



WRITTEN COMMENTS

SOUTH AFRICAN LAW REFORM COMMISSION

*TRAFFICKING IN PERSONS,
ISSUE PAPER 25, PROJECT 131*

INTRODUCTION

The South African Human Rights Commission (SAHRC) welcomes the initiatives by the South African Law Reform Commission to address the issue of trafficking in persons. It is of concern that we presently do not have any legislation that adequately addresses this phenomenon. The Commission accordingly urges that the necessary steps are taken to ensure that comprehensive legislation is drafted and processed in Parliament speedily.

In commenting on the Issue Paper, the Commission will draw on its experiences and work in a number of areas. Some of these areas include: the commissions work in the area of child rights. In particular, the Commission conducted an Inquiry into Sexual Abuse against children in the Gauteng area. The Commission has also looked at the issues of child labour and exploitation during the Inquiry into Human Rights Violations in Farming Communities. Finally, the Commission has worked extensively in the areas of xenophobia and refugee rights, raising many concerns over the years over conditions at the Lindela Repatriation Centre.

THE MANDATE OF THE SAHRC

The South African Human Rights Commission is one the institutions created in terms of Chapter 9 of the Constitution to support democracy in South Africa. The SAHRC is mandated by section 184 of the Constitution to:

- (a) Promote respect for human rights and a culture of human rights;
- (b) Promote the protection, development and attainment of human rights; and
- (c) Monitor and assess the observance of human rights in the Republic.

Please find below replies to the questions that have been posed in the Issue Paper.

CHAPTER 3 SUBSTANTIVE LAW

DEFINING TRAFFICKING IN PERSONS

Questions

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

The definition as set out in the Palermo Protocol is sufficiently broad to encompass the act of trafficking in persons at an international as well as at a domestic level.

Two suggestions are however put forward. These are:

- A specific sub clause should be added to any legislation that is drafted indicating that it is of domestic application. In other words, the legislation must not state that the crime of trafficking is transnational in nature. This is necessary in order that there is no confusion whether the law is applicable domestically. Also, when interpreting the definition it must be clear that it is applicable domestically as well.
- Any legislation that is drafted must not limit the application of the crime to people who are members of organized crime groups. It is quite possible, especially in the domestic context that individuals can also commit this crime. Furthermore, additional evidentiary burdens, that may prove cumbersome, will be placed on the State when prosecuting the crime of trafficking if they must prove that it is an organized crime group that is the perpetrator.

2. Should certain forms of trafficking in persons be categorised as ‘severe forms of trafficking in persons’¹ If yes, what would constitute severe forms of trafficking in persons? Should higher

¹ In the USA, in terms of Public Law 106-386, October 28, 2000 (Victims of Trafficking and Violence Protection Act of 2000), severe forms of trafficking in persons means –

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

sentences be imposed on those who are found guilty of a severe form of trafficking in persons? If yes, what would be an appropriate sentence?

It is very difficult to identify severe forms of trafficking, as each case must be dealt with individually. The severity of the form of trafficking should be dealt with through appropriate sentencing. It is suggested that legislation should include a section that provides for “factors to be considered by the court when determining an appropriate sentence”. These factors could include:

- The number of victims
- The ages of the victims
- The length of time for which victims were held
- The conditions under which victims were held
- The nature of any physical or mental abuse that victims may have suffered and its impact
- Whether the perpetrator is a members of an organized criminal group
- Whether there was any profiteering out of the trafficking
- The nature of the exploitation that the victims were subjected to
- Whether the victims are members of a vulnerable group e.g. women and children
- Any other relevant factors

CONSENT TO EXPLOITATION

Question

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

Where the victim of trafficking is a child, consent should always be irrelevant. A child cannot consent to exploitation.

The definition contained in the Palermo Protocol provides for sufficiently broad circumstances in which a court would deem the consent of a victim to be irrelevant.

CRIMINALISATION OF CERTAIN ACTS AND SENTENCING

Questions

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

Minimum sentences should not be contained in the proposed legislation. The severity of the crime and the impact on the victim can only be determined on a case-by-case basis. It is therefore important that this sentencing jurisdiction is left in the hands of the court to exercise.

The criminal provisions in the legislation should make it clear that trafficking is a serious offence.

Amendments to the Criminal Procedure Act in terms whereof the crime is determined to be a Schedule 5 offence (thus making it more onerous for an accused to obtain bail) would also send a clear message to would be perpetrators that trafficking is considered a serious offence by the State.

Finally, legislating that this crime can only be prosecuted at the regional or high court level would provide an indication as to the seriousness of the offence.

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

Yes. This example of trafficking by deception for employment opportunities, knowing that the person will be exploited, is one that occurs at a domestic level. Examples of these are young women who are lured from poor rural areas to be domestic workers in cities and farmworkers that are lured to different provinces and then exploited. Where all the elements of trafficking are present then this should definitely fall within the scope of trafficking (i.e. where exploitation falls within the definition of forced labour within the trafficking definition).

6. Should it be a criminal offence to intentionally destroy, confiscate or possess any passport, immigration document or other identification document belonging to a victim of trafficking?² If yes, what would be an appropriate sentence for such an offence?

² Macedonia adopted a new law in 2002 that criminalises trafficking in persons and actions associated with trafficking such as the destruction of identification documents. See in this regard USA Department of State **Trafficking in Persons Report 2002**, p. 72.

Such actions should clearly be made a criminal offence. It needs to be further considered whether such an offence should be included in trafficking legislation or whether this is an issue for the Department of Home Affairs to investigate whether current legislation deals with the matter satisfactorily.

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

The Sexual Offences Bill as it currently stands repeals section 20(1)(aA). If the Bill is passed as it currently stands, the question posed becomes moot.

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

This could be an additional consideration that the court takes into account at the sentencing stage when determining the seriousness of the offence. See reply to question 2 above.

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

This could be an additional consideration that the court takes into account at the sentencing stage when determining the seriousness of the offence. See reply to question 2 above.

DENIAL OF ENTRY TO SOUTH AFRICA

Question

10. With reference to article 11(5) of the Palermo Protocol, should persons found guilty of the crime of trafficking in persons or associated offences, whether convicted in South Africa or any other country, be denied entry to South Africa or have their visas revoked? If yes, should the convicted person's family members be denied entry to South Africa if they have benefited from the unlawful activity

for which that person was convicted and knew or reasonably should have known that the benefit was the product of such unlawful activity? If yes, should such a provision also apply to the children (who were under the age of 18 years when the benefit was received) of the convicted person? Please motivate your answer.

The Immigration Act deals with the denial of entry of persons into the country.

A distinction must be made between those persons who have been convicted of criminal offences in a court of law and those who have not. In the latter case, the presumption of innocence must be applied and persons cannot be denied entry. A further practical problem with the question poses is how would immigration officials determine if the person has benefited from the unlawful activity.

VICTIM PROTECTION

Questions

11. Should a person who has been trafficked to South Africa be exempted from prosecution for any offences committed as a direct result of being trafficked?³

This ought to be determined on a case-by-case basis and the Director of Public Prosecutions should be authorized to exercise a discretion in this regard.

In those instances where the trafficked victim is willing to testify against the trafficker on order to obtain a conviction then it would be acceptable to consider exempting the person from prosecution.

Where the offence was committed under threat or duress it is highly unlikely that the person had the necessary intention to commit a crime and therefore prosecution in these cases would not be appropriate.

It is possible that the gravity of some crimes would not render it suitable to exempt the trafficked person from prosecution.

12. What measures can be taken to reduce the trafficking of persons to South Africa?

This discussion needs to be broadened to include a discussion on what measures can be taken to reduce domestic trafficking.

³ The Commission in its investigation into sexual offences has recommended that child prostitutes should be seen as victims and not as perpetrators. See in this regard South African Law Reform Commission **Discussion Paper 85: Sexual Offences, the Substantive Law** (Project 107) August 1999, par. 3.7.10.2.

There needs to be public education and awareness raising on what constitutes trafficking. It needs to be communicated that trafficking is a serious criminal offence.

Question

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

- Public awareness programs
- Training of relevant state officials who may come into contact with potential victims e.g. police, border officials, immigration officials and labour officials
- Creation of an intersectoral structure within the legislation to address the issue of trafficking.
- Creation of a toll free hotline to report trafficking.

THE TRAFFICKING NETWORK

Question

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

Again, the distinction should be reflected in the sentence that is handed down. This issue needs to be handled on a case-by-case basis. A broad generalization cannot be made as to which actors within the trafficking chain are more responsible for the continuation and perpetuation of the crime.

TRAFFICKING VERSUS EXPLOITATION

Questions

15. *How should legislation on trafficking in persons address instances where traffickers also subject their victims to exploitation in the process of trafficking them?*

16. The definition of trafficking in persons as set out in article 3 of the Palermo Protocol states that ‘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'. Should the latter forms of exploitation be defined? If yes, how?

These forms of exploitation should be defined with reference to the many internationally accepted definitions that already exist.

17. Are there any other forms of exploitation, which in your view should be defined? If yes, how?

SOUTH AFRICAN SUPPORT SYSTEM FOR VICTIMS OF TRAFFICKING

General Comment

This section of the Issue Paper fails to deal with a support system for victims of internal trafficking. Whilst it is recognized that victims from other countries may have some needs that are different to those of South African victims who are trafficked internally, it must be ensured that all victims receive the necessary support and services. More information is therefore needed on the types of needs and services that victims of internal trafficking require in order that the legislation can adequately provide for these victims.

The Issue Paper, by failing to deal with internal victims of trafficking creates the impression that any future legislation will not deal adequately with this area of trafficking, despite the stated objective of the Issue Paper that it seeks to do so. The Issue Paper as it currently stands creates the impression that future legislation will deal with trafficking as a transnational phenomenon.

Questions

18. What services should be provided to persons who have been trafficked to South Africa? What Department(s) or institution(s) should be responsible for the provision of such services? Please motivate your answer.

A multi sectoral approach is needed to attend to all of the services that victims of trafficking will need. The following departments and services can be identified:

Social Services

Victims will need a place to stay (shelter), food, and counseling services.

Health Services

Victims may need access to health services.

Safety & Security

In some instances, victims will need protection from their traffickers and may have to be provided with protection services and/or witness protection.

Home Affairs

Victims may need to obtain identity documents when they are victims of internal trafficking. Alternatively when they are victims who have been trafficked outside of South Africa they would require assistance in obtaining travel and identity documents.

Foreign Affairs

Victims who are to be returned to their countries of origin will need the assistance of the foreign affairs services and their countries consular services in South Africa.

Transport

Victims need to be transported back to their homes.

Most of the services listed above will also be needed for victims of domestic trafficking.

19. What services should be provided to South African citizens or persons holding permanent residency in South Africa who have been trafficked to other parts of the world (including those still abroad)? What Department(s) or institution(s) should be responsible for the provision of such services? Please motivate your answer.

20. How can interaction and co-operation between the government and non-governmental organizations be fostered in order to ensure effective provision of services to victims of trafficking?

The legislation ought to provide for the establishment of an intersectoral committee to coordinate the implementation of the legislation. Representatives of NGO's should be members of this Committee.

A government department such as the Department of Social Services should take the lead in establishing a database of service providers and facilitate the provision of services that are available within the NGO sector.

21. What can be done to overcome the problem of language with regard to persons trafficked to South Africa?

This can also be a problem internally in South Africa where persons are trafficked from one province to another. However, it is recognized that it is far easier to resolve the matter when it happens at a domestic level.

Providing in the legislation that interpreters be made available to persons who are trafficked from foreign countries to South Africa is difficult due to the practical obstacles that it may present. Any provision would therefore have to be couched in terms such as “..where possible...”. Despite these practical obstacles, there ought to be a positive obligation placed on the State to take measures to provide for interpretation services for victims. It will thereby become one of the issues that the implementers of the legislation will have to deal with at a practical level to ensure the successful implementation of the legislation.

The Department of Foreign Affairs should be consulted on the matter and requested to assist. There also needs to be liaison between SAPS, Justice and Foreign Affairs where a victim is arrested or presents at a police station for assistance. The Department of Foreign Affairs can assist in dealing with the matter through its formal contacts with consular officials of foreign countries in South Africa and through their diplomatic ties.

It is noted that the Palermo Protocol places a positive obligation on South Africa to ensure that its domestic and administrative systems contain measures that provide victims of trafficking with information on relevant court proceedings and administrative proceedings and assistance to enable their views and concerns to be presented and considered at criminal proceedings against offenders. By implication, it can be read in to this provision that in order for this clause to be implemented, interpretation services would have to be provided for victims. (See Article 6.2. of the Palermo Protocol)

Article 6.3(a) of the Palermo Protocol makes specific provision that State Parties shall consider implementing measures, including counseling and information in a language that the victim can understand. In order to comply with the Protocol it can therefore be argued that the State must demonstrate that it has taken positive steps towards ensuring interpretation services for victims of trafficking.

22. Should guidelines be drawn up for the police on how to deal with unaccompanied children who have no documents allowing them to be in South Africa? If yes, what should be the content of these guidelines?

This issue does not only pertain to trafficking of persons.

It is a matter for the Department of Home Affairs and the police to take responsibility to deal with.

Legislation is not necessarily the appropriate place for such guidelines. Rather, provision can be made that this will be one of the tasks of the intersectoral committee.

23. Should an international social services unit be established within the Department of Social Development? With regard to victims of trafficking, what should be the functions of this unit?

The establishment of an International social services unit once again creates the impression that trafficking is only being recognized as a transnational phenomenon and that only victims who are trafficked transnationally will receive assistance from the State. In order to move away from this impression, it is proposed that a social services unit for victims of trafficking be established within the Department of Social Services. Within that unit, provision can be made to provide for those aspects of services that are different for victims who come from other countries. The unit should provide a holistic service with various components linking it to other relevant government departments and service providers. Within this comprehensive service there should be also be specific services for foreign victims e.g. interpreters, links to foreign affairs etc... .

24. Should persons who assist victims of trafficking, especially children, who are illegal in South Africa, be exempted from prosecution in certain circumstances? If yes, in what circumstances?

Section 42 of the Immigration Act states specifically that persons who provide humanitarian assistance will not be considered guilty of aiding and abetting an illegal foreigner to be in the country. This clause of the legislation was specifically argued for during the drafting process in order to ensure that persons, even though they be illegally in the country, cannot be denied access to emergency medical treatment for example.

It is not clear at this stage, how far a court will go in interpreting humanitarian assistance.

25. *Child care facilities have been known to refuse admission to children who have been involved in commercial sex work because they may be uncontrollable and may have a bad influence on the other children.⁴ Should children who have been trafficked for purposes of sexual exploitation, especially those who were voluntary involved in commercial sex work before being trafficked, be placed in residential care facilities with other children in care? Please motivate your answer. If no, how should these children be reintegrated with other children in care in instances where family reunification is not possible?*

26. *How can the process of providing victims of trafficking with temporary resident permits be facilitated?*

⁴ ECPAT International **The Psychosocial Rehabilitation of Children who have been Commercially Sexually Exploited** compiled by Cotterill C and Delaney Stephanie 2001, p 20.

27. Reintegration of child victims of trafficking, especially those who have been trafficked by their families, will not be successful unless their families are equipped to receive them back. How can the family be empowered to receive and parent the child?

REGISTER FOR VICTIMS OF TRAFFICKING

Questions

28. Should provision be made for the reporting of cases of trafficking in persons? If yes, should reporting be mandatory or voluntary? Please motivate your answer. Should the current Child Protection Register be used to record cases of trafficking in children? Please motivate your answer.

29. Should a register for victims of trafficking be established? If yes, what should be the purpose of such register? Which Department or institution should be responsible for the administration of such register? Who should have access to such register?

International experience demonstrates that trafficking in persons is a difficult crime to combat. Victims are placed in a severely disempowered situation being removed from their communities, unable to speak to the local language, being threatened etc.... . Combined with this, many traffickers are often linked to organized crime groups that are also engaged in the drug, arms and sex trade. This combination places victims in an extremely dangerous situation should they come forward and report to the authorities.

The situation clearly calls for a creative approach by law enforcement authorities to detect this crime form. The drafters of the legislation should therefore consider possible mandatory reporting of the crime especially where victims are children. Given that there is currently little public awareness of this crime, it may become difficult to enforce these provisions. Clearly, law enforcement officials should not rely on mandatory reporting requirements as a primary tool for being informed of this crime form.

Should mandatory reporting provisions be included in the legislation, it is essential that they are backed up with a broad program of education and awareness around trafficking.

It is unclear from the Issue Paper whether the Register described therein is for the purpose of recording information about victims, information about incidences

of trafficking or the names of convicted traffickers. This point needs to be clarified.

Registers commonly refer to the recording of convicted perpetrators; for example, the Sex Offenders Register which Parliament is currently considering for inclusion in the Criminal Law (Sexual Offences) Amendment Bill.

The SAHRC did not support the inclusion of such a Register in the Bill for a number of reasons.

A summary of the SAHRC position is as follows:

“Some of the concerns for inclusion of a register:

- ❑ *Only convicted offenders names would appear, this gives a false sense of security*
- ❑ *Person will be punished twice*
- ❑ *Victim’s ID would become known*
- ❑ *Could lead to vigilantism*

On the other hand it is attractive as:

- ❑ *Some of the view that it does not cost much- actually it does if it is to be effective*
- ❑ *It is really feel good legislation.*

The SAHRC supports the removal of the register as suggested by the project committee. There are registers already in place that deal more broadly with child abuse issues in the country and have not terribly effective.” SAHRC Submission on the Sexual Offences Bill

In line with the above arguments, the SAHRC would not be in support of a Traffickers register. As trafficking is yet to be criminalized in South Africa, it would take many years before there are substantial conviction rates and the register becomes of much use. It would therefore create a false sense of security for people who may wish to check, for example, if a prospective employer is a convicted trafficker.

Given the lack of information on trafficking, there is a clear need for trafficking to be effectively monitored and for information on traffickers and victims to be recorded in order that this information can be used to evaluate whether strategies employed to combat trafficking are working; and also, to identify trafficking “hot spots”.

All information on trafficking should be collated centrally. It would therefore not be supported that trafficking in children is separated out and that this information is kept separately.

PREVENTION OF TRAFFICKING IN PERSONS

Questions

30. With reference to article 9 of the Palermo Protocol, what policies, programmes or other measures should be established in order to educate potential victims of trafficking about the risks of becoming a victim, and to prevent trafficking in persons? What should be the content of such policies, programmes or other measures? Which Department(s) or institution(s) should be responsible for establishing such policies, programmes or other measures?

31. Given the fact that persons are also being trafficked from rural areas where little, if any, use is being made of television or radio, what is the most effective method to reach these persons through information campaigns?

32. What measures can be taken to ensure that victims of trafficking in South Africa are provided with information on, inter alia, their rights, measures in place to ensure their safety, and how to contact appropriate law enforcement authorities?

CHAPTER 4 PROCESS AND PROCEDURE

THE POLICE INVESTIGATION

Questions

33. Should guidelines be established for the police regarding the manner of identification and interviewing of victims of trafficking? If yes, what should be the content of these guidelines?

The legislation is not the appropriate place for setting out guidelines in this regard. This task could be listed in the legislation as one of the measures that needs to be taken to combat trafficking. The question is however an important one as a basis must be laid for the need for such guidelines in order that a provision, such as the one that has been suggested, can be included in the legislation. Therefore the question ought to be, is there a need for guidelines?

There are a number of reasons for why the police should consider drafting guidelines to assist their members in dealing with this crime. These include:

- The disempowerment of victims through threats, coercion, deception and use of violence
- The link to organized crime of many traffickers
- The targeting of vulnerable groups such as women and children

- The inability of victims to speak the domestic or regional language
- The lack of knowledge by victims to know where to go for help
- The crime form can involve many areas of policing e.g. child abuse, forced labor, assault, border control, organized crime, drug trafficking etc... It may thus be useful to police members to have guidelines to assist them when they deal with a trafficking case.

34. Given the nature of the crime of trafficking in persons and the fact that different sectors within the police deal with cases of trafficking in persons, should special police units be established to deal with cases of trafficking in persons?⁵ Please motivate your answer. If yes, what should be the duties of these units? If no, how can the current police service be improved to deal with the crime of trafficking in persons effectively and to ensure the protection of victims during the police investigation?

Given the fact, that the extent of trafficking is not currently known in South Africa, it would be extremely difficult to determine the number of units that are needed and where they should be based geographically. It would also be difficult to persuade parliament that additional resources must be allocated to a crime form for which there is little indication as to its prevalence.

Given the challenges that face the police it could certainly be recommended that internally there are persons designated to specialize in this area who can provide guidance, assistance and expertise to local police when they encounter the crime form. Alternatively, there is a need for some type of structure dedicated to trafficking that can coordinate the various responses internally within the SAPS.

It is a debatable issue however as to whether these members should be a separate unit. It would be preferable for the policing of trafficking to be integrated into the daily policing activities of all police.

35. *Should guidelines be drawn up for the police regarding the manner of ensuring that the authenticity of a data message to be used as evidence in criminal proceedings against traffickers is preserved? Please motivate your answer. If yes, what should be the content of these guidelines?*

BORDER CONTROL

Questions

36. *How can border control be strengthened in order to prevent and detect trafficking in persons effectively?*

⁵ In Britain, the police have dedicated contact officers in national and international law enforcement agencies who deal specifically with trafficking in persons cases. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 107.

37. What measures could be put in place to detect whether children traveling unattended are victims of trafficking?

The Department of Home Affairs should also be encouraged to review its legislation and analyze whether there are sufficient protections available for unaccompanied minors who travel into South Africa to protect them from falling prey to traffickers.

In the Philippines for example there is legislation, known as the Special Protection of Children against Child Abuse, Exploitation and Discrimination Act that provides that any child traveling outside of the country without his or her parents must obtain a Travel Clearance document from the Department of Social Welfare and Development.

In the United Kingdom, there has been a private members bill introduced into Parliament called the Children (Safeguards for Unaccompanied Travel) Bill. The purpose of the legislation is to create a tracking system for children who travel without their parents into the United Kingdom and to ensure that social services and education services are provided to the children. It is not clear whether this Bill has been passed into legislation.

The 2 examples given above demonstrate that there are a number of ways in which the matter can be addressed.

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

Corruption within the Department of Home Affairs has been discussed in the media. From these reports, it appears to be a widespread problem within the Department and one that is not confined to the issue of trafficking. Corruption needs to be dealt with systematically within the department as a whole. For the purposes of the present discussion it needs to be pointed out that it is not only border officials who may facilitate trafficking through corruption but also, other Home Affairs officials, such as, those who may assist in providing false documentation to, those who are involved in the repatriation of illegal foreigners to their countries of origin. Trafficking legislation is not the appropriate place to deal with this broader issue as it is interlinked with many other forms of corruption. Trafficking legislation should provide a link to the initiatives within Home Affairs to combat corruption amongst its officials. Awareness ought to be raised around trafficking and the links to corruption. In this awareness raising, further detailed measures specifically related to trafficking could be developed. In sum, provision needs to be made within the legislation for liaison between the implementing body of the trafficking legislation and the Department of Home

Affairs to address trafficking and corruption with a view to creating a more comprehensive plan to address the issue.

39. What measures can be taken in order to ensure that traffickers do not abuse the asylum process?

The Issue Paper refers to 2 examples of abuse provided by Director Dirk Gous, Border Police, SAPS. The first is where traffickers present a person brought into the country illegally and get them to apply for asylum where after they disappear. The second is where persons who enter the country illegally contact an attorney to assist them with applying for asylum. There is a suspicion that some of these attorneys may be working with the criminal syndicates.

In terms of legislation, the acts above could be criminalized with appropriate penalties that will deter potential traffickers from committing such crimes.

Again, education and awareness is needed amongst officials in order that they are alert to the possibility that a person presenting for asylum status is a trafficking victim.

CO-OPERATION AMONGST STATES IN MATTERS RELATING TO TRAFFICKING IN PERSONS

Questions

40. *Given the trans-national nature of the crime of trafficking in persons, should bilateral and/or multilateral agreements relating to the protection of victims of trafficking and the prosecution of traffickers be concluded between South Africa and countries that are not Parties to the Palermo Protocol whose citizens are being trafficked to South Africa and to which South African citizens are being trafficked? If yes, what should be the content of such agreements?*

41. *Are the legal provisions regarding extradition as set out above sufficient to ensure the effective extradition of traffickers for purposes of prosecuting them? If no, how should the problem be addressed?*

IMMIGRATION STATUS OF VICTIMS OF TRAFFICKING

Questions

42. Should temporary resident permits be issued to victims of trafficking?⁶ If yes, should the issuing of such permit be dependent on the victim's willingness to testify against traffickers in criminal proceedings?

43. Should permanent residence permits be provided to victims of trafficking if there is a real risk that the victim may be trafficked again, harmed or killed when returned to his or her country of origin?

44. Should a victim's immediate family be able to join him or her in South Africa for the duration of criminal proceedings against traffickers? Please motivate your answer.

45. Should a victim who has been trafficked to South Africa have a right to apply for refugee status?

The 1951 UN Convention relating to the Status of Refugees as well as the 1967 New York Protocol establishes the right to asylum due to a well founded fear of persecution based on reasons of race, religion, nationality, political opinion or membership of a particular social group. The South African legislation mirrors these requirements for refugee status.

A victim of trafficking may apply in appropriate cases for refugee status in terms of current South African legislation; namely, the Refugee Act 130/1998. However, the requirements of the Act would exclude many victims from applying for refugee status unless they can demonstrate membership of one of the 5 groups.

International refugee law does not currently recognize fear of persecution on the basis of gender as a ground for applying for refugee status. Many victims of trafficking are women who are trafficked for purposes of sexual exploitation. There is currently a debate internationally around this issue. It could be argued in certain cases that the victim is a member of a social group.

For a further in depth discussion on this issue see *"New Issues in Refugee Research, Working Paper 80 The Trafficking of women for sexual exploitation: a gender-based and well founded fear of persecution.," Jena Shearer Demir, March 2003, UNHRC, Evaluation and Policy Analysis Unity.* Available on the www

⁶ In the Czech Republic, the government may provide temporary residence to victims who agree to testify against traffickers. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 43.

Another option to consider, is the development of a new category of visa that can grant the victim status for staying in South Africa until it is determined that she return to her country.

LEGAL REPRESENTATION

Question

- 46. Should victims of trafficking be provided with separate legal representation in criminal proceedings against traffickers, taking into account the role of the prosecutor? If yes, on what grounds should such separate legal representation be provided?**

It is difficult to justify that victims of trafficking receive preferential treatment to victims of other crimes.

THE COURT PROCESS

THE CHILDREN'S COURT PROCESS

Question

- 47. What can be done to address the problems being experienced with placing foreign children, who are in the country illegally, in the childcare system?**

The Issue Paper raises the problem that social services are not currently been extended to illegal foreign children because they do not possess a SA 13-digit ID book. It is ventured that the problem perhaps goes further than this and that many children, particularly unaccompanied minors who are illegally in the country are repatriated and that social services are not provided to them.

This question posed thus raises a broader question, namely what rights contained in the constitution are to be recognized and given effect to in respect of illegal foreigners. In particular, which economic and social rights, such as the right of a child to social services are not subject to the limitations clause?

The recent Constitutional Court case of *Khosa & Others v Minister of Social Development & Others, Mahlaule and others v Minister of Social Development & Others CCT* extends rights of access to social security to permanent residents. The issue of whether the right to social services should be extended to illegal foreigners has not yet been determined by the Constitutional Court.

To the extent that some of the rights contained in section 28 of our Bill of Rights are non-derogable an argument can be made that social services should be extended to children who are illegally in the country. The problem of being unable to do so due to the fact that the child does not have a 13 digit ID Book is a

practical obstacle that would have to be resolved between the relevant government departments.

In sum, this matter must be resolved on a principled human rights basis and not on the inability of a child victim to obtain an identity document in a specified format.

THE CRIMINAL COURT PROCESS

PROBLEMS IN PROSECUTING TRAFFICKERS

OBTAINING OF TESTIMONY OF VICTIMS OF OTHER WITNESSES

OBTAINING OF TESTIMONY FROM VICTIMS OR OTHERS

WITNESSES OUTSIDE SOUTH AFRICA

Questions

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

This question presupposes that there would be a special unit within the police services handling trafficking cases and that prosecutors specializing in trafficking would assist the unit. If this be the case, then the prosecutor who assists the police in their investigation need not be the prosecutor that prosecutes the case in court. The "police prosecutor" would accordingly be exposed to becoming a witness to the same extent that police investigating the case may become a witness. Furthermore, a 'police prosecutor' would drive the prosecution in terms of advising and guiding the police on what evidence is necessary and must be placed before the court to ensure that there is a successful conviction.

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

This is a broader issue that needs to be addressed in a holistic manner at a national level. Victims of trafficking cannot receive preferential treatment in terms of victim protection over victims of other crimes.

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

It is suggested that many of the court methods being used (e.g. intermediaries, television cameras) to protect child victims of sexual abuse be considered for child victims of trafficking.

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

A victim of trafficking will express their views during criminal proceedings if they are called as a witness. In order for them to testify, an interpreter will have to be provided.

For further practical suggestions as to how interpreters can be made available to courts, see the written comments in question 21 above.

52. Should future legislation on trafficking in persons include provisions on the use of audiovisual link in instances where a victim or other witness is outside South Africa and whose testimony is needed in criminal proceedings against traffickers taking place in South Africa? If yes, by what means should such testimony be obtained in instances where the victim does not have access to audiovisual link equipment?

The ordinary rules of procedure and evidence that are applicable in criminal matters should be applied in trafficking trials.

COMPENSATION FOR DAMAGES

Questions

53. Are the legal remedies provided for in section 300 of the Criminal Procedure Act and section 30 of the Prevention of Organised Crime Act adequate to enable victims of trafficking to claim for damage suffered by them?⁷ If not, how should these provisions be amended in order to ensure that victims of trafficking are able to claim for damages suffered by them? What kind of damages should victims of trafficking be able to claim from their perpetrators?

As indicated in the Issue Paper, the Criminal Procedure Act and the Prevention of Organized Crime Act do not provide for claiming the full spectrum of damages that a victim of trafficking may be entitled to. However, the victim is not precluded from claiming damages by way of a civil delictual action against the perpetrator. These damages would include those generally recognized categories of

⁷ In the USA, section 1593 of Public Law 106-386, Oct. 28, 2000 (Victims of Trafficking and Violence Protection Act of 2000) makes it mandatory for a court to order that restitution be paid to a victim of trafficking for any losses suffered.

damages which fall into the general and special damages categories such as pain and suffering, past and future medical expenses, loss of earning etc....

An area that has not been discussed in the Issue Paper is whether provision ought to be made for the State to claim damages against the perpetrator for expenses incurred, alternatively for a fine to be paid by the perpetrator to cover the expenses incurred in caring for and repatriating or transporting the victim to their country of origin, or home, as the case may be.

INFORMATION TO BE PROVIDED TO VICTIMS OF TRAFFICKING

Question

54. With reference to article 6(2)(a) of the Palermo Protocol, what information should victims of trafficking be provided with and which authority should be responsible for providing such information to them?

The implementation of the draft South African Victim's Charter of Rights and the types of information to be provided to victims that are identified therein would ensure compliance with article 6(2)(a) of the Palermo Protocol.

The investigating officer would be the most appropriate person to provide the victim with the relevant information concerning the legal proceedings and information concerning services that are available to victims of trafficking.

JURISDICTIONAL ISSUES IN MATTERS RELATING TO TRAFFICKING IN PERSONS

Questions

55. Should all offences relating to the crime of trafficking in persons be heard in one court? If no, why not? If yes, which court? Please motivate your answer.

Criminal matters that are based on the same set of facts should be heard in one court. Depending on the nature of the charges, the criminal cases should be joined. The forum to be used would be dependent on the charges.

56. *If proceedings relating to the crime of trafficking in persons are instituted in a court, other than the one suggested by you, how and on what grounds should the matter be referred from that court to the court suggested by you?*

57. *Should the court suggested by you be able to refer an issue in a matter before it to another court for hearing if it is of the opinion that justice would be served by such referral? If yes, what can be done to*

ensure that the victim is not subjected to secondary abuse by having to repeat his or her ordeal in the court the issue is being referred to?

SECURITY AND CONTROL OF TRAVEL DOCUMENTS

Question

58. What can be done to improve the detection of forged travel documents at ports of entry?

59. With reference to article 12 of the Palermo Protocol, how can the Department of Home Affairs ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused, readily falsified, unlawfully altered, replicated or issued?

REPATRIATION OF VICTIMS OF TRAFFICKING

Question

60. What measures should be put in place to ensure the safety of victims of trafficking when repatriated to their countries of origin or returned to the place from where they have been trafficked?

61. What measures should be taken in instances where there is no protective system in place in the victim's country of origin?

Victims of trafficking must be informed of their right to apply for refugee status should they have a well grounded fear of persecution if they are repatriated to their country of origin.

The South African authorities in considering the asylum application should take into account whether the country to which the person is being repatriated has services available to the victim that will ensure their safety.

TRAINING OF LAW ENFORCEMENT OFFICIALS

Questions

62. Should provisions on training for law enforcement officials on the issue of trafficking in persons be included in the envisaged legislation on trafficking in persons? If yes, what should be the content of the training programme for the police, immigration officers, social workers and the judiciary respectively?

It would be preferable for a legislative obligation to be placed on the State to ensure that adequate training programs are conducted with the relevant state officials who will potentially come into contact with cases of trafficking.

63. Are there any other categories of persons, which in your view should be provided with training on the issue of trafficking in persons? If yes, who, and what should be the content of such training programmes?

Non-governmental organizations such as those that work with children, women, sex workers and refugees would also benefit from training programs.

EXTRA-TERRITORIL OPERATION OF ENVISAGED LEGISLATION ON TRAFFICKING IN PERSONS

Question

64. *Should extra-territorial operation be given to the envisaged legislation on trafficking in persons to make it possible to prosecute South African citizens as well as temporary or permanent residents in South Africa for the crime of trafficking in persons committed abroad?*

**Prepared by Judith Cohen
Parliamentary Officer
South African Human Rights Commission
jcohen@sahrc.org.za
Tel 021 426 2277**