



REPORT ON TRAFFICKING IN PERSONS



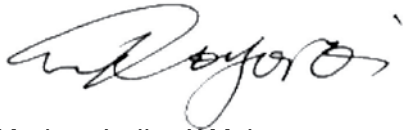
South African Law Reform Commission: Project 131

Trafficking in Persons

Report: August 2008

TO MRS BS MABANDLA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973 as amended), for your consideration, the Commission's report on trafficking in persons.

A handwritten signature in black ink, appearing to read 'Mokgoro', with a stylized flourish at the end.

Madam Justice Y Mokgoro
Chairperson: South African Law Reform Commission
August 2008

SOUTH AFRICAN LAW REFORM COMMISSION

The South African Law Reform Commission was established by the South African Law Reform Commission Act, 1973 (Act No. 19 of 1973)

The members of the Commission are –

The Honourable Madam Justice Y Mokgoro (Chairperson)
The Honourable Mr Justice Willie Seriti (Vice-Chairperson)
The Honourable Mr Justice Dennis Martin Davis
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Summary of Recommendations

The Report addresses three main aspects i.e. the prevention of trafficking in persons, the prosecution of traffickers and other role-players, and the protection of victims of trafficking. The recommendations contained in the Report can be summarised as follows:

1. It is recommended that public awareness programmes or other measures for the prevention of trafficking in persons should be established.
2. The creation of the following offences are recommended: the offences of trafficking in persons; debt bondage; destroying, confiscating, possessing and concealing of documents of victims of trafficking; using the services of victims of trafficking; and facilitating trafficking in persons. It is further recommended that it should be a criminal offence for a commercial carrier to transport a victim of trafficking across the borders of South Africa if such victim does not have the travel documents required for lawful entry into or departure from South Africa.
3. Given the global nature of the crime of trafficking in persons, it is recommended that South African courts should be provided with extra-territorial jurisdiction in certain circumstances in respect of an act committed outside South Africa which would have constituted an offence if committed within South Africa.
4. It is recommended that the National Commissioner of the South African Police Service, the Ministers of Home Affairs, of Labour and the National Director of Public Prosecutions must issue directions which must be adhered to by police officials, immigration officials, labour inspectors and prosecutors respectively. These directions should inter alia address the following:
 - (a) the manner in which victims of trafficking should be identified, interviewed and treated, paying particular attention to the vulnerability of child victims;
 - (b) the referral of victims of trafficking to social and health care services; and
 - (c) measures to be taken to ensure the safety of victims of trafficking if there is a likelihood that harm might result to them.
5. As the crime of trafficking in persons knows no boundaries, co-operation with other States in respect of issues relating to trafficking in persons is important. The Report therefore provides for international cooperation in respect of any matter pertaining to trafficking in persons with other States irrespective of whether they are party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.
6. With regard to protective measures, the Report provides for the reporting and referral of child and adult victims of trafficking respectively. The protective measures in terms of the Children's Act, 38 of 2005 apply to all child victims of trafficking. It is further recommended that a finding in terms of the Children's Act (Act 38 of 2005) that a foreign child victim of trafficking is in need of care and protection should serve as authorisation for allowing the child to remain in South Africa.
7. It is recommended that if after an assessment it is found that an adult is a victim of trafficking, he or she must be issued with a certificate certifying him or her as a victim of trafficking. Being certified as a victim of trafficking —
 - (a) gives the person the right to apply for a recovery and reflection period which will allow him or her to stay in South Africa for up to 90 days;
 - (b) means that no criminal prosecution can be instituted against him or her for illegal entry or remaining in South Africa or assisting another to do so, for possessing any fabricated or falsified passport or identity document, for being involved in an illegal activity to the extent that he or she has been compelled to do so, as a direct result of his or her situation as a victim of trafficking.

8. It is recommended that a temporary residence permit should be provided to a victim of trafficking who has agreed to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons or if an investigation indicates that it is not safe to return the victim to his or her country of origin or the country from where he or she has been trafficked.

9. It is recommended that a permanent residence permit should be provided to a victim of trafficking after five years continuous residence in South Africa from the date on which a temporary residence permit was issued to him or her if 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.

10. It is recommended that a foreign victim of trafficking is entitled to the same public health care services as those to which South African citizens have access.

11. The Report provides for the accreditation of an organisation to provide certain services to adult victims of trafficking. An accredited organisation must offer a program aimed at the provision of accommodation, counseling, rehabilitation and the reintegration of adult victims of trafficking into their families and communities. Such organisations may also offer a programme aimed at the provision of education and skills development training to adult victims of trafficking. An accredited organisation that provides services to an adult victim of trafficking who has a child in his or her care must offer a programme aimed at the reception, care and development of such a child. Such a child must be referred to a child protection organisation or the provincial department of social development for investigation in order to determine whether he or she is in need of care and protection. Only persons who have been certified as victims of trafficking or who have been repatriated (as victims of trafficking) to South Africa are entitled to access a programme offered by an accredited organisation. An accredited organisation must draw up a plan to address the immediate and long term needs of those accessing their programmes.

12. It is recommended that a court may, on its own accord or on the request of the complainant or prosecutor, in addition to any punishment which it may impose in respect of any offence provided for in the Bill, order a person convicted of such offence to pay appropriate compensation to the victim of the offence for —

- (a) damage to or the loss or destruction of property, including money;
- (b) physical, psychological or other injury;
- (c) being infected with a life-threatening disease; or
- (d) loss of income or support.

The court may, in addition to any payment of compensation to the victim, make an order for the 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 or repatriation of the victim of the offence.

13. The Report prohibits the summary deportation of foreign victims of trafficking and provides that such victims should be repatriated in terms of a process that takes cognisance of their safety not only during the repatriation process, but also in the countries to which they are to be returned. It provides that reasonable steps must be taken to find suitable family members or an institution or organisation that renders assistance to victims of trafficking in the countries to which they are to be returned and that are willing to provide assistance to them. It further provides for a process in terms of which South African citizens or permanent residents should be repatriated to South Africa in order to ensure their safe return and the provision of necessary services to them.

14. The Report provides for the establishment of an Inter-sectoral Committee that will be responsible for the monitoring of the implementation of the proposed legislation, for ensuring that the different organs of state comply with their roles and responsibilities in terms of the proposed legislation, and for collating and analysing information relating to trafficking in persons.

15. The Report provides for an information management system in terms of which information relating to the trafficking of persons should be collated and analysed. Information relating to trafficking in persons in the possession of the Departments of Social Development, of Home Affairs, the South African Police Service, the National Director of Public Prosecutions or an accredited organisation is to be provided to the Inter-sectoral Committee on trafficking in persons. This Committee will collate and analyse the information received and will compile a report which will be submitted to Parliament annually.

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Acronyms

Anex CDW:	Activists networking against the exploitation of Child Domestic Workers
DOJCD:	Department of Justice and Constitutional Development
IOM:	International Organisation for Migration
LCCL(SA):	Leadership Conference of Consecrated Life of Southern Africa, Trafficking in Persons Desk
POWA:	People Opposing Women Abuse
SAHRC:	South African Human Rights Commission
SAPS:	South African Police Service
SOCA Unit:	Sexual Offences and Community Affairs Unit
SWEAT:	Sex Worker Education and Advocacy Taskforce
UNODC:	United Nations Office on Drugs and Crime, Anti-Human Trafficking Unit

Chapter 1:

Introduction

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Introduction

The problem

1.1 Trafficking in persons has become one of the most lucrative businesses today with linkages spread around the world. Trafficking in persons involves the trading of persons as commodities by various means and is often connected to organised crime. Various factors contribute to the trafficking of persons. These include poverty, lack of economic opportunities, war, natural disasters and political instability.

1.2 South Africa is regarded as a country of destination for victims of trafficking.¹ There have been sporadic reports of the trafficking of South Africans to other parts of the world.² South Africa is also a transit point for trafficking operations between developing countries and developed countries.³ South African women and children are trafficked internally for purposes of commercial sexual exploitation, domestic work and other forms of labour.⁴ It is important to note that foreigners who have been trafficked to South Africa may be re-trafficked within the borders of South Africa.

1.3 Persons may be trafficked for various purposes. These include, but are not limited to trafficking for purposes of sexual exploitation; forced labour or slavery or practices similar to slavery or servitude;⁵ forced marriages; begging, adoptions or the removal of organs or other body parts.⁶

1.4 There are no reliable statistics on the number of persons trafficked to and from South Africa. The clandestine nature of trafficking in persons and the lack of a coordinated response to the problem make it difficult to provide reliable statistics. It is therefore difficult to give an accurate overview of the extent of the problem within South Africa and across its borders. The determination of the extent of the problem is also complicated by the fact that it is sometimes difficult to distinguish between trafficking in persons and smuggling in persons.⁷ It is further complicated by the fact that not all reported cases of trafficking in persons can be recorded as such. This will be done once the proposed legislation on trafficking in persons is promulgated. The South African Police Service is

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- 1 IOM, Pretoria 'Children smuggled into SA to work as slaves' **Eye on Human Trafficking Bulletin** Issue 17, 2008; Namhla Tshisela 'First child trafficking case in court' **Sowetan** 13 May 2008; US Department of State **Trafficking in Persons Report** June 2008; 'Human Trafficking: A Southern African Perspective', Paper presented at the International Association of Women Judges Conference held in Panama, 25 – 28 March 2008; Agiza Hlongwane 'Thai women held after raid on suspected brothel in Umbilo' **Sunday Tribune** 29 April 2007; Monica Laganparsad 'Marked rise in Thai sex trafficking' **Daily News** 9 April 2007; Sibusiso Ngilwa 'Trafficking: Police investigated' **Sunday Tribune** 24 December 2006; Savides and Mchunu 'International trafficking syndicate suspected: Police, Thai Embassy to meet over sex slave probe' **The Mercury** 19 December 2006; Sibusiso Ngilwa 'Cops want to see Thai girls' clients' **Sunday Tribune** 17 December 2006.
 - 2 US Department of State **Trafficking in Persons Report** June 2008; IOM, Pretoria " '\$6,000. I was bought for that price': A South African's testimony" **Eye on Human Trafficking Bulletin** Issue 18, 2007; IOM, Pretoria 'Young South African women trafficked to Ireland' **Eye on Human Trafficking Bulletin** Issue 13, 2007; IOM: Pretoria 'Middle East job opportunities for South Africans?' **Eye on Human Trafficking Bulletin** Issue 9, 2006; IOM: Pretoria 'South African Women Trafficked to Macau' **Eye on Human Trafficking Bulletin** Issue 2, May 2004, p.1 and 4; 'S A kinders dalk in smokkelnet' **Rapport** 3 August 2003, p.11.
 - 3 'Human Trafficking: A Southern African Perspective', Paper presented at the International Association of Women Judges Conference held in Panama, 25 – 28 March 2008; US Department of State **Trafficking in Persons Report** June 2008.
 - 4 US Department of State **Trafficking in Persons Report** June 2008; IOM, Pretoria 'Young South African women trafficked to Ireland' **Eye on Human Trafficking Bulletin** Issue 13, 2007; O'Connor 'Handel in kinders vind ook in Suid-Afrika plaas' **Die Volksblad** 28 Januarie 2006; Police bust national child prostitution syndicate" **SABC News** 18 November 2004; Police rescue another 14 child prostitutes" **SABC News** 25 November 2004; International Organisation for Migration **Trafficking in Women and Children for Sexual Exploitation in Southern Africa** 2003, compiled by Martens J, Pieczkowski M and Van Vuuren-Smyth B; 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.
 - 5 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.
 - 6 See paragraphs 3.7 – 3.21 of the Discussion Paper for a more detailed discussion on the purposes for which persons may be trafficked.
 - 7 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, whilst trafficking involves the continued exploitation of the victim. However, the 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.

able to record only reported cases to be prosecuted in terms of the recently promulgated Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.⁸ The provisions relating to trafficking in children as contained in the Children's Act, 38 of 2005 is unfortunately not in operation yet.⁹ Furthermore, the National prosecuting Service of the National Prosecuting Authority would only be able to record cases prosecuted under the first-mentioned Act.

1.5 This Report is essentially divided into five chapters, namely, (1) the introduction, (2) the current legal position, (3) the prosecution of traffickers and other role-players, (4) the protection of victims of trafficking in persons, and (5) the prevention of trafficking in persons.

The Constitution of the Republic of South Africa Act 108 of 1996

1.6 The Bill of Rights contained in Chapter 2 of the Constitution is the cornerstone of the South African democracy. The Bill of Rights provides that no one may be subjected to slavery, servitude or forced labour.¹⁰ It states that everyone has 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 to be free from all forms of violence from either public or private sources, the right not to be tortured in any way and the right not to be treated or punished in a cruel, inhuman or degrading way.¹¹ It further affirms the democratic values of human dignity¹² and freedom of movement.¹³ Children also have the right to be protected from maltreatment, neglect, abuse or degradation and the right to be protected from exploitative labour practices.¹⁴

1.7 The above rights apply to all persons, including victims of trafficking as well as those who are vulnerable to being trafficked. Government has an obligation to respect, protect and fulfil the rights contained in the Bill of rights.

South Africa's international obligations

1.8 The Discussion Paper on Trafficking in Persons¹⁵ (hereafter referred to as "the Discussion Paper") gives a comprehensive overview of the 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") as well as of other international and regional instruments addressing the issue of trafficking in persons.¹⁶ The South Africa government has signed and/or ratified several of these instruments. This has placed an obligation on the government to bring its domestic laws and policies in line with the standards set by these instruments. Due consideration was given to these instruments in the drafting of this Report.

Initiatives to combat trafficking in persons in South Africa and across its borders

1.9 In response to the phenomenon of trafficking in persons and to organised crime, various initiatives were embarked on. These include the following:

8 See paragraph 2.5 for a more detail discussion on the Act.

9 See paragraph 2.6 for a more detail discussion on the Act.

10 Section 13.

11 Section 12.

12 Section 10.

13 Section 21.

14 Section 28.

15 South African Law Reform Commission *Discussion Paper 111: Trafficking in Persons* (Project 131) June 2006.

16 See pages 6 - 25 of the Discussion Paper.

Human Trafficking Desk

1.10 A Human Trafficking Desk was established within the Organised Crime Unit of the South African Police Service in 2003. The Human Trafficking Desk is responsible for doing the following:¹⁷

- Coordinates all trafficking in persons issues received from the provinces, project investigations and the offices of the National Commissioner and the Minister for Safety and Security.
- Advises the head of the Organised Crime Unit on matters relating to trafficking in persons.
- Advises the provinces and organised crime units on complex matters arising from trafficking in person's investigations.
- Provides training to members of organised crime units tasks with investigating human trafficking cases.
- Liaises with relevant counter parts within the South African Police Service on a national, provincial and local level as well as external role-players.
- Refers investigations to provinces and monitor such investigations through monthly progress reports.
- Monitor and evaluate whether the Organised Crime Unit effectively addresses organised crime involving the trafficking of persons.

Prosecutions

1.11 The National Prosecuting Authority has prosecuted several cases of trafficking in persons.¹⁸ These cases were, however, prosecuted under existing laws because our law did not provide for an offence of trafficking in persons at the stage the offences were committed.

Task Team on Trafficking in Persons

1.12 The Sexual Offences and Community Affairs (SOCA) Unit is a directorate within the National Prosecuting Authority. The SOCA Unit has established and is chairing a 10-member Task Team on Trafficking in Persons. This Task Team comprised of persons representing the following government departments and organisations: the Human Trafficking Desk within the Organised Crime Unit of SAPS, Ports of Entry Policing within SAPS, the Departments of Home Affairs, of Social Development, of Labour and of Justice and Constitutional Development, the International Organisation for Migration, Molo Songololo and the United Nations Office on Drugs and Crime. The Task Team developed the National Strategy to Prevent and Respond to Human Trafficking for Sexual Purposes.¹⁹ The Task Team will also be responsible for the implementation of the Strategy. A three-year funding agreement between the European Union Commission and the South African Government through the National Prosecuting Authority was entered into for the implementation of the strategy.

1.13 The Task Team also convenes quarterly meetings with a broader group of stakeholders involved in the management of trafficking who collectively forms the Trafficking in Persons Consultative Forum.

1.14 The SOCA Unit has also established similar task teams at provincial level.

¹⁷ Information obtained from the Human Trafficking Desk on 2 July 2008.

¹⁸ The following unreported cases were successfully prosecuted: State vs Amien Andrews and State vs Elizabeth Maswanganye. The case of State vs Phillips is still sub judice.

¹⁹ The strategy focuses on sexual offences only given the SOCA Unit's mandate to deal with sexual offences. See paragraph 2.41 for a detailed discussion regarding the strategy.

Webpage

1.15 The SOCA Unit has also established a Human Trafficking Webpage linked to the Government website. The purpose of the webpage is to show the actions the South African Government is taking to combat trafficking in persons. Regional developments regarding trafficking in persons are also mentioned on the webpage.

Thuthuzela Care Centres

1.16 The high levels of sexual violence against women and children, especially rape, are a serious challenge to South Africa, in particular the criminal justice system. The Thuthuzela Care Centres (TCCs) were established to deal with this challenge by improving the process of reporting and prosecution of rape and other sexual offences in a dignified and caring environment. These centres seek to lessen the trauma of sexual violence and to reduce secondary victimization of survivors by providing professional medical care, counseling, access to dedicated investigators and prosecutors all under one roof.²⁰ As victims of trafficking are often subjected to sexual exploitation, they would be able to make use of the services provided at the TCCs.

Helpline

1.17 At a non-governmental level, the International Organisation for Migration has established a helpline for the reporting of cases of trafficking in persons. The IOM provides victims of trafficking who join its Southern African Counter-Trafficking Assistance Programme with safe accommodation, medical and psychosocial assistance, and assistance in returning to their home countries and reintegration assistance. The IOM has also provided training on victim identification and assistance to a number of law enforcement officials and civil society representatives.

Conferences

1.18 Various conferences to raise awareness on issues relating to trafficking in persons were held in South Africa. These include the Africa Region Conference on Human Trafficking hosted by the South African Chapter of the International Association of Women Judges from 18 to 21 October 2007, the Global Inter-Faith Dialogue: What the Religious Communities can do to Combat Human Trafficking held from 3 to 5 October 2007, and the Next Steps to Path-breaking Strategies in the Global Management and Prosecution of Sex Trafficking in South Africa held by the Task Team on Trafficking in Persons in collaboration with the War Against Trafficking Alliance from 22 to 24 June 2004.

Other

1.19 Other government actions taken to counter organised crime in general include the establishment of the Directorate of Special Operations (Scorpions),²¹ the Criminal Assets Recovery Fund, and the Financial Intelligence Centre.

Origin of the investigation

1.20 The Commission's investigations into the review of the Child Care Act²² and sexual offences respectively considered the issue of trafficking in children. However, given time constraints to finalise both the investigations referred to, the Commission realised that it would not be able to conduct detailed research into the issue of trafficking in children. 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

20 Information obtained at http://www.unicef.org/southafrica/hiv_aids_998.htm on 23 June 2008.

21 The Scorpions will be merged with the organised crime unit of SAPS.

22 74 of 1983.

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 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.

Consultation process

1.21 In accordance with the Commission's policy of consulting as widely as possible, every effort was made to publicise the investigation and to elicit responses from relevant stakeholders as well as from members of the public.

1.22 In January 2004 the Commission published an Issue Paper on trafficking in persons with the aim to identifying aspects relating to trafficking in persons in need of legal reform. The Issue Paper 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. The Commission distributed the Issue Paper to relevant stakeholders and, on request, to members of the public. An electronic copy of the Issue Paper was also made available on the Commission's website. The Issue Paper elicited a lively response. Submissions received on the Issue Paper came from government departments, various organisations as well as from ordinary members of the public. A list of names of respondents to the Issue Paper is enclosed as Annexure A.

1.23 Based on the submissions received on the Issue Paper, an inter-departmental meeting was held on 31 August 2004. This meeting deliberated on the following issues:

- (a) The 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.

1.24 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, of Home Affairs, and of Social Development. A representative from the United Nations Children's Fund (UNICEF) also attended the meeting.²³ 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.

1.25 The Issue Paper was followed by a Discussion Paper, including a draft Bill, which set out the Commission's preliminary recommendations for law reform relating to the issue of trafficking in persons. The Discussion Paper was published in April 2006. Submissions received on the Issue Paper informed the Commission's preliminary proposals for law reform as set out in the Discussion Paper. Similar to the Issue Paper, the Discussion Paper was distributed as widely as possible. As part of the consultative process on the Discussion Paper, the Commission held provincial meetings in order to provide an opportunity to interested parties to discuss the Commission's preliminary recommendations as set out in the Discussion Paper and draft Bill. Consultative meetings were held in Pretoria on 6 June 2006, in Nelspruit on 13 June 2006, in Cape Town on 20 June 2006, in the Eastern Cape on 22 June 2006, in Durban on 27 June 2006, and in Bloemfontein on 29 June 2006. At these consultative meetings, the Commission's preliminary proposals for law reform were discussed with reference to extensive worksheets

23 UNICEF provided financial support for the meeting.

compiled for this purpose.²⁴ Attendees were invited to take these worksheets to their respective institutions and to submit the completed worksheets to the Commission. Worksheets were also distributed via e-mail upon request. In addition to proposals made at these consultative meetings, the Commission received several written submissions. The closing date for submissions on the Discussion Paper was 30 June 2006, but was extended, on public request, to 31 July 2006. A list of names of respondents to the Discussion Paper is enclosed as **Annexure B** and the worksheets are enclosed as **Annexure C**.

1.26 This Report was tabled for discussion and approval at the Commission's meeting held on 31 May 2008. Although the Commission in principle agreed with the content of the report, it decided to delay the approval of the report in order to give those departments on whose line functions the proposed legislation will have an impact another opportunity to comment on the proposed legislation. The Commission received minor comments from the Departments of Foreign Affairs, of Home Affairs, of Social Development, of Labour and the South African Police Services. Comments were also received from the Inter-departmental Management Team Steering Committee and the Trafficking in Persons Tasks Team. The proposed legislation was amended, where possible, to reflect the comments made.

Purpose of this Report

1.27 Submissions received on the Discussion Paper have formed the basis for the Report on Trafficking in Persons and have informed the solutions identified by the Commission. The purpose of the Report is to set out the Commission's final recommendations for law reform relating to the issue of trafficking in persons. The Report is accompanied by a draft Bill enclosed as **Annexure D**.

²⁴ The worksheets related to the following aspects: the prosecution of traffickers and other role-players, the protection of victims of trafficking in persons, and the prevention of trafficking in persons.

Chapter 2:

The Current Legal Position

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The Current Legal Position

Introduction

2.1 South Africa has signed and/or ratified various international instruments that condemn trafficking in persons. The most recent of these instruments is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. This Protocol supplements the United Nations Convention against Transnational Organised Crime and must be read with the Convention as the Convention requires states parties to legislate on various matters relevant to the issue of trafficking in persons.²⁵

2.2 In terms of section 231(2) of the Constitution,²⁶ an international agreement binds the Republic of South Africa only when it is enacted into law by way of national legislation, unless it is an agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive.

2.3 Hence the South African government has commenced with various processes to bring its domestic laws in accordance with the standards set by these international instruments.

2.4 While South Africa does not yet have legislation that comprehensively address the trafficking of persons, the Criminal Law (Sexual Offences and Related Matters) Amendment Act²⁷ and the Children's Act²⁸ contain transitional provisions relating to trafficking in persons pending the adoption of comprehensive legislation.

2.5 The Criminal Law (Sexual Offences and Related Matters) Amendment Act criminalises trafficking in persons for purposes of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person.²⁹ A sentence of life imprisonment may be imposed on a person convicted of the offence of trafficking in persons.³⁰ The Act further makes it a criminal offence for a commercial carrier that brings a person into or removes a person from South Africa if the person does not have the documents required for lawful entry into or departure from South Africa unless the commercial carrier can give justifiable reasons for doing so.³¹ A person convicted of this offence is liable to imprisonment of not less than 10 years if he or she is a first offender, or of not less than 15 years if he or she is a second offender or of not less than 20 years if he or she is a third or subsequent offender.³² A commercial carrier is, in addition to any offence under the Act, liable to pay the cost of the trafficked person's care, safekeeping and return from South Africa.³³ Furthermore, the Act provides that a victim of trafficking is not liable for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked.³⁴

25 Article 1 of the 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.

26 Constitution of the Republic of South Africa Act 108 of 1996.

27 32 of 2007.

28 38 of 2005.

29 Section 71(1) read with the definition of trafficking in section 70.

30 The offence of trafficking in persons is included in Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997.

31 Section 71(6)(a) – (b).

32 The offence of trafficking in persons is included in Part 111 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997.

33 Section 71(6)(c).

34 Section 71(5).

2.6 The Children's Act criminalises the trafficking of children for purposes of exploitation³⁵ and provides for a fine and imprisonment of up to 20 years or both a fine and such imprisonment for anyone convicted of this crime.³⁶ This Act defines exploitation to include all forms of slavery or practices similar to slavery, forced marriage, sexual exploitation, servitude, forced labour or services, child labour and the removal of body parts.³⁷ Apart from criminalising the act of trafficking in children, the Act also criminalises certain behaviour facilitating trafficking in children.³⁸ In terms of the Act the court may suspend all parental responsibilities and rights of parents, guardians and other persons who have parental responsibilities and rights in respect of children pending an inquiry by a children's court if they were involved in the trafficking of their children.³⁹ The Act broadens the definition of trafficking in the UN Protocol on Trafficking in Persons by, amongst others, adding to the definition the adoption of a child facilitated or secured through illegal means. The Act gives effect to the UN Protocol on Trafficking in Persons.⁴⁰ Unlike the Protocol, the Act recognises the trafficking of children for purposes of removing their body parts, other than organs. The Act recognises the need for international co-operation between South Africa and countries that are State Parties to the Protocol as well as those countries that have not ratified the Protocol.⁴¹ The Act recognises the role that various government departments play in the protection of child victims of trafficking and provides for specific assistance that should be rendered to child victims of trafficking by these departments. The Act identifies certain categories of professional persons who may come into contact with child victims of trafficking and places a legal obligation on them to refer child victims of trafficking to a designated social worker for an investigation to determine whether these children are in need of care and protection.⁴² Should they be found to be in need of care and protection, the protective measures in terms of the Act will be applicable to them. The Act gives recognition to the vulnerability of foreign child victims of trafficking by stipulating that due consideration should be given to the availability of care arrangements and the safety of the children in the country to which they are to be returned before a decision to repatriate them is taken.⁴³ Likewise, assistance to return to South Africa must also be provided to child victims of trafficking who are citizens or permanent residence of South Africa.⁴⁴ The Act also enables the South African courts to prosecute South African citizens, those permanently residing in South Africa or a juristic person or partnership registered in terms of any law in South Africa that commits an act of trafficking in children in another country if such an act would have constituted an offence if committed in South Africa.⁴⁵

2.7 The provisions relating to trafficking contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Children's Act will be repealed by their incorporation into the proposed trafficking legislation.

2.8 Pending the promulgation of comprehensive legislation on trafficking in persons, the Criminal Law (Sexual Offences and Related Matters) Amendment Act is the most appropriate legislation to charge those who traffick persons for purposes of sexual exploitation. Furthermore, several common law and statutory law provisions could be used to prosecute persons suspected of being involved in the trafficking of persons. Under the common law, depending on the circumstances of each case, such persons could be charged with kidnapping, common assault, assault with intent to cause grievous bodily harm, extortion, slavery, attempted murder and murder.

35 Section 284.

36 Section 305(8).

37 Section 1.

38 Section 285.

39 Section 287.

40 Section 281.

41 Section 283.

42 Section 288.

43 Section 290.

44 Section 286.

45 Section 291.

Statutory offences are provided for in the Sexual Offences Act,⁴⁶ the Riotous Assemblies Act,⁴⁷ the Immigration Act,⁴⁸ the Basic Conditions of Employment Act,⁴⁹ the Intimidation Act,⁵⁰ the Domestic Violence Act⁵¹ and the Prevention of Organised Crime Act.⁵² These common law and statutory law offences are discussed in more detail below.

Common law offences

Kidnapping

2.9 Kidnapping is one of the means used to recruit persons for purposes of trafficking them. Kidnapping consists in unlawfully and intentionally depriving a person of liberty of movement.⁵³ The act of deprivation may take the form of physically moving the person from one place to another or imprisoning the person without physically moving him or her,⁵⁴ or by enticing him or her away by craft or cunning,⁵⁵ or through some other act by which the person is deprived of liberty.⁵⁶ If a person was trafficked by means of kidnapping, a charge of kidnapping could be laid against the perpetrator. However, if the person was kidnapped in another country before being brought to South Africa, it would not be possible for the state to charge the perpetrator with the crime of kidnapping because it is an offence over which the South African courts would not have jurisdiction.⁵⁷ The circumstances relating to the kidnapping may be relevant in order to shed light on any offences that might have been committed in South Africa.

Common assault and assault with intent to cause grievous bodily harm

2.10 Victims of trafficking are usually subjected to various forms of physical abuse in order to break their spirit and to make them submit to the demands of their exploiters. Perpetrators could be charged with one or more of the following forms of assault depending on the circumstances of each case.

2.11 A charge of common assault could be laid against perpetrators if they have unlawfully and intentionally applied force to the person of a victim or have inspired a belief in the victim that force is immediately to be applied to him or her. Force includes not only direct application of force but also cases of unlawful touching where the manner or nature of the touch is in some way insulting to the victim such as spitting in the victim's face.⁵⁸

46 23 of 1957.

47 17 of 1956.

48 13 of 2002.

49 75 of 1997.

50 72 of 1982.

51 116 of 1998.

52 121 of 1998.

53 Burchell Jonathan *Principles of Criminal Law* (third edition) Lansdowne: Juta 2005 at 758.

54 See for example *S v Mellors* 1990 (1) SACR 347 (W) where X has entered a building and kept Y against her will. X was accordingly convicted of kidnapping.

55 See for example *R v Long* 1970 (2) SA 153 (RA) where X pretended to be a photographer's assistant who had to fetch a little girl from her school to photograph her, and in this way obtained possession of the girl.

56 Burchell (*op cit*) at 760.

57 *S v Fraser* 2005 (1) SACR 455 (SCA) at 458.

58 Burchell (*op cit*) at 682 - 685.

2.12 Perpetrators could previously be charged with indecent assault. This form of assault has been repealed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act which provided for the following offences: sexual assault,⁵⁹ compelled sexual assault,⁶⁰ and compelled self-sexual assault.⁶¹

2.13 Perpetrators could be charged with assault with intent to cause grievous bodily harm if serious physical injury, whether applied directly or indirectly, is caused to the person of a victim. It is not necessary that the perpetrator actually cause grievous bodily harm but it is sufficient that he intends to cause it. If the perpetrator intends to cause a grievous injury but causes a slight injury or none at all, he or she may nevertheless be guilty of assault with intent to cause grievous bodily harm. Conversely, if the perpetrator inflicts a serious injury without intending to cause grievous bodily harm, this crime is not committed.⁶²

Attempted murder and murder

2.14 In addition to a charge of rape, a charge of attempted murder could be laid against a perpetrator if a victim of trafficking is infected with the HIV virus as a result of being raped. Where the victim has died from the disease, a charge of murder could be laid against the perpetrator.

2.15 It is, however, difficult to prove murder or attempted murder in cases of harmful HIV-related behaviour. Murder is defined as the unlawful and intentional killing of another person.⁶³ When prosecuting this crime, the state must prove that the accused has committed all the elements of the crime. The state must therefore show that the accused (a) knew that he was HIV positive, and (b) knew or foresaw the possibility that his behaviour would pass on the HIV virus to the victim which would at a later stage cause the death of the victim. However, just because the accused person tested HIV positive does not mean that he was the one who has infected the victim with the virus. Similarly, just because the victim died of AIDS does not mean that she was infected by the accused person. Hence the state will have to prove, beyond reasonable doubt, that the fact that the victim died of AIDS is a direct result of having being raped by the accused.

Extortion

2.16 Perpetrators could be charged with extortion (better known as blackmail). Extortion involves the unlawful and intentional application of coercive pressure by one person upon another in order that the other may feel compelled to provide the extorter with some advantage or benefit which he or she might not otherwise have given.⁶⁴ Victims of trafficking who refuse to submit to exploitation are often threatened with retaliation against their families as a way of forcing them to submit to the demands of their exploiters. Victims may also be threatened that photos or video recordings of them engaging in sexual conduct will be sent to their families.

2.17 As with kidnapping, it would not be possible to charge perpetrators with any of the offences mentioned above if these were committed outside the borders of the Republic of South Africa.

Slavery

2.18 Slavery is regarded as an international (as opposed to a national) crime over which all civilized states are allowed (or even required) to exercise universal jurisdiction. The slaver has, as a matter of customary international law, become regarded as someone belonging to the category of *hostis humani generis* (enemies of mankind) in whose prosecution all nations have an interest. Customary international law has always been regarded as part of South Africa's common law, except where it was in conflict with an Act of Parliament or

59 Section 5.

60 Section 6.

61 Section 7.

62 Burchell (*op cit*) at 690.

63 Burchell (*op cit*) at 668.

64 Burchell (*op cit*) at 826.

other legislation, judicial precedent or an executive act of state. This has now been confirmed by section 232 of the Constitution.⁶⁵ Current criminal law authors no longer mention slavery as a crime in terms of South African common law. However, the mere fact that criminal law authors do not refer to slavery as a common law crime any longer, or that prosecutions for such a crime have not taken place for many years, does not mean that such a crime has fallen in desuetude to the extent that it no longer exists. In the end, it must be either the legislature or a court of law that determines whether a crime has fallen into desuetude, and not textbook writers. Before a court will find that a common law crime has fallen into desuetude and, therefore, that it is no longer to be recognised as a crime, the court will have due regard to the common customs observed by society and determine whether the *boni mores* still require the act to be punished under criminal law. There has, however, to date not been such a judicial decision in respect of slavery in South Africa.⁶⁶

2.19 However, other than the offences mentioned above, the high court is, in terms of section 19(1)(a) of the Supreme Courts Act,⁶⁷ empowered to exercise universal jurisdiction over international crimes under customary international law, including the crime of slavery, irrespective of where the crime was committed. All that is required is the presence of the person in the area of the court exercising jurisdiction.

Statutory law offences

Sexual Offences Act, 23 of 1957

2.20 The Act stipulates that any person who keeps a brothel⁶⁸ is guilty of an offence.⁶⁹ The Act further lists the circumstances where certain persons (who may somehow be associated with the brothel but who would not normally be considered to be 'keeping') are deemed to be keeping a brothel.⁷⁰ Thus, if a victim of trafficking is found at a brothel, the person who is keeping the brothel could be criminally charged.

2.21 Section 10(b) of the Act makes it a criminal offence for any person who inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed. The prohibition of concealing a woman in a brothel is aimed at conduct that would "seek to prevent a female enticed into the brothel from being discovered and removed by family or officials".⁷¹ It is committed by concealing the female in a place in the house or place which is a brothel.

2.22 Section 10(d) of the Act makes it a criminal offence for any person who procures or attempts to procure any female to become an inmate of a brothel. Depending on the interpretation followed it could imply mere occupancy of a brothel or it could imply an element of imprisonment or loss of autonomy, and could thus refer to the situation where the procured woman is not in a position to leave such brothel of her own volition.

2.23 Section 12(1)(a) of the Act provides that it is an offence for any person to take or detain a woman against her will to or in or upon a house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not. Section 12(3) of the Act provides that the accused will be deemed to have detained a woman if he withholds any wearing apparel with intent to compel or induce her to remain in the place.

65 Constitution of the Republic of South Africa Act 108 of 1996.

66 Submission made on the South African Law Reform Commission Discussion Paper by Mr. Lamprecht, Regional Magistrate, Division of Mpumalanga. See also AV Lansdowne and J Campbell *South African Criminal Law and Procedure* (vol 5) 1982 at 19-20; J Dugard *International Law: A South African Perspective* (second edition) Lansdowne:Juta 2000 at 141 and 143; CWH Lansdown et al *Gardiner and Lansdown: South African Criminal Law and Procedure* Vol II. Specific Offences (sixth edition) 1957 at 1059-63.

67 59 of 1959.

68 Section 1 of the Act defines a brothel as "any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose".

69 Section 2.

70 Section 3.

71 Milton and Cowling *South African Criminal Law and Procedure* Vol III: Statutory Offences at E3-134.

2.24 Section 17 of the Act penalises persons who knowingly permit any house or place to be used for the purpose of any offence under the Act. A person could therefore be criminally charged if he or she knowingly leases or allows a house or place to be used for the sexual exploitation of victims of trafficking.

2.25 Section 20(1)(a) of the Act provides that it is an offence for any person knowingly to live wholly or in part on the earnings of prostitution. In terms of section 21(3) of the Act, a person who is proved to have no visible means of support and who -

- (a) resides in a brothel
- (b) lives with a prostitute; or
- (c) habitually is in the company of a prostitute -

is deemed to be knowingly living wholly or in part on the earnings of prostitution.

2.26 The effect of this presumption is not only to establish that the accused lived on the earnings of prostitution, but also that he or she did so knowingly.⁷² While the "earnings" referred to here are usually received directly from the prostitute, it is sufficient that the money is given in consideration of the act of prostitution and can therefore be given directly to the trafficker by the client of the prostitute.⁷³

Riotous Assemblies Act, 17 of 1956

2.27 Section 18(2) of the Act provides that 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.

2.28 If a trafficker conspires with another person to aid the commission of a crime against a victim of trafficking⁷⁴ or incites another person to commit an offence against the person of a victim of trafficking,⁷⁵ he or she could be charged in terms of the above section.⁷⁶

Immigration Act, 13 of 2002

2.29 This Act regulates entry to and departure from South Africa and makes it a criminal offence for-

- (a) anyone who enters, remains in, or departs from South Africa in contravention of the Act;⁷⁷ or
- (b) anyone who knowingly assists a person to enter or remain in, or depart from South Africa in contravention of the Act.⁷⁸

2.30 Furthermore, section 49(15)(a) of the Act makes it a criminal offence for a person to, for the purpose of entering, remaining in or departing from South Africa or of assisting any other person to enter, remain or depart from South Africa, use or attempt to use any fabricated or falsified document or any document issued by a lawful authority he or she is not entitled to use. This section could be used to charge a person who crosses or assists victims of trafficking to cross the borders of South Africa with fabricated or falsified passports. It could further be

⁷² Milton and Cowling (*op cit*) at E3-100.

⁷³ Milton and Cowling (*op cit*) at E3-103.

⁷⁴ For example a brothel owner who conspires with a client to have sexual intercourse with a victim of trafficking in contravention of section 20(1A) of the Sexual Offences Act, 23 of 1957. In this case the client would be aiding the commission of the crime.

⁷⁵ For example assaulting the victim of trafficking.

⁷⁶ In *S v Jordan* 2002 (6) SA 642 (CC) the majority judgment found that a client of a prostitute commits an offence under section 18(2) of the Riotous Assemblies Act, 17 of 1956.

⁷⁷ Section 49(1)(a).

⁷⁸ Section 49(2).

used to charge a person who, for example, through financial reward to a corrupt official, obtained a passport issued by a lawful authority.

Basic Conditions of Employment Act, 75 of 1997

2.31 This Act prohibits all forms of forced labour⁷⁹ and stipulates that no person may for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour.⁸⁰ Forced labour is not defined in South African law. However, the Forced Labour Convention 29 of 1930⁸¹ defines forced labour as all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him or herself voluntarily.⁸² Hence it could be argued that a person who is involved in prostitution or other forms of labour against his or her will is being subjected to forced labour.

Intimidation Act, 72 of 1982

2.32 Victims of trafficking are often compelled to submit to exploitation through acts of intimidation. Such acts include threats of harm to family members of the victims and are punishable in terms of the Intimidation Act.⁸³ The Act makes it a criminal offence for a person who-

- (a) without lawful reason and with intent to compel or induce any person to do any act, assaults, injures or causes damage to any person; or in any manner threatens to kill, assault, injure or cause damage to any person; or
- (b) acts or conducts him or herself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication fears for his or her own safety or the safety of his or her property or the security of his or her livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person.⁸⁴

2.33 Paragraph (a) expressly requires intention for a conviction of the crime created in that paragraph. As far as the crime created in paragraph (b) is concerned, intention is not expressly required. In paragraph (b), the words "that it might reasonably be expected that the natural and probable consequences thereof would be that . . ." embodies an objective test, which is difficult to square with the subjective test which the courts apply to determine the existence of intention. The use of the words "that it might reasonably be expected" in the paragraph means that X would only be guilty of the crime created in the paragraph if the reasonable person would have foreseen the result as the natural and probable consequence of his or her conduct. It follows from this that, in order to secure a conviction of contravention of this paragraph, it is sufficient to prove culpability in the form of negligence.⁸⁵

Domestic Violence Act, 116 of 1998

2.34 This Act defines a domestic relationship to include a relationship between a complainant and a respondent who share or recently shared the same residence or who is in an actual or perceived romantic relationship of any duration.⁸⁶ Hence the provisions of the Act could be used where the perpetrator, e.g. a brothel owner, share the same residence with the victim of trafficking. A perpetrator may sometimes start a romantic relationship with one of the victims or may cause her to believe that there is a romantic relationship between them. This is done in order to ensure that the victim keeps an eye over the rest of the victims and to inform the

79 Section 48(1).

80 Section 48(2).

81 This Convention was ratified by South Africa on 5 March 1997.

82 Article 2(1).

83 The crime of intimidation may overlap with other crimes such as extortion and assault.

84 Section 1(1).

85 Snyman (*op cit*) at 441.

86 Section 1.

perpetrator of any possible problems. Such a victim would be able to lay a charge in terms of the Act if subjected to any form of domestic violence as defined in terms of the Act.

Prevention of Organised Crime Act, 121 of 1998

2.35 This Act makes it an offence to receive or retain any property derived from a pattern of racketeering activity whilst knowing or ought reasonably to have known that such property is so derived, and to use or invest any part of such property.⁸⁷ A pattern of racketeering activity is defined as the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1. The relevant offences in Schedule 1 are rape, kidnapping, assault with intent to cause grievous bodily harm, indecent assault, contravention of section 20(1) of the Sexual Offences Act,⁸⁸ and extortion.

2.36 The Act further provides for the recovery of the proceeds of unlawful activities⁸⁹ as well as the civil forfeiture of criminal assets that have either been used to commit an offence or are the proceeds of such offence.⁹⁰

2.37 Hence, any property or proceeds derived from the exploitation of a victim of trafficking can be forfeited.

Policy framework

2.38 The South African government's response to the unacceptably high levels of crime has led to a range of policy initiatives, some of which relate specifically the trafficking of persons. These policy initiatives include the following:

National Crime Prevention Strategy

2.39 Cabinet approved the National Crime Prevention Strategy (NCPS) in 1996. The NCPS aims to reduce crime through the following interventions: the criminal justice process, the reduction of crime through environmental design, public values and education, and transnational crime. In recognizing the inadequate support given to victims of crime historically, the NCPS acknowledge the need to promote and implement a victim-centered approach to crime prevention. This was done through the introduction of the Victim Empowerment Programme in 1998 as an integral part of the NCPS. The Victim Empowerment Programme seeks among other things to enhance the effectiveness of victim support services, to improve access to the criminal justice system, to redesign the criminal justice system to empower victims, to provide a greater and more meaningful role for victims in the criminal justice system, to improve the service that the criminal justice process delivers to victims of crime and to deal with the damaged caused by criminal acts by providing remedial interventions for victims. The implementation of the NCPS is achieved through the Justice, Crime Prevention and Security (JCPS) Cluster.⁹¹

Service Charter for Victims of Crime in South Africa and the Minimum Standards on Services for Victims of Crime

2.40 In 2004 Cabinet approved the Service Charter for Victims of Crime in South Africa and the Minimum Standards on Services for Victims of Crime. These documents are part of government's Victim Empowerment Programme. The Victims Charter aims to improve service delivery to victims of crime and stipulates that the following rights of victims must be upheld during their interaction with the criminal justice system: the right to be

87 Section 2(1)(a).

88 23 of 1957.

89 Chapter 5 of the Act.

90 Chapter 6 of the Act.

91 Information obtained from the presentation made to the Department of Justice and Constitutional Development at the Information Session on Victims Right held from 22 – 26 October 2007.

treated with fairness and with respect for dignity and privacy, the right to offer information, the right to receive information, the right to protection, the right to assistance, the right to compensation, and the right to restitution. The Minimum Standards explain the rights as contained in the Victims Charter and serve as a guideline for service providers who interact with victims of crime. They set out the different processes and responsibilities a victim can expect from the criminal justice system. They also determine the minimum standards that victims can expect from government departments.

National Strategy to Prevent and Respond to Human Trafficking for Sexual Purposes

2.41 The Task Team on Trafficking in Persons⁹² has developed the National Strategy to Prevent and Respond to Human Trafficking for Sexual Purposes. The Strategy has been converted into the following Result Areas: knowledge and understanding of trafficking in South Africa deepened; cooperation and coordination structure established and functioning; capacity building and training; prevention strategy, public education and awareness programmes, and evaluation and audit. The objectives of these result areas are to support moves towards compliance with the Trafficking Protocol; to achieve greater capacity in South Africa to combat trafficking in persons, prosecute perpetrators and assist victims; and to develop a more effective, multi-sectoral and coordinated response to trafficking in persons.

Anti-Rape Strategy for the Prevention of Sexual Violence against women and children

2.42 The Interdepartmental Management Team (IDMT) has finalised the framework for the anti-rape strategy. The process for the development of the anti-rape strategy was reviewed at the IDMT's Strategic Session held in Pretoria on 26 and 27 June 2008.⁹³ It is hoped that the anti-rape strategy to be developed will comprise an approach that enables both the prevention of and a multi-sectoral response to rape.

⁹² See also paragraph 1.12 above.

⁹³ Information obtained from Adv Qaba from the Sexual Offences and Community Affairs Unit on 27 June 2008.

Chapter 3:

The Prosecution of Traffickers and other Role Players

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The Prosecution of Traffickers and other Role Players

SUBSTANTIVE MEASURES

Criminalising the act of trafficking in persons and other acts relating to trafficking in persons

3.1 The Commission recommended 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 persons and should provide for an appropriate sentence.⁹⁴ The following are the relevant provisions as set out in the Combating of Trafficking in Persons Bill (hereafter referred to as “the Bill”) to the Discussion Paper.

Trafficking in persons

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.

“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

94 See paragraph 5.29 and clause 38(1) of the proposed Bill to the Discussion Paper.

- (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;

"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;

"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);

"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;

3.2 The Commission further recommended that the offence of trafficking in persons be included in Schedule 1, Schedule 2, Part III and Schedule 5 to the Criminal Procedure Act.⁹⁵ The inclusion of the offence in Schedule 1 would mean that a peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed the offence of trafficking in persons.⁹⁶ The inclusion of the offence in Schedule 2, Part III would mean that a person accused of committing the offence of trafficking in persons may not be released on bail before his or her first appearance in a lower court.⁹⁷ Furthermore, if a person is likely to give evidence in criminal proceedings in respect of the offence of trafficking in persons, a judge in chambers would be able to issue a warrant for the detention of such person if ⁹⁸

- (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.

3.3 The inclusion of the offence in Schedule 5 would 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

⁹⁵ See paragraph 5.23 of the Discussion Paper and the proposed amendments to Schedule 1, Schedule 2 Part III and Schedule 5 of the Criminal Procedure Act as set out in Schedule 1 to the Bill to the Discussion Paper.

⁹⁶ See section 40 of the Criminal Procedure Act.

⁹⁷ See section 59 of the Criminal Procedure Act.

⁹⁸ See section 185 of the Criminal Procedure Act.

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.

Submissions received

Submissions relating to the definition of trafficking in persons

3.4 The workshop participants suggested that “kidnapping” be included in the list of means that could be used to move a person into a trafficking situation.⁹⁹ The participants suggested that paragraph (b) should be deleted and that paragraph (a) be reformulated as follows:

“(a) the recruitment, sale, supply, procurement, capture, removal, transportation, transfer, harbouring or receipt of a persons or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic—

...” This proposal is supported by the IOM, Dr Gould and the Department of Foreign Affairs.

3.5 According to the participants, the above amendment will make it clear that the adoption of a child must be for the purpose of exploitation in order to be a case of trafficking.

3.6 The Western Cape NGO Task Team on Human Trafficking supported the proposed definition of trafficking.

3.7 The SAHRC suggested that the definition of trafficking be placed in the main body of the proposed legislation because this definition defines the subject matter.

3.8 The Children’s Rights Project submitted that article 3(c) of the Trafficking Protocol should be reflected in the proposed legislation. This article stipulates that 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 threat or 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. Hence the respondent recommended that in addition to the proposed definition, trafficking in relation to children should be defined in such a manner which must exclude the mentioned means.

3.9 The UNODC supported the proposed definition of trafficking in persons. The respondent further stated that it would still be in compliance with the Trafficking Protocol if the requirement of the means as provided for in the definition is suppressed. This, according to the respondent, would ease prosecutors’ task in proving the offence.

3.10 SWEAT proposed that the definition of trafficking should read as follows: “Trafficking takes place for the purposes of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, industrial, agricultural, sexual or reproductive), in forced or bonded labour, or in 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.”

Submissions relating to the offence of trafficking in persons (clause 5)

3.11 The IOM submitted that the proposed legislation should consistently use the term “human trafficking” or “trafficking in persons” to refer to the offence, and should avoid the use of the term “trafficking”, which more broadly refers to the illicit dealing in or bartering of any commodity.

3.12 The workshop participants made the following suggestions in respect of clause 5:

(a) the words “and unlawfully” should be deleted from all the offences clauses;

- (b) it should be clearly stated what is meant by "operate" in subclause 5;
- (c) the offence of trafficking should be included in Schedule 1 to the Prevention of Organised Crime Act;¹⁰⁰
- (d) the following should be inserted in the beginning of subsection (1): Notwithstanding the common law position regarding slavery or the slave trade.

3.13 The workshop participants agreed with the Commission's recommendation that the offence of trafficking in persons be included in Schedule 1 and Schedule 2, Part III of the Criminal Procedure Act, 51 of 1977. Some participants further supported the inclusion of the offence of trafficking in persons Schedule 5 of the Act. However, other participants said that the offence of trafficking in persons should not be included in Schedule 5, but in Schedule 6 of the Act.

3.14 Some of the workshop participants argued that trafficking in persons should be punishable with the same punishment as the common law crime of slavery. They stated that slavery is an international crime and our courts have jurisdiction over such crimes. Hence, if the punishment for trafficking is the same as that for slavery, the high court would be able to impose a sentence of up to life imprisonment and the regional court would be able to impose a sentence of up to 15 years. However, the regional court would be able to refer the case to the high court for sentencing if a higher sentence is needed.

3.15 The SOCA Unit suggested that Schedule 6 of the Criminal Procedure Act be amended as follows:

Murder, when-

- (a) it was planned or premeditated;
- (b) the victim was-
 - (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or
 - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:
 - (i) Rape; or
 - (ii) robbery with aggravating circumstances; or
 - (iii) trafficking in persons
- (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape-

- (a) when committed-
 - (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who is charged with having committed two or more offences of rape; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

100 This was supported by the Department of Home Affairs.

- (v) by a person, group of persons or syndicate who is charged with the offence of trafficking in persons

3.16 The SOCA Unit further suggested that Schedule 5 of the Criminal Procedure Act be amended to include the following: Trafficking in persons in circumstances other than those set out in Schedule 6.

3.17 Various respondents supported clause 5.¹⁰¹ With regard to the other offences, the Western Cape NGO Task Team on Human Trafficking suggested that a period of imprisonment of not less than four years be imposed on perpetrators.

3.18 IOM proposed that the reference to “adoption” in subclauses (5)(2)(a)(ii) and (5)(2)(b) should be deleted given their earlier recommendation regarding the placement of the term “adoption” in the definition of trafficking. According to the respondent, illegal adoption should not be seen as equivalent to the exploitation stage of the trafficking process. Instead, adoption, whether legal or illegal, should be considered one of the actions which, if for purposes of exploitation, constitute the crime of trafficking in persons. Furthermore, persons who facilitate the illegal adoption of children should be charged according to the relevant criminal offence, but not with the offence of trafficking in persons if facilitation of the illegal adoption is not for the purpose of exploitation.

3.19 The UNODC points out that clause 5(1) describes two kinds of conducts, i.e. “trafficks another person” or “allows another person to be trafficked”. The respondent stated that it is not clear why the second form of conduct has been criminalised as such conduct could be covered by the ancillary offences of facilitating, aiding, and abetting, or participation as an accomplice. The respondent further submitted that it would merit a separate offence if the intention is to expand the ancillary offences to those who are aware of a trafficking situation and who do nothing to stop it or who passively assist in the commission of the offence. The respondent submitted that subclause (2) as far as it relates to consent is in compliance with the Trafficking Protocol and stated that subclauses (3) – (5) address the liability of employers well. The respondent further agrees with the proposed penalty and stated that the seriousness of the crime is taken into account if the maximum penalty is at least four years.

3.20 Ms Lansink submitted that clause 5 is problematic as a result of the broad definition of trafficking as proposed. With reference to clause 5(2), she stated that any agency of person is being removed because even if no false promises were made or if no coercion has been used, and the person is exploited in a broad sense, this would be regarded as trafficking if the person has been moved or transferred, whereas the UN Trafficking Protocol states that consent is irrelevant only if one or more of the listed means has been used.

3.21 Dr Gould suggested that clause 5(2)(a)(ii) be deleted because the legislation is aimed at prosecuting cases of illegal adoption only if the adoption is intended to result in the exploitation of a child.

3.22 SWEAT disagreed with the recommendation that consent should be irrelevant where any means have been used to move a person into an exploitative situation. The respondent believed that while deception and coercion should be taken into account, consent should be considered in the case of adults consenting to engage in sex work. The respondent only supported consent being irrelevant where children are involved.

3.23 The DOJCD suggested that a trafficker should be defined.

Submissions relating to the definition of abuse of vulnerability

3.24 The Bill to the Discussion Paper defines abuse of vulnerability as follows:

“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

101 IOM, Western Cape NGO Task Team on Human Trafficking and Childline SA.

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;

3.25 The workshop participants suggested that the word “substance” be defined.¹⁰²

3.26 The SOCA Unit submitted that the state might have difficulty in proving “reduced capacity to form judgements by virtue of being a child” as stated in paragraph (e) and therefore suggested that the words “reduced capacity to form judgements” be deleted. Ms Lansink shared the concern raised by the SOCA Unit.

3.27 The Western Cape NGO Task Team on Human Trafficking suggested that consideration be given to adding the following as factors making persons vulnerable to being trafficked: poverty, unemployment, economic disadvantages, family circumstances, and history of emotional, sexual and physical abuse.

3.28 Anex CDW stated that the provision of situational examples of what creates vulnerability is restrictive and the danger exists that these situations might be used as a norm to measure vulnerability. The respondent argued that the identification of illegal immigrants, pregnant women, people with disabilities, drug addicts and children as those most vulnerable confines trafficking to a certain group being more vulnerable than others.

3.29 SWEAT shared the concerns raised by Anex CDW and submitted that the vulnerability should not be attributed to the person, but to the circumstances in which the person finds him or herself. Hence the respondent suggested that reference be made only to the abuse of a position of vulnerability, without listing any vulnerability.¹⁰³

3.30 The Gender, Health and Justice Research Unit proposed that the list of examples of vulnerabilities be removed. They submitted that the court should examine the facts of each case in order to determine what might constitute vulnerabilities. However, if the Commission chooses to retain the list of vulnerabilities, pregnancy as an example of vulnerability should be deleted.

3.31 The Department of Home Affairs suggested that paragraph (a) be amended as follows: the person having entered or remained in the Republic illegally or without proper documentation.¹⁰⁴

Submissions relating to the definition of exploitation

3.32 IOM said that the Commission should consider adding the qualification “at a minimum” to the list of practices that constitute exploitation, rather than close the list completely. The definition of exploitation would then read as follows: “Exploitation includes, at a minimum-....” The UNODC advised that the Commission should add after the words “exploitation includes” the following words: “but is not limited to”.

3.33 The workshop participants recommended that “forced marriage” either be defined similar to the definition for forced labour or it should be left for the courts to develop.

3.34 The Department of Home Affairs is of the view that forced marriage must be defined. This view is supported by IOM and Dr Gould.

102 This suggestion was supported by Dr Gould.

103 This suggestion was supported by Ms Lansink.

104 This suggestion was supported by Dr Gould.

3.35 IOM proposed that “forced marriage” in paragraph (a) should be placed on its own as a distinct point. This was supported by the Western Cape NGO Task Team on Human Trafficking.

3.36 IOM highlighted that debt bondage facilitates trafficking in persons, but is not a form of exploitation and should therefore not be included in paragraph (a).

3.37 The Western Cape NGO Task Team on Human Trafficking suggested that “debt bondage” in paragraph (a) should be placed on its own as a separate subparagraph.

3.38 Childline SA suggested that forced surrogacy (forcing a woman to be impregnated and then to give up her baby for adoption) should be added as a form of exploitation. The respondent further suggested that consideration be given to including in the proposed legislation the definition of “sexual exploitation” contained in the Children’s Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

3.39 Ms Lansink suggested that that “practices similar to slavery” be defined as follows.

“Practices similar to slavery:

- (a) debt bondage, that is to say, 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 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.
- (b) “Serfdom, that is to say, 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.
- (c) Any institution or practice whereby:
 - (i) A woman without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents or guardian, family or any other person or group; or
 - (ii) The husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A Woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both his natural parents or his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

Submissions relating to the definition of removal of body parts

3.40 Some of the workshop participants proposed that “removal of body parts” be redefined as follows:

“removal of or trade in body parts” means the removal or trade in of any organ or other body part from a living person or the deceased body of a person who has been killed for the sole purpose of removing the organ or body part in contravention of the National Health Act, 2003 (Act No. 61 of 2003).

Submission relating to the definition of servitude

3.41 The workshop participants suggested that the word “serious” be deleted from the definition.

Submissions relating to the definition of sexual exploitation

3.42 SWEAT recommended that the term “sexual exploitation” should not be defined. The respondent submitted that anyone made to sell sex against their will is not participating in prostitution, but is being sexually exploited. Furthermore, anyone who is in a position of vulnerability that result in him or her engaging in sexual

acts is being sexually exploited. The respondent said that should the Commission decide to retain the definition, the reference to prostitution should be removed.

3.43 The SOCA Unit suggested that the words “any other practice in terms of which it cannot be said that the person participated voluntarily” be deleted because the other forms of coercion are broad enough to cover a wide spectrum of cases.

3.44 The Western Cape NGO Task Team on Human Trafficking advised that the Commission should ensure alignment between this definition and the definition of sexual exploitation contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act. The respondent argued that the word “participation” could imply mutual involvement. Hence the respondent suggested that the words “induces to” rather be used which more clearly describe the one-sided nature of coercion. This is supported by Ms Fudge who suggested that the definition be reworded as follows: sexual exploitation “means the inducement of a person into prostitution or other sexual acts, or the inducement of a person into the production of pornographic material as a result of being subjected to threat, force, intimidation, coercion, abuse of power or abuse of a person’s vulnerabilities”.¹⁰⁵ Ms Fudge suggested that pornographic material be defined in order to avoid legal challenges from traffickers as to what constitute pornographic material.¹⁰⁶ The following definition of pornography is suggested: “pornography for the definition of trafficking includes any image, however created, real or simulated, using the body or parts of the body, or the voice, of any person, for any acts which aim at sexual arousal”.

3.45 Ms Fudge said that the proposed legislation correctly states that consent is not to be considered a defence to the intended exploitation. However, consent is reintroduced in the definition of sexual exploitation, thus making consent in fact a defence to the intended sexual exploitation and re-imposing the burden of proof onto the victim which the Trafficking Protocol sought to remove. The respondent added that the Protocol clearly regards prostitution in itself as exploitation and does not refer to forced prostitution.

Additional submissions

3.46 With reference to paragraph 3.65 of the Discussion Paper, the SOCA Unit suggested that the proposed legislation should provide for competent verdicts of alternative crimes committed.

Evaluation and recommendations

Response to the submissions relating to the definition of trafficking in persons

3.47 In response to the SAHRC’s suggestion regarding the placement of the definition of trafficking, it should be noted that reference to the word “trafficking” is made throughout the proposed legislation. Hence, it is more appropriate to define “trafficking” in the definitions section.

3.48 With regard to the Children’s Rights Project submission, it should be noted that paragraph (a)(i) of the definition makes reference to “any means, including...” . A case of trafficking in persons can therefore be established although none of the listed means were used. Furthermore, clause 5(2)(a) clearly states that consent to the intended exploitation shall not be a defence to a charge of trafficking. The Commission, however, recommends that clause 5(2) be reformulated to accommodate the concerns raised.¹⁰⁷

3.49 The Commission recommends that the word “capture” and the word “removal” be removed from paragraph (a) of the definition of trafficking. This is because these acts are some of the means used for trafficking

¹⁰⁵ This was supported by the Coalition against Trafficking in Women who also submitted that “inducement” implies the instrumentality of third parties such as pimps and recruiters who are usually part of the trafficking chain.

¹⁰⁶ The only reference to pornography in the Films and Publications Act, 65 of 1996 is to child pornography which is defined.

¹⁰⁷ Clause 4(3)(a) of the Bill to this Report.

a person and are already sufficiently covered by the acts of force or other forms of coercion as a certain degree of force or coercion will usually be used when removing or capturing a person.

Response to the submissions relating to the offence of trafficking in persons (clause 5)

3.50 With regard to the IOM's comment regarding the consistent use of the term human trafficking or the term trafficking in persons, the Commission would like to point out that wherever the word "trafficking" is used, it should be read within the context of the definition of trafficking which clearly indicates that the word trafficking refers to the trafficking of persons.

3.51 With reference to the UNODC's submission regarding subclause (1), the Commission recommends that the words "or allows another person to be trafficked" be deleted. This is because these words could be interpreted as placing a positive duty on every person to prevent the trafficking of another person. This is not the intention of the proposed trafficking legislation as a person is only required to act in a particular manner if he or she has a specific legal duty to act in such a manner. Furthermore, any other form of criminal participation in the crime of trafficking in persons would be covered by ancillary offences such as aiding and abetting or participation as an accomplice.

3.52 The Commission agrees that subclause (1) should make reference to the common law position regarding slavery.¹⁰⁸ This will ensure that the common law position is not repealed by the proposed trafficking legislation. The Commission further agrees that all references to "unlawfully" be removed from the offences chapter. "Unlawfully" is redundant because a court will in anyway first need to establish the unlawfulness of the actions of an accused prior to a conviction. In response to the submission made in respect of subclause 5, the Commission recommends that the words "its business" be added to the end of the subclause.¹⁰⁹ The Commission supports the inclusion of the crime of trafficking in persons in Schedule 1 of the Prevention of Organised Crime Act.

3.53 The Criminal Law (Sexual Offences and Related Matters) Amendment Act amends Schedule 5 to the Criminal Procedure Act by the inclusion of any trafficking related offence committed by a commercial carrier in the Schedule. This will mean that where an accused is charged with such an offence, the court would have to order that he or she be detained in custody until he or she 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. The Bill further amends Schedule 6 to the Criminal Procedure Act by the inclusion of the offence of trafficking in persons. The burden of proof in Schedule 6 is higher than that provided for in Schedule 5 in that the accused must adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permits his or her release. Hence the Commission recommends that the proposed trafficking legislation should be amended accordingly.¹¹⁰

3.54 In response to the suggestion that the offence of trafficking in persons be punishable with the same punishment as the common law crime of slavery, the Commission would like to point out that the Criminal Law (Sexual Offences and Related Matters Amendment) Act amends Schedule 2, Part I of the Criminal Law Amendment Act so as to ensure that a person who commits the offence of trafficking in persons is sentence to a minimum term of life imprisonment. The Commission therefore recommends that the proposed trafficking legislation be amended accordingly.¹¹¹

108 Clause 4(1) of the Bill to this Report.

109 Clause 4(6) of the Bill to this Report.

110 See the proposed amendments to Schedule 5 and Schedule 6 of the Criminal Procedure Act as set out in Schedule 1 of the Bill to this Report.

111 See the proposed amendments to Schedule 2, Part I of the Criminal Law Amendment Act as set out in Schedule 1 to the Bill to this Report.

3.55 The Commission agrees with the SOCA Unit's proposal that trafficking in persons should also be made a Schedule 6 offence where the death of a victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit the offence of trafficking in persons.

3.56 The Commission further supports the SOCA Unit's suggestion that the following be included as a Schedule 6 offence: rape when committed by a person or syndicate charged with the offence of trafficking in persons.¹¹²

3.57 The Commission agrees with IOM's submission regarding the deletion of all references to the adoption of a child. The Commission further supports Dr Gould's suggestion that clause 5(2)(a)(ii) be deleted.

3.58 In response to the submissions made by Ms Lansink and SWEAT, the Commission recommends that the words "by any means, including" be deleted from the definition of trafficking in persons. The Commission believes that the listed means in the definition is broad enough to cover all possible cases of trafficking in persons. However, the proposed trafficking legislation should clearly state that where any of the means referred to in the definition of trafficking has been used, it shall not be a defence to a charge of trafficking in persons that an adult person who is a victim of trafficking has consented to the intended exploitation or that the intended exploitation did not occur. However, even if none of the means referred to in the definition of trafficking has been used, it should not be a defence that a child 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 the intended exploitation or that the intended exploitation did not occur.¹¹³

3.59 The Commission agrees with the DOJCD that the word trafficker should be defined as reference to this word is made throughout the Bill and the Report.¹¹⁴

3.60 The Commission recommends that section 18 of the Criminal Procedure Act be amended by adding the offence of trafficking in persons to the list of offences provided for in that section. Doing so would mean that the right to institute a prosecution for the offence of trafficking in persons would not lapse after the expiration of a period of 20 years from the time when the offence was committed.¹¹⁵

3.61 The Criminal Law (Sexual Offences and Related Matters) Amendment Act amends Schedule 2, Part II of the Criminal Procedure Act by adding the offence of trafficking in persons to the listed offences in Part II. The Commission recommends that the proposed trafficking legislation be amended accordingly.¹¹⁶ This would mean that an accused that is in custody in respect of the offence of trafficking in persons may neither be released on bail nor be released on a warning in lieu of bail by a police official.

Response to the submissions relating to the definition of abuse of vulnerability

3.62 The Commission does not support the suggestion that the word "substance" be defined because of the huge number of dependence producing substances available. By not defining the word, the risk of excluding any of these substances is reduced. The Commission, however, suggests that the word "dependence-producing" be inserted before the word "substance".

3.63 The Commission agrees with the comments of the SOCA Unit made in respect of paragraph (e).

3.64 The Commission supports the suggestion that poverty, unemployment and economic disadvantages be added as factors making persons vulnerable to being trafficked. Hence the Commission recommends

112 See the proposed amendments to Schedule 6 of the Criminal Procedure Act as set out in Schedule 1 to the Bill to this Report.

113 Clause 4(3) of the Bill to this Report.

114 Clause 1 of the Bill to this Report.

115 See the proposed amendment to section 18 of the Criminal Procedure Act as set out in Schedule 1 to the Bill to this Report.

116 See the proposed amendment to Schedule 2 Part II of the Criminal Procedure Act as set out in Schedule 1 to the Bill to this Report.

that the following paragraph be added to the definition of abuse of vulnerability: (g) "socio-economic circumstances."¹¹⁷

3.65 The Commission is of the view that the concerns expressed by Anex CDW, SWEAT and the Gender, Health and Justice Research Unit are based on an incorrect reading of the definition. The vulnerabilities listed in paragraphs (a) – (e) are linked directly to a person who has been subjected to such physical or psychological abuse that leads that person to believe that he or she has no reasonable alternative, but to submit to exploitation. Hence, not every person with a disability or who are pregnant will be vulnerable. Furthermore, cognisance should be taken that the definition clearly states that vulnerability is not limited to the factors listed in paragraphs (a) – (e).

3.66 The Commission supports the suggestion made by the Department of Home Affairs in respect of paragraph (a).¹¹⁸

Response to the submissions relating to the definition of exploitation

3.67 Responding to the suggestions made by the IOM and the UNODC, the Commission is of the view that the word "includes" means that the list is open-ended and that other practices that constitute exploitation could still be added. However, the Commission is willing to add the words "but is not limited to" after the words "exploitation includes" as this has been done in other pieces of legislation.¹¹⁹

3.68 The Commission supports the proposal that forced marriage in paragraph (a) of the definition be made a separate paragraph and that the reference to debt bondage in paragraph (a) be deleted. The Commission agrees with the suggestions that forced marriage be defined. Hence the Commission recommends that forced marriage be defined as follows: Forced marriage means a marriage in contravention of the laws in relation to civil and customary marriages in the Republic.¹²⁰

3.69 With reference to Childline SA's suggestion regarding forced surrogacy, the Commission would like to point out that although the Children's Act 38 of 2005 regulates surrogacy motherhood agreements it does not deal with instances where a female person is impregnated against her will without having to enter into an agreement with the person(s) to whom the child once born will be sold. Hence the Commission is of the view that the definition of exploitation should include the impregnation of a female person against her will for the purpose of selling her child when born.¹²¹

Response to the submissions relating to the definition of removal of body parts

3.70 The Commission agrees with the suggested amendments to the definition of removal of body parts.¹²² It should however be noted that the trade in any organ or other body part will only fall within the ambit of the definition if the person from whom the organ or other body part was taken was trafficked for the specific purpose of removing the organ or other body part whether or not the person was killed in the process. The definition does not cover instances where the organ or body part was removed from a living or deceased person who was not trafficked for the purpose of removing his or her organ or other body part.

117 Clause 1 of the Bill to this Report.

118 Clause 1 of the Bill to this Report.

119 Clause 1 of the Bill to this Report.

120 Clause 1 of the Bill to this Report.

121 Clause 1 of the Bill to this Report.

122 Clause 1 of the Bill to this Report.

Response to the submission relating to the definition of servitude

3.71 The Commission supports the proposal that the word “serious” be removed from the definition of servitude.

Response to the submissions relating to the definition of sexual exploitation

3.72 With reference to SWEAT’s submission, the commission is of the view that sexual exploitation be defined to include the commission of any sexual offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act and any other offence of a sexual nature in any other law against a victim of trafficking.¹²³ Doing so will ensure that any form or manner of sexual exploitation is covered by the definition.

3.73 With regard to Ms Fudge submission on the definition of sexual exploitation, the Commission is of the view that given its investigation into adult prostitution it is premature to regard voluntary prostitution as exploitation.

Response to additional submission

3.74 The Commission supports the SOCA Unit’s suggestion that the proposed legislation should provide for competent verdicts of alternative crimes committed. The Commission accordingly recommends that an appropriate provision be included in the proposed trafficking legislation.¹²⁴

Debt bondage

3.75 As victims of trafficking are often subjected to debt bondage, the Commission recommended that the proposed legislation should define and criminalise the act of debt bondage. The Commission further requested 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.¹²⁵ The following are the relevant provisions as set out in the proposed Bill to the Discussion Paper.

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.

“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;

¹²³ Clause 1 of the Bill to this Report.

¹²⁴ See the proposed amendments to the Criminal Procedure Act by the addition of section 261A as set out in Schedule 1 to the Bill to this Report.

¹²⁵ See paragraphs 5.72 – 5.73 of Discussion Paper.

3.76 The Commission further recommended that the proposed Bill to the Discussion Paper should provide for an appropriate sentence for a person convicted of the above offence.¹²⁶

Submissions received

3.77 The Western Cape NGO Task Team on Human Trafficking agreed with the recommended definition of debt bondage and suggested that the maximum period of imprisonment for debt bondage be increased to 10 years.

3.78 Anex CDW submitted that the proposed definition of debt bondage is linked almost exclusively to sexual exploitation and recommended that this definition be extended to trafficking for labour purposes. The respondent mentioned that in practice remuneration is often withheld, forcing the employee to borrow money against his or her salary. According to the respondent, this method prevents an employee from leaving the employer.

3.79 SWEAT proposed that more research be conducted into the issue of what constitutes “manifestly excessive” as referred to in the definition of debt bondage. According to the respondent, monetary amounts are relative to the person concerned, the country and the context.

3.80 The Gender, Health and Justice Research Unit said that the term “manifestly excessive” is quite vague because it does not determine by what standards such debts are to be judged. What might seem manifestly excessive by the standards of the country into which a person migrates or is trafficked might not be excessive in light of practices in that person’s country of origin. Similarly, people in situations of extreme poverty might voluntarily enter into debt agreements that seem manifestly excessive given their economic status in their home country, but which they are willing to pay in order to be brought to work in another country. Hence the respondent suggested that the proposed legislation should include a system for determining what “manifestly excessive” means in this context, and what standards it is to be measured by.

3.81 Several workshop participants felt that because reference to “debt bondage” is made in the definition of exploitation, it is unnecessary to make it a separate criminal offence. However, the definition of debt bondage should remain in the proposed legislation.

3.82 With reference to section 83 of the Criminal Procedure Act and Du Toit et al, the SOCA Unit suggested that the following test be applied. First test: Does the evidence that is necessary to establish one of the charges at the same time also establish the other? If the evidence that is necessary to establish one of the charges at the same time confirms the other then there is only one offence and the duplication is impermissible. Second test (the single intent test): If a person commits numerous acts, each one of which could be a separate offence on its own, but they constitute a continuous transaction that is carried out with a single intent, his or her conduct would constitute a single offence. In light of the latter, the respondent submitted that an offender could be charged with the offence of trafficking in persons by proving that a person is a victim of trafficking having due regard to the guiding principles as set out in clause 4 including clause 6 (debt bondage) of the Bill to the Discussion Paper. The respondent, however, expressed concern over the fact that an offender could, in addition to the offence of trafficking in persons, be charged with the offence of debt bondage. This in the respondent’s view would amount to a duplication of charges. The respondent is, however, of the opinion that although debt bondage should be a separate offence, it should be charged in the alternative.

3.83 IOM stated that debt bondage serves a dual purpose. Firstly, debt bondage makes the victim compliant to the demands of the trafficker by promising a way out of his or her exploitative situation once the debt is paid. Secondly, a victim who is eager to pay off his or her debt quickly is more likely to work harder and bring in more revenue for the trafficker than one who has lost all hope in achieving his or her freedom. The respondent suggested that the Commission should consider acknowledging the dual purpose of debt bondage in the

¹²⁶ See clause 38(2) of the Bill to the Discussion Paper.

proposed legislation by making debt bondage a separate offence as well as including it expressly as one of the means listed in the definition of trafficking in persons. Given these suggestions, the definition of trafficking should read as follows:

"Trafficking in persons means –
the recruitment, sale, supply, procurement, capture, adoption, removal, transportation, transfer, harbouring or receipt of persons, within or across the borders of the Republic – by any means, including the use of threat, force, intimidation or other forms of coercion, abduction, fraud, debt bondage, deception, abuse of power...."

3.84 According to the respondent, the proposed legislation will recognise the dual role of debt bondage in human trafficking by including debt bondage as both a separate offence (like physical assault), and as a means of trafficking in persons.

3.85 SAPS argued that debt bondage should not be a separate offence, but should be included in the definition of trafficking. However, several respondents¹²⁷ said that debt bondage should remain a separate offence. According to the Western Cape NGO Task Team on Human Trafficking, this will enable the prosecution to prosecute a perpetrator for the offence of debt bondage in cases where the offence of trafficking in persons cannot be proved. Childline SA added that the penalty for debt bondage should be increased.

3.86 Ms Fudge proposed that debt bondage be included in the definition of trafficking as one of the means that could be used to induce submission into an exploitative situation.

3.87 The Office of the Premier, Western Cape Provincial Government submitted that debt bondage be criminalised only insofar as it relates to trafficking in persons. Furthermore, debt bondage should not be made a separate offence.

3.88 SWEAT recommended that debt bondage should be considered a separate offence that is not necessarily linked to trafficking in persons. This was supported by Dr Gould who suggested that the prohibition of practices resulting in debt bondage should rather be included in the Basic Conditions of Employment Act or the Labour Relations Act since debt bondage is not a feature only of trafficking, but may be a feature of other exploitative labour practices.

3.89 SWEAT stated that there has been much written about adults being trafficked into the sex work industry that notes that the majority of women were involved in the adult entertainment sector prior to being trafficked and were aware that they would be working as sex workers in the country of destination. What they did not consent to was the debt bondage and the forced labour conditions that followed. The respondent submitted that the problems of forced labour and debt bondage can exist in all industries, including the sex work industry, and are better remedied by suitable steps from the Department of Labour to enforce basic labour rights.

3.90 Ms Lansink recommended that debt bondage be part of the offence of trafficking in persons in accordance with the UN Trafficking Protocol and the COE Trafficking Convention. The respondent stated that debt bondage is not so much a means but an end purpose: debt bondage is a "practice similar to slavery". However, this does not prevent the State from criminalising debt bondage as a crime outside the context of trafficking as a supplementary or a separate crime for cases where not all elements of the crime can be proven against an accused, e.g. no transportation or transfer has taken place. The respondent stated that there might be instances where only debt bondage per se can be proven and not trafficking. Thus, the State if it so prefers may establish debt bondage as a separate offence in addition to debt bondage as constituting one of the elements of trafficking.

3.91 The DOJCD submitted that debt bondage should remain a separate offence in order to provide prosecutors with various options for the prosecution of an offender.

127 The Western Cape NGO Task Team on Human Trafficking, the SAHRC, Childline SA, the LCCL(SA) and Anex CDW.

Evaluation and recommendations

3.92 With reference to the submission made by Anex CDW, the Commission is of the view that the proposed definition of debt bondage is wide enough to cover all forms of exploitation. Furthermore, the example mentioned by the respondent is not a form of debt bondage and can be addressed in terms of the Basic Conditions of Employment Act.¹²⁸

3.93 Responding to the submission made by SWEAT and the Gender, Health and Justice Research Unit regarding the term "manifestly excessive", the Commission is of the view that an objective test should be applied to determine whether a debt owed or claimed to be owed is manifestly excessive. The court should therefore consider whether a reasonable person would have found the debt owed or claimed to be owed manifestly excessive. In order to make this clear, the Commission recommends that the words "as reasonably assessed" be inserted before the words "manifestly excessive".¹²⁹

3.94 The Commission reconsidered the inclusion of debt bondage in the definition of exploitation. The Commission is of the view that debt bondage should not be included in the definition of exploitation as it is not a form of exploitation, but only facilitates the exploitation of a victim of trafficking in that the victim is forced to stay in the exploitative situation until the debt is repaid.

3.95 The Commission agrees with the submissions made by the SOCA Unit and Ms Fudge. The Commission further agrees with the submission made by IOM and those respondents who argued that debt bondage should remain a separate offence.

3.96 The Commission supports the suggestion that the maximum period of imprisonment for debt bondage be increased to 10 years.

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

3.97 The Commission considers it important to criminalise the destruction, confiscation, possession and concealment of the travel and/or other identification documents of victims of trafficking. This is because the travel documents of victims of trafficking are often confiscated or destroyed as a method of exercising control over them and to prevent them from running away. Hence the Commission recommended that the mentioned conduct be criminalised by amending section 49(15) of the Immigration Act.¹³⁰ Alternatively, the Commission recommended that the following provision be included in the proposed Bill to the Discussion Paper.

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.

3.98 The Commission further recommended that the proposed Bill to the Discussion Paper should provide for an appropriate sentence for a person convicted of the above offence.¹³¹

3.99 The Commission requested 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.

¹²⁸ 75 of 1997.

¹²⁹ See paragraph (b)(i) of the definition of debt bondage in clause 1 of the Bill to this Report.

¹³⁰ See the proposed amendment to section 49(15) of the Immigration Act as set out in Schedule 1 to the Bill to the Discussion Paper.

¹³¹ See clause 38(3) of the Bill to the Discussion Paper.

Submissions received

3.100 The workshop participants expressed the view that the mentioned conduct be criminalised in both the proposed trafficking legislation and the Immigration Act.¹³² They further said that although the proposed penalty to be included in the Immigration Act is four years, the penalty in terms of the trafficking legislation should be increased to 10 years. The offence in terms of the Immigration Act would be a lesser serious offence than the offence in terms of the trafficking legislation.

3.101 The SOCA Unit, the Western Cape NGO Task Team on Human Trafficking, Anex CDW and Ms Lansink were in favour of retaining the clause in the proposed legislation. However, SAPS and the DOJCD did not support this, but suggested that the clause be included in the Immigration Act.

3.102 Childline SA and SWEAT agreed that the mentioned conduct be criminalised. Childline SA supported the proposed penalty.

3.103 The UNODC agreed that the mentioned conduct be criminalised and submitted that the option to be chosen is a national discretion. The respondent stated that the seriousness of the offence is taken into account as the maximum penalty is four years.

3.104 The Office of the Premier, Western Cape Provincial Government submitted that, if the intention is to generally outlaw the mentioned conduct, the amendment of the Immigration Act would be preferable.

Evaluation and recommendations

3.105 The Commission gave due consideration to the Submissions received and agrees with the workshop participants that the mentioned conduct should be criminalised in both the proposed trafficking legislation and the Immigration Act. This will mean that if no link can be proved between the said conduct and the crime of trafficking, one would be able to prosecute in terms of the Immigration Act. The Commission further supports the suggestion that the penalty be increased to 10 years imprisonment.¹³³

Using the services of victims of trafficking

3.106 The Commission believes that an effective strategy to combat the trafficking of persons should include measures to address the demand for the services of victims of trafficking. Hence the Commission recommended that the proposed Bill to the Discussion Paper should provide as follows.

Using the services of victims of trafficking

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.

3.107 The Commission further recommended that the proposed Bill to the Discussion Paper should provide that a person convicted of the above offence be liable to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.¹³⁴

¹³² This suggestion was supported by the LCCL(SA), the Department of Home Affairs, SWEAT and Dr Gould. The LCCL(SA), however, felt that if the Commission is not in favour of including it in both pieces of legislation, it should preferably be included in the proposed trafficking legislation because the mentioned conduct is intrinsic to the way in which victims of trafficking are compelled to remain in exploitative situations.

¹³³ See clause 6 as well as the proposed amendments to section 49(15) of the Immigration Act as set out in Schedule 1 to this Bill.

¹³⁴ See clause 38(4) of the Bill to the Discussion Paper.

Submissions received

3.108 The workshop participants emphasised the need for the proposed provision.¹³⁵ They stated that this provision must provide for presumptions in order to get over the difficulty of proving intent. They further suggested that the scope of the provision be extended by including an element of negligence. This could be done by stating that the person ought reasonably to have known that the other person was a victim of trafficking. Other participants proposed that the words “or negligently” be inserted after the word “intentionally”.

3.109 The workshop participants proposed that the penalty for the offence should be a maximum of 5 years imprisonment.¹³⁶ They said that the courts will be more willing to impose a higher sentence in the case of intentional use of the services of victims. However, in the case of negligence, the courts may impose a lower sentence.

3.110 SWEAT proposed that this clause should state clearly that the person knew that the other person is a victim of trafficking.

3.111 The Gender, Health and Justice Research Unit submitted that clause 8 is problematic because it is not clear whether the person in question has to know the status of the alleged victim of trafficking, or whether the person is guilty regardless of whether he or she knew the status of the alleged victim. The respondent said that the use of the term “intentionally” rather than “knowingly” or even “negligently” can be interpreted to only require that the person intend to benefit from an alleged victim without requiring that person to know that the alleged victim has been trafficked. Section 8 could thus apply to persons who intentionally and unlawfully benefit from victims of trafficking (for example, by hiring them for illegal sex work) without knowing that they are victims of trafficking. The respondent said that if the intent of the proposed legislation is to criminalise knowingly benefiting from a victim of trafficking, the relevant parts could be re-written as follows:

8. Any person who intentionally and unlawfully benefits, financially or otherwise, from the services of a person he or she knows to be 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

3.112 The respondent added that a standard of negligence (“or should have known”) could be used if that more precisely addresses the behaviour the proposed legislation seeks to criminalise.

3.113 Dr Gould proposed that the Department of Labour should be responsible for monitoring and acting on exploitative labour practices, especially when those relate to victims of trafficking.

Evaluation and recommendations

3.114 The Commission agrees with those respondents who submitted that the proposed provision should make it clear that the accused person should have had knowledge about the fact that the other person is a victim of trafficking. The Commission further supports the workshop participants’ suggestion that the proposed provision be extended to include an element of negligence.¹³⁷

3.115 The Commission supports the suggestion that the penalty for the offence be increased to a period not exceeding 5 years imprisonment.¹³⁸

135 The Western Cape NGO Task Team on Human Trafficking and Childline SA also supported the proposed provision.

136 Childline SA also felt that the proposed penalty should be increased. The Office of the Premier, Western Cape Provincial Government suggested that the proposed penalty be increased to 10 years imprisonment.

137 Clause 7 of the Bill to this Report.

138 Clause 7 of the Bill to this Report.

Conduct facilitating trafficking in persons

3.116 Apart from criminalising the act of trafficking in persons, the Commission recommended that conduct facilitating trafficking in persons be criminalised.¹³⁹ The following are the relevant provisions as set out in the proposed Bill to the Discussion Paper.

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.

3.117 The Commission further recommended that the proposed Bill to the Discussion Paper should provide for an appropriate sentence for a person convicted of the offences in clause 9(1) and 9(3).¹⁴⁰

Submissions received

3.118 Some workshop participants recommended that this clause be amended as follows:

9. (1) Any person who
- (a) intentionally leases or subleases or allows any room, house, building or establishment to be used for facilitating or promoting trafficking in persons or who ought reasonably to have known that such room, house, building or establishment will be used for facilitating or promoting trafficking in persons; or
 - (b) advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that facilitates trafficking by any means, including the use of the Internet or other information technology,¹⁴¹

3.119 The workshop participants further suggested that the Commission should consider the use of presumptions in order to get over evidential boundaries. In this regard, the Commission was referred to the Films and Publications Act as an example.

3.120 The UNODC agreed with the criminalisation of Internet Service providers who fail to comply with their obligation under this clause and stated that the proposed penalty is consistent with the Trafficking Protocol.

3.121 The Department of Home Affairs suggested that Internet service providers should be monitored as to whether they comply with clause 9(3) of the Bill.

3.122 SWEAT recommended that subclause (1)(a) be amended as follows: intentionally and unlawfully leases or subleases or allows any room, house, building or establishment to be used for the purpose of harbouring a person he or she knows to be a victim of trafficking.

¹³⁹ See paragraph 5.52 – 5.53 of the Discussion Paper.

¹⁴⁰ See clauses 38(5) – (6) of the Bill to the Discussion Paper.

¹⁴¹ The amendment to paragraph (b) was supported by Dr Gould.

3.123 The DOJCD said that it should be made clear whether a Internet service provider is expected to screen the sites on its server in order to report sites containing information in contravention of subsection (1)(b) to the South African Police Service.

Evaluation and recommendations

3.124 The Commission supports the proposed amendments to clause 9(1) as suggested by the workshop participants.¹⁴²

3.125 In response to the DOJCD's submission, the Commission is of the view that Internet service providers must report only those sites of which they have knowledge and should not be required to screen the sites on their servers. However, Internet service providers must take reasonable steps to prevent the use of their services for the hosting of information that facilitates trafficking in persons. Furthermore, an Internet service provider that has knowledge that any Internet address on its server contains information that facilitates trafficking in persons must (a) report such an Internet address to the South African Police Service, (b) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities, and (c) take all reasonable steps to prevent access to the Internet address by any person. An Internet service provider who fails to comply with these obligations should be liable to a fine or to imprisonment for a period not exceeding five years or to both such a fine and such imprisonment.¹⁴³

Liability of commercial carriers

3.126 The Commission considers it important to determine the liability of commercial carriers that transport foreigners to South Africa as victims of trafficking could be amongst such persons. The Commission recommended that the following provision be included in the proposed Bill to the Discussion Paper.

Liability

- 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.

3.127 The Commission further recommended that section 35(3) 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 an unaccompanied child is a victim of trafficking, he or she must forthwith report the matter to the police.¹⁴⁴

Submissions received

3.128 The Western Cape NGO Task Team on Human Trafficking, Childline SA and the UNODC supported clause 39. The UNODC submitted that the following could be considered as an alternative:

"Duty of, and offence by, commercial carriers

¹⁴² Clause 8(1) of the Bill to this Report.

¹⁴³ Clause 8(2) – (3) of the Bill to this Report.

¹⁴⁴ See also the proposed amendments to section 35(3) of the Immigration Act as set out in Schedule 1 to the Bill to the Discussion Paper.

- (1) Any person who engages in the transportation of goods or people for commercial gain must verify that every passenger possesses the identity and/or travel documents required to enter the destination country and any transit countries.
- (2) Any commercial carrier who knowingly fails to comply with subsection(1) commits an offence and [in addition to any other penalty provided in any other law or enactment] is liable to an imprisonment of ... [or/and] a fine of
- (3) A commercial carrier that is found guilty of a second /[third] offence shall/may have his licence to operate revoked.
- (4) A commercial carrier is liable for the costs associated with the person's accommodation in, and removal from [State's name]
- (5) Any [commercial carrier], any [person who engages in the transportation of goods or people for commercial gain] who knowingly fails to report to the competent authorities that a person has attempted to or has travelled on that carrier without the identity and legal/travel documents required to enter the destination country or any transit countries, commits an offence and [in addition to any other penalty provided in any other law or enactment] is liable to an imprisonment of ... [and/or] a fine of
- (6) A [commercial carrier], any [person who engages in the transportation of goods or people for commercial gain] is not guilty of an offence under subsection (2) if:
 - (a) that person had reasonable grounds to believe that the documents that the transported person has, are the travel documents required for lawful entry in [State's name]
 - (b) the transported person possessed the lawful travel documents when boarded, or last boarded the means of transport to travel to [State's name]
 - (c) the entry into [State's name] occurred only because of circumstances beyond the control of the [commercial carrier], [person who engages in the transportation of goods or people for commercial gain]"

3.129 With regard to the proposed amendment to section 35 of the Immigration Act, Childline SA proposed that a list of accompanied children, especially those who are not accompanied by their "usual parent", should also be provided to an immigration official.¹⁴⁵ The respondent mentioned that in the trafficking cases it has dealt with, the children were always accompanied by an adult.

3.130 The UNODC and the Department of Home Affairs agreed with the proposed amendment to section 35 of the Immigration Act.

Evaluation and recommendations

3.131 The Criminal Law (Sexual Offences and Related Matters) Amendment Act provides harsher penalties for commercial carries that bring victims of trafficking into or that remove them from the Republic if such victims do not have the travel documents required for lawful entry into or departure from South Africa. Hence the Commission recommends that the provisions relating to commercial carriers contained in this Act be incorporated into the proposed trafficking legislation.¹⁴⁶

3.132 The Commission has reconsidered its proposed amendment to clause 35(3) of the Immigration Act. The Commission agrees that a person in charge of a conveyance should upon demand deliver to an immigration officer a list of all the children on board the conveyance indicating which children are unaccompanied. The Commission is of the view that an Immigration officer should report all suspected cases of trafficking and not only those involving unaccompanied children.¹⁴⁷

¹⁴⁵ This proposal was supported by the workshop participants.

¹⁴⁶ Clause 9 of the Bill to this Report. See also the proposed amendments to Schedule 2, Part III of the Criminal Law Amendment Act as set out in Schedule 1 to the Bill to this Report.

¹⁴⁷ See the proposed amendments to section 35(3) of the Immigration Act as set out in Schedule 1 to the Bill to this Report.

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

3.133 The Commission recommended that section 287 of the Children's Bill¹⁴⁸ be repealed by incorporating it into the proposed trafficking legislation. 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. The following is the relevant provision as set out in the proposed Bill to the Discussion Paper.

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
 - (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.

Submissions received

3.134 The Department of Social Development supported the proposed provision.

Evaluation and recommendations

3.135 In the absence of any submissions suggesting amendments to the proposed clause, the Commission recommends that the clause be included in the proposed Bill to the Report. However, the words "or allowed the child to be trafficked" should be deleted.¹⁴⁹

Revocation of visa or temporary residence

3.136 South African law does not provide for the denial of entry of suspected or convicted traffickers into the country. Hence the Commission recommended that section 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 a 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;
- (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.

3.137 Alternatively, the Commission recommended that the proposed Bill to the Discussion Paper should provide as follows.

¹⁴⁸ This Bill has since been enacted and is now known as the Children's Act 38 of 2005. Wherever the Discussion Paper has referred to the Children's Bill, this Report will refer to the said Act.

¹⁴⁹ Clause 35 of the Bill to this Report.

Revocation of visa or temporary residence permit

- 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.

3.138 Furthermore, the Commission requested 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.

Submissions received

3.139 The workshop participants were in favour of including the provision in both the proposed trafficking legislation and the Immigration Act.¹⁵⁰ They, however, suggested that the Commission should propose the amendment of the entire paragraph (b) of subclause 29(1) as this paragraph will prohibit the authorities from bringing a person to South Africa for prosecution if a warrant for his or her arrest is outstanding. Thus, if the person is a prohibited person, he or she cannot be allowed into South Africa. The workshop participants said that this paragraph could be amended by deleting the words “the Republic or”.

3.140 The SOCA Unit was in favour of retaining the clause in the proposed legislation.

3.141 The Western Cape NGO Task Team on Human Trafficking felt strongly that the proposed provision be included in the Immigration Act, 13 of 2002 because this Act deals with the legal status of a person involved in the crime of trafficking in persons.¹⁵¹

3.142 The Department of Home Affairs preferred the amendment of section 29 of the Immigration Act instead of retaining clause 41 of the proposed legislation. The respondent further suggested that the word “revoked” be substituted with the word “withdrawn” to ensure consistency throughout the Immigration Act.

Evaluation and recommendations

3.143 The Commission is of the view that the suggested provision should be included in the Immigration Act as this Act is the primary legislation on the legal status of persons. The Commission agrees with the workshop participants that clause 29 should not prohibit the relevant authorities from bringing a person to the South Africa if a warrant for his or her arrest is outstanding. The Commission further adopts the suggestion made by the Department of Home Affairs that the word “revoked” be substituted with the word “withdrawn”.¹⁵²

3.144 Upon further research, the Commission realised that section 28 of the Immigration Act provides for the withdrawal of a permanent residence permit if its holder is convicted of an offence listed in Schedule 1 of the Act. The following offences are included in Schedule 1: murder, rape, indecent assault, robbery, kidnapping, assault when a dangerous wound is inflicted or any conspiracy, incitement or attempt to commit an offence referred to in this Schedule. Hence the Commission recommends that the offence of trafficking in persons also be included in Schedule 1 of the Act.¹⁵³

¹⁵⁰ This was supported by LCCL(SA) who added that if the Commission is not in favour of including it in both pieces of legislation, it should preferably be included in the proposed trafficking legislation.

¹⁵¹ This was supported by the Office of the Premier, Western Cape Provincial Government.

¹⁵² See the proposed amendments to section 29(1) of the Immigration Act as set out in Schedule 1 to the Bill to this Report.

¹⁵³ See the proposed amendments to Schedule 1 of the Immigration Act as set out in Schedule 1 to the Bill to this Report.

PROCESS AND PROCEDURE

The police investigation

3.145 The Commission is of the view that instead 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. Hence the Commission recommended that the following provisions be included in the proposed Bill to the Discussion Paper.

- 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 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.
- (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.

3.146 Alternatively to subclause 1(b), the Commission recommended 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.

Submissions received

3.147 The workshop participants supported the proposed provisions and suggested that similar instructions be issued for labour inspectors.

3.148 The Western Cape NGO Task Team on Human Trafficking advised the Commission to reconsider the wording of subclause (4) as it gives the impression that any new or amended national instructions or directives must be submitted to Parliament within two years after commencement of the Act.

3.149 SAPS submitted that in terms of clause 12, trafficking in persons can be reported to any police official. This, according to the respondent, is in conflict with clause 44(1)(a)(i) and (ii) which provides that the National Commissioner must issue national instructions regarding the division or divisions within the police to be tasked with the investigation of trafficking cases as well as the manner in which the reporting of an alleged trafficking case is to be dealt with. The respondent highlighted that instructions for the police are not published in the Gazette because some instructions, especially those dealing with investigative techniques, are of a sensitive nature. The respondent recommended that the National Commissioner should deal with the issue by means of broad directions, similar to the directions to deal with corruption and terrorist activity. (See as an example GG 26552 of 16 July 2004 and GG 27598 of 20 May 2005). The respondent stated that if cases of trafficking in persons are to be reported to any police official as proposed, then the directions should stipulate to which division within SAPS a report of trafficking in persons should be forwarded for investigation.

3.150 SAPS favoured the alternative proposed in respect of section 44(1)(b).¹⁵⁴ The respondent stated that training should be dealt with in terms of policy within SAPS and in accordance with the strategic objectives and priorities of SAPS for a specific period of time. This was, however, not supported by the LCCL(SA) and the Office of the Premier, Western Cape Provincial Government. They felt that the provisions should remain in the proposed legislation.

3.151 With reference to subclause (3)(a), Childline SA suggested that two years are too long and suggested that it be replaced with a one year period.

3.152 The UNODC supported this provision and stated that it is consistent with the general obligations regarding victims of trafficking.

3.153 SWEAT supported subclause (1)(b). The respondent further submitted that there must be a cut off date by which time all police officials should be trained. The respondent proposed 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.

3.154 SWEAT supported the recommendation that the national instructions be reviewed regularly.¹⁵⁵

3.155 Dr Gould agreed with the proposed provisions. The respondent further submitted that international experience suggests that it would be important for social workers or other service providers to be present when the police conduct a raid to arrest traffickers so that potential victims of trafficking can be catered for as soon as possible.

3.156 The DOJCD suggested that clause 44(1)(a)(vii) should also refer to the trial stage.

¹⁵⁴ This was supported by the Department of Home Affairs and the DOJCD.

¹⁵⁵ See paragraph 6.24 of the Discussion Paper.

Evaluation and recommendations

3.157 The Commission supports the suggestion made by the workshop participants that the proposed trafficking legislation should also provide for similar instructions or directives for labour inspectors.¹⁵⁶ This is because labour inspectors may also be the first point of contact with victims of trafficking working in exploitative situations.

3.158 The Commission agrees with the Western Cape NGO Task Team that the wording of subsection (4) should be amended to make it clear that new or amended national instructions or directives could immediately be tabled in Parliament.¹⁵⁷

3.159 With regard to the concerns raised by SAPS, the Commission recommends that all references to the words “national instructions” be replaced with the word “directions”. Furthermore, there should be no requirement that the directions be published.

3.160 With reference to the submissions in respect of training on the national instructions (directions), the Commission has decided not to provide for such training in the proposed legislation as the issue of training deals with ensuring the successful implementation of the proposed provisions rather than the provisions themselves. The Commission is further of the view that training is a policy issue and should not be addressed in legislation. Hence the Commission recommends that the Departments of Safety and Security should ensure that the relevant police officials are trained on the proposed directions so as to assist in achieving the aims of the said provisions.¹⁵⁸

3.161 The Commission supports the suggestions made by Childline SA¹⁵⁹ and the DOJCD.¹⁶⁰

Obtaining of testimony of victims or other witnesses

3.162 The Discussion Paper states 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 further states that, 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. Hence the most likely means of prosecution is through the testimony of victims or other witnesses. The Discussion Paper outlines the current protective measures for victims or other witnesses who are scared to testify in criminal proceedings. Such measures include witness protection, closed-circuit television, intermediaries, and in camera hearings.¹⁶¹ However, 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. Section 66(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 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:

¹⁵⁶ Clause 37(5) of the Bill to this Report.

¹⁵⁷ Clause 37(9) of the Bill to this Report.

¹⁵⁸ See also paragraphs 5.61 – 5.63 of this Report.

¹⁵⁹ Clause 37(8) of the Bill to this Report.

¹⁶⁰ Clause 37 (1)(g) of the Bill to this Report.

¹⁶¹ See paragraphs 5.164 – 5.165 of the Discussion Paper.

- (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 criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;
- (iii) the criteria to be used and 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, in respect of witnesses and, in particular, child complainants below the age of 16 years;
- (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;
- (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;

3.163 The above provisions will apply to victims of trafficking who have been subjected to sexual abuse. These provisions will, however, not apply to persons who have been trafficked for other purposes.

Submissions received

3.164 The Commission has received no submissions.

Evaluation and recommendations

3.165 The Commission recommends that provisions similar to those set out in clause 66(2) of the Criminal Law (Sexual Offences) Amendment Act should be included in the proposed trafficking legislation in order to ensure that prosecutors are educated on the various protective measures that can be used to ensure the safety of witnesses.¹⁶²

3.166 The Commission reiterates its 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. The Commission therefore reaffirm its recommendation that the National Director of Public Prosecutions¹⁶³ 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.

¹⁶² See clause 37(6)(a) – (f) of the Bill to this Report.

¹⁶³ The witness protection programme falls within the mandate of the National Director of Public Prosecutions.

- (d) The extension of the witness protection programme to victims of trafficking who are at risk of harm, but who choose not to assist with the investigation of alleged traffickers or to testify against such traffickers.¹⁶⁴
- (e) Alternatively to (d) above, provision of alternative protective measures to the mentioned victims.

3.167 The Commission recommends that the offence of trafficking in persons and any trafficking related offence committed by a commercial carrier be included in the Schedule to the Witness Protection Act.¹⁶⁵ The Schedule list the offences in respect of which a witness or related person may be placed under protection.

Co-operation amongst states in matters relating to trafficking in persons

3.168 The Commission is of the view that the proposed trafficking legislation should lay the foundation for bilateral, regional and multilateral agreements on trafficking in persons between South Africa and other States. Hence the following provisions were included in the proposed Bill to the Discussion Paper.

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.
- (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.

Submissions received

3.169 No submissions were received on the above provision.

Evaluation and recommendations

3.170 In light of the fact that no submissions were received on the above provision, the Commission recommends that it be included in the proposed Bill to the Report.¹⁶⁶

¹⁶⁴ The Commission recommended 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. See in this regard clause 15 of the proposed Bill to the Discussion Paper.

¹⁶⁵ See the proposed amendment to the Schedule to the Witness Protection Act as set out in Schedule 1 to the Bill to this Report.

¹⁶⁶ Clause 36 of the Bill to this Report.

Extra-territorial application of the proposed legislation

3.171 The Commission believes that given the cross-border nature of the crime of trafficking in persons, the proposed trafficking legislation should provide for extra-territoriality in respect of the offences established in terms of it. Hence the proposed Bill to the Discussion Paper provided as follows:

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.

Submissions received

3.172 The workshop participants made the following recommendations:

- The words “at the time the offence was committed” in paragraph (c) make this a territorial offence. This paragraph is therefore not needed. However, the deletion of the mentioned words will make it an extra-territorial offence and will give the courts universal jurisdiction.
- Universal jurisdiction irrespective of where the crime was committed, the nationality of the victim or the perpetrator is reserved for most serious crimes. Slavery is one of such crimes. All States are allowed to exercise universal jurisdiction over international crimes. The proposed legislation should provide the High Court with universal jurisdiction over the offence of trafficking in persons. All that is required is the presence of the person in the area of the court exercising jurisdiction.

3.173 Various respondents agreed with the proposed provision.¹⁶⁷

3.174 The UNODC submitted that consideration be given to the optional provision of the Convention against Transnational Organised Crime which recognises jurisdiction on the basis of the nationality of the victim.

Evaluation and recommendations

3.175 The Commission supports the suggestion that the proposed trafficking legislation should provide the High Court with universal jurisdiction. This is because the crime of trafficking in persons, similar to the common law offence of slavery, is regarded as an international crime and it is within the interest of all civilised nations to exercise jurisdiction over it. The Commission therefore recommends that the draft Bill to this Report should stipulate that the High Court has jurisdiction in respect of an offence under the proposed trafficking legislation, if the person to be charged is, after the commission of the offence, present in the territory of the South Africa, or in its territorial waters or on board a ship or aircraft registered or required to be registered in South Africa.¹⁶⁸ This means that the High Court will have jurisdiction irrespective of where the offence was committed, by whom it was committed or against whom it was committed.

¹⁶⁷ The Western Cape NGO Task Team on Human Trafficking, Childline SA and the UNODC.

¹⁶⁸ Clause 10(1)(d) and 10(2) of the Bill to this Report.

3.176 The Commission supports the UNODC's submission. The Commission is of the view that South African courts should have jurisdiction in respect of an act committed outside South Africa which would have constituted an offence in terms of the proposed trafficking legislation if committed against a citizen of or a person ordinarily resident in South Africa. Hence it is recommended that this view be reflected in the draft Bill to the Report.¹⁶⁹

¹⁶⁹ See clause 10(1)(c) of the Bill to this Report.

Chapter 4:

The Protection of Victims of Trafficking in Persons

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The Protection of Victims of Trafficking in Persons

SUBSTANTIVE MEASURES

Identification of victims of trafficking

4.1 In order to ensure that those who usually come into contact with victims of trafficking are able to identify such victims, the Commission recommended that the proposed trafficking legislation should provide for broad guiding principles to determine whether a person is a victim of trafficking.¹⁷⁰ The relevant provisions as set out in the proposed Bill to the Discussion Paper are as follows.

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;

¹⁷⁰ See paragraph 6.27 of the Discussion Paper.

- (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.

4.2 In order to facilitate the identification of victims of trafficking, the Commission recommended 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 and the Minister for Safety and Security, 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.¹⁷¹

Submissions received

4.3 The workshop participants supported the proposed guiding principles. They, however, suggested that the proposed legislation should refer to guidelines instead of guiding principles. The participants submitted that the Commission should decide whether the guiding principles should form part of the text of the Bill or whether they should be attached as a Schedule to the Bill.

4.4 The SOCA Unit suggested that subclause 1 (b) should also make reference to threats against property.

4.5 The Western Cape NGO Task Team on Human Trafficking identified the need to stipulate who should decide who is a victim of trafficking and stated that guidelines be given for the making of such decisions.

4.6 SAPS suggested that the guiding principles be inserted in chapter 4 of the proposed legislation. According to the respondent, the proposed legislation should first deal with the offences before providing guidelines for the identification of victims of trafficking. Alternatively, guidelines should be provided for in the regulations to the proposed legislation in order to ensure a more flexible approach in that change circumstances can be accommodated more easily, without following the cumbersome process of amending existing legislation.

4.7 The SAHRC did not support the inclusion of the guiding principles in the proposed legislation. The respondent submitted that the proposed legislation should state clearly which government officials will be responsible for determining who a victim of trafficking is. Furthermore, clarity is needed as to whether such a

171 See clause 10 of the Bill to the Discussion Paper.

determination would be subjected to an administrative procedure and whether the provisions of the Promotion of Administrative Justice Act¹⁷² would be applicable.

4.8 The Kwa-Zulu Natal Department of Community Safety and Liaison, Childline SA and Ms Toughy (Doctors for life) supported the inclusion of the guiding principles in the proposed legislation.

4.9 Ms Fudge suggested that the following be added to clause 4(1)(a): deception, fraud, abuse of power or vulnerability. With regard to clause 4(2)(b), the respondent argued that reference to the exploitation of prostitution as work is a denial of the specific harm suffered during prostitution.

4.10 Anex CDW said that the guiding principles are useful tools to determine whether a person is a victim of trafficking. The respondent was, however, concerned that if a victim of trafficking does not fit the profile of a person described in the guiding principles, he or she would lose the protection of our courts and the justice system. The respondent added that clause 4(2)(b) should be amended as follows: not allowing a person to leave the employment premises unless accompanied by the traffickers or their associates. Furthermore, clause 4(2)(d) should be amended as follows: keeping the person behind closed doors, under guard or electronic surveillance by means of threat or punishment.

4.11 The UNODC submitted that the proposed guiding principles are good indicators to identify victims of trafficking. The respondent suggested that the guiding principles be included in the national instructions provided for in clause 44.

4.12 SWEAT is of the view that the guiding principles should not be included in the proposed legislation, but should be used for training purposes.¹⁷³ The respondent argued that each case should be judged against the elements of the definition of trafficking, taking into account the circumstances of each individual case. The respondent said that if the Commission decides to retain this clause, subclause (2)(b) should be amended as follows: not allowing a person to leave work and/or living premises unless accompanied by the traffickers or their associates. The respondent further advised that because the factors listed in clause 4(3) could apply to many persons, they should not be considered as indicators for trafficking.

4.13 The Gender, Health and Justice Research Unit disagreed with the inclusion of guiding principles in the proposed legislation. The respondent argued that the proposed legislation clearly defines trafficking and gives judges the tools to determine whether trafficking has occurred by forcing them to consider the actions taken by the alleged trafficker, the means by which the alleged trafficker took those actions, and the purposes of the alleged trafficking. Hence the respondent suggested that Chapter 2 be removed from the Bill. The respondent added that the guidelines principles could perhaps be reworked into a manual for social service and health providers, to guide them in aiding and offering resources to suspected trafficking victims.

4.14 Dr Gould suggested that the guiding principles be referred to as guidelines and should be attached as an annexure to the proposed legislation.

4.15 With regard to clause 10 of the proposed Bill to the Discussion Paper, various respondents proposed that this clause be deleted.¹⁷⁴ The respondents submitted that human trafficking routes are dynamic and change constantly. Hence it is not advisable to declare countries as countries of origin or destination for human trafficking.

4.16 Ms Ogunlaya (Doctors for Life) supported clause 10. The respondent, however, conceded that if the relevant officials are properly trained, they would be able to identify victims of trafficking.

¹⁷² 3 of 2000.

¹⁷³ This was supported by Ms Lansink who added that the guiding principles should be included in policy.

¹⁷⁴ The workshop participants, IOM, Western Cape NGO Task Team on Human Trafficking, Anex CDW, the UNODC, SWEAT, Ms Lansink, Dr Gould and the Kwa-Zulu Natal Department of Community Safety and Liaison.

Evaluation and recommendations

4.17 The Commission agrees with the workshop participants and Dr Gould that the proposed legislation should rather refer to guidelines instead of guiding principles.

4.18 The Commission agrees with the Western Cape NGO Task Team on Human Trafficking and the SAHRC that the proposed legislation should clearly stipulate who can determine whether a person is a victim of trafficking.

4.19 Anex CDW's fear that some victims of trafficking may fall through the cracks if they do not fit the profile of a person described in the guiding principles is not justified. This is because the guiding principles include an open-ended list of circumstances that should be taken into account when determining whether a person is a victim of trafficking. More than one of the listed circumstances may have to be considered before a determination can be made that a person is a victim of trafficking. In order to make it more clear that the determination whether a person is a victim of trafficking is not limited to the mentioned guiding principles, the Commission recommends that the introductory part to the guiding principles should be amended as follows:

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, but is not limited to, such of the following guiding principles as may be relevant in a particular case:

4.20 The Commission supports the proposed amendments made by the SOCA Unit and Ms Fudge. The Commission further agrees with Anex CDW and SWEAT's proposed amendment to subclause 2(b). The Commission disagrees with Anex CDW that the words "by means of threat or punishment" be added at the end of subclause 4(2)(d) as doing so will limit the application of this provision.

4.21 With reference to the submissions made by SAPS, the SAHRC, SWEAT, Ms Lansink and the Gender, Health and Justice Research Unit, the Commission gave due consideration as to whether the guiding principles should be deleted from the proposed legislation or whether they should be included in the regulations to the legislation. The protection of victims of trafficking forms an integral part of the proposed legislation. Hence the Commission concludes that because victim identification is important for ensuring the protection of victims of trafficking, the Inter-sectoral Committee should be responsible for developing and reviewing guidelines on the identification of victims of trafficking and traffickers.¹⁷⁵

4.22 The Commission supports the suggestion that clause 10 be deleted.

Reporting and referral of victims of trafficking

4.23 The Commission considers the reporting and referral of victims of trafficking an important step towards the protection of such victims. Hence the proposed Bill to the Discussion Paper included the following provisions.

¹⁷⁵ See clause 41(1)(d) of the Bill to this Report.

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.

Submissions received

4.24 The workshop participants in general agreed with the proposed provisions. There was, however, disagreement as to who should be the first point of contact for victims of trafficking. Some felt that a case of trafficking in persons should first be reported to social services, whilst others argued that the provision correctly stipulates that the matter should first be reported to a police official. Some said that the report should not be made to just any police official. They suggested that the report be made to a police official from one of the specialised units as the police official to whom the report is to be made must make an initial assessment of the report whereafter he or she should decide whether or not to investigate the report. If a report is made at a local police station, then it should be referred to a police official from a specialised unit. Others argued that the report should be made to a designated police official specifically trained to deal with trafficking cases. Furthermore, a specialised unit to deal with trafficking cases should be established within the police. If a trafficking case is reported at a local police station, the nearest specialised unit must immediately be informed of the case. The units should be established in areas experiencing problems with trafficking in persons. The workshop participants also suggested the following:

- Include in subclause(1) the following: teachers¹⁷⁶ and relevant staff of the Airport Company South Africa (ACSA).
- Protection should be provided to those who report trafficking cases (informers).
- A directory of services should be established so that those who come in contact with victims of trafficking know where to refer them.

176 The inclusion of teachers in subclause 1 was supported by Anex CDW.

4.25 The SOCA Unit suggested that it should be mandatory for any person or organisation who exercises authority over children to report cases of child trafficking. With reference to subclause (4)(a)(ii), the respondent said that the determination as to whether a report is frivolous or materially unfounded is subjective. The respondent suggested that either clear directives should be established as to what will constitute frivolous or materially unfounded or reference to these words should be deleted.

4.26 IOM submitted that the proposed legislation should differentiate between (i) procedures for reporting and investigating cases of human trafficking, and (ii) procedures for identifying and referring victims of human trafficking. Cases of trafficking or suspected criminal activity involving trafficking, in which persons are suspected of being exploited (but who are not able to present themselves before a government official due to their captive circumstances) should be reported to police officials for purposes of investigation, as per the procedure outlined in clause 12. The clause 12 procedure, however, is not suitable for identifying and referring a person suspected of having been trafficked but who is no longer in a captive criminal environment. The potential victim may be able to present him or herself before a government official, yet may typically face a persisting threat from his or her trafficker and therefore be in urgent need of immediate protection and assistance. In such cases, clause 12 of the proposed legislation is problematic on account of (a) who is charged with identifying and referring victims and (b) the procedure to be followed when identifying a potential victim. While police officials may receive reports of trafficking, the respondent suggested that police officials should not be charged with the identification of potential victims of trafficking, as proposed in clause 12(4). Owing to the nature of the crime, victims are likely to be fearful and mistrusting of the police, typically having been convinced by their traffickers that contact with law enforcement is likely to lead to criminal charges against them and imprisonment, and/or detention and summary deportation. Victims' mistrust may also be enforced by first-hand exposure to police officials who benefit from traffickers' enterprises or facilitate trafficking. The respondent recommended that the role of police officials should be limited to (i) the referral of potential victims of trafficking for identification to the national Department of Social Development (DSD), provincial departments of social welfare, or to National Prosecuting Authority, and (ii) the investigation of the circumstances surrounding potential cases of trafficking. The respondent stated that under clause 12(4)(a), the requirement that a police official investigate a report that a person may have been trafficked and only thereafter "without delay, ensure the safety of the victim of trafficking", is also problematic. Given that police investigations often take weeks or months to be completed, persons with potentially genuine claims to having been trafficked who have presented themselves to police officials would, in terms of clause 12(4), have to live at large during the interim with no protection from their traffickers; with no basic material assistance, or psychological or medical services; and without having their legal status addressed. Faced with such delays, victims of trafficking may simply disappear, be forced out of desperation to return to their traffickers, or be arrested at a future point in time by another arm of law enforcement for criminal activities directly related to their having been trafficked. Delays in delivering protection and assistance to victims may make them more reluctant to participate in formal investigations and prosecutions against their traffickers. The respondent suggested that the following procedure for identifying and referring victims of trafficking be considered:

Step 1: *Prima facie identification of a potential victim of trafficking*

Any state official listed in clause 12(1) (as well as a police official or a state prosecutor) who suspects or believes that a person is a victim of trafficking must immediately report that person as a "potential victim of trafficking" to a social worker employed by the Department of Social Development (DSD) or a provincial department of social welfare, or a prosecutor employed by the National Prosecuting Authority (NPA), for purposes of identification. Such referral should be made by a state official when (i) a person claims to be a victim of trafficking, or (ii) when the official is presented with prima facie evidence that suggests that someone has been trafficked, for example, where a person is found in circumstances described in clause 4 of the proposed legislation.

Step 2: Screening of a potential victim of trafficking

The purpose of step 2 is to allow for a more detailed and thorough enquiry to take place into a claim by a person of having been trafficked. Any “potential victim of trafficking” referred to the DSD or the NPA must, within 24 hours, undergo an in-depth screening interview to assess whether he or she is a bona fide victim of trafficking, as per the proposed definition of trafficking. Standard best practice for screening victims of trafficking in IOM missions worldwide involves 3 steps: (i) an assessment of pre-interview indicators, (ii) an in-depth interview with the suspected victim, and (iii) an analysis of additional, corroborative evidence presented by the case. This screening procedure could be an appropriate model for the DSD and NPA.

Following thorough screening, any person found to be a victim of trafficking should immediately be given access to the full range of support measures provided for child and adult victims of trafficking in terms of the proposed legislation, and be informed of the right to a stay of deportation (including assistance in the application process). Conversely, should any “potential victim of trafficking” fail to be positively identified by the DSD or the NPA as bona fide, the normal course of the law would take its effect.

The rationale for a prima facie identification (step 1), followed up promptly by a screening process (step 2), is to ensure that claims of having been trafficked (or circumstances which suggest trafficking) are tested speedily and, where such claims and/or circumstances are verified, victims of trafficking are able to access protection and services immediately, without experiencing the delays likely to occur as a result of formal police investigations.

Step 3: Certification of a victim of trafficking

Persons deemed to be bona fide victims of trafficking should have their status formally certified by the DSD or the NPA. The proposed legislation currently lacks any provision by which victims of trafficking can be officially documented and certified as beneficiaries entitled to various forms of protection and assistance provided for in the legislation. A formal mechanism for documenting and certifying victims of trafficking who may benefit from South Africa’s proposed anti-trafficking legislation is important for two reasons. Firstly, without official documentation clearly stating that a person has been recognised by the state as a victim of trafficking, persons identified as trafficked by the DSD or NPA may, for example, not be recognised as such by the Department of Home Affairs or the South African Police Service, leading to possible arrest and/or deportation, or other potential conflicts in departmental functions and powers. Secondly, documentation reflecting victims of trafficking’ status will ease their access to the services and residency options provided for in the proposed legislation.

Both the DSD and the NPA should be equally empowered to issue documentation for purposes of certifying victims of trafficking. Care, however, must be taken to ensure that certification is discreet so as not to expose victims of trafficking to publicity, discrimination, or circumstances that could lead to their stigmatisation.

Step 4: Police enquiry into circumstances surrounding person having been identified as trafficked

Once a person has been certified as a victim of trafficking, a police enquiry should be launched with the purpose of investigating the circumstances surrounding the case and confirming the veracity of the story claimed during the screening process (step 2). This enquiry must be completed within the 60-day stay of deportation period granted to a certified victim of trafficking. If the enquiry reveals that the person is genuinely a victim of trafficking, he or she should continue to enjoy uninterrupted access to legal status, and protection and services provided for in the proposed legislation, for the duration of the 60-day stay of deportation period. Should the police enquiry reveal that the person screened and certified by DSD or NPA has in fact no grounds to be certified as having been trafficked, legal status and services to that person should immediately be revoked at which point the law would take its normal course.

4.27 The Western Cape Task Team on Human Trafficking suggested that a specialised unit on human trafficking be established. This unit can then be incorporated into one of the existing units, e.g. the Family Violence and Sexual Offences Unit. Furthermore, a police official should not be the final decision-maker in case applications.

4.28 With reference to clause 12(4)(a)(iii), SAPS submitted that it should be clearly stated what the words “ensure the safety of the victim of trafficking if his or her safety is at risk” mean. The respondent posed the question whether a police official would be required to guard the victim or refer him or her to a place of safety.

4.29 SAPS submitted that the reporting of cases of trafficking in persons should be mandatory for everyone.¹⁷⁷ The respondent said that this proposal is in line with section 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 as well as section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

4.30 The SAHRC suggested that the reporting of trafficking cases be channelled through the proposed centres for adult victims of trafficking. The respondent stated that although trafficking is a crime which should be reported to the police, the complex nature of trafficking caution against using the police as the “sole trackers of trafficking”.

4.31 The Kwa-Zulu Natal Department of Community Safety and Liaison submitted that an initial assessment by a police officer as provided for in clause 12(4)(a)(i) may delay the matter and suggested that the matter be investigated as soon as a report is made. The respondent said that if the above clause is retained, then the regulations must provide guidance as to how a police officer must make an initial assessment. There must also be a verification mechanism in place to ensure that the assessment is done objectively.

4.32 With reference to subclause (4)(a), Childline SA submitted that the words “without delay” be substituted with a time period. The respondent further supported option 2 in terms of which an adult victim of trafficking is to be referred to an accredited organisation.

4.33 Ms Toughey (Doctors for life) supported the proposed provisions.

4.34 SWEAT did not favour the mandatory reporting of trafficking cases as contemplated in subclause (1). The respondent gave the following reasons to substantiate their view:

- (a) persons who might be subject to exploitation would fear police investigation if they access any service;
- (b) over-reporting or avoidance of reporting may occur due to the broad definition of what constitutes identifiers of victims of trafficking;
- (c) individuals who may be in abusive and/or situations of exploitation, but not trafficked may be caught up in this reporting mandate;
- (d) mandatory reporting may impact negatively on the doctor-patient confidentiality relationship.

4.35 The UNODC argued that the reporting obligation on the identified professionals in subclause 12(1) would be a breach of confidentiality between such professionals and their clients or patients. The respondent submitted that there may be instances where reporting of the case may put the safety of the victim at immediate risk.

4.36 The Gender, Health and Justice Research Unit did not support the mandatory reporting provision in clause 12(1). They argued that if medical personnel are required to report any suspicions of trafficking, people who manifest any of the conditions as set out in chapter 2 may be viewed as possible victims of trafficking. According to the respondent, mandatory reporting is only used in cases of child and elderly abuse, where it is assumed a child or elderly person cannot identify and/or report the abuse of him or herself. In general the

177 This view was supported by the SAHRC.

criminal law treats children and the aged very differently from adults, and assumes that they have much more limited agency and ability to navigate the legal system. Adults, however, are assumed to be competent to decide whether to report assaults, rapes, and other forms of violence. The respondent was of the view that health care and social work professionals should rather be encouraged to inform suspected trafficking victims of their rights and the services available to them, but should not be put in the position of making life-altering decisions for those people. To do so denies the agency of those individuals, and their ability to assess whether reporting their trafficking is best for them.

4.37 Dr Gould said that the police should not be the first point of contact with victims of trafficking and suggested that the SOCA Unit be the lead agency on cases of trafficking in persons.

Evaluation and recommendations

4.38 The Commission gave due consideration to the issue as to whether a case of trafficking in persons should first be reported to a police official or to social services. The Commission is of the view that a case of trafficking in persons must first be reported to a police official because it is the mandate of the police to receive all reports of alleged criminal offences. However, in order to ensure that victims of trafficking are provided with the necessary social services, the Commission recommends that a police official to whom a case of trafficking has been reported must, within 24 hours, refer that case to a child protection organisation or the provincial department of social development in case of a child victim of trafficking and to an accredited organisation or the provincial department of social development in case of an adult victim of trafficking. The Commission, however, does not agree that a case of trafficking be reported first to an official from one of the specialised police units or that a specialised unit to deal with trafficking cases be established within the police. This is because the Commission recommends that the National Commissioner of the South African Police Service must issue directions in respect of the division or divisions within the police to be tasked with the investigation of trafficking cases.¹⁷⁸

4.39 The Commission gave thorough thought to the argument of the UNODC and SWEAT that the mandatory reporting obligation in terms of clause 12(1) of the Bill to the Discussion Paper might result in a breach of confidentiality between the listed persons and their clients or patients. The Commission concedes that this provision may create problems in practice. Hence the Commission recommends that a case of child trafficking should be reported only when it is in the best interest of the child concerned.¹⁷⁹ This is in line with section 28(2) of the Constitution of the Republic of South Africa Act¹⁸⁰ which stipulates that a child's best interest is of paramount importance in every matter concerning the child. Thus, notwithstanding any confidentiality relationship between a professional and his or her patient or client, a case of child trafficking must be reported if it is in the best interest of the child concerned to do so. Furthermore, the trafficking of an adult person should be reported only if the person concerned has given his or her written consent, except in circumstances where the person is (a) mentally disabled, or (b) in an altered state of consciousness, including under the influence of any medicine, drug or other substance, to the extent that the person's consciousness or judgement is adversely affected. However, consent of the person concerned should not be a requirement if he or she is held captive in an exploitative situation.¹⁸¹

4.40 With regard to the reporting and referral of adult victims of trafficking, the Commission supports, subject to the necessary amendments, the procedure for identifying and referring victims of trafficking as suggested by IOM.

¹⁷⁸ Clause 37(1)(a) of the Bill to this Report.

¹⁷⁹ Clause 11(1) of the Bill to this Report.

¹⁸⁰ 108 of 1996.

¹⁸¹ Clause 12(1) of the Bill to this Report.

4.41 The Commission is of the view that the reporting and referral of child victims of trafficking should be linked to the protective measures contained in the Children's Act and should therefore be dealt with separately from the reporting and referral of adults. The procedure provided for in clause 110(5)-(8) of the Children's Act should then apply in respect of all reports and referrals made to a designated child protection organisation or the provincial department of social development.¹⁸²

4.42 SAPS referred to section 34 of the Prevention and Combating of Corrupt Activities Act¹⁸³ and section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act¹⁸⁴ to substantiate its proposal that the reporting of cases of trafficking in persons should be mandatory for everyone. The Commission does not support this proposal and is of the view that the mentioned Acts cannot be used in support thereof. Section 34 of the Prevention and Combating of Corrupt Activities Act places a duty on persons who hold a position of authority. Such a duty is therefore not placed on everyone. Section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act places on everyone a duty to report terrorist and related activities. Terrorism threatens the security of the State and it is therefore justified to place a duty to report on everyone. With regard to trafficking in persons, the mandatory reporting of trafficking cases needs to be balanced with adequate resources in order to ensure that each reported case is investigated. 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 could 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. The Commission is further of the view that those who must report cases of trafficking are, given their expertise, better placed to identify whether a person is a victim of trafficking than the ordinary person on the street.

4.43 The Commission agrees with the workshop participants and Annex CDW that teachers should be added to the list of persons who must report cases of trafficking in persons.¹⁸⁵ The Commission is, however, of the view that this should only be in respect of cases of child trafficking. In addition, the Commission recommends that

182 Clause 11(5) of the Bill to this Report. Clause 110(5) – (8) of the Children's Act provides as follows:

- (5) The provincial department of Social Development or designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4), must —
 - (a) ensure the safety and well-being of the child concerned, if the child's safety or well-being is at risk;
 - (b) make an initial assessment of the report;
 - (c) unless the report is frivolous or obviously unfounded, investigate the truthfulness of the report or cause it to be investigated;
 - (d) if the report is substantiated by such an investigation, without delay initiate proceedings in terms of this Act for the protection of the child; and
 - (e) submit such particulars as may be prescribed to the Director-General for inclusion in Part A of the National Child Protection Register.
- (6) (a) A designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4) must report the matter to the relevant department of social development.
- (b) The provincial head of social development must monitor the progress of all matters reported to it in terms of paragraph (a).
- (7) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) may—
 - (a) take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitable qualified person or organisation;
 - (b) if he or she is satisfied that it is in the best interest of the child not to be removed from his or her home or place where he or she resides, but that the removal of the offender from such home or place would secure the safety and well-being of the child, requests a police official in the prescribed manner to take the steps referred to in section 153;
 - (c) deal with the child in the manner contemplated in sections 151, 152 or 155.
- (8) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) must report the possible commission of an offence to a police official.

183 12 of 2004.

184 33 of 2004.

185 Clause 11(1) of the Bill to the this Report.

traditional health practitioners must be added to the list of persons who must report cases of both adult and child trafficking.¹⁸⁶ This is because traditional health practitioners may also serve as the first point of contact with victims of trafficking.

4.44 In terms of clause 12(1) and (2) of the Bill to the Discussion paper, a belief that another person is a victim of trafficking is sufficient to report the matter. This means that a subjective test would need to be applied in order to determine whether a person had reason to believe that another person was a victim of trafficking. The Commission is of the view that the reporting of a case of trafficking in persons should be determined by factors which can be assessed objectively. Hence the Commission recommends that a case of trafficking should be reported only when the person who makes the report on reasonable grounds concludes that another person is a victim of trafficking.¹⁸⁷

4.45 The Commission agrees with the workshop participants that those who report cases of trafficking should be protected. Protection should, however, be provided only to those who make a report in good faith.¹⁸⁸

4.46 The Commission agrees with the workshop participants that a directory of services be established in order to facilitate the referral of victims of trafficking to relevant services. The Commission reaffirms its recommendation made at paragraph 6.29 of the Discussion Paper that a resource directory be established which should indicate the following:

- (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.

Providing victims of trafficking with immunity against prosecution

4.47 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 felt that automatic immunity from prosecution may lead to abuse of the criminal justice system in that anyone who e.g. 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. The proposed Bill to the Discussion Paper therefore included the following provision.

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.

Submissions received

4.48 Most of the workshop participants supported the proposed provision. They submitted that the basis on which the NDPP should make such determination should be provided for in the regulations to the proposed legislation.

¹⁸⁶ Clauses 11(1) and 12(1) of the Bill to this Report.

¹⁸⁷ Clauses 11(1) – (2) and 12(1) – (2) of the Bill to this Report.

¹⁸⁸ Clauses 11(3)(b) and 12(3)(b) of the Bill to this Report.

4.49 IOM urged the Commission to delete clause 11 because the purpose of the proposed legislation is to protect victims of trafficking and not to prosecute them. The respondent suggested that the Commission should consider inserting the following provision in the proposed legislation to ensure that it remains consistent with the United Nations High Commissioner of Human Rights' Recommended Principles and Guidelines on Human Rights and Human Trafficking:

- (a) Victims of trafficking shall not be detained, imprisoned, and/or liable to criminal prosecution for:
 - (i) The offence of trafficking in persons or being a party to an offence of trafficking in persons; or
 - (ii) Illegal entry into the Republic, in connection with the act of trafficking in person if the Republic is the receiving country; or
 - (iii) Unlawful residence in the Republic after being trafficked, if the Republic is the receiving country; or
 - (iv) Possession of any fraudulent travel or identity documents that the person obtained, or with which the person was supplied, for the purpose of entering the receiving country in connection with the act of trafficking in person.

4.50 The respondent said that a failure to grant victims of trafficking immunity from prosecution as suggested above will discourage most victims from co-operating with law enforcement and prosecuting authorities, and will adversely affect the ability of the state to investigate and prosecute traffickers.

4.51 The Western Cape Task Team on Human Trafficking, Childline SA and Ms Ogunlaya (Doctors for Life) agreed that the National Director of Public Prosecutions should decide whether to prosecute victims of trafficking for offences committed as a direct result of their situation as victims of trafficking.

4.52 Anex CDW agreed that victims of trafficking should be provided with immunity for offences committed as a direct result of their situation as victims of trafficking. The respondent, however, said that the provision of immunity should depend on the type of crime committed and hence suggested that the proposed legislation should contain a schedule of offences for which immunity should be provided.

4.53 The UNODC supported the proposed provision and added that an alternative to the proposed provision could be formulated as follows:

"Immunity from criminal prosecution

Trafficked persons shall not be detained, imprisoned, and liable to criminal prosecution for:

- (a) the person's illegal entry, in connection with a trafficking offence;
- (b) the person's period of unlawful residence after being trafficked;
- (c) the person's procurement or possession of any fraudulent travel or identity documents that the person obtained, or with which the person was supplied, for the purpose of entering the receiving country in connection with the act of trafficking in persons; or
- (d) the person's involvement in unlawful activities to the extent that he or she has been compelled to do so."

4.54 Mr Patel directed the Commission's attention to section 204 of the Criminal Procedure Act in terms of which the court may confer indemnity. The respondent suggested that, similarly, the proposed legislation should provide that a police officer (of a certain rank) should be able to grant immunity from prosecution to a victim of trafficking.

4.55 SWEAT submitted that victims of trafficking should be provided with immunity from prosecution for any offences committed in the context of them having been trafficked. The respondent disagreed with the

Commission that the decision whether to prosecute victims of trafficking should rest with the National Director of Public Prosecutions.¹⁸⁹ The respondent requested that immunity from prosecution be provided to at least those who have committed sex work related offences, if the Commission decides to retain this clause.

4.56 People Opposing Women Abuse (POWA) submitted that besides victims of trafficking, individuals who fall outside the ambit of the law such as undocumented persons and sex workers are vulnerable. The respondent said that it should be acknowledged that such individuals are vulnerable to various forms of abuse and should therefore not be criminally liable in these circumstances.

4.57 With reference to subclause (2), Dr Gould proposed that the word “may” be substituted with the word “shall”. The respondent added that the National Director of Public Prosecutions should have directives on the kind of cases that should not be prosecuted. For example, immunity from prosecution should be granted for immigration-related offences, but not necessarily for serious crime such as murder.

Evaluation and recommendations

4.58 The Commission recommended that an alleged child victim of trafficking should be referred to a designated child protection organisation or the provincial department of social development to investigate the truthfulness of the report of being a victim of trafficking.¹⁹⁰ The Commission further recommended that an alleged adult victim of trafficking should be referred to an accredited organisation or the provincial department of social development to assess whether the person is a victim of trafficking. If it is found that the person is a victim of trafficking, he or she must be issued with a certificate, certifying that he or she is a victim of trafficking.¹⁹¹ Given these recommendations it would be sufficient if the proposed Bill to this Report states that no criminal prosecution may be instituted against a child who was found to be a victim of trafficking after an investigation in terms of section 110(5)(c) of the Children’s Act or an adult person who has been certified as a victim of trafficking for the following offences:

- (a) entering or remaining in South Africa in contravention of the Immigration Act;
- (b) assisting another person to enter or remain in South Africa in contravention of the Immigration Act;
- (c) possessing any fabricated or falsified passport, identity document or other document used for the facilitation of movement across borders; and
- (d) being involved in an illegal activity to the extent that he or she has been compelled to do so.

4.59 The above offences should, however, be as a direct result of the victim’s situation as a victim of trafficking.¹⁹²

4.60 The above provision will exclude any false claims of being a victim of trafficking as only those victims who have gone through a process of determining whether they are victims of trafficking will benefit from this provision. The proposed provision also addresses the concerns raised in respect of allowing the National Director of Public Prosecutions to decide whether to prosecute a victim of trafficking.

Immigration status of victims of trafficking

4.61 Although the Trafficking Protocol does not place an obligation on State Parties to permit victims of trafficking to remain in their territories, the Commission realises that doing so would be important because the successful prosecution of traffickers is most likely through the testimony of victims of trafficking. This requires that

189 This was supported by Ms Lansink who added that the proposed clause might cause some victims of trafficking not to come forward out of fear for prosecution.

190 Clause 11 of the Bill to this Report.

191 Clause 12 of the Bill to this Report.

192 Clause 15 of the Bill to this Report.

victims should stay in South Africa for the duration of criminal proceedings against traffickers and may require that victims be granted some kind of residency status. The following provisions were therefore included in the Bill to the Discussion Paper.

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.
- (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

Permanent residency

Option one

The Commission recommended that the Refugees Act be amended as follows:

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

- (a) ...
- (b) ...
- (c) ...
- (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.

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, the Commission recommended that the Bill should alternatively provide as follows:

A victim of trafficking is entitled to apply for a permanent residence permit in terms of section 27 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.

Option three

In terms of this option, the Commission recommended that the following subsection 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.

*Submissions received*Clause 15: Suspension of deportation

4.62 Several respondents¹⁹³ supported the inclusion of a suspension of deportation period in the proposed legislation.

4.63 Some of the workshop participants suggested that the 60-day period should be divorced from the prosecution of traffickers. They said that cognisance should be taken of the issue of a compellable witness as such a witness may be forced to testify against his or her traffickers. They said that the 60-day period may not be sufficient to conduct an investigation into the circumstances of the victim.¹⁹⁴ One workshop participant suggested that the Criminal Procedure Act should be amended to provide that the police may obtain a statement from a victim (who is not willing to assist with the police investigation or prosecution of the traffickers). If criminal proceedings against the traffickers are instituted, the police official who took the statement can then be called as a witness to verify the statement without the court having to call the victim to testify.

4.64 Dr Gould supported the proposed provision. The respondent, however, argued that if a victim decides not to co-operate with law enforcement and prosecuting authorities, the 60-day period may be insufficient to make a determination as to whether it is safe to deport the victim.

4.65 The UNODC submitted that the granting of a suspension of deportation period is found as a best practice in combating trafficking in persons. The respondent said that the proposed provision is a possible approach and stated that an alternative provision could be formulated as follows:

"Recovery and reflection period

- (1) Where [the investigative competent authority] has reasonable grounds to believe that a person is a trafficked person, he or she shall notify the [competent immigration authority] who shall grant the trafficked person the right to remain legally in [State's name] for a period of ... days.
- (2) Subsection (1) shall not prevent or prejudice the competent authorities from carrying out any relevant investigative activities."

4.66 SWEAT submitted that the granting of a suspension of deportation period should not be subject to the discretion of the Director-General of the Department of Home Affairs.¹⁹⁵ However, if the proposed legislation retains this discretion, then the discretionary powers of the Director-General should be devolved in order to facilitate the granting of a suspension of deportation period.

Clause 16: Temporary residency

4.67 The majority of the workshop participants supported the proposed provision. Some participants were not sure whether the visitor's permit should be extended to victims of trafficking or whether provision should be made for a new permit. A small number of participants argued that temporary and permanent residence permits should be provided to all victims of trafficking regardless of whether they agree to assist with the investigation of and prosecution of traffickers.

4.68 The Western Cape NGO Task Team on Human Trafficking, Childline SA, Ms Ogunlaya (Doctors for Life), Dr Gould and the DOJCD supported the provision of a temporary residence permit to victims of trafficking who are willing to co-operate with law enforcement and prosecuting authorities. However, Anex CDW, SWEAT and Ms

193 The workshop participants, IOM, Western Cape NGO Task Team on Human Trafficking, Childline SA and Ms Ogunlaya (Doctors for Life).

194 Anex CDW and SWEAT suggested that the 60 days be changed to 90 days whilst Mr Patel suggested that this clause should provide for extension of the 60-day period in instances where there are reasonable grounds to do so.

195 This view was supported by Ms Lansink who submitted that a suspension of deportation period be granted to a person once he or she is identified as a victim of trafficking.

Lansink argued that the provision of a temporary residence permit to a victim of trafficking should not depend on his or her willingness to co-operate with law enforcement and prosecuting authorities. SWEAT was concerned that victims of trafficking will not be protected in cases where the traffickers are not arrested or where they face danger or hardship if returned to their countries of origin.

4.69 SAPS felt that the provision of residency status to victims of trafficking should be dealt with in the Immigration Act and the Refugees Act.

4.70 The UNODC submitted that the proposed provision is a possible approach and stated that an alternative provision could be formulated as follows:

"Immigration status of victims of trafficking

Notwithstanding the provisions of any other law, the victim and accompanying dependents shall have the right to remain legally [and to work] in [State's name] for the duration of any relevant legal proceedings."

Clause 17: Permanent residency

4.71 The workshop participants could not agree which option is preferable.

4.72 The Department of Home Affairs and the DOJCD preferred option one. The Department of Home Affairs stated that this option will minimise abuse of the system in that five years of continuous residence as a refugee is required before permanent residence may be granted. The respondent submitted that option three is not an option as the determination of humanitarian grounds is too subjective.

4.73 IOM did not support option one. The respondent stated that the majority of victims of trafficking with whom it has dealt with in South Africa are not refugees in terms of the Refugee Convention. The respondent had appreciation for the fact that South Africa's current backlog in processing asylum claims may limit the Government's ability to provide victims of trafficking with emergency assistance and security should they have to join the asylum queue. The respondent favoured option two and proposed that a permanent residence permit should be issued to victims of trafficking where they (i) have remained in South Africa 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 in South Africa; (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; and (iii) are likely to be trafficked again should they return to their countries of origin.

4.74 Childline SA, the Office of the Premier, Western Cape Provincial Government, and Ms Ogunlaya (Doctors for Life) preferred option two.

4.75 The LCCL(SA) submitted that options one and two place a difficult burden of proof on victims of trafficking because these options require victims to prove to the satisfaction of the Director-General of the Department of Home Affairs that they may be harmed, killed or trafficked again if returned to their countries of origin or the countries from where they have been trafficked. The respondent preferred option three because, in its view, this option requires a lesser probative burden of likelihood that the prejudice will occur.

4.76 Anex CDW favoured option three and added that the permit should allow victims of trafficking to work in the meantime and eventually to study in South Africa.

4.77 Ms Lansink proposed that all three options be used. The first in terms of the Refugees Act, the second in terms of the Immigration Act and the third by extending a temporary residence permit as proposed on page 288 of the Discussion Paper.

4.78 The UNODC submitted that all three options are possible approaches and are in compliance with the Trafficking Protocol. The respondent, however, preferred option three as it seems simpler and refers to humanitarian grounds.

4.79 SWEAT suggested that both the proposed trafficking legislation and the Refugees Act should stipulate that victims of trafficking are entitled to apply for permanent residency. The respondent expressed concern over section 27(d) of the Immigration Act which refers to the criteria of "being of good and sound character". This, according to the respondent, is discriminatory and can adversely affect sex workers. The respondent added that socio-economic factors should be a motivating factor for allowing victims of trafficking to stay in South Africa.

4.80 The Western Cape NGO Task Team on Human Trafficking suggested that the proposed legislation should provide for a human trafficking permit which should allow its bearer to work and study and to have access to basic services.

Evaluation and recommendations

4.81 The Commission concurs with those workshop participants who suggested that the suspension of deportation period be divorced from the prosecution of traffickers. The suspension of deportation period should therefore not hinder the authorities to conduct any relevant investigation. It is, however, important that any such investigation is done with due regard to the emotional state of the victim.¹⁹⁶ The Commission further agrees with those who proposed that the suspension of deportation period be extended to 90 days.¹⁹⁷

4.82 The Commission recommends that a suspension of deportation period must be granted only to victims who have been certified as victims of trafficking in terms of clause 12(6)(a) of the Bill to this Report. This means that the Director-General of the Department of Home Affairs will not have discretion as to whether or not such a period should be granted to a victim.¹⁹⁸ This is because persons who have been certified as victims of trafficking have already gone through a process to ascertain whether they are real victims of trafficking.

4.83 The Commission is of the view that it is not necessary to link the granting of the suspension of deportation period or the granting of temporary residency to the condition that the victim of trafficking should be placed in the care of a designated child protection organisation, an accredited organisation or any other person, organisation or institution so authorised. This is because child victims of trafficking will be reported or referred to a designated child protection organisation in terms of clause 11 of the Bill to this Report and adult victims of trafficking will be reported or referred to an accredited organisation in terms of clause 12 of the Bill to this Report.

4.84 It is important to ensure that those victims who have been granted a suspension of deportation period, but who are not willing to assist with the investigation and prosecution of traffickers are not returned to their countries if their safety may be at risk in those countries. The Commission subsequently recommends that if a foreigner, after a period of 30 days since he or she has been granted a suspension of deportation period, is still unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and prosecution of a trafficker, an investigation into his or her circumstances must be conducted in order to determine whether it is safe to return him or her to his or her country of origin or the place from where he or she has been trafficked.¹⁹⁹ Furthermore, upon expiration of the suspension of deportation period granted to a foreigner, the information obtained as a result of an investigation into the circumstances of such a foreigner must be provided to the Director-General of the Department of Home Affairs to be taken into account when deciding whether to repatriate

¹⁹⁶ Clause 16(5)(b) of the Bill to this Report.

¹⁹⁷ Clause 16(1) of the Bill to this Report.

¹⁹⁸ Clause 16(1) of the Bill to this Report.

¹⁹⁹ Clause 16(3) of the Bill to this Report.

him or her.²⁰⁰ Such a foreigner should be entitled to apply for a temporary residence permit despite the fact that he or she was not willing to co-operate with the authorities.²⁰¹

4.85 The Commission recommends that the term “suspension of deportation period” be substituted with the term “recovery and reflection period”. The latter term is more suitable as it indicates that the purpose of the period is to allow victims to recover from the abuse to which they have been subjected and to reflect on the way forward, including whether they want to co-operate with the authorities.

4.86 The Commission does not support those submissions which state that the granting of temporary residency should not be subject to the victim’s co-operation with law enforcement and prosecuting authorities. This is because the non-renewable suspension of deportation period (recovery and reflection period) is available to all victims of trafficking regardless of whether they are willing to assist law enforcement and prosecuting authorities. An unconditional provision of temporary residency to all victims of trafficking may lead to an abuse of the system. It would also be difficult to determine for how long victims who are not willing to assist with the investigation and prosecution of traffickers should have temporary residency. With reference to SWEAT’s submission that victims will face danger or hardship if returned to their countries of origin, the Commission recommends in clause 18 that victims of trafficking be provided with permanent residency in instances where they cannot return to their countries of origin or the countries from where they have been trafficked if there is a risk that they may be harmed, killed or trafficked again.

4.87 With regard to the three options for permanent residency proposed in the Discussion Paper, the Commission agrees with IOM that, given the current backlog in processing asylum claims, it might not be feasible to require that victims of trafficking should first apply for refugee status whereafter an application for a permanent residence permit may be made. The Commission recommends that both option two²⁰² and option three²⁰³ be included in the proposed Bill. Victims of trafficking who have not been in the country for a period of five years in order to apply for permanent residency as set out in option two, would be able to apply for an extension of their visitor’s permits in terms of option three.

4.88 The Commission disagrees with IOM that one of the requirements for granting a permanent resident permit to a victim of trafficking should be that the victim must have remained in South Africa in order to assist the authorities with the investigation of and the prosecution of traffickers. The Commission can see no reason for not returning a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked if his or her safety is not in danger.

4.89 The Commission does not support SWEAT’s suggestion that socio-economic factors should be a motivating factor for allowing victims of trafficking to stay in South Africa. 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 countries and that there is no possibility that they may be harmed, killed or trafficked again.

4.90 The Commission disagrees with SAPS that the provision of residency status to foreign victims of trafficking should be dealt with in the Immigration Act and the Refugees Act. The Commission is of the view that the Refugees Act is not relevant when dealing with the issue of residency. Furthermore, whilst the Commission is in favour of addressing the provision of residency to foreign victims of trafficking in the proposed trafficking legislation, references to the Immigration Act should be made where necessary.

200 Clause 16(4) of the Bill to this Report.

201 Clause 17(1)(b) of the Bill to this Report.

202 Clause 18 of the Bill to this Report.

203 Clause 17(3) of the Bill to this Report.

The provision of services to victims of trafficking in persons

4.91 The Commission cannot over emphasise the importance of providing needed services to victims of trafficking. Child victims of trafficking are covered by the protective measures set out in the Child Care Act²⁰⁴ and the Children's Act.²⁰⁵ The Commission, however, took cognisance of the fact that South Africa lacks a proper system in terms of which assistance can be provided to adult victims of trafficking.²⁰⁶ Hence the following provisions were included in the Bill to the Discussion Paper.

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—
- (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 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.

204 74 of 1983.

205 38 of 2005.

206 See paragraphs 6.112 - 6.119 of the Discussion Paper.

4.92 Alternatively to the above provision the Commission recommended that the Minister for Social Development must establish and operate centres for adult victims of trafficking. Similarly to the above provisions, it was recommended that centres for adult victims of trafficking should also offer various programmes to adult victims of trafficking.²⁰⁷

Submissions received

4.93 The majority of the workshop participants were in favour of the provisions in terms of which the Director-General of Social Development may accredit an organisation to provide accommodation to adult victims of trafficking.²⁰⁸

4.94 The LCCL(SA) submitted as follows:

- (a) Specialised shelters would place victims of trafficking and staff at risk of reprisals.
- (b) The ability to recover from their experiences might be compromised if victims are constantly in the company of people who have suffered similar abuse.
- (c) South Africa lacks an adequate system of shelters catering for the various needs of victims.

4.95 The LCCL(SA) added that it would be better to assist accredited organisations to extend their services to victims of trafficking. Furthermore, victims of trafficking in South Africa may come from various backgrounds, e.g. refugees, illegal immigrants, people from rural areas and small cities. Hence, in some cases it may be better to refer a victim to an organisation focussing on victims from a certain background.

4.96 The UNODC stated that, due to various reasons, victims of trafficking often tend to have more trust in non-governmental organisations than in governmental institutions. With reference to clause 25(1)(a), the respondent submitted that securing the safety of victims of trafficking remains the responsibility of law enforcement. Hence, the requirement that accredited organisations should secure the safety of victims of trafficking should be made in co-operation with relevant law enforcement authorities. The respondent suggested that clause 25(2) should refer to both a male or female victim of trafficking who has a child in his or her care.²⁰⁹ Furthermore, it is important that the term "counselling" entails not only psychological counselling, but also information regarding the legal rights of victims of trafficking as required by article 6(3)(b) of the Trafficking Protocol.

4.97 The Department of Social Development agreed with the content of clause 23. With reference to clause 24, the respondent submitted that the norms and standards must be prescribed by the Director-General of the Department of Social Development. The respondent proposed that clause 25(3) be amended as follows: 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 his or her parents [the adult victim]. The respondent suggested that the following paragraph be added to clause 26: the treatment and counselling needs of the victim.

4.98 Ms Lansink said that requiring from an accredited organisation to secure the safety of adult victims of trafficking is a high standard to meet. The respondent suggested that an accredited organisation should rather be required to take reasonable measures to offer secure facilities.

4.99 The discussion paper posed the question how the proposed legislation should deal with the provision of accommodation to men over the age of 18 years. In response to this, Dr Gould suggested the following:

- (a) In the case of foreign victims of trafficking who are not in need of witness protection and who have positively been identified as bona fide victims of trafficking, provision should be made by the Department of Home Affairs (or another government department) for compensation

207 See paragraph 6.165 of the Discussion Paper and clauses 18 to 22 of the Bill to the Discussion Paper.

208 This was supported by Childline SA, the LCCL(SA), Anex CDW, the Department of Home Affairs, Ms Ogunlaya (Doctors for Life), Ms Toughey (Doctors for life), Ms Lansink, the UNODC and SWEAT.

209 This was supported by the Gender, Health and Justice Research Unit.

- for the cost of accommodation while an investigation is undertaken to establish whether the victims can be safely repatriated.
- (b) In the case of South African victims of trafficking, the Department of Social Development should provide compensation for the cost of accommodation while an investigation is undertaken to establish whether it is safe for the victims to return to their homes.

4.100 Dr Gould submitted that the proposed legislation does not address ownership of case management sufficiently. The respondent suggested that existing facilities be used to accommodate victims of trafficking. However, due to the current shortage of facilities, additional funds must be made available. The respondent further proposed that the issue of who pay for South African nationals to be returned and accommodated on their return should be addressed.

4.101 SWEAT urged the Commission to legislate minimum standards for accredited organisations that will allow the people who stay there to function with as much independence and dignity as possible. The respondent said that there should be a continuum of services available to victims and state assistance should not be limited to those in organisations. The respondent said that the legislation should stipulate that these organisations must be secular and non-sexist. Furthermore, assistance in the form of services and grants should be provided for those who do not want to stay at the centres.

4.102 SWEAT believed that trafficking victims must be provided with legal assistance, shelter, social security, access to anti-retrovirals where needed, access to a competent translator during all court proceedings and access to all documentation in relation to the case and information regarding compensation and redress for damage suffered.

4.103 SWEAT submitted that the proposed legislation should explicitly state that victims of trafficking can access voluntary counselling and testing (VCT), post-exposure prophylaxis (PEP) in cases where victims were subjected to sexual exploitation, trauma counselling, mental health services and access to drug counselling and treatment.

4.104 Ms Lansink proposed that victims of trafficking should be provided with access to appropriate health care services, including access to adequate physical and psychological care in accordance with the Recommended Principles and Guidelines of the UNHCHR²¹⁰ and the recommendations of the Special Rapporteur on Violence against Women.²¹¹ Furthermore, medical and psychological care should be adequate and confidential and should include, upon the request of the trafficked person, voluntary HIV testing services with pre and post test counselling.

4.105 The SAHRC submitted that the proposed legislation does not state clearly what the prerequisite circumstances and procedures are for receiving shelter at an accredited organisation. Furthermore, the following should be clarified:

- (a) Can a victim of trafficking simply present himself or herself to an accredited organisation and request shelter or is the recommendation of a social service, medical, labour, immigration professional, or police official necessary?
- (b) Under what conditions may the request for temporary shelter be granted?
- (c) For what duration may victims stay at an accredited organisation?
- (d) Can victims of trafficking leave an accredited organisation at any time?

4.106 The DOJCD suggested that clause 23 should clearly state which Minister should be responsible for prescribing the process for the accreditation of an organisation. Furthermore, clause 24 should state who should prescribe the minimum norms and standards.

210 United Nations Office of the High Commissioner for Human Rights *Recommended Principles and Guidelines on Human Rights and Human Trafficking* 20 May 2002.

211 E/CN.4/2000/68.

Evaluation and recommendations

4.107 Given the fact that the majority of the respondents to the Discussion Paper are in favour of accrediting an organisation to provide accommodation to adult victims of trafficking in accordance with a programme suited for the needs of such victims, the Commission recommends that this approach be reflected in the proposed Bill to this Report.²¹²

4.108 The Commission recommends that the heading "CENTRES FOR ADULT VICTIMS OF TRAFFICKING" in chapter 6 of the Bill to the Discussion Paper be replaced with the heading "SERVICES TO ADULT VICTIMS OF TRAFFICKING". Furthermore, the provision of accommodation to adult victims of trafficking should be one of the programmes offered by an accredited organisation.

4.109 The Commission agrees with the SAHRC that the proposed trafficking legislation should state who may access a programme offered by an accredited organisation.²¹³

4.110 With reference to the submission made by the UNODC and Ms Lansink, the Commission has recommended that an accredited organisation to whom a case of trafficking in persons has been referred must, where necessary with the assistance of the South African Police Service, ensure the safety of the person concerned if the person's safety is at risk.²¹⁴ An accredited organisation should thus not be required to take main responsibility for the safety of victims of trafficking. They should merely be required to take reasonable measures to ensure the safety of victims.

4.111 The Commission agrees with the submission made by the UNODC and the Gender, Health and Justice Research Unit in respect of clause 25(2) of the proposed Bill to the Discussion Paper.²¹⁵

4.112 In terms of the proposed Bill to the Discussion Paper any organisation would be able to apply for accreditation to provide services to men over the age of 18. However, the Commission realises that currently there are not sufficient organisations providing services to male victims of trafficking. Hence the Commission recommends that where no organisation is able to accommodate a male victim of trafficking, the Department of Social Development should pay the cost of alternative accommodation.

4.113 The Commission agrees with SWEAT that assistance should not be limited to those who are accommodated in an accredited organisation.

4.114 With reference to SWEAT's submission, clause 28 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act already provides victims of sexual offences the right to access PEP. The Prevention and Treatment of Substance Abuse Bill addresses counselling and treatment of drug addicts. A cross reference to these laws can be made in the trafficking legislation. Furthermore, the National Policy on Testing for HIV deals with HIV testing as well as pre-test and post-test counselling. It is therefore not necessary to address this in the trafficking legislation.

4.115 In response to the suggestion made by the DOJCD, the Commission recommends that the Minister for Social Development should prescribe the process for the accreditation of an organisation as well as the minimum norms and standards to be complied with by such an organisation.²¹⁶

212 See chapter 6 of the Bill to this Report.

213 Clause 22 of the Bill to this Report.

214 Clause 12(5)(a) of the Bill to this Report.

215 Clause 21(2) of the Bill to this Report.

216 Clause 20(1) of the Bill to this Report.

4.116 The Commission is further of the view that clause 24 should list the issues to which the minimum norms and standards should relate.²¹⁷

Compensation for damage suffered

4.117 In terms of our current criminal justice system victims of trafficking are not able to claim for psychological damage suffered and have few remedies to claim compensation from perpetrators. Section 300 of the Criminal Procedure Act allows victims to claim compensation for damage to or loss of property, including money.²¹⁸ 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. This remedy is inaccessible to many, if not all, victims of trafficking because of the high cost for bringing an application to the High Court. Consequently the Commission gave due consideration to the reparation provisions contained in the Sentencing Framework Bill.²¹⁹ This Bill provides that a sentence of reparation may be imposed for any offence and must be considered in every case.²²⁰ In addition to the above remedies the Commission recommended that provisions similar to those relating to reparation in the Sentencing Framework Bill should be included in the proposed trafficking legislation. The following provisions were thus included in the proposed Bill to the Discussion Paper.

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.
- (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.

217 Clause 20(2) – (3) of the Bill to this Report.

218 See paragraph 6.183 of the Discussion Paper.

219 South African Law Reform Commission *Report on a New Sentencing Framework* (Project 82) November 2000. Also see the discussion at paragraphs 6.180 to 6.182 of the Discussion Paper.

220 Clause 37(1).

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.

Submissions received

4.118 The workshop participants supported the proposed provisions. A few, however, argued that determining the quantum of the damage will be problematic and will require expert testimony.²²¹ Others did not agree with this view and argued that the proposed legislation gives the court discretion to make an order for compensation.

²²¹ The DOJCD also expressed concern that the criminal courts are not equipped to address the issue of quantification of damages.

If the court is not in a position to determine the quantum of the damage, it can refrain from making an order. However, the prosecution should be in a position to lead evidence to determine the quantum of the damage. It was further stated that the proposed provisions do not exclude a civil action and that this should be made clear in the proposed legislation.

4.119 The SOCA Unit recommended that following a conviction on a charge of debt bondage, the court should be entitled to award to a victim of trafficking an amount equivalent to the amount that has been accumulated by the offender through subjecting the victim to debt bondage.

4.120 Childline SA and Ms Toughey (Doctors for life), the Western Cape NGO Task Team on Human Trafficking supported the provisions regarding compensation to victims of trafficking. With regard to compensation to the state, the Western Cape NGO Task Team on Human Trafficking felt that such funds should also be used for reintegration services.

4.121 Anex CDW was concerned that the right of the state to claim compensation as provided for in clause 31 may compromise the right of the victim to claim compensation. The respondent suggested that in instances where the perpetrator does not have sufficient funds or property to compensate the victim and the state, the victim should first be compensated.

4.122 The UNODC agreed with the proposed provisions and suggested that the following provision be added: "The return of the victim to his or her home country or any absence of the victim from the jurisdiction shall not prejudice to victim's right to claim and receive compensation."

4.123 The Office of the Premier, Western Cape Provincial Government suggested that clause 27 should specify whether the court may make an order for compensation only upon application or on its own accord or both upon application and on its own accord.

4.124 Ms Ogunlaya (Doctors for Life) suggested that the proposed legislation should enable victims of trafficking to claim compensation for the contraction of a life threatening disease, such as HIV/AIDS.

4.125 SWEAT and the Department of Home Affairs supported the recommendation that 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.

4.126 The DOJCD supported the provisions on compensation. The respondent submitted that there is a need to ensure that victims of trafficking benefit from these provisions and that the implementation of these provisions is monitored. Hence the respondent suggested the following:

- (a) Prosecutors should inform victims of trafficking about their right to and the process to claim compensation.
- (b) When consulting with victims of trafficking, prosecutors should take detailed information on damage caused to enable the quantification of the amount to be claimed.
- (c) Statistics should be kept of all cases where compensation orders were granted. Statistics should also be kept of cases where the courts refrained to provide compensation orders and the reasons for doing so.

Evaluation and recommendations

4.127 The Commission agrees with those respondents who argued that it will not be problematic to determine the quantum of the damages in a claim for compensation and supports their proposal that the proposed trafficking Bill should clearly state that the proposed provisions do not exclude a civil action for damages.²²²

222 Clause 25(4) of the Bill to this Report.

4.128 Responding to the submission made by the SOCA Unit, both the proposed Bills to the Discussion Paper and the Report respectively state that the court may order the payment of appropriate compensation. Thus, when making an order for compensation the court will have to consider all the relevant facts, including the period to which a person was subjected to debt bondage.

4.129 Responding to the submission made by Anex CDW, both the proposed Bills to the Discussion Paper and the Report respectively state that an order for compensation to the State must be in addition to an order for compensation to a victim. This means that appropriate compensation should first be paid to the victim before compensation is paid to the State.

4.130 The Commission supports the suggestions made by the Office of the Premier (Western Cape Provincial Government),²²³ Ms Ogunlaya (Doctors for Life)²²⁴ and the DOJCD²²⁵. In addition to the submission made by the DOJCD, the Commission recommends that a police official investigating a case of trafficking in persons should also take detailed information on damage caused to enable the quantification of the amount to be claimed.²²⁶

4.131 Responding to the submission made by the UNODC, in terms of our current legal system a person's right to claim compensation for damage suffered will not be prejudice because of his absence from the country.

PROCESS AND PROCEDURE

Legal representation of victims of trafficking in persons

4.132 The Commission realises that the provision of separate legal representation to victims of trafficking would have several benefits. The Commission, however, recommended in the Discussion Paper²²⁷ 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:

- (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.

4.133 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.

²²³ Clause 25(1) of the Bill to this Report.

²²⁴ Clause 25(1)(c) of the Bill to this Report.

²²⁵ Clause 37(6)(h) – (i) and (j)(ii) – (iii) of the Bill to this Report.

²²⁶ Clause 37(1)(j) of the Bill to this Report.

²²⁷ See paragraph 6.225 of the Discussion Paper.

4.134 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.

Submissions received

4.135 The Children's Rights Project referred the Commission to its initial submission made on the Trafficking Issue Paper and once again re-iterated the importance of a victim having separate legal representation.²²⁸ The purpose of such a legal representative would not be to act as a second prosecutor, but rather to protect the interests of the victim, to ensure that the victim's story is properly told and that procedural and evidentiary rules as they pertain to the victim are properly enforced. As a legally trained person the victim's lawyer will bring an understanding of the process and the interactions with the criminal justice system, greatly facilitating the flow of information to the victim. Furthermore, the presence of a victim's lawyer at the time that a statement is taken would help to ensure that the victim is properly and appropriately interviewed and would provide the victim with a measure of support. The respondent thus supported the provision of legal representation for victims.

4.136 The DOJCD submitted that the provision of separate legal representation to victims of trafficking would not be financially viable and suggested that prosecutors be trained to deal with trafficking cases.

Evaluation and recommendations

4.137 The Commission gave due consideration to the submission made by the Children's Rights Project and agrees with the submission made. The Commission can, however, not ignore the fact that limited resources do not permit the provision of separate legal representation to victims of trafficking. Hence the Commission reaffirms its recommendations as set out in the Discussion Paper.²²⁹

Deportation and repatriation of victims of trafficking

4.138 The Commission realises that 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. The Commission believes that victims should not be returned to their countries if doing so would put their safety at risk. Victims of trafficking should therefore be repatriated in terms of a process that takes cognisance of their safety not only during the repatriation process, but also in the countries to which they are to be returned. Hence the following provisions were included in the proposed Bill to the Discussion Paper.

228 Submission to the South African Law Reform Commission on its Issue Paper on Trafficking in Persons made by the Children's Rights Project, Community Law Centre, 31 March 2004, pp 26-29.

229 See paragraph 6.225 of the Discussion Paper.

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 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.

Submissions received

4.139 Childline, the UNODC, Ms Ogunlaya (Doctors for Life), Dr Gould and the workshop participants supported the proposed provisions on repatriation of victims of trafficking.

4.140 The Western Cape NGO Task Team on Human Trafficking, SWEAT and Childline SA agreed that the summary deportation of victims of trafficking be prohibited.

4.141 The SOCA Unit suggested that decisions regarding the repatriation of child victims of trafficking should be made by commissioners of child welfare. The respondent proposed that a commissioner of child welfare considering the repatriation of a child victim of trafficking must request a report from the office of the family advocate prior to making his or her decision. The respondent further proposed that this report must be drafted after consultation with social workers, the South African Police Service, the Director of Public Prosecutions and other appropriate organisations.

4.142 With reference to clause 34(a), the Department of Social Development suggested that the words "suitable family members or" be inserted after the words "take reasonable steps to find".

Evaluation and recommendations

4.143 In response to the suggestion made by the SOCA Unit, the Commission would like to point out that a child who is to be repatriated would have already gone through the child care system. This is because clause 11 provides that when a child victim of trafficking is found, he or she must be referred to a designated child protection organisation or the provincial department of social development. A child victim of trafficking who has

been placed by the children's court within our current child care system would anyway be entitled to remain in South Africa for the duration of the children's court order.²³⁰ The proposed Bill to the Report also provides for sufficient safeguards to ensure that a child is not repatriated if doing so would put his or her safety at risk.²³¹ The Commission therefore finds it unnecessary to refer the child back to the children's court to decide whether he or she should be repatriated.

4.144 The Commission supports the proposal made by the Department of Social Development.

230 Clause 13(3) of the Bill to this Report.

231 See clause 31(1) of the Bill to this Report.

Chapter 5:

Prevention of Trafficking in Persons

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Prevention of Trafficking in Persons

SUBSTANTIVE MEASURES

Introduction

5.1 Although the rescuing and re-integration of victims of trafficking is important, a preventative approach is also needed. Hence the following provisions were included in the Bill to the Discussion Paper.

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.
- (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.

Submissions received

5.2 The workshop participants, Childline SA and the Department of Social Development supported the proposed provisions. The workshop participants further suggested the following:

- Subclause 2(a) should refer to all members of the community with specific reference to rural communities.
- The public should be informed what trafficking in persons is in order to enable them to identify victims or perpetrators and to report cases of trafficking in persons.

- Public awareness programmes should also be extended to hospitals and prisons so that victims of trafficking who are in hospital and those who are in prison for crimes committed as a result of their situation as victims can be made aware of their rights.²³²
- Public awareness programmes should be extended to our neighbouring countries.
- A toll-free number should be established to report cases of trafficking.
- Include the Department of Finance to ensure that the required budget is made available.
- Victims of trafficking should be involved in both the design and delivery of the proposed programmes.
- The proposed programmes should also target the public in general.
- Awareness-raising campaigns should be backed by support services.
- Awareness programmes should include issues around human rights (equality, dignity, non-discrimination) and not just victim rights.
- Include in subclause 1 the Ministers for Health and Labour.
- Need a separate body to oversee these programmes.

5.3 The Western Cape NGO Task Team on Human Trafficking recommended that clause 37(1) should read as follows: "The Minister and all other relevant government departments (Safety & Security, SAPS, Health, Education, Social Development at all three levels of government in consultation with non-governmental organizations; Home Affairs, Foreign Affairs, Labour, etc.) establish public awareness, education and training programmes and other measures for the prevention of trafficking in persons designed to..." In addition, the respondent suggested that the clause should state the following:

- (a) Inform and educate the general public on trafficking in persons, who to report to and where to go for help.
- (b) Inform and educate vulnerable groups and those at risk of trafficking in persons, especially women and children.
- (c) Inform and educate unions and employers about trafficking in persons.
- (d) Inform and educate victims of trafficking in persons about their rights, services, legal and other remedies, support and assistance programmes.
- (e) Provide training and skills development to build capacity amongst service providers and duty bearers.
- (f) Inform and educate foreign visitors about the implications of trafficking in persons.

5.4 The respondent proposed that clause 37(1)(c) be amended as follows: "discourage the demand and supply factors that foster the exploitation of victims of trafficking, especially women and children." The respondent further proposed that clause 37(2)(a) be amended as follows: "include appropriate measures aimed at reaching rural communities and other vulnerable groups." The respondent recommended that the Commission should include in the prevention chapter provisions for on-going research and information sharing to establish the extent and nature of trafficking in persons in South Africa.

5.5 The SAHRC suggested that the prevention chapter be moved towards the beginning of the proposed legislation²³³ and that clause 37(3) should be placed in a general delegation clause within the General Provisions Chapter (Chapter 11). The respondent further proposed that a standard delegation clause be included in the proposed legislation.

5.6 SWEAT suggested that clause 37(1)(c) be deleted. This was supported by Dr Gould. The respondents argued that discouraging the clients of sex workers from purchasing the services of sex workers is not a way of

232 The workshop participants explained that some persons may enter SA without knowing that they are victims of trafficking and may be arrested by the authorities before they could reach their place of exploitation.

233 This suggestion was supported by Anex CDW.

combating trafficking. SWEAT added that little is known about the sex work industry itself in South Africa and even less about incidences of trafficking of persons into sex work.

5.7 SWEAT argued that women and trafficked persons need to be involved in awareness programmes, as far as possible, in developing any prevention and/or public awareness activities. The respondent said that there is a need for a strong connection between the awareness programmes and trade unions and/ or associations or movements of women like the South African Domestic Workers Union and Sikhulu Sonke that organises women on farms. Furthermore, engaging workers and women's movements in raising awareness is crucial to not only prevention but also to rescue efforts.

5.8 In addition to the proposed provisions, Ms Lansink suggested that self-empowerment strategies be included in order to provide economic safety nets for women and empower those most at risk of being trafficked. Legal and cultural factors such as discriminatory practices that limit women's access to education and employment need to be addressed. The respondent suggested that migration should be less restrictive and the possibility of legal migration should be increased, with migrant workers receiving the same level of protection of their labour rights as citizens. Furthermore, the demand for cheap and exploitative labour should be discouraged (including the demand for forced labour/forced or exploitative sexual services). This could be done by, inter alia, using the education curricula to raise awareness on gender stereotypes.

5.9 The Gender, Health and Justice Research Unit suggested that the proposed legislation should also provide for economic and social initiatives in order to prevent the trafficking of persons. With reference to clause 37(1)(c), the respondent said that the proposed legislation should include directives as to how the demand for trafficking will be identified and what measures might be taken to discourage it. Furthermore, it should be stated which branches of government will be responsible for discouraging the demand for the trafficking of persons.

5.10 The DOJCD argued that the Department of Safety and Security should play a leading role in the establishment of public awareness programmes because crime prevention falls within SAPS's mandate. The respondent submitted that it should only play a supportive role in this regard. The respondent added that public awareness programmes should also be provided in different languages, including foreign languages.

Evaluation and recommendations

5.11 The Commission supports the suggestion that public awareness programmes or other measures for the prevention of trafficking in persons be aimed at all members of the public.²³⁴

5.12 With reference to the proposal that a toll-free number be established for the reporting of cases of trafficking in persons, the Commission would like to point out that the IOM has already established such a toll-free number. Hence the Commission is not in favour of establishing an additional toll-free number as this will be a duplication of existing measures.

5.13 The Commission shares the view that victims of trafficking should be involved in the design and delivery of public awareness programmes. The participation of such victims could be facilitated through non-governmental organisations providing services to them.

5.14 The Commission agrees with the suggestion that the Ministers for Health and Labour be added to the list of Ministers who should be responsible for the establishment of public awareness programmes. This is because victims of trafficking who have been subjected to abuse often need to access health care services, and labour inspectors may be the first point of contact with victims who are being subjected to exploitative labour practices. The Commission is also of the view that the Minister for Foreign Affairs be added to the list so as to ensure that South African embassy staff situated in other countries inform and educate visa applicants about issues relating to trafficking in persons. Embassy staff could also co-operate with anti-trafficking institutions or organisations in

²³⁴ Clause 3(1)(a) of the Bill to this Report.

those countries in order to make the public aware about issues regarding trafficking in persons. However, after further consideration, the Commission recommends that the Inter-sectoral Committee established in terms of Section 40, must be responsible for establishing public awareness programmes.

5.15 The Commission supports the suggestion made by the Human Rights Commission that the proposed trafficking legislation should provide for the delegation of powers and duties. The Commission therefore recommends that any Director-General referred to in the proposed legislation should be able to delegate any power or duty assigned to him or her to an official in the employ of his or her department.²³⁵ Such a Director-General should also be able to assign any power or duty assigned to him or her to his or her provincial head.²³⁶ Consequently, provincial heads should be able to delegate any power or duty assigned to them to an officer in the employ of their respective departments.²³⁷

5.16 The Commission is of the view that SWEAT's and Dr Gould's argument is premised on an incorrect interpretation of clause 37(1)(c). This clause is not specifically aimed at discouraging the clients of sex workers from purchasing the services of sex workers. It is aimed at discouraging the demand that fosters the exploitation of victims of trafficking, regardless of the kind of exploitation to which they have been subjected. It should further be kept in mind that all sex workers are not necessarily victims of trafficking. Hence, measures designed to discourage demand should be specific. Furthermore, the Trafficking Protocol obliges States Parties to adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons that leads to trafficking.

5.17 The Commission agrees with those who submitted that it is important that educational and economic opportunities be improved and expanded for those at risk of becoming victims of trafficking. However, the Commission does not share the view that such opportunities be provided for by the proposed trafficking legislation. Hence the Commission recommends that the Departments of Labour, Education and Social Development develop policies for the creation and/or improvement of educational and economic opportunities for victims of trafficking.

5.18 In response to the submission made by DOJCD, the Commission is of the view that DOJCD should be the lead department to establish public awareness programmes. The Commission's view is based on the fact that the National Prosecuting Authority, in particular its Sexual Offences and Community Affairs Unit, with the assistance of the IOM, is in the process of developing public awareness programmes on the issue of trafficking in persons. The Commission agrees with the submission that public awareness programmes be provided in different languages, including foreign languages.²³⁸

Database on trafficking in persons

5.19 Article 10(1) of the Trafficking Protocol requires that law enforcement, immigration or other relevant authorities should co-operate by exchanging information 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.
- (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 among individuals and groups engaged in such trafficking, and possible measures for detecting them.

²³⁵ Clause 45 of the Bill to this Report.

²³⁶ Clause 46 of the Bill to this Report.

²³⁷ Clause 47 of the Bill to this Report.

²³⁸ Clause 3(2)(b) of the Bill to this Report.

5.20 In order to enable law enforcement and immigration officials to exchange such information, a system needs to be put in place in terms of which such information could be collected, collated and analysed.

5.21 Various international organisations collect data on trafficking in persons. The following are examples of such organisations.

5.22 The International Organisation for Migration (IOM) systematically enters information on trafficking victims they have assisted into their Counter-Trafficking Database. This database includes qualitative and quantitative information on the number of victims assisted, their countries of origin, the countries to which they were trafficked, their nationality, gender and age, trafficking routes, the methods used to recruit them and the type of exploitation to which they were subjected at their destination.²³⁹

5.23 The United Nations Office on Drugs and Crime, through its Global Programme against Trafficking in Human Beings, systematically collects and collate open-source information on trafficking in persons. A broad range of sources are scrutinised for information on trafficking trends, the routes used, the profile of victims and offenders and criminal justice responses. The data collected is comparable between countries and regions.²⁴⁰

5.24 The Innocenti Research Centre of the United Nations Children's Fund has a data collection mainly on the trafficking of children in African countries. The focus is on collecting quantitative and qualitative data on action against trafficking in all African countries.²⁴¹

5.25 There has been a boom in information on trafficking in persons over the past few years, although the reliability of that information remains a problem. However, most of the information is prepared for advocacy or fund-raising purposes. If figures on such trafficking are given, they are usually based on published estimates of the level of trafficking and in most cases there is no explanation of how those figures were calculated.²⁴²

Submissions received

5.26 The workshop participants favoured the establishment of a database on trafficking in persons and agreed with the proposed information, as set out in paragraph 7.49 of the Discussion Paper, to be included in such a database. They further suggested the following:

- With reference to paragraph 7.49 of the Discussion Paper, point (f), include the words "and exit" after the word "enter" and add at the end of point (h) the words "and how these documents were obtained".
- The list should refer to information regarding the link between those involved in trafficking and those involved in other organised crime.
- The list should include info on bilateral or multilateral agreements relating to trafficking in persons.
- The list should include statistics on the gender, age and nationality of the victims.
- Travel agencies must report cases of trafficking of which they become aware.
- Information about the following should be added:
 - vulnerable race or ethnic groups;
 - high risk geographical areas;

239 Kangaspunta Kristiina "Mapping the inhuman trade: preliminary findings of the database on trafficking in human beings" (2003) 3:1-2 **Forum on Crime and Society** at 86; Laczko Frank "Enhancing data collection and research on trafficking" Paper presented at an International Conference on Measuring Human Trafficking held in Courmayeur Mont Blanc, Italy 2-4 December 2005.

240 Kangaspunta Kristiina (*op cit*) at 81-82. See also United Nations Office on Drugs and Crime **Report on Trafficking in Persons: Global Patterns** April 2006 at 109 - 116.

241 Kangaspunta Kristiina (*op cit*) at 101.

242 Kangaspunta Kristiina (*op cit*) at 83 - 84.

5.27 With reference to paragraph 7.50, of the discussion paper the workshop participants agreed with the purposes for which the proposed database on trafficking in persons should be used. They further suggested as follows:

- Add at the end of paragraph (c) the following: “and the reasons thereof”.
- The following paragraph should be added: to identify new trends and new modus operandi.
- Capacity building must play a factor when determining the budget.
- The database should also be used to assist organisations such as NGOs.

5.28 Alternatively to the establishment of a database on trafficking in persons, the Commission considered the feasibility of recording information relating to trafficking in persons in one of the existing police databases. More specifically, the Crime Administration System of the South African Police Service. The workshop participants did not support this. They felt that the Crime Administration System is not accessible. The majority of the participants suggested that a separate database on trafficking in persons should be established. The participants supported paragraph 7.55 of the discussion paper and suggested the following amendments to the paragraph:

- With reference to paragraph (c), delete the words: “and that receive any form of funding from the South African government”
- Add the following paragraph (e): The Department of Foreign Affairs must provide information on victim assistance on missions abroad or cases that have been brought to their attention.
- Also include other institutions or departments that have information on trafficking such as the National Intelligence Agency and the South African Secret Service.

5.29 The workshop participants proposed that the following departments and institutions should have access to the database on trafficking in persons: The departments of Home Affairs, Foreign Affairs, Labour, Social Development, Safety and Security (specifically Crime Intelligence), the National Prosecuting Authority and the National Intelligence Agency.

5.30 With reference to paragraph 7.38 – 7.57 of the discussion paper, the SOCA Unit submitted that not all cases of trafficking in persons will be recorded in the Crime Administration System (CAS) because not all such cases will be reported. According to the respondent, vital information could be lost if CAS is used to record information relating to trafficking in persons. Hence the respondent recommended that a separate database should be established in order to ensure a holistic situational analysis. The respondent suggested that the proposed database should be established in terms of the proposed trafficking legislation and that the Department of Home Affairs in consultation with the relevant stakeholders mentioned in paragraph 7.55 of the discussion paper be responsible for the administration of such a database. The respondent mentioned that in terms of the Witness Protection Act, only the handler or the witness protection officer has access to information relating to victims under witness protection. The respondent further suggested that an application for access to the database must be brought via the head of the relevant departments or institutions identified as having access to the database.

5.31 The Western Cape NGO Task Team on Human Trafficking advised that the proposed database should not be used to determine the budget to be allocated for the fight against trafficking in persons, but should be used to —

- (a) assess the impact and effectiveness of measures against trafficking in persons;
- (b) provide insight into the extent, manifestation and nature of trafficking;
- (c) determine the needs of victims of trafficking in persons; and
- (d) determine appropriate programmes, services and resources to be allocated for the prevention of trafficking in persons.

5.32 SAPS submitted that the Crime Administration System should record only crime and that other Departments or NGOs should not have access to it. The Crime Administration System should therefore not be used to record general information on trafficking in persons.

5.33 Childline SA agreed with the proposed content of the database and suggested that the database should contain information relating to all reported cases of trafficking to SAPS. The respondent agreed that the existing Crime Administration System be used to record information relating to trafficking in persons, provided that such a system would be able to capture all the relevant information. If not, then the system should be modified. With reference to question 7 of the Prevention Worksheet, the respondent submitted that all non-governmental and international organisations that work with or provide services to victims of trafficking, whether or not they receive any form of funding from the South African government, must provide information on victims of trafficking with whom they have come in contact.

5.34 The UNODC suggested that the following additional information should be contained in the database:

- (a) The areas (cities or towns) where victims of trafficking are being exploited.
- (b) Inter-linkages of trafficking in persons with other forms of crime.

5.35 The respondent further submitted that this form of data collection cannot be used as a baseline to verify an increase or decrease in the trafficking of persons. This is due to the fact that the data can be affected by several other factors such as variation in the ability of law enforcement or the offenders. With reference to question 4 of the Prevention Worksheet, the respondent submitted that the benefit of independent data collection is that such database can include not only cases recorded by the police, but also cases recorded by NGOs and inter-governmental organisations or any other reliable sources. With reference to question 7 of the Prevention Worksheet, the respondent proposed that, in addition to the proposed suggestions, a system of co-ordination with foreign institutions be created in order to have access to information regarding recorded cases of trafficking in other countries. Such information could include information on (a) countries of transit and destination for South African victims of trafficking, (b) victims transiting through South Africa, and (c) countries of origin for victims trafficked to South Africa.

5.36 Dr Gould submitted that the establishment of the envisaged database should be informed by the utility of the —

- (a) database in assessing numbers of trafficking victims over a period of time, or at any one time;
- (b) database in providing information about the nature of trafficking in South Africa or across its borders;
- (c) database for identifying trafficking trends; and
- (d) the information for assessing and allocating resources for victim support and protection and for informing future policy.

5.37 Dr Gould said that in order for the database to be useful, it should include cases identified by NGOs that provide social and legal services. The respondent suggested that an easily accessible reporting form be made available to be completed and submitted electronically by NGOs and others when they encounter cases of trafficking in persons. The respondent said that the form does not need to include the name or other identifying characteristics of the victim. This will allow analysis of the information by NGOs because government departments may lack in-house research capacity to undertake such an analysis. The respondent added that the database could be designed in such a way that only one department or institution would be able to alter the data. Furthermore, the envisaged database should be established separate from the Crime Administration System of the South African Police Service and the information captured on the database should be accessible to the Department of Social Development, the South African Police Service, the National Prosecuting Authority, NGOs working with victims of trafficking and those who do policy research on trafficking issues.

5.38 SWEAT said that they would support a database which ensure the confidentiality of information relating to victims of trafficking and that would serve the purpose of keeping statistics and credible information on the extent of the problem.

5.39 The DOJCD is of the view that the proposed legislation should provide that SAPS be responsible for the establishment and administration of the database given SAPS's link to Interpol and role in crime prevention.

Evaluation and recommendations

5.40 In order to avoid a duplication of information, the Commission is of the view that when collecting data on trafficking in persons only information on reported and actual cases of trafficking in persons should be collected and not information from other sources such as text books, research reports and newspapers. This is because the latter sources may refer to the same instance of trafficking in persons, which could result in multiple entries. It may also occur that different source institutions replicate the same information without referring to the original source. This may further result in a duplication of information. Hence it is important to ensure that information in the possession of government institutions and non-governmental organisations providing services to victims of trafficking is being collected, collated and analysed in order to have a national overview of the problem.

5.41 The Commission held a meeting with the South African Police Service (SAPS): Crime Intelligence on 6 August 2007. The purpose of this meeting was to determine whether information relating to trafficking in persons could be captured in the Crime Administration System (CAS). Crime Intelligence is of the view that only trafficking cases that have been reported to the police should be recorded in the CAS. Such cases can then be divided into subcategories to capture information relating to the profiles of traffickers and their victims, trafficking trends, routes used etc. Any other information, besides reported cases, that could be recorded in the CAS would be information received through intelligence. Thus, information relating to trafficking in persons that is in the possession of other Departments, institutions or organisations cannot be captured in the CAS as this system is not designed to capture such information.

5.42 In light of the Commission's meeting with Crime Intelligence, the Commission is of the view that the relevant departments, institutions and organisations that have in their possession information relating to trafficking in persons should put in place internal information management systems in terms of which such information could be collected, collated and analysed.

5.43 In addition to information relating to trafficking in persons captured by SAPS, the Directorate of Special Operations (Scorpions),²⁴³ the Departments of Home Affairs, Labour and Social Development would also have information relating to trafficking in persons in their possession. However, the Scorpions and the Department of Labour do not need to put in place internal information management systems for the following reasons. With regard to cases dealt with by the Scorpions, a case docket would be opened at SAPS for all criminal cases. Such cases are entered into the CAS. With regard to the Department of Labour, clauses 11(1) and 12(1) stipulate that a labour inspector must report cases of child and adult trafficking respectively.

5.44 As not all cases involving adult victims of trafficking will be reported to SAPS, the Commission recommends that accredited organisations must put in place internal information management systems in terms of which information relating to cases of trafficking they have dealt with could be collected and analysed.²⁴⁴ Such information should include the following:

- (a) the number of foreign victims who have accessed a programme provided for in terms of clause 21 of the Bill to this Report.
- (b) the number of South Africans or permanent residents who are victims of trafficking and who have accessed a programme provided for in terms of clause 21 of the Bill to this Report.

243 The Scorpions will be merged with the Organised Crime Unit of SAPS.

244 Clause 24 of the Bill to this Report.

- (c) the number of victims who have accessed a programme provided for in terms of clause 21 of the Bill to this Report and who have not been reported to the South African Police Service;
- (d) the countries from which foreign victims have been trafficked;
- (e) the countries to which South Africans or permanent residents have been trafficked;
- (f) the purposes for which the victims have been trafficked;
- (g) the methods used to recruit and transport the victims;
- (h) the methods and routes used for trafficking the victims to South Africa; and
- (i) the types of travel documents that victims have used or attempted to use to cross the borders of South Africa.

5.45 The Commission recommends that the Department of Home Affairs must put in place an internal information management system in terms of which information on victims of trafficking who have been repatriated to South Africa could be collected, collated and analysed.²⁴⁵ Such information should include the following:

- (a) the number of victims who have been repatriated to South Africa;
- (b) the countries to which the victims have been trafficked;
- (c) the nationality, age and gender of the victims;
- (d) the purposes for which the victims were trafficked;
- (e) the methods and routes used by traffickers to exit South Africa and to enter the country to which the victims were trafficked;
- (f) the methods used by traffickers to recruit and transport the victims; and
- (g) the types of travel documents that traffickers and their victims have used or attempted to use to cross the borders of South Africa and to enter the country to which the victims were trafficked.

5.46 Cases of trafficking in persons detected by immigration officials at ports of entry that involve the use of illegal documents for entering and exiting South Africa are being referred to SAPS.²⁴⁶ SAPS will open a case docket if it is established that a criminal offence has been committed. The case will then be recorded in the CAS.

5.47 As it is important to have a national overview of all prosecutions, convictions and sentences imposed on perpetrators relating to trafficking in persons, the Commission recommends that the National Director of Public Prosecutions must collect and analysed information relating to (a) the number of trafficking prosecutions, convictions and the form of sentences imposed on perpetrators, (b) the number of victims of trafficking awarded compensation orders in terms of clause 25 of the Bill to this Report, and (c) the number of cases where the courts refrained to provide compensation orders in terms of clause 25.²⁴⁷

5.48 In addition to the fact that SAPS will enter the offence of trafficking in persons into the CAS, the Commission recommends that the proposed trafficking legislation should provide that the National Commissioner of the South African Police Service should issue directions regarding the collection and analyses of information relating to reported cases of trafficking in persons, including information relating to²⁴⁸ —

- (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 persons are being trafficked;
- (e) the profiles of the traffickers and their victims;

²⁴⁵ Clause 37(3)(f) of the Bill to this Report.

²⁴⁶ SAPS offices have been established at all ports of entry.

²⁴⁷ Clause 37(6)(j) of the Bill to this Report.

²⁴⁸ Clause 37(1)(k) of the Bill to this Report.

- (f) the methods and routes used by traffickers to enter South Africa;
- (g) the methods used by traffickers to recruit and transport their victims; and
- (h) the types of travel documents that traffickers and their victims have used or attempted to use to cross the borders of South Africa.

5.49 In order to ensure that the above information is captured as accurately and comprehensively as possible, the Commission recommends that a standardised questionnaire be made available at all police stations. The proposed questionnaire should be filled in once a statement in respect of a trafficking case is made. The questionnaire should then be completed by the investigating officer. The questionnaire will then be submitted, through SAPS internal operational protocols, to those responsible for entering the information into the CAS.

5.50 As it is important that the information collected and analysed by the different departments, institutions and organisations referred to above be captured at a central point in order to have a national overview of the problem, the Commission recommends that SAPS, the Department of Home Affairs, the National Director of Public Prosecutions and accredited organisations must provide an annual report on the information so collected and analysed to the Inter-sectoral Committee established in terms of clause 40 of the Bill to this Report.

5.51 The Children's Act²⁴⁹ provides that Part A of the National Child Protection Register must record all reports of abuse or deliberate neglect of a child made to the Director-General of the Department of Social Development and all findings by a children's court that a child is in need of care and protection because of abuse or deliberate neglect of the child.²⁵⁰ Such reports and findings will include the abuse and deliberate neglect of child victims of trafficking. It is therefore important that the Inter-sectoral Committee established in terms of clause 40 has access to such information. Hence the Commission recommends that the proposed trafficking legislation should stipulate that the Director-General of the Department of Social Development should provide the Inter-Sectoral Committee with an annual report on all reports of abuse or deliberate neglect of a child and all findings by a children's court that a child is in need of care and protection because of abuse or deliberate neglect of the child as far as such reports and findings relate to child victims of trafficking.²⁵¹

Training

5.52 The effective implementation of the proposed trafficking legislation is crucial. It is therefore important that those who will be responsible for its implementation be trained on the issue of trafficking in persons.

Submissions received

5.53 The Commission recommended in the Discussion Paper 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. This was supported by the workshop participants.²⁵² They proposed that the Department of Foreign Affairs should also be included in the above list and suggested that parastatals such as the Legal Aid Board should also have policies in place regarding training on the content of the proposed trafficking legislation.

249 38 of 2005.

250 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. 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.

251 Clause 39 of the Bill to this Report.

252 This recommendation was also supported by SWEAT who also suggested the inclusion of the Department of Labour.

5.54 Childline SA felt that the training of those tasked with the implementation of the proposed legislation should be legislated. With reference to question 15 of the Prevention Worksheet, the respondent agreed with the issues identified and suggested the following additions:

- (a) repatriation processes, and
- (b) the impact of the crime of trafficking in persons on victims and their families.

5.55 The Children's Rights Project submitted that training must be inter-sectoral and should involve various government departments including Justice, SAPS, the National Prosecuting Authority, Social Development, Home Affairs, Foreign Affairs and Education.

5.56 The UNODC agreed that the issue of training should be addressed in policy and not in legislation. This was supported by the workshop participants.

5.57 Anex CDW said that the training of police and border officials could be done through the establishment of a protocol which must be implemented by all police officials. Furthermore, officials at the border should be provided with the necessary training and resources in order to conduct interviews with potential victims of trafficking

5.58 Dr Gould proposed that inspectors from the Department of Labour should also be trained on victim identification, what constitutes debt bondage, and how to respond when identifying a victim of trafficking.

5.59 SWEAT disagreed that the Regional Office of the IOM, based in Pretoria, be responsible for co-ordinating the proposed training. The respondent said that the IOM is not a South African body and has a narrow focus on trafficking into sex work, as well as a focus on cross border trafficking. Thus, since the IOM is focused on trafficking into the sex work industry, they are not experts on trafficking into other areas. The respondent believed that we need an inclusive body of trainers from South Africa, which could draw people on board such as former trafficked victims.

5.60 SWEAT submitted that training should also address issues relating to gender, access to justice and the right of victims to institute civil action to claim reparation.

Evaluation and recommendations

5.61 The European Commission has provided the Department of Justice of Justice and Constitutional Development with donor funding in support of a program titled "Assistance to the South African Government to prevent and react to human trafficking". The Sexual Offences and Community Affairs Unit (SOCA) within the National Prosecuting Authority is driving this program. One of the result areas of this program includes capacity building and training of persons within the following departments or organisations: the South African Police Service, the Department of Home Affairs, Health, Social Development, and the National Prosecuting Authority. Part of the donor funding has been set aside for this result area which should be conducted over a two year period. This result area will be implemented by the International Organisation for Migration (IOM) in terms of a Contribution Agreement with the European Union with the collaboration of the NPA and the other relevant national departments. The IOM will be responsible for the development of training modules of which each will be suited to the needs of the departments specified above. These modules will at a later stage be offered to other departments, educational institutions and civil society. All the result areas under the program will be designed to continue after the end of the third year when the program comes to an end. Thus all the actions will be designed for maximum integration into the institutional framework of the participating departments and organisations in order for a sustained benefit to be achieved.

5.62 The Commission is of the view that it is important that government departments who will receive training from IOM, build on such training by ensuring that provision for training is included in their respective budgets.

5.63 The Commission would like to reiterate its view that training is a policy issue and should not be addressed in legislation.²⁵³

PROCESS AND PROCEDURE

Border control

5.64 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 responsible for border control is established through a national Border Control Operational Co-ordination Committee (BCOCC).²⁵⁴ 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.²⁵⁵ 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.²⁵⁶

5.65 The Protection and Security Services Division: Border Police of the South African Police Service is responsible for policing ports of entry. Cases relating to criminal activities at ports of entry are being referred to them.

5.66 The South African National Defence Force (SANDF) was responsible for the policing of all land borderlines until 2003. This function has since been taken over by the Land Borderline Control: Visible Policing Division of the South African Police Service (SAPS) following a Cabinet decision at a Legotla in 2003. The South African borderlines are currently being policed by both the SANDF and SAPS with the view to phase out the responsibility of the SANDF by 2009 after which SAPS will have sole responsibility for the policing of all borderlines.²⁵⁷

5.67 Land Borderline Control is in the process of establishing sea borderline units which main purpose would be to police the sea borderlines.²⁵⁸ Airstrips beside all international South African airports are also being policed.²⁵⁹

5.68 Land Borderline Control has held a conference, in conjunction with six of South Africa's neighbouring countries, from 10 – 14 September 2007. The purpose of this Conference was to devise a border control strategy. This strategy inter alia aims to establish co-operation in the prevention of the illegal movement of persons across the borders of the countries concerned.

5.69 The police, in general, play a significant role in border control. In terms of section 13(6) of the South African Police Service Act,²⁶⁰ 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

253 See also paragraph 3.160 of this Report.

254 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.

255 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.

256 Briefing of the Department of Home Affairs to the Parliamentary Portfolio Committee on Home Affairs, September 2005.

257 Interview conducted with Director Korabie, Land Borderline Control: Visible Policing, South African Police Service on 1 August 2007.

258 The South African Navy is currently exercising a sea security function.

259 Interview conducted with Director Korabie, Land Borderline Control: Visible Policing, South African Police Service on 1 August 2007.

260 68 of 1995.

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.

5.70 Despite current measures to control the movement of persons across the borders of South Africa, 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

5.71 No submissions were received.

Evaluation and recommendations

5.72 Given the fact that the policing of the South African borderlines and ports of entry falls within the responsibility of the South African Police Service, the Commission recommends that the proposed trafficking legislation should stipulate that the National Commissioner of the South African Police Service must issue a direction regarding the measures to be taken in order to ensure the detection of trafficking in persons at South African ports of entry and borderlines.²⁶¹ Such measures could include specific operations to investigate suspected trafficking cases around ports of entry or borderlines. Police officials at ports of entry, particularly those at key ports of entry, should receive specialised training on trafficking in persons. Joint counter-trafficking operations with officials from neighbouring countries on issues relating to trafficking in persons could also be conducted.

Security and control of travel and other identification documents

5.73 The crime of trafficking in persons is often facilitated by the production and supply of forged and/or fraudulently acquired documentation. Despite efforts to prevent the illegal movement of persons through South African ports of entry, some persons succeed in entering the country with forged travel documentation without being detected. It is therefore important to ensure that travel and identity documents are of such quality that they cannot easily be falsified, unlawfully altered, replicated or issued.

Submissions received

5.74 The DOJCD proposed that clause 45 of the Bill to the Discussion Paper should, apart from the offence of trafficking in persons, refer to the other offences under the Bill such as debt bondage.²⁶²

Evaluation and recommendations

5.75 The Discussion Paper sets out the Department of Home Affairs' proposed measures regarding the introduction of a smart card to improve the security of identification documents and passports.²⁶³

5.76 As smart 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.

²⁶¹ Clause 37(1)(i) of the Bill to this Report.

²⁶² Clause 45 provides as follows: 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 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.

²⁶³ See paragraphs 7.81 – 7.96 of the Discussion Paper.

5.77 The Commission is, however, disappointed by the delay in finalising the process of producing the smart cards and appreciates the difficulties being experienced with a project of this size but would like to urge the Department of Home Affairs to finalise the process of introducing smart cards as soon as possible.

5.78 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 such documents.

5.79 The Commission supports the submission made by the DOJCD and accordingly recommends that the proposed trafficking legislation should also refer to the other offences.²⁶⁴

²⁶⁴ Clause 38 of the Bill to this Report.

Annexures:

Annexures

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Annexure A

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 Labour²⁶⁵

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

Molo Songololo (Consultative Workshop)

Mr Nico Botha, Department of Home Affairs: Counter Corruption Chief Directorate

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

²⁶⁵ 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.

Annexure B

LIST OF RESPONDENTS TO THE DISCUSSION PAPER

Activists networking against the exploitation of Child Domestic Workers

Childline SA (Mrs Joan van Niekerk)

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

Department of Home Affairs

Department of Justice and Constitutional Development

Department of Social Development

Dr Chandré Gould

Gender, Health and Justice Research Unit

International Organisation for Migration

Kwa-Zulu Natal Department of Community Safety and Liaison, Office of the Head of Department

Leadership Conference of Consecrated Life of Southern Africa, Trafficking in Persons Desk

Mr Dries Lamprecht, Regional Magistrate: Lydenburg

Mr Patel (Rashid Patel and Company)

Mr Ricardo Wyngaard

Ms Annette Lansink

Ms Debbie Toughey (Doctors for life)

Ms Rachael Ogunlaya (Doctors for Life)

Ms Robyn Fudge

Office of the Premier, Western Cape Provincial Government

People Opposing Women Abuse

Sex Worker Education and Advocacy Taskforce

Sexual Offences and Community Affairs Unit

South African Human Rights Commission

South African Police Service

United Nations Office on Drugs and Crime, Anti-Human Trafficking Unit

Western Cape NGO Task Team on Human Trafficking

Annexure C



DISCUSSION PAPER 111: TRAFFICKING IN PERSONS

QUESTIONNAIRE: PROSECUTION OF TRAFFICKERS AND OTHER ROLE PLAYERS

NAME:.....

DEPARTMENT / ORGANISATION:.....

CONTACT DETAILS

Address:

Tel:

Fax:

E-mail:

This questionnaire should be read in conjunction with the discussion paper and proposed legislation on trafficking in persons. Please indicate your agreement or disagreement with the recommendations below. Comment as comprehensively as possible.

DEFINING TRAFFICKING IN PERSONS

1. The Commission recommends that trafficking in persons should be defined as follows:

"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;

Do you agree with the above definition? If not, please provide reasons and formulate an alternative definition.

.....

2. The Commission recommends that “abusing vulnerability” should be defined as follows:

“abusing 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;

Do you agree with the above definition? If not, please provide reasons and formulate an alternative definition.

.....

3. The Commission recommends that the term “exploitation” should be defined as follows:

“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;

Do you agree with the above definition? If not, please provide reasons and formulate an alternative definition.

.....

4. The Commission recommends that the terms slavery, sexual exploitation, servitude, forced labour and removal of body parts 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 practice in terms of which it cannot be said that the person participated voluntarily;

“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;

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

"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);

Do you agree with the above definitions? If not, please provide reasons and formulate alternative definitions.

.....

OFFENCES

5. The Commission recommends that the offence of trafficking in persons should be formulated as follows (clause 5 and para 5.29 – 5.30 of DP):

- (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.

Do you agree? If not, please motivate your response and formulate an alternative.

.....

6. The Commission recommends that a person convicted of the offence of trafficking in persons should, in addition to a sentence for any other offence of which he or she may be convicted, be liable to a fine or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment (clause 38(1)). Do you agree? If not, please provide reasons.

.....

7. The Commission recommends that it should be a criminal offence for 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,

The Commission further 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 in contravention of paragraph (b) above. Furthermore, an Internet service provider who fails to comply with this obligation should be guilty of an offence and liable, on conviction, to a fine as may be prescribed from time to time (clause 9 and para 5.50 – 5.53 of DP). Do you agree? If not, please motivate your answer.

.....

8. The Commission recommends that the act of debt bondage, within the context of trafficking in persons, should be criminalised because victims of trafficking are often subjected to debt bondage as a means of keeping them in an exploitative situation. It is recommended that the offence of debt bondage should be formulated as follows (Clause 6 and para 5.68 – 5.73 of DP):

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 further recommends that debt bondage should be defined 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:

- (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;

Do you agree with the above? If not, please provide reasons.

.....

9. The Commission recommends that a person convicted of the offence of debt bondage should be liable to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment (clause 38 (2)). Do you agree? If not, please motivate your answer.

.....

10. Should debt bondage remain a separate offence as outlined above or should it 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?

.....

11. The passports and other travel documents of victims trafficked to South Africa are usually confiscated on their arrival in the country as a means of preventing them from reaching out to the authorities. In order to combat such conduct, the Commission recommends that section 49(15) of the Immigration Act be amended as follows (Schedule 1 to the Bill, p.311 and para 5.74 – 5.88 of DP)

Any natural or juristic person, or a partnership who—

- (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.

Alternatively, the proposed trafficking legislation could provide as follows:

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.

Do you agree that the above conduct be criminalised? If yes, which option is preferable and why? If you do not agree, please provide reasons.

.....

12. The Commission recommends that a person convicted of the latter offence should be liable to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment (clause 38(3)). Do you agree? If not, please provide reasons.

.....

13. As the trafficking of persons are being fuelled by the demand for the services of victims of trafficking, the Commission recommends that 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 should be guilty of an offence (clause 8 and para 5.89 – 5.104). Do you agree? If not, please provide reasons.

.....

14. The Commission recommends that a person convicted of the above offence should be liable to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment (clause 38(4)).

.....

15. The Commission recommends that the offence of trafficking in persons should be made a Schedule 5 offence in terms of the Criminal Procedure Act, 51 of 1977. In addition, the Commission recommends that the offence of trafficking in persons be included in Schedule 1 and Schedule 2, Part III of the Criminal Procedure Act (Par 5.23 and draft Bill, pages 313 - 315). Do you agree? If not, please provide reasons.

.....

LIABILITY IN RESPECT OF CONVEYANCES

16. Section 35(7) of the Immigration Act, 13 of 2002, provides that a person in charge of a conveyance must ensure that any foreigner conveyed to a South African port of entry (a) hold a valid passport and if 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. In light of this the Commission recommends that the proposed 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—

- (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 (clause 39 and para 5.125 – 5.128).

Do you agree with the above? If not, motivate your answer.

.....

REVOCATION OF VISA OR TEMPORARY RESIDENCE PERMIT

17. The Commission recommends that section 29 of the Immigration Act be amended as follows (Schhedule 1 to the Bill, p.308 and para 5.132 – 5.149):

Prohibited persons

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:

- (a) Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;
- (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;
- (c) anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;
- (d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;
- (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
- (f) anyone found in possession of a fraudulent residence permit, passport or identification document.

(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.

- (2) The Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person.

Alternatively to clause (1A) above, the proposed legislation could provide as follows (clause 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.

Do you agree with the above? If yes, which option is preferable and why? If you do not agree, please provide reasons.

.....

NATIONAL INSTRUCTIONS AND DIRECTIVES

18. 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. 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 proposed legislation should provide as follows (clause 44 and para 5.150 – 5.163; 6.21 – 6.24):

- (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.

Do you agree with the above? If not, please provide reasons.

.....

EXTRA- TERRITORIAL JURISDICTION

19. Given the global nature of the crime of trafficking in persons, the Commission recommends that the proposed legislation should provide as follows (clause 43 and para 5.244 – 5.247):

- (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.

Do you agree with the above? If not, please motivate your response.

.....

20. Are there any other issues not addressed in the discussion paper or proposed legislation which in your view should have been addressed?

.....



DISCUSSION PAPER 111: TRAFFICKING IN PERSONS

QUESTIONNAIRE: PROTECTION OF VICTIMS OF TRAFFICKING

NAME:

DEPARTMENT/ORGANISATION:.....

CONTACT DETAILS

Address:

Tel:

Fax:

E-mail:

This questionnaire should be read in conjunction with the discussion paper and proposed legislation on trafficking in persons. Please indicate your agreement or disagreement with the recommendations below. Comment as comprehensively as possible.

IDENTIFYING AND REPORTING VICTIMS OF TRAFFICKING

1. As victim identification forms an important part of victim protection, the Commission recommends that the proposed legislation should provide for broad guiding principles when deciding the question as to whether a person is a victim of trafficking in persons (See chapter 2 of the draft Bill).

Do you agree? If not, please provide reasons.

.....

2. In order to facilitate the identification of victims of trafficking, the Commission recommends that the proposed legislation should provide as follows (clause 10 and par 6.28):

- (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).

Do you agree? If not, please provide reasons.

.....

3. With regard to the reporting and referral of victims of trafficking, the Commission recommends that the proposed legislation should provide as follows (clause 12 and para 6.31 – 6.43):

- (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.

Do you agree? If not, please motivate your answer.

.....

IMMUNITY FROM PROSECUTION

4. 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. For example, victims of trafficking may be prosecuted for illegal entry in terms of the Immigration Act. The Commission therefore 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 (clause 11 and para 6.44 – 6.58).

Do you agree? If not, please provide reasons.

IMMIGRATION STATUS OF VICTIMS OF TRAFFICKING

5. Foreign victims of trafficking are often deported when found in the country illegally. This may hamper the prosecution of trafficking cases as the successful prosecution of traffickers is most likely through the testimony of victims of trafficking. Hence the Commission recommends that the proposed legislation should provide for a non-renewable suspension of deportation period which will allow foreign victims of trafficking to remain in the country for a period not exceeding 60 days regardless of whether they are willing to co-operate with law enforcement and prosecuting authorities in the investigation and prosecution of a case of trafficking in persons (clause 15 and par. 6.103). Do you agree? If not, please motivate your response.

6. The Commission recommends that a temporary residence permit (visitor's permit) should be issued to victims of trafficking who are present in the country and who have agreed to co-operate with law enforcement and prosecuting authorities in the investigation and prosecution of a case of trafficking in persons (clause 16 and para 6.104 – 6.105). Do you agree? If not, please provide reasons.

7. 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 the Commission recommends the following options:

Option 1

In terms of this option, it is recommended that the Refugees Act, 130 of 1998, be amended to provide that a person qualifies for refugee status if he or she 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 (See schedule 1 to the draft Bill, p.312). 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.

Option 2

Instead of first applying for refugee status, whereafter an application for a permanent residence permit may be made, in terms of this option a victim of trafficking should be entitled to apply for a permanent residence permit in terms of section 27(h) of the Immigration Act, 2002, after five years continuous residence in the country from the date on which he or she was granted a visitor's permit, 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 (See clause 17 as well as the proposed amendment to section 27 of the Immigration Act in Schedule 1 to the draft Bill, p.306 - 308).

Option 3

In terms of this option, the following subsection could be added at the end of clause 16 of the draft Bill:

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.

Which option do you prefer? Please provide reasons for your choice. If you do not agree with any of the options, what would you recommend? Please motivate your answer.

.....

PROVISION OF SERVICES TO VICTIMS OF TRAFFICKING

8. The Commission is of the view that various services, including accommodation and counselling, should be provided to victims of trafficking. The Commission therefore recommends the following options:

Option 1

In terms of this option, the Department of Social Development should have the responsibility to establish centres for adult victims of trafficking²⁶⁶ which should offer a programme suited for the needs of such victims (clauses 18 – 22 and para 6.165 – 6.166).

Option 2

In terms of this option, the Director-General of the Department of Social Development should accredit organisations to provide accommodation to adult victims of trafficking in accordance with a programme suited for the needs of such victims (clauses 23 – 26 and para 6.167 – 6.168).

Which option do you prefer? Please provide reasons for your choice. If you do not agree with any of the options, what would you recommend? Please motivate your answer.

.....

COMPENSATION TO VICTIMS OF TRAFFICKING

9. The Commission recommends that a court may, in addition to any punishment which it may impose in respect of any offence under the proposed legislation, 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;

²⁶⁶ 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. The Children's Bill also makes provision for the placement of children who are in need of care and protection.

resulting from the commission of such offence (clauses 27 – 30 and para 6.203 – 6.211).

Do you agree? If not, please provide reasons.

.....

10. The Commission further recommends that a court may—
- (a) in addition to any punishment which it may impose in respect of any offence under the proposed legislation;
 - (b) in addition to any order for compensation to a victim of trafficking; 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 (clause 31).

Do you agree? If not, please provide reasons.

.....

DEPORTATION AND REPATRIATION OF VICTIMS OF TRAFFICKING

11. Victims of trafficking are often deported without a prior investigation into their circumstances in order to ensure that they are not returned to the same circumstances that made them vulnerable to being trafficked. Hence, the Commission recommends that the summary deportation of victims of trafficking should be prohibited (See clause 32 of the draft Bill). The Commission further recommends that victims of trafficking should be repatriated in terms of a process that takes 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 (clauses 33 – 35 and para 6.266 – 6.279)).

Do you agree with these recommendations? If not, please motivate your response.

.....

12. Are there any other issues not addressed in the discussion paper or proposed legislation which in your view should have been addressed?

.....



DISCUSSION PAPER 111: TRAFFICKING IN PERSONS

QUESTIONNAIRE: PREVENTION OF TRAFFICKING IN PERSONS

NAME:

DEPARTMENT / ORGANISATION:.....

CONTACT DETAILS

Address:

Tel:

Fax:

E-mail:

This questionnaire should be read in conjunction with the discussion paper and proposed legislation on trafficking in persons. Please indicate your agreement or disagreement with the recommendations below. Comment as comprehensively as possible.

PUBLIC AWARENESS PROGRAMMES

1. As prevention is an important component of the fight against trafficking in persons, the Commission recommends that the proposed legislation should provide as follows (clause 37 and para 7.34 – 7.36):

- (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.
- (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.

Do you agree? If not, please provide reasons.

.....

DATABASE ON TRAFFICKING IN PERSONS (7.38 – 7.57)

2. There are no official statistics on the number of persons trafficked to and from South Africa. Moreover, as the act of trafficking in persons often takes place clandestinely, it is difficult to obtain statistics on trafficking activities. The Commission has therefore considered the establishment of a database on trafficking in persons. 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.

Do you agree? If not, please provide reasons. Is there any other information which in your view should be contained in a database on trafficking in persons?

.....

3. The Commission is of the view that a database on trafficking in persons 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
 - (e) for statistical purposes.

Do you agree? If not, please motivate your response.

.....

4. Alternatively to the establishment of a database on trafficking in persons, the Commission considered the feasibility of recording information relating to trafficking in persons into one of the existing police databases. The Crime Intelligence Division of the South African Police Service is 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. Do you agree with this view? If not, please provide reasons. What other alternatives would you suggest?

.....

5. Should a separate database on trafficking in persons be established or should information relating to trafficking in persons rather be recorded into an existing database as suggested above?

.....

6. If a separate database on trafficking in persons is to be established, should it be established in terms of the proposed legislation or in terms of policy? Which department or institution should be responsible for the establishment and administration of such a database?

.....

7. Whether information on trafficking in persons is recorded in an existing database 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 such a database. In this regard the Commission invites comments on the following proposals:

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.²⁶⁷
- (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.

Do you agree with the above proposals? If not, please provide reasons.

.....

8. Which departments, institutions or organisations should have access to the recorded information?

.....

²⁶⁷ It may not always be possible to reveal information regarding trafficking cases still under investigation as this could hamper the police investigation. However, such information should be provided where possible.

BORDER CONTROL

9. The Commission is of the view that it is not appropriate to address issues relating to border control in the proposed trafficking legislation because the detection of victims of trafficking is just but one of the purposes of effective border control. The Commission considers it more appropriate to address legislative measures on border control in the Immigration Act, 13 of 2002. Do you agree? If not, please provide reasons. If you are of the view that the proposed trafficking legislation should address issues relating to border control, how should this be done?

.....

10. With regard to the protection of children travelling unaccompanied across the borders of South Africa, the Commission recommends that section 35 of the Immigration Act, 13 of 2002, 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 of the conveyance. Furthermore, if an immigration officer has reason to believe that an unaccompanied child so listed 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 (See Schedule 1 to the Bill, p310).

Do you agree with the above recommendation? If not, please motivate your response.

.....

SECURITY AND CONTROL OF IDENTIFICATION DOCUMENTS AND PASSPORTS

11. 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 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. Because of these characteristics, it would be very difficult and expensive to forge the smart ID cards. In addition to the smart ID cards, the Department of Home Affairs plans to issue passports which, similarly to the smart ID cards, will be based on integrated child technology (7.81 – 7.95).

Are the above measures sufficient to ensure that identification documents and passports issued by the Department are of such quality that they cannot easily be misused, falsified or unlawfully altered, replicated or issued? If you do not agree, what other measures would you suggest?

.....

TRAINING (8.24 – 8.34)

12. The Commission concludes that the issue of training will best be addressed in policy as policy is more flexible to amend should the need arise to revisit and change any aspect relating to training on trafficking in persons. Do you agree? If not, please provide reasons.

.....

13. The Commission 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.

.....

14. 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 entering South Africa.

.....

15. 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.

Do you agree, if not please provide reasons.

.....

16. Are there any other issues not addressed in the discussion paper or proposed legislation which in your view should have been addressed?

.....

Annexure D

REPUBLIC OF SOUTH AFRICA

PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL

(As introduced in the National Assembly)

(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B ... -2008]

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 address the trafficking of persons within or across the border of the Republic; to prevent trafficking in persons; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for measures to protect and assist victims of trafficking in persons; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING that poverty, unemployment and the search for improved socio-economic opportunities are contributing factors 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 the trafficking of persons globally;

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,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

DEFINITIONS AND OBJECTS OF ACT

Definitions

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 or remained in the Republic illegally or without proper documentation;
- (b) pregnancy;
- (c) any disability of the person;
- (d) addiction to the use of any dependence-producing substance;
- (e) being a child; and
- (f) socio-economic circumstances;

“accredited organisation” means an organisation accredited in terms of section 19 to provide services to adult victims of trafficking;

“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, 2005 (Act No. 38 of 2005);

“carrier” includes a company, or the owner, operator or master of any means of transport;

“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, as reasonably assessed, is manifestly excessive;
- (ii) the value of those services as reasonably assessed is not applied towards the liquidation of the debt or purported debt; or
- (iii) the length and nature of those services are not respectively limited and defined;

“designated child protection organisation” means a designated child protection organisation as defined in the Children’s Act, 2005 (Act No. 38 of 2005);

“exploitation” includes, but is not limited to —

- (a) all forms of slavery or practices similar to slavery;
- (b) forced marriage;
- (c) sexual exploitation;
- (d) servitude;
- (e) forced labour;
- (f) child labour as defined in section 1 of the Children’s Act, 2005 (Act No. 38 of 2005);
- (g) the removal of body parts; and
- (h) the impregnation of a female person against her will for the purpose of selling her child when born.

“forced marriage” means a marriage in contravention of the laws in relation to civil and customary marriages in the Republic;

"forced labour" means labour or services obtained or maintained through threats, the use of force, intimidation or other forms of coercion, or physical restraint;

"foreigner" for purposes of this Act, means a person who is not a citizen or permanent resident of the Republic;

"guardian" means a person as defined in section 1 of the Children's Act, 2005 (Act No. 38 of 2005);

"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, 2005 (Act No. 38 of 2005);

"parental responsibilities and rights" in relation to a child, means the responsibilities and rights referred to in section 18 of the Children's Act, 2005 (Act No. 38 of 2005);

"person" for purposes of this Act includes a natural person, a juristic person and a partnership, unless the context indicates otherwise;

"provincial department of social development" means a provincial department of social development as defined in the Children's Act, 2005 (Act No. 38 of 2005);

"removal of body parts" means the removal or trade in any organ or other body part from a living person or the deceased body of a person who has been killed for the sole purpose of removing the organ or other body part 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 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 harm;

"sexual exploitation" means the commission of any sexual offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or any offence of a sexual nature in any other law against a victim of trafficking;

"slavery" means, other than to the extent permitted by law, reducing a person by any means to a state of submitting to the control of another person as if such other person were the owner of that person;

"social worker" means a person who is registered or deemed to be registered as a social worker in terms of section 17 of the Social Service Professions Act, 1978 (Act No. 110 of 1978);

"trafficker" means a person who is known or suspected to be involved in the offence of trafficking in persons;

"trafficking" means the recruitment, sale, supply, procurement, transportation, transfer, harbouring, receipt of persons or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic –

- (a) by means of the use of threat, force, intimidation or other forms of coercion, abduction, kidnapping, fraud, deception, debt bondage, 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
- (b) by abusing vulnerability,

for the purpose of exploitation, 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 prosecution of traffickers and related persons and for appropriate penalties;
 - (c) to provide for the prevention of trafficking in persons, and for the protection and assistance of victims of trafficking;
 - (d) to provide for effective enforcement measures; and
 - (e) generally to combat trafficking in persons.

CHAPTER 2

PREVENTION OF TRAFFICKING IN PERSONS

Public awareness

3. (1) The Inter-sectoral Committee established in terms of section 40 must, and where appropriate, after consultation with relevant non-governmental organisations, establish public awareness programmes or other measures for the prevention of trafficking in persons designed to –
 - (a) inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, and South African citizens or permanent residents who depart for work abroad, 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 for and the supply of victims of trafficking that fosters the exploitation of such victims, 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) where possible, be provided in a language understood by the persons at whom they are directed.
 - (c) be reviewed biennially in order to determine their effectiveness.
- (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 3

OFFENCES AND PENALTIES

Trafficking in persons²⁶⁸

4. (1) Notwithstanding the common law position regarding slavery, the slave trade and practices similar to slavery, any person who intentionally trafficks another person is guilty of the offence of trafficking in persons.

(2) A person who —

- (a) performs any act which is aimed at committing the offence of trafficking in persons;
- (b) incites, instigates, commands, directs, aids, advises, recruits, encourages or procures any other person to commit the offence of trafficking in persons; or
- (c) conspires with any other person to commit the offence of trafficking in persons or to aid in the commission thereof;

is guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing the offence of trafficking in persons would be liable.

(3) It is no defence to a charge of contravening subsection (1) that —

- (a) a child 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 the intended exploitation or that the intended exploitation did not occur, even if none of the means referred to in the definition of trafficking has been used.
- (b) an adult person who is a victim of trafficking has consented to the intended exploitation or that the intended exploitation did not occur, only if one or more the means referred to in the definition of trafficking has been used.

(4) In order to establish the liability in terms of subsection (1) or (2) 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.

(5) Subsection (4) 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.

(6) A finding by a court that an employer or principal has contravened subsection (1) or (2) serves as a ground for revoking the licence or registration of the employer or principal to operate its business.

Debt bondage

5. Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

Destruction, confiscation, possession or concealment of documents

6. Any person who intentionally 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

²⁶⁸ Schedule 1 to this Bill amends the Criminal Law Amendment Act 105 of 1997 by including the offence of trafficking in persons in Schedule 2, Part 1 of that Act. This means that a regional court or a High Court may sentence a person it has convicted of the offence of trafficking in persons to imprisonment for life.

the offence of trafficking in persons is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.²⁶⁹

Using the services of victims of trafficking

7. Any person who intentionally benefits, financially or otherwise, from the services of a person or uses or enables another person's usage of the services of that person he or she knows or ought reasonably to have known to be a victim of trafficking is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

Conduct facilitating trafficking in persons

- 8.** (1) Any person who —
- (a) intentionally leases or subleases or allows any room, house, building or establishment he or she knows or ought reasonably to have known will be used for facilitating or promoting trafficking in persons; or
 - (b) advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that facilitates or promotes trafficking in persons by any means, including the use of the Internet or other information technology,

is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

- (2) An Internet service provider operating in the Republic —
 - (a) must take all reasonable steps to prevent the use of its service for the hosting of information referred to in subsection (1)(b);
 - (b) that has knowledge that any Internet address on its server contains information referred to in subsection (1)(b) must—
 - (i) report such an Internet address, as well as the particulars of the person maintaining or in any manner contributing to such Internet address, to the South African Police Service;
 - (ii) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities; and
 - (iii) take all reasonable steps to prevent access to the Internet address by any person.
- (3) An Internet service provider who fails to comply with the provisions of subsection (2) is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both such a fine and such imprisonment.

Liability of carriers

- 9.** (a) A carrier commits an offence if the carrier brings a victim of trafficking into or removes a victim of trafficking from the Republic and, upon entry into or departure from the Republic, the victim of trafficking does not have the travel documents required for lawful entry into or departure from the Republic.
- (b) A carrier is not guilty of an offence under paragraph (a) if—
- (i) the carrier had reasonable grounds to believe that the documents that the victim of trafficking has are the travel documents required for lawful entry into or departure from the Republic by him or her;
 - (ii) the victim of trafficking possessed the travel documents required for lawful entry into or departure from the Republic when he or she boarded, or last boarded, the means of transport to travel to or from the Republic; or
 - (iii) entry into the Republic occurred only because of illness of or injury to a person on board, stress of weather or other circumstances beyond the control of the carrier.

²⁶⁹ See also the proposed amendment to section 49(15) of the Immigration Act, 2002 (Act No. 13 of 2002) in Schedule 1 to this Bill.

- (c) A carrier is, in addition to any offence under this section, liable to pay the cost of the victim of trafficking's care, safekeeping and repatriation from the Republic.
- (d) A court must, when convicting a carrier of an offence under this section, in addition order the carrier concerned to pay the costs contemplated in paragraph (c).

Extra-territorial jurisdiction

10. (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) has committed the offence against a citizen of the Republic or a person who is ordinarily resident in the Republic;
 - (d) is, after the commission of the offence, present 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;
 - (e) is, for any reason, not extradited by the Republic or if there is no application to extradite that person; or
 - (f) is a juristic person or a partnership registered in terms of any law in the Republic.
- (2) Only the High Court has jurisdiction in respect of an offence contemplated in subsection 1(d).
- (3) A person who commits an offence referred to in subsection (1) is liable on conviction to the penalty prescribed for that offence.
- (4) Any offence committed in a country outside the Republic as contemplated in subsection (1) is, for purposes of determining the jurisdiction of a court to try the offence, deemed to have been committed—
- (a) at the place where the complainant is ordinarily resident; or
 - (b) at the accused person's principal place of business.
- (5) No prosecution may be instituted against a person in terms of this section with respect to conduct which formed the basis of an offence under this Act in respect of which such person has already been convicted or acquitted by a court of another jurisdiction.
- (6) The institution of a prosecution in terms of this section must be authorised in writing by the National Director of Public Prosecutions.

CHAPTER 4

IDENTIFICATION AND PROTECTION OF VICTIM OF TRAFFICKING

Reporting and referral of child victim of trafficking

- 11.** (1) An immigration official, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional health practitioner or traditional healer who on reasonable grounds concludes that a child is a victim of trafficking must, within 24 hours, report that conclusion to a police official for investigation if it is in the best interest of the child concerned.
- (2) A person who on reasonable grounds concludes that a child is a victim of trafficking may report that conclusion to a police official for investigation.
- (3) A person referred to in subsection (1) or (2) —
- (a) must substantiate that conclusion to a police official.

- (b) who makes a report in good faith is not liable to civil action on the basis of the report; and
- (c) is entitled to have his or her identity kept confidential if his or her safety is at risk as a result of the report, unless the interests of justice require otherwise.
- (4) A police official to whom a report has been made in terms of subsection (1) or (2) or a police official who on reasonable grounds concludes that a child is a victim of trafficking must, within 24 hours, refer that child to a designated child protection organisation or the provincial department of social development, pending a police investigation into the matter.
- (5) The procedure provided for in section 110(5) to (8) of the Children's Act, 2005 (Act No. 38 of 2005) shall apply in respect of a child referred to a designated child protection organisation or the provincial department of social development in terms of subsection (4).
- (6) A person who fails to comply with the provisions of subsection (1) is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 1 year or to both such fine and such imprisonment.

Reporting and referral of adult victim of trafficking

- 12.** (1) An immigration official, labour inspector, social worker, social service professional, medical practitioner, nurse, traditional health practitioner or traditional healer who on reasonable grounds concludes that an adult person is a victim of trafficking must, within 24 hours, report that conclusion to a police official for investigation: Provided that the person concerned has given his or her written consent, except in circumstances where the person is —
- (a) mentally disabled; or
 - (b) in an altered state of consciousness, including under the influence of any medicine, drug or other substance, to the extent that the person's consciousness or judgement is adversely affected.
- (2) A person who on reasonable grounds concludes that an adult person is a victim of trafficking may report that conclusion to a police official for investigation.
- (3) A person referred to in subsection (1) or (2) —
- (a) must substantiate that conclusion to a police official;
 - (b) who makes a report in good faith is not liable to civil action on the basis of the report; and
 - (c) is entitled to have his or her identity kept confidential if his or her safety is at risk as a result of the report, unless the interests of justice require otherwise.
- (4) A police official to whom a report has been made in terms of subsections (1) or (2) or a police official who on reasonable grounds concludes that a person is a victim of trafficking must, within 24 hours, refer that person to an accredited organisation or the provincial department of social development, pending a police investigation into the matter.
- (5) An accredited organisation or the provincial department of social development to whom a referral has been made in terms of subsection (4) must —
- (a) within 24 hours, where necessary with the assistance of the South African Police Service, ensure the safety of the person concerned if the person's safety is at risk; and
 - (b) without delay, in the prescribed manner, assess whether the person concerned is a victim of trafficking.
- (6) If, after an assessment referred to in subsection 5(b), it is found that the person concerned is a victim of trafficking—
- (a) he or she must be issued with a certificate as prescribed, certifying him or her as a victim of trafficking; and
 - (b) he or she must be informed of the right to apply for a recovery and reflection period in terms of section 16, if he or she is a foreigner.

(7) A person in possession of a certificate issued in terms of subsection (6)(a) is entitled to have access to a programme offered by an accredited organisation in terms of section 21.

(8) A person who fails to comply with the provisions of subsection (1) is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 1 year or to both such fine and such imprisonment.

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 in terms of section 151 of the Children's Act, 2005 (Act No. 38 of 2005), pending an investigation in terms of section 155(2) of the Children's Act, 2005 (Act No. 38 of 2005).

(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, 2005 (Act No. 38 of 2005), 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 service

14. A foreigner who is a victim of trafficking is entitled to the same public health care services as those to which the citizens of the Republic have access.

Criminal prosecution against victim of trafficking prohibited

15. No criminal prosecution shall be instituted against a child who was found to be a victim of trafficking after an investigation in terms of section 110(5)(c) of the Children's Act, 2005 (Act No. 38 of 2005), or an adult person who has been certified as a victim of trafficking in terms of section 12(6)(a) for —

- (a) entering or remaining in the Republic in contravention of the Immigration Act, 2002 (Act No. 13 of 2002);
- (b) assisting another person to enter or remain in the Republic in contravention of the Immigration Act, 2002 (Act No. 13 of 2002);
- (c) possessing any fabricated or falsified passport, identity document or other document used for the facilitation of movement across borders; and
- (d) being involved in an illegal activity to the extent that he or she has been compelled to do so, as a direct result of his or her situation as a victim of trafficking.

Chapter 5

STATUS OF FOREIGN VICTIM OF TRAFFICKING

Recovery and reflection period

16. (1) Notwithstanding the provisions of the Immigration Act, 2002 (Act No. 13 of 2002), the Director-General of the Department of Home Affairs must, in the prescribed manner and subject to the prescribed conditions, allow a foreigner who has been certified as a victim of trafficking in terms of section 12(6)(a), regardless of his or her status, to remain in the Republic for a non-renewable recovery and reflection period not exceeding 90 days.

(2) A foreigner who has been granted a recovery and reflection period in terms of subsection (1) must be assessed by an accredited organisation for purposes of drawing up a plan to address the immediate and long term needs of the person as provided for in terms of section 23.

(3) If a foreigner referred to in subsection (1), after a period of 30 days since he or she has been granted a recovery and reflection period, is still unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker, an investigation into his or her circumstances must be conducted by the Director-General: Social Development in order to determine whether it is safe to return him or her to his or her country of origin or the place from where he or she has been trafficked.

(4) If a foreigner referred to in subsection (3) is still unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker upon expiration of the recovery and reflection period, the information obtained as a result of an investigation contemplated in subsection (3) must be provided to the Director-General of the Department of Home Affairs to be taken into account when deciding whether to repatriate the foreigner.

(5) The granting of a non-renewable recovery and reflection period referred to in subsection (1) shall not—

- (a) depend upon the willingness of a victim of trafficking to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons; and
- (b) prevent or prejudice the competent authority from conducting any relevant investigation, provided that due regard is given to the emotional state of the victim.

Temporary residency

17. (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 —

- (a) who —
 - (i) Is present in the Republic; and
 - (ii) has agreed to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons;
- (b) if an investigation referred to in section 16(3) indicates that it is not safe to return him or her to his or her country of origin or the country from where he or she has been trafficked.

(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 recovery and reflection period contemplated in section 16 was granted or has expired.

(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.

Permanent residency

18. 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 a visitor's permit referred to in section 17 was issued to him or her, 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.²⁷⁰

²⁷⁰ 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 this Bill.

CHAPTER 6

SERVICES TO ADULT VICTIMS OF TRAFFICKING

Accreditation of organisation to provide services

19. The Director-General of the Department of Social Development may on application by an organisation accredit such organisation, in terms of a process prescribed by the Minister for Social Development, to provide services to adult victims of trafficking in accordance with a programme contemplated in section 21 suited for the needs of such victims.

Minimum norms and standards

20. (1) The Minister for Social Development must, after consultation with interested parties, the Ministers for Finance, Health, Justice and Constitutional Development and the South African Police Service, determine norms and standards for accredited organisations by regulation.

(2) The norms and standards contemplated in subsection (1) must relate to the following:

- (a) measures to ensure the safety of victims of trafficking, especially those at risk of harm;
- (b) access to and provision of adequate health care;
- (c) the provision of separate facilities for male and female victims of trafficking;
- (d) hygienic and adequate toilet facilities;
- (e) access to refuse disposal services or other adequate means of disposal of refuse generated at the facility; and
- (f) the drawing up of action plans for emergencies.

(3) An accredited organisation that provides services to adult victims of trafficking who have children in their care must, in addition to the norms and standards contemplated in subsection (1), provide —

- (a) a safe environment for children;
- (b) proper care for sick children or children that become ill; and
- (c) safe storage of anything that may be harmful to children.

(4) An accredited organisation qualifies for funding from money appropriated by Parliament only if it complies with the norms and standards contemplated in subsection (1).

Programme offered by accredited organisation

21. (1) An accredited organisation —

- (a) must offer a programme aimed at —
 - (i) the provision of accommodation to adult victims of trafficking;
 - (ii) the provision of counselling to adult victims of trafficking;
 - (iii) the provision of rehabilitation services to adult victims of trafficking; and
 - (iv) 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 services to an adult victim of trafficking who has a child in his or 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 in whose care he or she is.

(4) A child referred to in subsection (2) must be referred to a child protection organisation or the provincial department of social development for investigation in terms of section 155(2) of the Children's Act, 2005 (Act No. 38 of 2005), to determine whether the child is in need of care and protection.

Access to programme offered by accredited organisation

22. A person who has been certified as a victim of trafficking in terms of section 12(6)(a) or who has been repatriated to the Republic in terms of section 33 is entitled to access a programme offered by an accredited organisation, notwithstanding whether he or she is accommodated at such an organisation.

Plan to address needs of victim of trafficking

23. An accredited organisation must draw up a plan to address the immediate and long term needs of a person who has been certified as a victim of trafficking in terms of section 12(6)(a) or a victim of trafficking who has been repatriated to the Republic in terms of section 33.

Information management

24. (1) An accredited organisation must, in the prescribed manner, collect information on victims of trafficking relating to —

- (a) the number of foreign victims of trafficking who have accessed a programme contemplated in section 21.
- (b) the number of South African citizens or permanent residents who are victims of trafficking and who have accessed a programme contemplated in section 21 .
- (c) the number of victims who have accessed a programme contemplated in section 21 and who have not been reported to the South African Police Service;
- (d) the countries from which foreign victims have been trafficked;
- (e) the countries to which South African citizens or permanent residents have been trafficked;
- (f) the purposes for which the victims have been trafficked;
- (g) the methods used to recruit and transport the victims;
- (h) the methods and routes used for trafficking the victims to South Africa; and
- (i) the types of travel documents that victims have used or attempted to use to cross the borders of South Africa and how these documents were obtained.

(2) An accredited organisation must provide an annual report on the information contemplated in subsection (1) to the Inter-sectoral Committee established in terms of section 40.

Chapter 7

COMPENSATION²⁷¹

Compensation to victim of trafficking

25. (1) The court may, on its own accord or on the request of the complainant or the prosecutor, 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;
- (c) being infected with a life-threatening disease; or
- (d) loss of income or support,

resulting from the commission of such offence: Provided that a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the Gazette in respect of the respective courts.

(2) 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.

(3) 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.

(4) 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.

(5) 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

26. (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.

²⁷¹ 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 recovery and reflection period or the duration of criminal proceedings against traffickers would not qualify as being ordinarily resident in South Africa. Hence the Commission reiterates its proposal 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.

Recovery of compensation

27. (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

28. (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

29. 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 25; 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 TRAFFICKING

Deportation of victim of trafficking prohibited

30. Subject to section 31, the summary deportation of a victim of trafficking is prohibited.

Repatriation of victim of trafficking from Republic

31. (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 an adult 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—

- (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; and
 - (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 Director-General of the Department of Social Development to take reasonable steps as contemplated in section 32(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 an adult who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked who freely elects to do so.

Assistance to foreign victim of trafficking

- 32.** The Director-General of the Department of Social Development must—
- (a) take reasonable steps to find suitable family members or an institution or organisation that renders assistance to victims of trafficking in the country to which a person referred to in section 31(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 31(2)(b)(i).

Repatriation of victim of trafficking to Republic

- 33.** (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, 2005 (Act No. 38 of 2005);
 - (vi) upon entry into the Republic of a person who is an adult victim of trafficking refer the person to an accredited organisation.

Escorting of child victim of trafficking

- 34.** (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

GENERAL PROVISIONS

Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

35. (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, the court may —

- (a) suspend all the parental responsibilities and rights of that parent, guardian, or other person; and
 - (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 4.

International co-operation

36. (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.
- (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.

Directions

37. (1) The National Commissioner of the South African Police Service must, after consultation with the Minister for Safety and Security and the National Director of Public Prosecutions, issue directions 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:

- (a) the division or divisions within the police to be tasked with the investigation of trafficking cases;
- (b) the manner in which the reporting of an alleged trafficking case is to be dealt with;
- (c) the manner in which trafficking cases are to be investigated;
- (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 and prosecution 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;
 - (i) measures to be taken in order to ensure the detection of trafficking in persons at South African ports of entry and borderlines;
 - (j) the kind of information that must be obtained from a victim of trafficking with the view to provide such information to the prosecuting authority for purposes of determining the quantum of the damages suffered by the victim for which he or she may claim compensation in terms of section 25; and
 - (k) the collecting and analysing of information on reported cases of trafficking in persons, including information relating to —²⁷²
 - (i) the countries from which victims are being trafficked to South Africa;
 - (ii) the countries to which South African citizens and other residents are being trafficked;
 - (iii) the nationality of victims transiting South Africa and the countries to which they are being trafficked;
 - (iv) the purposes for which the persons who have been identified as victims of trafficking have been trafficked;
 - (v) the profiles of the traffickers and their victims, including the gender, age and nationality of the victims;
 - (vi) the routes used by traffickers to enter and exit South Africa;
 - (vii) the methods used by traffickers to recruit and transport their victims;
 - (viii) the types of travel documents that traffickers and their victims have used or attempted to use to cross the borders of South Africa and how these documents were obtained; and
 - (ix) the link between trafficking operations and those involved in other forms of organised crime.
- (2) The National Commissioner of the South African Police Service must provide an annual report on the information contemplated in subsection (1)(k) to the Inter-sectoral Committee established in terms of section 40.
- (3) The Minister of Home Affairs must issue directions 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:
- (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;
 - (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; and
 - (f) the collecting and analysing of information on victims of trafficking who have been repatriated to South Africa in terms of section 33 relating to—
 - (i) the number of victims who have been repatriated to South Africa and the countries to which they have been trafficked;
 - (ii) the profiles of the victims, including the gender and ages of the victims;

²⁷² The South African Police Service: Crime Intelligence (responsible for collecting and analysing all relevant crime information) agrees that subcategories relating to the mentioned information could be created in the Crime Administration System. Such information would be available in the case docket and could also be gathered by way of a standardised questionnaire which must be completed by the investigating officer in a trafficking case.

- (iii) the purposes for which the victims were trafficked;
 - (iv) the routes used by traffickers to exit South Africa and to enter the countries to which the victims were trafficked;
 - (v) the methods used by traffickers to recruit and transport the victims; and
 - (vi) the types of travel documents that traffickers and their victims have used or attempted to use to exit South Africa and to enter the countries to which the victims were trafficked and how these documents were obtained.
- (4) The Minister of Home Affairs must provide an annual report on the information contemplated in subsection (3)(f) to the Inter-Sectoral Committee established in terms of section 40.
- (5) The Minister of Labour must issue directions regarding the following matters which must be adhered to by all labour inspectors who come into contact with victims of trafficking in the execution of their duties:
- (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
 - (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) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioner of the South African Police Service and the Director-General of Social Development, issue directions 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 cases relating to trafficking in persons, including the following:
- (a) the manner in which cases relating to trafficking in persons should be dealt with in general;
 - (b) the criteria to be used and the circumstances in which the prosecution must apply to court for an order that a witness and, in particular, child complainants give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;
 - (c) the criteria to be used and 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, in respect of a child witness;
 - (d) 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;
 - (e) the circumstances in which the prosecution must request the court to consider directing that the identity of a witness should not be revealed or that it should not be revealed for a period specified by the court as provided for in section 153 of the Criminal Procedure Act, 1977;
 - (f) 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;
 - (g) the provision of interpretation services during court proceedings to foreign victims of trafficking who are not conversant with any of the South African languages;
 - (h) the need to inform victims of trafficking about their right to and the process to claim compensation in terms of section 25;

- (i) the kind of information that must be obtained from a victim of trafficking for purposes of determining the quantum of the damages suffered by the victim for which he or she may claim compensation in terms of section 25; and
- (j) the collecting and analysing of information relating to —
 - (i) the number of trafficking prosecutions, convictions and the form of sentences imposed on traffickers;
 - (ii) the number of victims of trafficking awarded compensation orders in terms of section 25;
 - (iii) the number of cases where the courts refrained to provide compensation orders in terms of section 25 and the reasons for doing so.
- (7) The National Director of Public Prosecutions must provide an annual report on the information contemplated in subsection (6)(j) to the Inter-sectoral Committee established in terms of section 40.
- (8) Any directions issued under this section, except the directions issued under subsection (1), must be tabled in Parliament within one year after the commencement of this Act.
- (9) Any new or amended directions issued under this section, except new or amended directions issued under subsection (1), must be tabled in Parliament.

Legitimacy and validity of documents

38. 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 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 an offence under this Act.

Annual report on abuse or deliberate neglect of child and findings by children's court that child is in need of care and protection

39. The Director-General of the Department of Social Development must submit to the Inter-Sectoral Committee established in terms of section 40 an annual report on all reports of abuse or deliberate neglect of a child and all findings by a children's court that a child is in need of care and protection because of abuse or deliberate neglect of the child as contained in Part A of the National Child Protection Register provided for in Part 2 of Chapter 7 of the Children's Act, 2005 (Act No. 38 of 2005) insofar as such reports and findings relate to child victims of trafficking.

CHAPTER 10

ADMINISTRATION OF ACT

Establishment of Inter-sectoral Committee

- 40.** (1) There is hereby established a Committee to be known as the Inter-sectoral Committee on matters relating to trafficking in persons.
- (2) The Committee shall consist of —
- (a) the Director-General: Justice and Constitutional Development, who shall be the chairperson of the Committee;
 - (b) the National Commissioner of the South African Police Service;
 - (c) the Director-General: Home Affairs;
 - (d) the Director-General: Foreign Affairs;
 - (e) the Director-General: Social Development;

- (f) the Director-General: Health;
 - (g) the Director-General: Labour;
 - (h) the National Director of Public Prosecutions; and
 - (i) the Chief Executive Officer: Government Communication and Information System.
- (3) The members of the Committee may designate an alternate to attend a meeting of the Committee in their place.
- (4) (a) The members of the Committee shall designate one of its members as deputy chairperson of the Committee, and when the chairperson is not available, the deputy Chairperson shall act as chairperson.
 - (b) If neither the chairperson nor the deputy chairperson is available, the members present at a meeting shall elect a person from their own ranks to preside at that meeting.

Functions of Committee

- 41.** (1) The Committee shall be responsible for —
- (a) monitoring that this Act is implemented in an integrated, co-ordinated and uniform manner by the different organs of state;
 - (b) ensuring that the different organs of state comply with the roles and responsibilities allocated to them in terms of this Act;
 - (c) collating and analysing information relating to trafficking in persons obtained in terms of sections 24, 37(1)(k), 37(3)(f), 37(6)(j) and 39 with the view to determine the following:
 - (i) the countries from which victims are being trafficked to South Africa;
 - (ii) the countries to which South African citizens and other residents are being trafficked;
 - (iii) the nationality of victims transiting South Africa and the countries to which they are being trafficked;
 - (iv) the number of victims who have been repatriated to South Africa and the countries to which they were trafficked;
 - (v) the purposes for which persons who have been identified as victims of trafficking have been trafficked;
 - (vi) the profiles of the traffickers and their victims, including the gender, age and nationality of the victims;
 - (vii) the routes used by traffickers to cross the borders of South Africa;
 - (viii) the routes used by traffickers to enter the countries to which South African citizens and other residents were trafficked;
 - (ix) the methods used by traffickers to recruit and transport their victims;
 - (x) the types of travel documents that traffickers and their victims have used or attempted to use to cross the borders of South Africa and to enter the countries to which South African citizens and other residents were trafficked and how these documents were obtained;
 - (xi) the link between trafficking operations and those involved in other forms of organised crime.
 - (xii) the number of trafficking prosecutions, convictions and the form of sentences imposed on perpetrators;
 - (xiii) the number of victims of trafficking awarded compensation orders in terms of section 25 of the Act;
 - (xiv) the number of cases where the courts refrained to provide compensation orders and the reasons for doing so;

provided that information which identifies victims of trafficking shall be kept confidential;

- (d) developing and reviewing guidelines on the identification of victims of trafficking and traffickers.

Report to Parliament

- 42.** (1) The Minister must, after consultation with the Cabinet members responsible for safety and security, home affairs, foreign affairs, social development and the National Director of Public Prosecutions —
- (a) within one year after the implementation of this Act, submit —
 - (i) reports to Parliament by each Department or institution referred to in subsection (1) on the implementation of this Act;
 - (ii) a report to Parliament reflecting information relating to trafficking in persons referred to in subsection 41(1)(c); and
 - (b) every year thereafter submit reports referred to in paragraph (a)(i) and a report referred to in paragraph (a)(ii) to Parliament.

Regulations

- 43.** The Minister may make regulations regarding —
- (a) any matter prescribed in terms of this Act; and
 - (b) generally, any matter which the Minister deems necessary to be prescribed in order to achieve the objects of this Act.

Delegation of powers and duties by Minister

- 44.** (1) Any Minister referred to in this Act may delegate any power or duty assigned to him or her in terms of this Act to his or her Director-General or an official in the employ of his or her Department.
- (2) A delegation in terms of subsection (1) —
 - (a) is subject to any limitations, conditions and directions which the Minister may impose;
 - (b) must be in writing;
 - (c) may include the power to sub-delegate; and
 - (d) does not divest the Minister of the responsibility concerning the exercise of the power or the performance of the duty.
 - (3) The Minister may —
 - (a) confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
 - (b) at any time withdraw a delegation.
 - (4) The Minister may not delegate a power or duty to make regulations.

Delegation of powers and duties by Director-General

- 45.** (1) Any Director-General referred to in this Act may delegate any power or duty assigned to him or her in terms of this Act to an official in the employ of his or her Department.
- (2) A delegation in terms of subsection (1) —
 - (a) is subject to any limitations, conditions and directions which the Director-General may impose;
 - (b) must be in writing; and
 - (c) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.
 - (3) The Director-General may —
 - (a) confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
 - (b) at any time withdraw a delegation.

Assignment of powers and duties by Director-General

- 46.** (1) Any Director-General referred to in this Act may assign any power or duty assigned to him or her in terms of this Act to his or her provincial head, by agreement with that provincial head.
- (2) An assignment in terms of subsection (1) —
- (a) is subject to any limitations, conditions and directions which the Director-General may impose;
 - (b) must be in writing;
 - (c) may include the power to delegate; and
 - (d) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.
- (3) The Director-General may confirm, vary or revoke any decision taken in consequence of an assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision.
- (4) The Director-General may at any time withdraw an assignment.

Delegation of powers and duties by provincial heads

- 47.** (1) A provincial head to whom a power or duty has been assigned in terms of section 46 may delegate such power or duty to an officer in the employ of the province concerned.
- (2) A delegation in terms of subsection (1) —
- (a) is subject to any limitations, conditions and directions which the provincial head may impose;
 - (b) must be in writing; and
 - (c) does not divest the provincial head of the responsibility concerning the exercise of the power or the performance of the duty.
- (3) The provincial head may —
- (a) confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
 - (b) at any time withdraw a delegation.

CHAPTER 11

MISCELLANEOUS MATTERS

Laws repealed or amended

- 48.** 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

- 49.** This Act is called the Prevention and Combating of Trafficking in Persons Act, 2008, 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.

Act No. and year	Title	Extent of repeal or amendment
68 of 1969	Prescription Act	<p>1. The amendment of section 12 by the substitution of subsection (4) of the following subsection:</p> <p>(4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18 (2), 20 (1), 23, 24 (2), <u>and 26 (1)</u> [and 71 (1) or (2)] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, <u>and an alleged offence as contemplated in sections 4(1) or (2), 5, and 7 of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</u> during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.</p>
51 of 1977	Criminal Procedure Act	<p>1. The substitution for section 18 of the following section:</p> <p>Prescription of right to institute prosecution</p> <p>18. The right to institute a prosecution for any offence, other than the offences of-</p> <ul style="list-style-type: none"> (a) murder; (b) treason committed when the Republic is in a state of war; (c) robbery, if aggravating circumstances were present; (d) kidnapping; (e) child-stealing; (f) rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; (g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, or (h) trafficking in persons [for sexual purposes by a person] as contemplated in section <u>4(1) or (2) of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</u> [71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]; or (i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed. <p>2. The addition of the following section:</p> <p>261A. <u>If the evidence on a charge of trafficking in persons does not prove the offence of trafficking in persons, but the offence of —</u></p> <ul style="list-style-type: none"> (a) <u>rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or any attempt to commit such offence;</u> (b) <u>compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or any attempt to commit such offence;</u>

51 of 1977	Criminal Procedure Act	<p>(e) <u>compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);</u></p> <p>(f) <u>assault with intent to do grievous bodily harm;</u></p> <p>(g) <u>common assault;</u></p> <p>(h) <u>debt bondage as contemplated in section 8 of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...);</u></p> <p>(i) <u>destroying, confiscating, possessing or concealing of documents as contemplated in section 6 of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...);</u></p> <p>(j) <u>using the services of a victim of trafficking as contemplated in section 7 of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...);</u></p> <p>(k) <u>entering or remaining in, or departing from the Republic as contemplated in section 49(1)(a) of the Immigration Act, 2002 (Act No. 13 of 2002);</u></p> <p>(l) <u>knowingly assisting a person to enter or remain in, or depart from the Republic as contemplated in section 49(2) of the Immigration Act, 2002 (Act No. 13 of 2002);</u></p> <p>(m) <u>employing a child as contemplated in section 43 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997); or</u></p> <p>(n) <u>forced labour as contemplated in section 48 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), the accused may be found guilty of the offence so proved.</u></p> <p>3. The substitution for Schedule 1 of the following Schedule:</p> <p style="text-align: center;">SCHEDULE 1</p> <p style="text-align: center;">(Sections 40 and 42)</p> <p>Treason.</p> <p>Sedition.</p> <p>Public violence.</p> <p>Murder.</p> <p>Culpable homicide.</p> <p>Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Trafficking in persons [for sexual purposes by a person] as contemplated in section 4(1) or (2) of the <u>Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</u> [71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007].</p> <p>Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</p> <p>Robbery.</p> <p>Kidnapping.</p> <p>Childstealing.</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>
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		<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> <p>4. The substitution for Part II of Schedule 2 of the following Part:</p> <p style="text-align: center;">PART II (Sections 59, 72)</p> <p>Treason.</p> <p>Sedition.</p> <p>Murder.</p> <p>Rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Trafficking in persons [for sexual purposes by a person] as contemplated in section 4(1) or (2) of <u>the Prevention and Combating of Trafficking in Persons Act, (Act No. ... of ...)</u> [71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007].</p> <p>Robbery.</p> <p>Assault, when a dangerous wound is inflicted.</p> <p>Arson.</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, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500.</p> <p>Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones.</p> <p>Any offence under any law relating to the illicit-</p> <ul style="list-style-type: none"> (a) possession of- <ul style="list-style-type: none"> (i) dagga exceeding 115 grams; or (ii) any other dependence-producing drugs; or (b) conveyance or supply of dependence-producing drugs. <p>Any offence relating to the coinage.</p> <p>Any conspiracy, incitement or attempt to commit any offence referred to in this Part.</p> <p>5. The substitution for Part III of Schedule 2 of the following Part:</p> <p style="text-align: center;">PART III (Sections 59, 61, 72, 184, 185, 189)</p> <p>Sedition.</p> <p>Public violence.</p> <p>Arson.</p>
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		<p>Murder.</p> <p>Kidnapping.</p> <p>Childstealing.</p> <p><u>Trafficking in Persons as contemplated in section 4(1) or (2) of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</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>6. The substitution for Schedule 5 of the following Schedule:</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>Treason.</p> <p>Murder.</p> <p>Attempted murder involving the infliction of grievous bodily harm.</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6.</p> <p>Any trafficking related offence by a commercial carrier as contemplated in section 9 of the <u>Prevention and Combating of Trafficking in Persons Act, (Act No. ... of ...)</u> [71 (6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007].</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> <ul style="list-style-type: none"> (a) the value of the dependence-producing substance in question is more than R50 000,00; or (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 enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) the offence was committed by any law enforcement officer. <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> <ul style="list-style-type: none"> (a) involving amounts of more than R500 000,00; or (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 (c) if it is alleged that the offence was committed by any law enforcement officer- <ul style="list-style-type: none"> (i) involving amounts of more than R10 000,00; or (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>Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively on a child under the age of 16 years.</p>
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		<p>An offence referred to in Schedule 1-</p> <ul style="list-style-type: none"> (a) and the accused has previously been convicted of an offence referred to in Schedule 1; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1. <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> <p>7. The substitution for Schedule 6 of the following Schedule:</p> <p style="text-align: center;">SCHEDULE 6</p> <p style="text-align: center;">(Sections 50 (6), 58 and 60 (11) and (11A))</p> <p>Murder, when-</p> <ul style="list-style-type: none"> (a) it was planned or premeditated; (b) the victim was- <ul style="list-style-type: none"> (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1; (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: <ul style="list-style-type: none"> (i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or (ii) robbery with aggravating circumstances; or (iii) <u>Trafficking in Persons as contemplated in section 4(1) or (2) of the Prevention and Combating of Trafficking in Persons Act, (Act No. of ...)</u> (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy. <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively-</p> <ul style="list-style-type: none"> (a) when committed- <ul style="list-style-type: none"> (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who is charged with having committed two or more offences of rape; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (v) <u>by a person or criminal gang who is charged with the offence of trafficking in persons;</u> (b) where the victim- <ul style="list-style-type: none"> (i) is a person under the age of 16 years; (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; (c) involving the infliction of grievous bodily harm. <p>Trafficking in persons [for sexual purposes by a person] as contemplated in section <u>4(1) or (2) of the Prevention and Combating of Trafficking in Persons Act, (Act No. of ...)</u> [71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007].</p> <p>Robbery, involving-</p> <ul style="list-style-type: none"> (a) the use by the accused or any co-perpetrators or participants of a firearm; (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or (c) the taking of a motor vehicle.
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		<p>An offence referred to in Schedule 5-</p> <p>(a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; 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 5 or this Schedule.</p> <p>The offences referred to in section 2, 3 (2) (a), 4 (1), 5, 6, 7, 8, 9, 10 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, section 2 (1) and (2) of the Civil Aviation Offences Act, 1972 (Act 10 of 1972), section 26 (1) (j) of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act 87 of 1993) and section 56 (1) (h) of the Nuclear Energy Act, 1999 (Act 46 of 1999).</p>
105 of 1997	Criminal Law Amendment Act	<p>The substitution for Schedule 2, Part I of the following Schedule:</p> <p style="text-align: center;">Schedule 2</p> <p style="text-align: center;">(Section 51)</p> <p style="text-align: center;">PART I</p> <p>Murder, when-</p> <p>(a) it was planned or premeditated;</p> <p>(b) the victim was-</p> <p>(i) a law enforcement officer performing his or her functions as such, whether on duty or not; or</p> <p>(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court;</p> <p>(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:</p> <p>(i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or</p> <p>(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);</p> <p>(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy;</p> <p>(e) the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim; or</p> <p>(f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1 (a) to (e) of the Witchcraft Suppression Act, 1957 (Act 3 of 1957).</p> <p>Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-</p> <p>(a) when committed-</p> <p>(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;</p> <p>(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;</p> <p>(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or</p> <p>(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;</p> <p>(b) where the victim-</p> <p>(i) is a person under the age of 16 years;</p> <p>(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or</p> <p>(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or</p> <p>(c) involving the infliction of grievous bodily harm.</p> <p>Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-</p>

		<p>(a) when committed-</p> <ul style="list-style-type: none"> (i) in circumstances where the victim was raped more than once by one or more than one person; (ii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or (iii) under circumstances where the accused knows that the person committing the rape has the acquired immune deficiency syndrome or the human immunodeficiency virus; <p>(b) where the victim-</p> <ul style="list-style-type: none"> (i) is a person under the age of 16 years; (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or <p>(c) involving the infliction of grievous bodily harm.</p> <p>Any offence referred to in section 2, 5, 6, 7, 8, 9, 10 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, when it is proved that the offence has-</p> <ul style="list-style-type: none"> (a) endangered the life or caused serious bodily injury to or the death of, any person, or any number or group of persons; (b) caused serious risk to the health or safety of the public or any segment of the public; or (c) created a serious public emergency situation or a general insurrection. <p>Trafficking in persons <u>as [for sexual purposes by a person] contemplated in section 4(1) or (2) of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</u></p> <p>[71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007].</p> <p>The substitution for Schedule 2, Part III of the following:</p> <p style="text-align: center;">PART III</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.</p> <p>Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20 (1) or 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Assault with intent to do grievous bodily harm on a child under the age of 16 years.</p> <p>Any offence in contravention of section 36 of the Arms and Ammunitions Act, 1969 (Act 75 of 1969), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in section 39 (2) (a) (i) of that Act.</p> <p>Any trafficking related offence by a commercial carrier as contemplated in section <u>9 of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</u> [71 (6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007].</p>
Act 112 of 1998	Witness Protection Act	<p>The substitution for the Schedule of the following Schedule:</p> <p style="text-align: center;">Schedule</p> <p>OFFENCES IN RESPECT OF WHICH A WITNESS OR RELATED PERSON MAY BE PLACED UNDER PROTECTION</p> <ol style="list-style-type: none"> 1. Treason. 2. Sedition. 3. Murder. 4. Rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

		<ol style="list-style-type: none"> 5. Public violence. 6. Robbery- <ol style="list-style-type: none"> (a) when there are aggravating circumstances; or (b) involving the taking of a motor vehicle. 7. Kidnapping. 8. Defeating the ends of justice. 9. Perjury. 10. Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. 10A Trafficking in persons <u>as contemplated in section 4(1) or (2) [for sexual purposes by a person] or any trafficking related offence committed by a commercial carrier as contemplated in section 9 of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</u> [or commercial carrier as contemplated in section 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]. 11. 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- <ol style="list-style-type: none"> (a) the value of the dependence-producing substance in question is more than R10 000,00; or (b) the value of the dependence-producing substance in question is more than R5 000,00 and 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 (c) the offence was committed by any law enforcement officer. 12. Any offence referred to in section 1 or 1A of the Intimidation Act, 1982 (Act 72 of 1982). 13. Any offence relating to- <ol style="list-style-type: none"> (a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or (b) the possession of an automatic or semi-automatic firearm, explosives or armament. 14. Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or an 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. <ol style="list-style-type: none"> (a) involving amounts of more than R50 000,00; or (b) involving amounts of more than R10 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 (c) if it is alleged that the offence was committed by any law enforcement officer- <ol style="list-style-type: none"> (i) involving amounts of more than R10 000,00; or (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. 15. Any offence referred to in the Prevention of Organised Crime Act, 1998. 16. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule. 17. Any other offence which the Minister has determined by regulation. 18. Any other offence in respect of which it is alleged that the offence was committed by- <ol style="list-style-type: none"> (a) a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (b) a law enforcement officer, and in respect of which the Director is of the opinion that the safety of a witness who is or may be required to give evidence, or who has given evidence in respect of such an offence in any proceedings or any related person, warrants protection. 19. Any other offence in respect of which the Director, after having considered the factors mentioned in section 10 (1) and any information gained in terms of section 10 (2), is of the opinion that the safety of a witness who is or may be required to give evidence, or who has given evidence in respect of such an offence in any proceedings or any related person, warrants protection.
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121 of 1998	Prevention of Organised Crime Act	<p>The substitution for Schedule 1 of the following Schedule:</p> <p style="text-align: center;">Schedule 1</p> <p style="text-align: center;">(Sections 1, 38, 50, 51, 52, 54, 58 and 73)</p> <ol style="list-style-type: none"> 1. Murder; 2. Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; 3. Kidnapping; 4. Arson; 5. Public Violence; 6. Robbery; 7. Assault with intent to do grievous bodily harm; 8. Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; 9. Any offence contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; 10. Any offence under any legislation dealing with gambling, gaming or lotteries; 11. Contravention of section 20 (1) of the Sexual Offences Act, 1957 (Act 23 of 1957); 12. Any offence contemplated in Part 1 to 4, or section 17, 18, 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; 13. Extortion; 14. Childstealing; 15. Breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence; 16. Malicious injury to property; 17. Theft, whether under the common law or a statutory provision; 18. Any offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955); 19. Fraud; 20. Forgery or uttering a forged document knowing it to have been forged; 21. Offences relating to the coinage; 22. Any offence referred to in section 13 of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992); 23. Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament; 24. Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969); 25. Dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance; 26. Any offence relating to exchange control; 27. Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones; 28. any offence contemplated in sections 1 (1) and 1A (1) of the Intimidation Act, 1982 (Act 72 of 1982); 29. Defeating or obstructing the course of justice; 30. Perjury; 31. Subornation of perjury;
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		<p>32. Any offence referred to in Chapter 3 or 4 of this Act;</p> <p>32A. Any specified offence as defined in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004;</p> <p>33. Any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine;</p> <p><u>33A. Trafficking in persons as contemplated in section 4(1) or (2) of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...);</u></p> <p>34. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.</p>
Act 56 of 2001	Private Security Industry Regulation Act	<p>The substitution for the Schedule of the following Schedule:</p> <p style="text-align: center;">Schedule TABLE OF OFFENCES</p> <p>High treason.</p> <p>Sedition.</p> <p>Sabotage.</p> <p>Terrorism.</p> <p>Public violence.</p> <p>Arson.</p> <p>Malicious damage to property.</p> <p>Intimidation.</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Murder.</p> <p>Robbery.</p> <p>Culpable homicide involving the use of a firearm or any form of intentional violence.</p> <p>Kidnapping.</p> <p>Assault with the intention to cause serious bodily harm.</p> <p>Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p> <p>Trafficking in persons [for sexual purposes by a person] as contemplated in section 4(1) or (2) of the <u>Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</u> [71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007].</p> <p>Child stealing.</p> <p>Fraud.</p> <p>Forgery or uttering of a forged document knowing it to have been forged.</p> <p>Breaking or entering any premises, whether in terms of common or statutory law, with the intention to commit an offence.</p> <p>Theft, whether in terms of common law or statutory law.</p> <p>Receiving stolen property knowing it to have been stolen.</p> <p>Extortion.</p> <p>Defeating the ends of justice.</p> <p>Perjury, whether in terms of common law or statutory law.</p> <p>An 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>An offence involving the illicit dealing in dependence-producing substances.</p> <p>Any offence in terms of statutory law involving an element of dishonesty.</p> <p>Any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998).</p> <p>Any offence in terms of the Explosives Act, 1956 (Act 26 of 1956).</p> <p>Any offence in terms of the Regulation of Foreign Military Assistance Act, 1998 (Act 15 of 1998).</p> <p>Any offence in terms of legislation pertaining to the control over the possession and use of firearms and ammunition.</p> <p>Any offence in terms of the Interception and Monitoring Prohibition Act, 1992 (Act 127 of 1992).</p> <p>Any offence in terms of the Intelligence Services Act, 1994 (Act 38 of 1994).</p> <p>Any offence in terms of the Protection of Information Act, 1982 (Act 84 of 1982).</p> <p>Crimen injuria.</p> <p>Any offence in terms of statutory law involving cruelty to an animal.</p> <p>Any offence in terms of any law relating to illicit dealing in or possession of precious medals or precious stones.</p> <p>Any offence in terms of statutory law punishable by a period of imprisonment exceeding two years without the option of a fine.</p> <p>Any conspiracy, incitement or attempt to commit any of the above offences.</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 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>(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>(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>(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>(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; [or]</p> <p>(g) is the relative of a citizen or permanent resident within the first step of kinship; or</p> <p>(h) <u>is a victim of trafficking referred to in section 18 of the Prevention and 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 or kidnapping</u>;</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 withdrawn.</u></p> <p><u>(1B) Subsection 1(b) shall not prohibit the relevant authorities from bringing a person to the Republic for prosecution if a warrant for his or her arrest is outstanding in the Republic.</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 (3)(e) and subsection (3A).</p> <p>Duties with regard to conveyances</p> <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>
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		<p>(i) any cases of disease, whether infectious or otherwise, which have occurred or are suspected to have occurred upon the voyage;</p> <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;</p> <p>(e) <u>a list of all the children on board of the conveyance indicating which children are unaccompanied; and</u></p> <p><u>(3A) If an immigration officer has reason to believe that any passenger on board the conveyance is a victim of trafficking, he or she must forthwith report the matter, in terms of section 11(1) or 12(1) of the Prevention and 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 any foreigner conveyed to a port of entry-</p> <p>(a) for purposes of travelling to a foreign country, holds a valid passport and transit visa, if required; and</p> <p>(b) holds a valid passport and visa, if required.</p> <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> <p>(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-</p> <p>(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</p> <p>(ii) any fabricated or falsified permit, certificate, written authority or other document; or</p> <p>(b) without sufficient cause has in his, [or] her or its possession-</p> <p>(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;</p> <p>(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;</p> <p>(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]</p>
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		<p>(iv) any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, or</p> <p>(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.</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>
		<p>5. The substitution for Schedule 1 of the following Schedule:</p> <p style="text-align: center;">SCHEDULE 1</p> <p style="text-align: center;">OFFENCES REFERRED TO IN SECTION 28 (a) AND (b) OF THIS ACT</p> <p>Treason against the Republic</p> <p>Murder</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively</p> <p>Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively</p> <p>Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively</p> <p>Trafficking in persons [for sexual purposes by a person] as contemplated in sections 4(1) or (2) and 9 [71 (1), (2) or (6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007] of the Prevention and Combating of Trafficking in Persons Act, ... (Act No. ... of ...)</p> <p>Robbery</p> <p>Kidnapping</p> <p>Assault when a dangerous wound is inflicted</p> <p>Arson</p> <p>Any conspiracy, incitement or attempt to commit an offence referred to in this Schedule</p>
38 of 2005	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>
Act 32 of 2007	Criminal Law (Sexual Offences and Related Matters) Amendment Act	<p>1. The repealed of sections 70 and 71</p>

Annexure E

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.

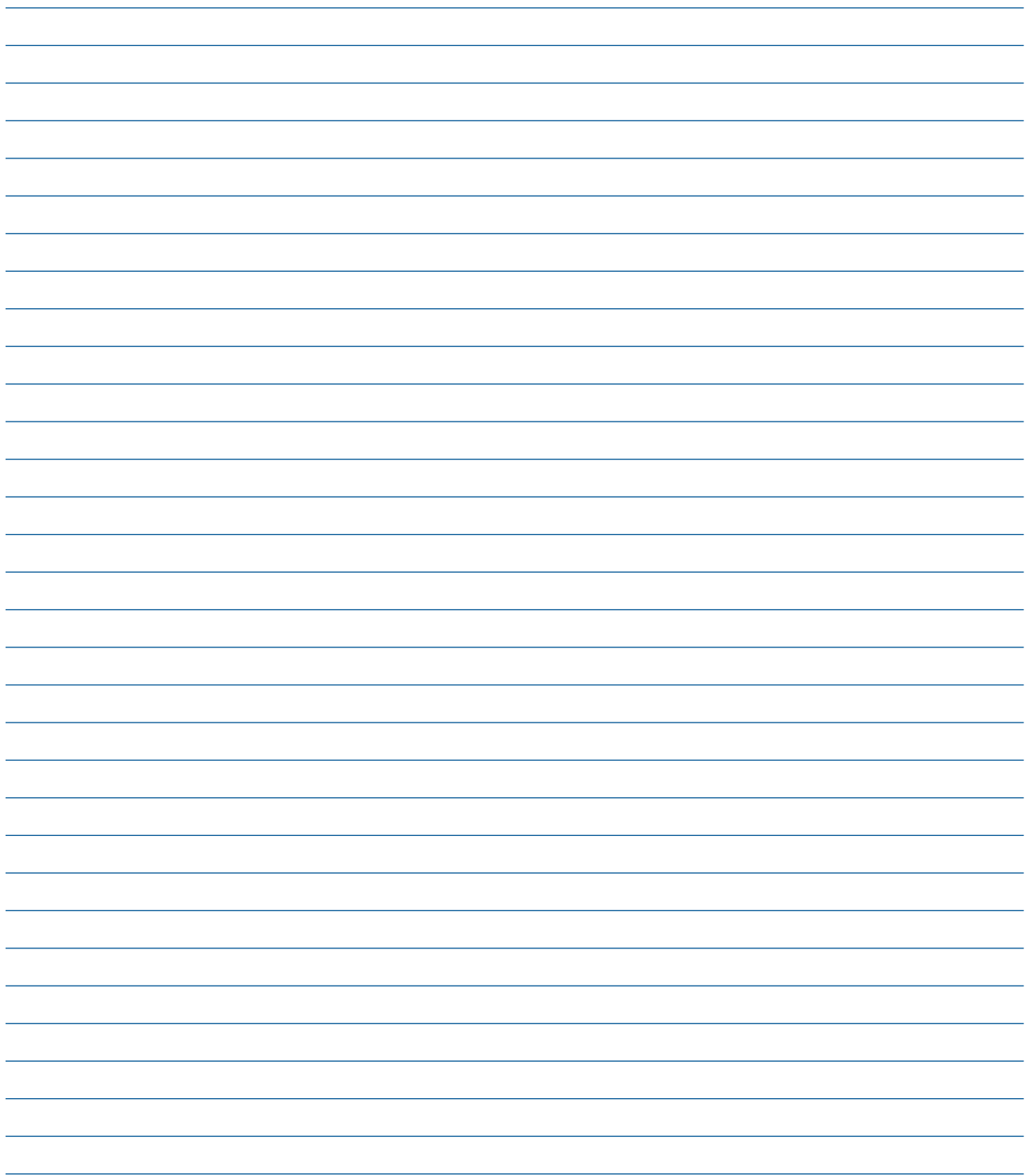
Article 20*Depositary and languages*

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.

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