
**Submission on the Prevention
and Combating of Trafficking in
Persons Bill**

**by Lawyers for Human Rights
and the Consortium for Refugees
and Migrants in South Africa**

[B7 - 2010]

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**To the Portfolio Committee on Justice
and Constitutional Development**

**Joint Submission by Lawyers for Human Rights and the Consortium for
Refugees and Migrants in South Africa on the Prevention and
Combating of Trafficking in Persons Bill**

1. Introduction

Lawyers for Human Rights (LHR) together with the Consortium for Refugees and Migrants in South Africa (CORMSA) welcomes the opportunity to comment on the Prevention and Combating of Trafficking in Persons Bill. Both LHR and CORMSA have been involved in the drafting process on this legislation for a number of years and we are disappointed in the length of time which the legislation is taking to come into force. We recognise the need for counter trafficking legislation as the current legal system is unable to adequately protect victims of trafficking and fully prosecute perpetrators. Our submission focuses primarily on the rights of children and in particular child victims of trafficking.

2. Understanding of the scale of the problem of trafficking in persons in South Africa

The full scale of the phenomenon of trafficking in Southern Africa is unknown however the situation of trafficking in persons in South Africa does not appear to be as serious as it is made out to be by both the media and the state. If we look at the hype around potential threats of trafficking surrounding the 2010 Soccer World Cup one would have expected reports on a scourge of trafficking related offences to have stemmed from this event. In stark contrast not one single case of trafficking in persons was reported to the Department of Justice or the Police services during the whole duration of the World Cup event. We are concerned about whether this speaks to a serious problem about law enforcement's ability to identify and detect cases of trafficking. LHR and CORMSA continue to remain concerned about the recruitment and exploitation of persons and especially children by criminals and traffickers, even if this is occurring on a much smaller scale than envisaged.

3. Submissions

Chapter 1

Re: Definition of "trafficking in persons"

<p>"trafficking" includes the delivery, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, exchange, lease, disposal or receiving of a person, or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic, of a person trafficked or an immediate family member of the person trafficked, by means of— (a) a threat of harm;</p>

(b) the threat or use of force, intimidation or other forms of coercion;
(c) the abuse of vulnerability;
(d) fraud;
(e) deception or false pretences;
(f) debt bondage;
(g) abduction;
(h) kidnapping;
(i) the abuse of power;
(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 advantage,
for the purpose of any form or manner of exploitation, sexual grooming or abuse of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic; and
“UN Protocol to Prevent, Suppress and Punish Trafficking in Persons” means the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000, the English text of which is replicated in Schedule 2.

The definition of trafficking in the Bill is overly complicated. We are concerned about the current definition as it may create uncertainty for law enforcement and prosecution officials. We recommend that the Bill uses a definition which is in line with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. We recommend that the Bill provides a succinct definition of “trafficking in persons” rather than an elaborate description of the phenomenon of trafficking, which is what it is currently attempting to do.

We recommend this definition: *“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.*

Chapter 3

Re: Section 9: Liability of carriers

Liability of carriers

9. (1) A carrier who brings a victim of trafficking into or removes a victim of trafficking from the Republic knowing that the victim of trafficking does not have a passport and, where applicable, a valid visa required for lawful entry into or departure from the Republic, is guilty of an offence and is liable on conviction to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years.

(2) A carrier is not guilty of an offence under subsection (1) if entry of the victims of trafficking into the Republic occurred because of circumstances beyond the control of the carrier.

(3) In addition to any other offence under this section, a carrier is liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim, as provided for in section 28.

There are already carrier sanctions in place to deal with the situation of carriers who transport persons without valid documents (see Sections 34 and 35 Immigration Act No. 13 of 2002). It is not possible for carriers to be able to identify victims of trafficking and their liability should be limited to transporting persons without valid and appropriate documents. LHR suggests a removal of these provisions on the liability of carriers.

Re: Section 11

We recommend that an additional factor which the court should consider on sentencing is any submission from victims:

(i) Any submissions which the victim may want to make for the court to consider in arriving at the decision

Chapter 4

Re: Section 13: Reporting and referral of adult victim of trafficking

(7) If, after an assessment referred to in subsection (5)(b), it is found that the person concerned is a victim of trafficking—
(a) a certificate, as prescribed, must be issued to him or her, certifying him or her to be a victim of trafficking; and
(b) he or she must be informed of the right to apply for a recovery and reflection period in terms of section 17, if he or she is a foreigner.

This section speaks of a certificate which will be issued to a victim of trafficking. It is not clear who the issuing authority of such certificate will be. We recommend that this issue be clarified as to which Department would have the authority to issue this certificate and what rights that certificate would entitle the bearer to.

We recommend that the following issues also be clarified with regard to the certificate:

1. Will this certificate provide immigration status, or will the holder also need to apply for an additional status in order to remain in the country.
2. Will the certificate have the effect of preventing the arrest of the holder as an illegal immigrant? Arbitrary and unlawful arrest of the victim is likely if she/he is not in possession of the appropriate documents detailing her immigration status in the country. This will result in re-traumatisation and will complicate any process aimed at rehabilitation.

3. Will the certificate allow the victim to access medical treatment? We recommend that the certificate is the means by which state hospitals will be able to provide medical treatment to victims of trafficking [on the same basis as South African citizens].

Further, looking at section 7(b) – who bears the onus of informing the victim that they have the right to apply for this recovery and reflection period?

Child victim of trafficking found in Republic

Re: Section 14

Child victim of trafficking found in Republic

14. (1) A child who is a victim of trafficking—
(a) must be referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act; and
(b) may, pending such investigation, be placed in temporary safe care in terms of section 151 of the Children's Act.
- (2) If, after an investigation as provided for in subsection (1), an illegal foreign child is brought before the children's court, the court may order that the child be assisted in applying for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998).
- (3) A finding in terms of section 156 of the Children's Act that an illegal foreign child who is a victim of trafficking is a child in need of care and protection serves as authorisation for allowing the child to remain in the Republic for the duration of the children's court order.

The Bill makes provision for the child to either be assisted to apply for asylum or to be permitted to remain in the country for the duration of the children's court order. There appears to be no reason to limit the scope of the means by which a child would be able to regularise their immigration status in the country.

Further, there are no provisions on how to treat the child should they reach majority during/ after this process if they have not been processed through the asylum system. This is an omission in the Bill and would place child victims of trafficking in a vulnerable and difficult position, if they are not able to return to their country of origin. Despite the availability of these three ways of regularising foreign persons in terms of the existing legislations, LHR does support that a separate and specific means of regularising trafficking victims via this Bill. However we feel that there are insufficient protections for child victims of trafficking.

We have over a number of years observed a consistent and ongoing problem with the Children's Court orders in that there is no way to assist a child who has been the subject of a Children's Court order to regularise their status once they reach the age of majority. The Children's Court order is only effective until the child reached 18 years old, thereafter the child is not protected and may be arrested and deported as an illegal foreigner in terms of the Immigration Act. There should be a mechanism outlined in this Bill, whereby child victims of trafficking are automatically assisted to apply for and receive immigration status and protection from arrest and deportation.

It is already possible to regularise the status of foreign persons in the country via certain sections in the Immigration Act, the Citizenship Act and the Refugees Act. All these avenues for regularisation should remain available to victims of trafficking.

We have made a summary of the three legal avenues which should remain available for both child and adult victims of trafficking:

- i. Via the Immigration Act s32(1) (b) of the Immigration Act 13 of 2002 as amended

Amendment of section 31 of Act 13 of 2002

32. Section 31 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph: 25
“(b) the officers and crew of [an official] a public [ship] conveyance of a foreign state, while such [ship] conveyance is in the port of entry.”;
 - (b) by the substitution for subsection (2) of the following subsection: 30
“(2) Upon application, the Minister[, as he or she deems fit, after consultation with the Board,] may under terms and conditions determined by him or her—
 - (a) allow a distinguished visitor and certain members of his or her immediate family and members in his or her employ or of his or her household to be admitted to and sojourn in the Republic [for a period not exceeding six months], provided that such foreigners do not intend to reside in the Republic permanently; 35
 - (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision[;]; [provided] 40
Provided that the Minister may—
 - (i) exclude one or more identified foreigners from such categories; and
 - (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;

The Minister of Home Affairs is afforded discretion to grant a foreign person the rights of permanent residence for a specific or unspecified period when special circumstances exist to justify such a decision.

- ii. Via the Citizenship Act No 88 of 1995

If a child is stateless and is born in the Republic, they would be entitled to citizenship according to the South African Citizenship Act No 88 of 1995. This is the current position however the Act is currently under review.

Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (2), shall be a South African citizen by birth, if-

[Section 2(4) (b)(i)] he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality

iii. Via the Refugees Act of 1998 as outlined in the Bill

These three avenues for the regularisation of the immigration status of adult and child victims of trafficking should continue to remain available to victims of trafficking. These should be available in addition to the visitors permit as outlined in Section 18 of the Bill.

LHR recommends that the section be replaced with these provisions:

1) A child who is a victim of trafficking—

(a) must be referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act; and

(b) may, pending such investigation, be placed in temporary safe care in terms of section 151 of the Children's Act.

(2) If, after an investigation as provided for in subsection (1), an illegal foreign child is brought before the children's court, the court may order that the child be assisted in regularising his or her immigration status. The child may be assisted to apply for a permit enabling him/her to remain in the country in terms of any available legislative means. If the child wishes to apply for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998) they must be assisted to do so.

(3) A finding in terms of section 156 of the Children's Act that an illegal foreign child who is a victim of trafficking is a child in need of care and protection serves as authorisation for allowing the child to remain in the Republic for the duration of the children's court order.

(4) A child who reaches the age of majority during this process must be assisted to regularise their immigration status and be assisted with naturalisation in terms of the relevant legislation where appropriate.

Section 15

Provision of health care services

Section 15 A foreigner who is a victim of trafficking is entitled to the same public health care services as those to which the citizens of the Republic have access.

We recommend the addition of this section:

A foreigner who is in possession of a certificate [issued by list the authority] would ensure that they receive medical treatment and care on the same basis as South African citizens.

It is unclear how a foreign person will be able to access health care on the same basis as SA citizens? The current documents which will be issued do not give any special rights with regard to access to medical care. Any foreign person on a visitor's visa will be treated as an ordinary foreign patient by

state hospitals. LHR has observed that state hospitals will enforce foreign fees on any individual who has a visitor's visa, or they will be referred to a private hospital for medical treatment. The Bill and regulations need to clarify how a victim of trafficking will be able to access these health services.

LHR recommends that the certificate (mentioned in Section 13 of the Bill) be the means by which a state hospital would be able to permit access to medical treatment on the same basis as access to South African citizens.

Section 18 (5)

(5) Despite the provisions of section 11(2) of the Immigration Act, the holder of a visitor's permit that has been extended in terms of subsection (4) may conduct work or study in the Republic.

We recommend for this visitor's permit to be specifically endorsed for work and study. In our experience we have observed foreign persons experience severe difficulties in securing work or engaging in studies if their permit is not specifically endorsed for these purposes. This issue can be clarified in any regulations to the Bill and subsequent Act.

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