugees Act	<p>1. The amendment of section 3 by the addition of subparagraph (d)</p> <p>Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—</p> <p>(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or</p> <p>(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; [or]</p> <p>(c) is a dependant of a person contemplated in paragraph (a) or (b); <u>or</u></p> <p><u>(d) is a victim of trafficking and proves to the satisfaction of the Director-General of the Department of Home Affairs that he or she may be harmed, killed or trafficked again if returned to his or her country of origin or the country from where he or she has been trafficked.</u></p>
51 of 1977	Criminal	Schedule 1

	Procedure Act	<p style="text-align: right;">(Sections 40 and 42)</p> <p>[Schedule 1 substituted by s. 17 of Act 26 of 1987 and amended by s. 8 of Act 122 of 1998.]</p> <p>Treason.</p> <p>Sedition.</p> <p>Public violence.</p> <p>Murder.</p> <p>Culpable homicide.</p> <p>Rape.</p> <p>Indecent assault.</p> <p>Sodomy.*</p> <p>Bestiality.</p> <p>Robbery.</p> <p>Kidnapping.</p> <p>Childstealing.</p> <p><u>Trafficking in Persons</u></p> <p>Assault, when a dangerous wound is inflicted.</p> <p>Arson.</p> <p>Malicious injury to property.</p> <p>Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.</p> <p>Theft, whether under the common law or a statutory provision.</p> <p>Receiving stolen property knowing it to have been stolen.</p> <p>Fraud.</p> <p>Forgery or uttering a forged document knowing it to have been forged.</p> <p>Offences relating to the coinage.</p> <p>Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.</p> <p>Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.</p> <p>Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.</p>
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		<p style="text-align: center;">Schedule 2</p> <p style="text-align: center;">[Schedule 2 amended by s. 15 of Act 62 of 2000.]</p> <p style="text-align: center;">PART III</p> <p style="text-align: center;">(Sections 59, 61, 72, 184, 185, 189)</p> <p style="text-align: center;">[Part III substituted by s. 5 of Act 126 of 1992.]</p> <p>Sedition.</p> <p>Public violence.</p> <p>Arson.</p> <p>Murder.</p> <p>Kidnapping.</p> <p>Childstealing.</p> <p><u>Trafficking in Persons</u></p> <p>Robbery.</p> <p>Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence.</p> <p>Contravention of the provisions of section 1 and 1A of the Intimidation Act, 1982 (Act 72 of 1982).</p> <p>Any conspiracy, incitement or attempt to commit any of the above-mentioned offences.</p> <p>Treason.</p> <p style="text-align: center;">Schedule 5</p> <p style="text-align: center;">(Sections 58 and 60 (11) and (11A) and Schedule 6)</p> <p style="text-align: center;">[Schedule 5 added by s. 14 of Act 75 of 1995, substituted by s. 9 of Act 85 of 1997 and amended by s. 36 (1) of Act 12 of 2004 and by s. 27 (1) of Act 33 of 2004.]</p> <p>Treason.</p> <p>Murder.</p> <p>Attempted murder involving the infliction of grievous bodily harm.</p> <p>Rape.</p> <p><u>Trafficking in Persons</u></p> <p>Any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), if it is alleged that-</p> <p>(a) the value of the dependence-producing substance in question is more than R50 000,00; or</p> <p>(b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any</p>
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		<p>enterprise acting in the execution or furtherance of a common purpose or conspiracy; or</p> <p>(c) the offence was committed by any law enforcement officer.</p> <p>Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament.</p> <p>Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 39 (2) (a) (i) of that Act.</p> <p>Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004-</p> <p>(a) involving amounts of more than R500 000,00; or</p> <p>(b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or</p> <p>(c) if it is alleged that the offence was committed by any law enforcement officer-</p> <p>(i) involving amounts of more than R10 000,00; or</p> <p>(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.</p> <p>Indecent assault on a child under the age of 16 years.</p> <p>An offence referred to in Schedule 1-</p> <p>(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or</p> <p>(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.</p> <p>The offences referred to in section 4 (2) or (3), 13 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.</p>
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SCHEDULE 2**Text of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons**

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001).

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions**Article 1**

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

Article 3

Use of terms

For the purposes of this Protocol:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons

Article 6

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - (a) Information on relevant court and administrative proceedings;
 - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other

relevant organizations and other elements of civil society, and, in particular, the provision of:

- (a) Appropriate housing;
 - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - (c) Medical, psychological and material assistance; and
 - (d) Employment, educational and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.
 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.
 6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.
2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.
2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.
4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.
5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.
6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:
 - (a) To prevent and combat trafficking in persons; and
 - (b) To protect victims of trafficking in persons, especially women and children, from revictimization.
2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.
3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.
5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10*Information exchange and training*

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:
 - (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;
 - (b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and
 - (c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.
2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11*Border measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.
2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.
3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of

transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.
5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.
6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14

Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15

Settlement of disputes

1. State Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.
2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.
3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters

governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.
2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.
3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.
4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.
5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.
2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.
2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.