



**SUBMISSION TO THE PARLIAMENTARY  
PORTFOLIO COMMITTEE ON JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT**

**PREVENTION AND COMBATING OF TRAFFICKING  
IN PERSONS BILL [B7-2010]**

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Submitted by:

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## **INTRODUCTION**

The Institute for Security Studies and the Women's Legal Centre would like to thank Honourable NA Ramatlhodi, MP, Chairperson: PC on Justice and Constitutional Development, and members of the Portfolio Committee, for the opportunity to provide comments on the Prevention and Combating of Trafficking in Persons Bill [B7-2010].

The ISS previously made a submission to the Portfolio Committee regarding an earlier version of this Bill on 11 June 2009. We are grateful to the Committee for having considered our submission and for the changes that have been made to the latest version of the Bill.

Trafficking in persons violates a number of rights guaranteed by the South African Constitution including the right to dignity contained in section 10 of the Constitution; the right to equality; the right to freedom and security of the person; the right to bodily and psychological integrity; the right not to be subjected to slavery, servitude or forced labour; the right to freedom of movement and the rights of children. Effective detection and prosecution of trafficking is a vital link in any anti-trafficking strategy but policing responses alone cannot address the fundamental root causes of trafficking: gender inequality; the demand for cheap labour whether for sex, agriculture, domestic or restaurant work in destination countries; limited economic opportunities for women in source countries; discrimination; violence and abuse. We believe that an effective anti-trafficking strategy must be grounded in a human rights approach which encourages an integrated, survivor-centred approach and must include progressive and fair migration policies, effective labour protections for vulnerable workers and increased opportunities for socio-economic development.

This submission will deal in detail with specific clauses of the Bill, make recommendations for changes and provide motivations for each of the changes. The changes relate to the following:

- The wording of the Preamble

- Chapter 1: definitions for ‘sexual exploitation’, ‘trafficking’ and ‘forced marriage’
- Chapter 2: Public awareness
- Chapter 3: Offences, penalties and extra-territorial jurisdiction
- Chapter 4: Reporting and referral of victims of trafficking
- Chapter 5: Status of foreign victims of trafficking
- Chapter 7: Compensation
- Chapter 8: Deportation and repatriation of victims of trafficking
- Chapter 9: General Provisions
- Chapter 10: Administration of the Act

We would like to call the attention of the Portfolio Committee to the fact that no costing appears to have been undertaken for this Bill. We would like to call upon the Committee to insist that the cost of implementing the Act be calculated before finalisation of the Bill. We are concerned in particular about the cost that may be incurred by the Department of Social Development, if as required by this version of the Bill, the DSD is responsible for conducting investigations in the countries of origin of victims of trafficking to ensure that the victim can be repatriated at the end of the requisite processes. We believe that such a costing could draw upon existing data of actual cases of trafficking in South Africa (from *inter alia* the National Prosecuting Authority and the International Organisation for Migration).

The Bill is to be welcomed, as it operationalises South Africa’s commitment to combating all forms of human trafficking and our international legal obligations to do so. We believe however that we should be cautious about passing an Act that may be too costly to implement fully and thus cause victims of trafficking further trauma.

## **PREAMBLE**

We recommend an amendment to the second statement of the Preamble which at presents reads:

*“CONCERNED by the increase of trafficking in persons, especially women and children, and the role played by organised criminal networks in the trafficking of persons globally.”*

There is no evidence upon which to base the statement that there is an **increase** in human trafficking. Indeed, there exists no sufficient baseline data in South Africa upon which to determine trends in trafficking at present. As such we believe it to be fallacious to refer to an increase. In addition, we believe it is sufficient to refer to the concern of the country about the phenomenon, without qualifying that by saying that there is an increase.

In addition, there is insufficient evidence to suggest that there is particular reason to believe that women and children are disproportionately victims of trafficking, or that organised crime groups are involved in all cases of human trafficking; although this is the common perception. We therefore propose the following re-wording of this clause:

*“CONCERNED by the phenomenon of trafficking in persons and the new opportunities this may provide to organised crime networks globally.”*

## **CHAPTER 1: DEFINITIONS**

We wish to emphasise the need for precise and unambiguous definitions in order to facilitate effective policing and prosecution of offences. Clear criminal law definitions are essential to the rule of law and to ensure that the Constitutional rights of both victims and defendants are protected. We would like to recommend that the following definitions be amended as set out below.

### Exploitation

The current definition of exploitation is drafted very widely and we believe that the potential for confusion exists if it is not tightened up. We are mindful of the fact that

it is virtually impossible to formulate a general definition of exploitation, however, there are some common themes which are generally accepted and understood to form the basis of exploitative conduct. We therefore recommend that in defining exploitation, the legislature should take into account the nature of the act itself, the benefit to another, the lack of consent, the object of the exploitive act, and the relationship of the abuser to the victim. We are of the view that the definition should be flexible enough so that courts can use it to remedy the variety of abusive conduct practiced by traffickers, without being so wide that it is open to challenge. We therefore recommend that the following definition be used:

*“Exploitation” shall include but not be limited to-*

- a) slavery or practices similar to slavery;*
- b) the exploitation of the prostitution of others;*
- c) other forms of sexual exploitation;*
- d) forced labour or services;*
- e) servitude or*
- f) the removal of organs.*

### Forced Marriage

The definition of “forced marriage” read together with the definitions of “exploitation” and “trafficking” as they are currently drafted could lead to the traditional practice of *ukuthwala* being criminalised as a form of trafficking. While legislation is essential to outlaw the abusive and illegal practice of bride abduction, it may not be fitting to attempt to do so in this piece of legislation. We believe that the practice of forced marriage should be dealt with in a separate statute which takes into account the social, economic and cultural/religious context of forced marriage in South Africa and clearly defines when the practice ceases to be elopement by consent and when it becomes abduction and/or forced marriage. Further, a proper analysis of the law in relation to *ukuthwala* shows that legal reform to prohibit the practice in its abusive form would require the amendment of other related laws (such as the amendment of the age of consent to have parity between the laws dealing with

customary marriage, civil marriage, children and sexual offences). The WLC has made submissions to the South African Law Reform Commission to consider drafting comprehensive legislation dealing with the harmful practice of *ukuthwala*.

Should the Portfolio Committee however elect to retain forced marriage in the statute we would like to point out that the current definition of forced marriage requires that the marriage be concluded without the valid consent of *both* parties to the marriage. This implies that the consent of one party would be sufficient. For example should the husband consent but not the wife, this would **not** constitute a forced marriage under the current definition. We are of the view that lack of consent from *any* of the parties to the marriage should constitute a forced marriage. We would therefore like to recommend that the following definition be used:

*“Forced marriage” means a marriage concluded against the will and without the valid consent of either or both of the parties to the marriage*

#### Sexual Exploitation

The definition of “sexual exploitation” read together with the definitions of “exploitation” and “trafficking” as they are currently drafted deems all forms of adult sex work to be trafficking. Further, §3(b) of the Bill deems consent to be irrelevant and thereby explicitly encompasses voluntary sex work. An approach which conflates trafficking with sex work renders all sex workers as victims, rationalises a fairly heavy-handed response to prostitution by the State, and ignores the economic and social contexts for sex work. Such a view assumes that most, if not all, people selling sexual services are women and girls who need rescue. Although the term ‘trafficking’ is relatively broad in meaning, inter-governmental conversations on the issue, and the interventions that governments have promoted, have historically tended to reduce trafficking to either transporting of women and girls into sex work, or to sex work itself.

A glaring example of the human rights abuses which have resulted from this approach can be seen in the harsh India – Nepal border control rules imposed during the late 1990s, lasting until 2007, which restricted the ability of women under 35 to travel overseas without a relative or a male guardian’s written consent, and required that women show permission letters from their fathers or husbands if they wished to leave

Nepal. The question of raids and rescue operations has been a constant source of concern for human rights activists. These are carried out arbitrarily, focused almost exclusively on the brothel districts and on arresting sex workers, regardless of whether or not there is any evidence of them having been trafficked. Such anti-trafficking initiatives reproduce assumptions about women as passive, incapable of decision-making, and in need of protection. These initiatives also fail to address the concerns of anti-trafficking advocates, as they are frequently used merely as a façade to deter the entry of certain categories of migrants or to clean up establishments within the sex industry. This agenda has relies on seeing sex work, and red-light areas generally, as exceptionally dangerous and exploitative, and on seeing heightened state-sponsored border controls and urban policing as a solution.

We therefore recommend that the following definition of “sexual exploitation” be used:

*“Sexual Exploitation” means the participation by a person in sex work, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage or fraud. Even in the absence of any of these factors, where the person participating in sex work, sexual servitude or the production of pornographic materials is under the age of 18, sexual exploitation shall be deemed to exist.”*

### Trafficking

The definition of trafficking in this version of the Bill is much expanded from the previous version. Indeed, the definition has broadened to such an extent that, in our view, it is neither practical nor clear. For example, in its current form the implication of the definition is that all sex workers would be victims of trafficking. Consider the following:

The definition as currently stated is that

*‘trafficking’ includes.....recruitment.... by means of .... (j) the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person, or (k) the giving or receiving of payments, compensation, rewards, benefits or any other kind of advantage...for the purpose of any form of*

*exploitation....including the commission of a sexual offence or any offences of a sexual nature....'*

It is clear from this definition of the term trafficking, that if the definition were to be accepted into legislation, all sex work would become trafficking victims and thus all sex workers should receive the same benefits and support as victims of trafficking and all brothel owners should be prosecuted as traffickers. More seriously even, all newspapers and internet sites that carry personal advertisements for adult sexual services (e.g. the classified advertisements in daily newspapers around the country) could be prosecuted for the offence of involvement in trafficking of persons as set out in section 4(2)(b) and 4(3)(b).

In addition, the broad scope of the definition would imply that any woman who is married and for whom her partner has paid *lobola* and who is then exploited by her husband (or raped by her husband) would be a victim of trafficking. The same would be the case for all cases of *ukuthwala*, as discussed above.

It is our submission that the definition of trafficking should be very clear in terms of the practices it seeks to criminalise and thus specific, while not creating impossible conditions for the determination of cases of trafficking.

In addition, the South African Law Reform Commission is currently coming to the end of an extensive process of research and public consultation about adult 'prostitution'. This process will result in recommendations to the Minister of Justice and Constitutional Development that may include recommendations for legal reform. It would thus be inappropriate and presumptuous of this legislation to undermine that process by providing a definition of trafficking that includes all sex work as trafficking.

It is also, in our view, not helpful to women who have made a conscious decision (albeit a constrained decision) to enter into sex work as a means to a financial end, to place them in the category of victim. Indeed, it may serve to drive the sex industry further underground to the detriment of those involved in the industry as sex workers.

A clear, simple and accurate definition of trafficking is far more likely to result in successful prosecutions (and the identification of victims for assistance) than the

convoluted, circular definition that is currently in the Bill. The definition could be as simple as:

*“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by any means, for forced labour or services, slavery or practices similar to slavery, servitude or the unlawful removal of organs.”*

The UN Protocol does not require states to include all the terms of the Protocol to define the crime. It should be noted that the above definition is very close to the definition of trafficking provided for in US law, where there have been many successful trafficking prosecutions. The ‘means’ listed in the definition of trafficking in the Protocol should be used at the sentencing stage to determine the length of the prison term: The worse the behaviour of the traffickers, the longer the prison term.

We are sure the intention of the Bill, as originally conceived was not to allow for such a broad definition that all forms of exploitation could be considered to be trafficking. We strongly urge the committee to reconsider the definition of trafficking.

## **CHAPTER 2: PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS**

This chapter of the Bill deals specifically with the issue of public awareness. It is our submission that there is currently insufficient evidence about who is particularly vulnerable or at risk of becoming a victim of trafficking. While the common-sense notion is that poor, rural women and children may be most at risk, international and national evidence does not support this notion. Indeed, we should be very cautious about providing ‘awareness raising’ in the absence of evidence about exactly who is vulnerable and what they need to know to protect themselves against abuse. For example, pamphlets or materials that merely warn rural girls and women to be aware of job opportunities offered in the cities could have the effect of severely constraining their options for work-seeking. There are examples of misleading advertising leading to trafficking, however there are few such cases in South Africa that we are aware of, and we ought to exercise caution in creating fear unnecessarily, especially if the result of the fear is that women’s life chances are curtailed.

It is our submission that there is currently insufficient evidence about who is particularly vulnerable or at risk of becoming a victim of trafficking, nor sufficient evidence to allow for generalisations about the common recruitment techniques of traffickers. The evidence that does exist is largely anecdotal and cannot inform profiling. We therefore urge the Committee to consider removing this section of the Bill, or modifying it as follows:

*“3.(1) The Intersectoral Committee established by Section 40 must, and where appropriate, after consultation with relevant non-governmental organisations and through consideration of the evidence presented in cases of trafficking, establish public awareness programmes for the prevention and combating of trafficking in persons.”*

### **CHAPTER 3: OFFENCES PENALTIES AND EXTRA-TERRITORIAL JURISDICTION**

#### Section 8: Conduct facilitating trafficking in persons

This section of the Bill as it currently stands requires that all potential lessors of premises to conduct investigations into potential lessees which falls outside of the scope of knowledge that an ordinary private or commercial lessor can reasonably be expected to have. In what circumstances could a landlord reasonably know that premises that s/he intends to lease to a person or legal entity will in future be used to facilitate or promote trafficking?

Further, the terms of “facilitate” and “promote” are not defined in the Bill and could cover a wide variety of activities. The manner in which the section is currently drafted could result in lessors unlawfully violating the rights of privacy of innocent lessees or potential lessees in order to prevent liability for prosecution. We recommend that the level of *mens rea* or intent required for this offence be more explicitly set out in order to prevent innocent third parties from being held liable for an offence. The current section also does not provide protection from civil liability for persons who report suspected offences erroneously but in good faith. The section does not provide any protection for confidential reporting of offences, potentially exposing those reporting trafficking offences to retribution from traffickers. We therefore recommend that the section be redrafted as follows:

*8(1) A person is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years if the person :*

- a) leases or subleases any room, house, building or establishment in circumstances where that person on reasonable grounds suspects or should reasonably suspect that premises will be used for the purposes of committing any act of trafficking or related offence in terms of this Act; or*
- b) subsequent to leasing or subletting any room, house, building or establishment, on reasonable grounds suspects or should reasonably suspect that premises are being used for the purposes of committing any act of trafficking or related offence in terms of this Act and the person does not take steps to immediately report that suspicion to a police official for investigation.*

*8(2) A person referred to in subsection 1(b)—*

- a) must provide reasons for that suspicion to a police official;*
- b) who makes the 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.*

Our concerns regarding Section 8(1)(b) of the Bill echo the concerns set out above regarding Section 8(1)(a), in that the section requires publishers, broadcasters and distributors to exercise direct control over not only the content of the material published, broadcast or distributed by them, but also requires them to have knowledge of the manner in which this information will be put to use in circumstances which cannot reasonably be expected to be within their sphere of knowledge.

Further, the section also requires persons who usually have no direct control over the content of information, such as printers and points of sale, to exercise control over the content of materials. Again the Bill does not clearly set out what the requisite *mens rea* or intent for the commission of this particular offence is and as such we believe that it could expose innocent third parties to prosecution. The current section also does not provide protection to persons who report suspected offences erroneously but in good faith from civil liability. The section does not provide for confidential

reporting of offences, potentially exposing those reporting trafficking offences to retribution from traffickers.

We believe that this section is meant to prevent the promotion and incitement of trafficking and trafficking related offences as set out in the Bill through the use of various forms of media. We therefore recommend that the Bill set out the elements of the crime of incitement with specific reference to trafficking and trafficking related offences.

In terms of our law, the crime of incitement requires someone (the inciter) to reach and seek to influence the mind of another in order to incite the commission of a crime. The influence can take a variety of forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement or goading, among others. The decisive question is whether the inciter reached and sought to influence the mind of another toward the commission of a crime. When the intended influence does not reach the mind of the other, the offence is one of attempt to incite. The inciter can be guilty of incitement even if the other person is not susceptible or does not respond. The crime of incitement is unilateral and does not require agreement to be reached with another party. We therefore recommend that Section 8(1)(b) be redrafted as follows

*8(3) A person is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years if the person*

- a) advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information where the person on reasonable grounds suspects that the information is intended to incite, promote or instigate trafficking or trafficking related offences in terms of this Act;*
- b) Is approached or requested by any person to advertise, publish, print, broadcast or distribute information where the person on reasonable grounds suspects that the information is intended to incite, promote or instigate trafficking or trafficking related offence in terms of this Act and the person does not take steps to immediately report that suspicion to a police official for investigation.*

8(4) *A person referred to in subsection 3(b)—*

- a) must provide reasons for that suspicion to a police official;*
- b) must take all reasonable steps to preserve any evidence for purposes of investigation and prosecution by the relevant authorities;*
- c) who makes the report in good faith, is not liable to civil action on the basis of the report; and*
- d) 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*

We are of the view that, were the committee to accept the redrafting of the sections as set out above, the current Section 8(2) would become superfluous as internet service providers would inevitably fall within the aforementioned sections.

#### **CHAPTER 4: IDENTIFICATION AND PROTECTION OF VICTIMS OF TRAFFICKING**

We are concerned that Section 13(1)(a) provides for a closed list of persons who have a duty to report cases of suspected trafficking of adults. Section 13(2) states that persons outside of the closed groups referred to in Section 13(1)(a) have an option to report any suspected trafficking of adults to the authorities. The aforementioned section is in direct contrast to the provisions of Section 12 which place a duty on all persons who suspect trafficking of children to report such suspicions to the police.

We can see no reason why a similar duty should not exist in respect of adult victims of trafficking. Given the nature of the offence and the unique means by which these offences are committed it is by no means certain that victims of trafficking would come into contact with any of the persons mentioned in the closed list created by Section 13(1)(a). Effective detection and prosecution of trafficking requires that all

members of society cooperate with the authorities to prevent and report trafficking.

We therefore recommend that the following section be inserted after Section 13(1)(a):

*13(1)(b) Any person other than the persons referred to in subsection (a) who on reasonable grounds suspects that an adult person is a victim of trafficking, must report that suspicion to a police official for investigation.*

Section 13(1)(b) provides for adult victims of trafficking to exercise their rights to privacy to a limited extent by requiring that social workers, social service professionals, medical practitioners, nurses, traditional health practitioners, traditional healers or traditional leaders obtain their written consent before reporting a reasonable suspicion of trafficking. We commend the drafters for taking this approach, however, we recommend that the Bill include safeguards to ensure that valid informed consent is obtained. We therefore recommend that the following definition of consent be inserted:

*“Consent” for the purposes of Section 13 means consent given freely and voluntarily without any inducement and may only be given if the person giving it:*

- a) has been given a clear explanation and adequate description of
  - i. the procedures to be followed when the report is filed; and*
  - ii. the precise nature of all medical and other personal information which will be disclosed to the authorities; and*
  - iii. the possible consequences and risks involved in filing a report;**
- b) has been given advice that the consent may be withdrawn any time before filing the report; and*
- c) has understood and signed the prescribed consent form.*

We also draw the attention of the Committee to the fact that the Bill does not make any provisions regarding what should happen to an individual who is initially identified as a possible victim of trafficking, and who may not be classified as such after consideration of the facts. Such a person may, for example, be victim of abuse or exploitation, but not a victim of trafficking. In such a case s/he may have been subjected to traumatic questioning by the police (for example) and then summarily deported. We submit that:

*“any person who, through the process of investigation to determine whether they are a victim of trafficking, is found to be a victim of abuse and/or labour exploitation, but not a victim of trafficking, must be provided with assistance and support from the appropriate government departments.”*

#### **CHAPTER 5: STATUS OF FOREIGN VICTIMS OF TRAFFICKING**

We are concerned that Section 19 places the onus on the victim of trafficking to prove that s/he may be harmed, killed or trafficked again if returned to their country of origin or the country from where they have trafficked. On a purely practical level, placing the onus on the victim to prove this would require that they have access to resources and information which would not be readily accessible to private individuals. We are of the view that the Department of Home Affairs would be in a better position in respect of access to resources as well as having access to sources of information and intelligence which would not be accessible to persons outside of the State institutions. We believe that requiring victims to prove that they may be harmed on return to their countries amounts to an unfairly onerous burden. We believe that the assessment of harm or danger should be done on an objective basis by the Department of Home Affairs in a manner similar to that which is used in making

determinations in respect of refugees and asylum seekers. We therefore recommend that the following sections be inserted:

*19(1) A victim of trafficking is entitled to apply for a permanent residence permit in terms of section 27 of the Immigration Act, after five years' continuous residence in the Republic from the date on which a visitor's permit referred to in section 18 was issued to him or her, upon proof to the satisfaction of the Director-General: Home Affairs that he or she may be harmed, killed or trafficked again if he or she is returned to his or her country of origin or the country from where he or she has been trafficked.*

*19(2) Upon receipt of an application for permanent residence by a foreigner who has been certified in terms of section 13(7) as a victim of trafficking, the Director General of Home Affairs*

- a) may request any information or clarification he or she deems necessary from an applicant;*
- b) may consult with and invite any other person to furnish relevant information on specified matters.*

*19(3) The Director General of Home Affairs in making his/her decision must have due regard to the provisions of the Promotion of Administrative Justice Act (Act No.3 of 2000) and in particular ensure that the Applicant fully understands the procedures, his/her rights and responsibilities and the evidence presented.*

- a) The Director General of Home Affairs must at the conclusion of the hearing
  - i. grant permanent residence; or*
  - ii. reject the application as unfounded,**
- b) If an application is rejected written reasons must be furnished to the applicant within five working days after the date of the rejection*
- c) A record of the proceedings together with the reasons must be submitted to the Intersectoral Committee established in terms of Section 40 within ten working days after the decision.*

## **CHAPTER 7: COMPENSATION**

Section 27 entitles a victim of trafficking to claim compensation from his/her traffickers where the amount of compensation that was awarded by a court in terms of Section 27(1) does not fully cover the damage suffered by the victim. Our concern with this section, and the following sections which set out the manner in which compensation may be claimed, is that it does not take into account the fact that the ordinary civil damages procedures in the Magistrates Court and High Court would necessitate the disclosure of certain personal information on the part of the victim in his/her capacity as the plaintiff in the matter, which could allow the traffickers to establish the victim's whereabouts. For example Section 27(3)(b) allows the court to vary the conditions for the payment of compensation. In the Magistrates Court such an application must be brought in the district in which the defendant/respondent, in this case, the trafficking victim, lives, resides or carries on business. Section 27(4)(d) sets out the procedures which the victim of trafficking must follow to get compensation where the trafficker has not complied with the order. This basically requires the victim to ascertain the whereabouts of the trafficker and to instruct the Sheriff of the Court to execute the order in the normal course.

While we support the need for a system to compensate victims of trafficking and allows them to hold their traffickers accountable, we caution against a system which does not have built in measures to protect victims of trafficking from retribution by their traffickers by allowing compensation claims to be filed in a manner which protects their identity and whereabouts. The compensation of victims of trafficking might be more manageable through a more general victim of crime compensation fund, which could be funded from the proceeds of crime. The South African Law Reform Commission has issued a discussion paper in this regard, but the report with recommendations has not been released.

## CHAPTER 8: DEPORTATION AND REPATRIATION OF VICTIMS OF TRAFFICKING

Section 30(3) allows the voluntary repatriation of adult victims of trafficking to their countries of origin or to the country from where they have been trafficked. Given the concerns around the abuse of voluntary repatriation procedures in respect of asylum seekers by immigration officials we recommend that additional safeguards be put in place in order to prevent similar abuses in respect of victims of trafficking. We therefore recommend that the following definition of voluntary repatriation be inserted into the Bill:

*“Voluntary repatriation” means consent to repatriation given freely and voluntarily without any inducement and may only be given if the person giving it*

- a) has been given a clear explanation and adequate description of the procedures to be followed in respect of repatriation;*
- b) the consequences and risks involved in repatriation including but not limited to;
  - i. the risk that they may be harmed, killed or trafficked again; and*
  - ii. the risk of prosecution in their country of origin**
- c) has been given advice on the legal, social and other protections offered to victims of trafficking in terms of this Act;*
- d) has been informed that the consent for voluntary repatriation may be withdrawn any time before repatriation has taken place; and*
- e) has understood and signed the prescribed consent form.*

We also note that Section 30(3) purports to allow the voluntary repatriation of adult victims of trafficking to the country from where they have been trafficked. We wish to point out that trafficking victims are often trafficked through various countries en route to their final destination. Care should be taken to ensure that victims are only repatriated to countries where they have a legitimate right of residence. We therefore recommend that the section be redrafted as follows:

*30(3) This section does not prohibit the voluntary 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 and where he or she has a legitimate right of residence.*

## **CHAPTER 9: GENERAL PROVISIONS**

It is our submission that Section 36: National Instructions and Directives should be shortened and simplified. In its current form the Bill requires officials from a number of departments and agencies to issue national instructions relating to how cases of trafficking should be identified and dealt with. These are the SAPS, the Director General of Home Affairs, the Director-General Labour and the National Director Public Prosecutions. It is our submission that while there are clearly agency or department-specific issues that could be dealt with by specific agencies, cross cutting issues, such as: ‘the manner in which victims of trafficking must be identified, interviewed and treated’ (see for examples 36(1)(d)) should be formulated by the Intersectoral Committee. The Committee should be tasked with developing a set of national instructions for all government departments and institutions in respect of key areas which should be dealt with on a common basis by all departments. We believe that this approach will ensure coherence and facilitate the interaction of various departments at the various stages of implementation of the Act. We recommend that the section be redrafted as follows:

*36(1) The Intersectoral Committee established in terms of section 40 must issue directives regarding the following matters with which all government officials must comply in the execution of their functions:*

- a) the manner in which the reporting of cases related to trafficking are dealt with*
- b) the manner in which victims of trafficking must be identified, interviewed and treated, with 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 official languages of the Republic;*
- d) the referral of victims of trafficking to social, health care and psychological services*

- e) *the collection and analysis of information on reported cases of trafficking in persons, including information relating to—*
- i. *the countries from which victims are being trafficked to the Republic;*
  - ii. *the countries to which South African citizens and other residents are being trafficked;*
  - iii. *the nationality of victims transiting the Republic 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 their age, gender, nationality and sex;*
  - vi. *the routes used by traffickers to enter and exit the Republic;*
  - 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 the Republic and how those documents were obtained; and*
  - ix. *the link between trafficking operations and those involved in other forms of organised crime.*

*36(2) The National Commissioner of the South African Police Service, after consultation with the Directors General Justice and Constitutional Development and Home Affairs, and the National Director of Public Prosecutions, must issue national instructions as provided for in section 25 of the South African Police Service Act, 1995 (Act No. 68 of 1995), regarding the following matters with which all police officials must comply in the execution of their functions in terms of this Act:*

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

- c) *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;*
- d) *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;*
- e) *measures to be taken in order to ensure the detection of trafficking in persons at South African ports of entry and borders;*
- f) *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 27;*

*36(3) The Director-General: Home Affairs must, issue directives regarding the following matters with which all immigration officers must comply in the execution of their functions in terms of this Act :*

- a) *the collection and analysis of information on victims of trafficking who have been repatriated to the Republic in terms of section 32 relating to—*
  - i. *the number of victims who have been repatriated to the Republic and the countries to which they have been trafficked;*
  - ii. *the profiles of the victims, including the age, gender and sex of the victims;*
  - iii. *the purposes for which the victims were trafficked;*
  - iv. *the routes used by traffickers to exit the Republic 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 the Republic and to enter the countries to which the victims were trafficked and how these documents were obtained.*

*36(4)(a) The Minister of Home Affairs must—*

- i. *submit all directives provided for in subsection (3) to Parliament 30 days before they are issued; and*
  - ii. *after the expiry of the 30-day period, publish them in the Gazette.*
- b) *The Director-General: Home Affairs must provide an annual report on the information referred to in subsection (3)(f) or any other relevant information to the Intersectoral Committee established by section 40, as determined by the Intersectoral Committee.*

*36(5) The National Director of Public Prosecutions must, after consultation with the National Commission of the South African Police Service and the Director General Justice and Constitutional Development issue directives regarding all matters which are 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;*
- 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, if the court does not make an order on its own accord in terms of subsection (2)(a) of that section or if 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, 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;*
- 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;*
- 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 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 need to inform victims of trafficking about their right to and the process to claim compensation in terms of section 27;*
- h) 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 27;*
- i) the collection and analysis 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 27; and*
  - iii. the number of cases where the courts did not provide compensation orders in terms of section 27 and the reasons for doing so.*

*36(6)(a) The Minister must—*

- i. *submit any directives provided for in subsection (7) to Parliament 30 days before they are issued; and*
- ii. *after the expiry of the 30-day period, publish them in the Gazette.*

*(b)The National Director of Public Prosecutions must provide an annual report on the information referred to in subsection (7)(i) or any other relevant information determined by the Intersectoral Committee established by section 40 as determined by the Intersectoral Committee.*

*36(7) The Intersectoral Committee established by section 40 must develop training courses in consultation with The National Commissioner of the South African Police Service, the National Director of Public Prosecutions and the Directors-General: Home Affairs, Labour and Social Development for each of these Departments, which must—*

- a) include training on the national instructions or directives, as the case may be, referred to in this section; and*
- b) provide for and promote the use of uniform norms, standards and procedures, to ensure that all police officials, prosecutors and other functionaries are able to deal with matters relating to trafficking in persons in an appropriate, efficient and sensitive manner.*

*36(8) The national instructions or directives referred to in this section must provide that adequate disciplinary steps are taken against any police official, prosecutor or other functionary who fails to comply with any duty imposed on him or her in terms of this Act or the national instructions or directives issued in terms of this Act.*

*36(9) Any national instruction or directive issued under this section may be amended or withdrawn in like manner.*

## **CHAPTER 10: ADMINISTRATION OF THE ACT**

Regulation 43(2)(a) tasks the Minister of Social Development with, inter alia, making regulations regarding the form of written consent referred to in Section 13(1)(b) as well as the assessment of a person to determine whether he or she is a victim of trafficking. In our view these two particular issues fall outside of the area of

competence of the Ministry of Social Development and should in fact be dealt with by the ministries within the justice cluster, i.e. Justice and Constitutional Development, the National Prosecuting Authority and the South African Police Services together with Home Affairs.

#### Responsibilities and functions of the Intersectoral Committee

Section 41 sets out the functions of the Intersectoral Committee. One of these functions is the establishment of an integrated information system. We are firmly of the view that such an integrated information system is essential to the state being able to monitor the nature and extent of human trafficking over time, and welcome this provision. Such an information system would provide data that can be used to enhance our response to the problem. However, we note that the Bill makes no provision for the establishment of a secretariat or similar body to enable the functioning of the information system, nor does it make clear whether one of the Departments or agencies represented on the Committee should take responsibility for the maintenance of the information system. In addition, the Intersectoral Committee is only required to meet twice a year, this is insufficient if the Committee is going to be the structure responsible for overseeing and maintaining the tool.

The usefulness of the information system lies not in the collection of the data, but the analysis thereof. It is therefore our view that:

- (i) The Department of Justice and Constitutional Development, or the National Prosecuting Authority, should be responsible for the collection and capture of all data from all relevant departments as set out in sections 26 and 36.
- (ii) The Department of Justice and Constitution Development, or National Prosecuting Authority, should be responsible for the day-to-day maintenance and management of the information system.
- (iii) The Department of Justice and Constitution Development, or National Prosecuting Authority, should be responsible for the analysis of the data gathered and should report the results of the analysis to the Intersectoral Committee at bi-annual meetings.

(iv) The data (cleaned of all data that would make it possible to identify specific victims or perpetrators) must be made available to the public on an annual basis. This would allow research organisations to use the data to inform trend analysis and characteristics of trafficking in South Africa and thus support efforts of government to deal with the problem.

## **CONCLUSION**

The Prevention and Combating of Trafficking in Persons Bill is important. It will give effect to South Africa's international commitments to counter and prevent human trafficking. It also will provide the basis for the prosecution of offenders and protection of victims of trafficking. While human trafficking may take several different forms, it is imperative that we are very clear about what it is that we wish to counter through administration of this new law. In its current form the Bill does not provide clarity about what exactly it is that we wish to counter. This is primarily a function of the poorly drafted definition of human trafficking.

There can be no doubt that South African law should entrench human rights, and should seek to provide the legal basis on which to act against abuses of rights such as labour exploitation, forced marriage, and sexual abuse. All of which may be the end result of a process of trafficking. However, trafficking itself is a process, and it is the process (as well as the end result), which this law should seek to criminalise. The current definition of trafficking casts the net too wide and would allow for an untenable position in which the law could be used to prosecute labour exploitation, as well as those involved in voluntary sex work. We believe that this is not the place, nor the intention of this law.

It is unavoidable that implementation of the law will involve a large number of government departments and agencies. It is therefore vital that adequate provision is made for co-operation between departments and that the Bill is clear and presents the roles of the various government structures clearly and unambiguously. This submission presents some proposals for how this may be done.

Provision for the establishment of an Integrated Information System is a welcome addition to the Bill. At the same time the Bill recognises that the non-governmental sector has an important role to play in the collection of data and the provision of assistance to victims. Yet, there is no mechanism provided in the Bill for the sharing of information collected with NGOs. This is a shortcoming. NGOs, like government agencies, need information to inform their interventions and ensure they are of the best quality. In addition, policy research organisations, like the Institute for Security Studies, and others, have an important role to play in providing contextual analysis of data to inform policy making. It is equally important that the state observes its ethical responsibility to ensure that the identities of victims and perpetrators are protected. Thus, we propose the release of information on an annual basis that excludes such information.

The ISS and WLCE are grateful for the opportunity to present this submission to the Portfolio Committee on Justice and Constitutional Development. We would like to continue supporting the work of the Committee in relation to this Bill and offer our assistance in that regard.