



LEGAL RESOURCES CENTRE

NPO No. 023-004

PBO No. 930003292

Cape Town Office

3rd Floor Greenmarket Place • 54 Shortmarket Street • Cape Town 8001 • South Africa • www.lrc.org.za

PO Box 5227 • Cape Town 8000 • South Africa • Tel: (021) 481 3000 • Fax: (021) 423 0935 • Email: info@lrc.org.za

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19 August 2010

The Portfolio Committee on Justice
and Constitutional Development

The Secretary

Mr. V Ramaano

Email: vramaano@parliament.gov.za

Dear Sir,

**SUBMISSIONS / PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS
BILL 7 OF 2010**

Please find attached hereto submissions on behalf of the Women's Rights Project of
the Legal Resources Centre.

Yours faithfully,

LEGAL RESOURCES CENTRE



CHARLENE MAY

**SUBMISSION TO THE PORTFOLIO COMMITTEE FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

PREVENTION AND TRAFFICKING IN PERSONS BILL,

NO. 7 OF 2010

19 August 2010

SUBMISSIONS PREPARED BY:

Legal Resources Centre www.lrc.org.za

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A: INTRODUCTION

The Legal Resources Centre (LRC) welcome this opportunity provided to civil society to make recommendations which will strengthen the legislative and policy framework which seeks to ensure prevention and combating as well as protection for survivors of human trafficking. We commend the Department of Justice and Constitutional Development and all other role players and stakeholders within civil society who has over the past few years worked tirelessly towards the enactment of this much needed legislation.

The submission is primarily concerned with the challenges to effective implementation of the Bill in its current form in relation to the criminal justice system, the immigration and refugee legislation as well as government allocation of adequate resources and budgets for effective enforcement of what the Bill aims to achieve. We believe that the effective implementation and enforcement of laws remains a central aspect for ensuring that all survivors, particularly women and children, enjoy their constitutionally protected rights. In addition to an effective criminal justice system facilitating the arrest, prosecution and punishment of perpetrators, the most effective response to trafficking of women and children is a clear demonstration of political will backed by action and commitment of resources by the state.

While we acknowledge that Bill is a gender-neutral item of legislation, trafficking is ongoing, pervasive and overwhelmingly gender-specific. It is an established principle of our constitutional framework and international law that the state has a duty to prevent acts of violence against women, to investigate such acts when they occur and to prosecute and punish perpetrators and provide redress and relief to survivors.

Against this backdrop, this submission which is based on the commenting organisations' areas of expertise and addresses two major interrelated concerns:

1. The implementation challenges within the Bill in its current form in terms of the relevant legislative framework in which its seeks to operate; and
2. The identification of certain omissions which would strengthen the implementation of the legislation; and

B: BRIEF DESCRIPTION OF THE ORGANISATIONS

The Legal Resources Centre (LRC), established in 1979, is a South-African based human rights organisation with regional offices in Johannesburg, Durban, Grahamstown and Cape Town. The organisation uses the law as an instrument of justice for the vulnerable and marginalized, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, and disability or by reason of social, economic, and historical circumstances. The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.

The LRC through its Gender Rights Project ("the project") focuses on empowering women by providing: legal advice; legal representation and negotiation; and by participating in advocacy and law reform. The LRC works both with South African Women as well as women from the rest of the continent the majority of who claim asylum in South Africa as a result of conflict and violence in their own countries. In the majority of cases these women are accompanied by minor children or we are faced with issues of unaccompanied minor children entering the country.

C: KEY CHALLENGES TO IMPLEMENTATION OF THE BILL

Chapter 4

Section 13(1)(b)

"A social worker, social service professional, medical practitioner, nurse, traditional health practitioner, traditional healer or traditional leader may only report a matter to a police official as provided for in paragraph (a) if the victim has given his/her written consent in the prescribed manner, except where the person is

- i) Mentally disabled; or*
- ii) in an altered state of consciousness, including being under the influence of any medicine, drug or other substance, to the extent that the persons consciousness or judgment is adversely affected."*

It is our belief that in practice a relationship of trust needs to be fostered in order to secure the trust of a victim of trafficking. Although the LRC does not provide psycho social support to clients we are aware of the vulnerable mental state of victims and that this could inhibit or hamper their willingness to provide consent to practitioners as outlined above. Consent in many regards is confused with a willingness to participate or co-operate with a possible police investigation and subsequent prosecution of offenders. This in itself might hamper victim's willingness to provide consent to practitioners to report matters in relation to trafficking.

Most victims of trafficking are individuals from poor and disadvantaged backgrounds who are ignorant of the protection of laws as well as lack education in order to express themselves in a written manner. In the case of foreign victims who lack the necessary language skills to express themselves verbally we might find that they are completely incapable to express themselves in writing, and would therefore not be able to provide written consent. The same argument could be made for adults who are illiterate and unable to read or write who often perceive their illiteracy as a vulnerability and embarrassment they would shy away from wanting engage in the written word without acknowledging their illiteracy. Traumatized victims could perceive the granting of written consent as a lack of trust on the side of the caregiver, and might also feel that consent is being granted under duress.

Although we acknowledge the role of privilege between the above care providers and victims we submit that the threat of consent would drive the victim away from seeking assistance in future. This in turn would lead to the victim remaining under bondage of the traffickers.

Recommendations:

We recommend that Section 13 (1)(a) and (b) be deleted and replaced with the wording in Section 12(1), which would in turn protect care providers from any law or policy which prohibits the disclosure of information. This will protect care providers and them to freely report any reasonable suspicion of trafficking to the Police..

The word "child" in Section 12(1) would be replaced with the word "adult person" to bring it in line with the heading of Section 13.

Section 14(2)

"If after an investigation as provided for in subsection (1), and 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)"

This section is in line with what is reflected in Section 32(2) of the Refugees Act 130 of 1998, as well as the provision in Section 289(2) of the Children's Act 38 of 2005. We support the provision of allowing a minor child to apply for asylum in terms of the Refugee Act, which would grant them legal status to remain in the country and afford them protection under international conventions. Further it would allow the minor child to attend school. The minor child would qualify to apply for certification as a refugee indefinitely in terms of Section 27 (c) and allows for an application for permanent residence to be awarded should the requirements in Section 27(d) of the Immigration Act be met.

However, we caution against the assumption that the implementation of this provision will result in the automatic qualification of refugee status to a minor child should it be found that the child has been trafficked. In order to qualify for refugee status the asylum seeker needs to clearly show a well founded fear of persecution on the following grounds: race; tribe; nationality; religion; political opinion and membership of a particular social group.

It is commonly accepted in Canada, Australia, the United Kingdom and the United States of America that trafficking itself and or a combination of human rights violations related to trafficking amounted to persecution. It is unclear whether the principle finds application in South

Africa and that a Status Determination Officer based at a Refugee Reception Office would recognize trafficking as a ground for persecution and therefore the granting of refugee status.

Recommendation:

In order for this Section to provide its intended protection we would recommend that Section 3 of the Refugees Act be amended to include trafficking as a ground for claiming refugee status.

Section 16(1)

"No criminal prosecution may be instituted against a child who is found to be a victim of trafficking after an investigation in terms of section 110(5)(c) of the Children's Act, or against an adult person who has been certified to be victim of trafficking in terms of section 13(7)(a)..."

The protection from prosecution provided for in this section is somewhat ambiguous as the protection is wholly dependent on the finalization of the investigation in terms of a minor child and the certification in terms of an adult person. Even though the section provides that the certificate must be issued without delay it does not prevent prosecution...

This section does not protect victims from arrest, which could inflict irreparable harm to victims who are in an emotional state.

If consent is required in terms of Section 13(1)(b) then surely this consent must be informed and victims need to be told that there is a risk of arrest and the possibility of prosecution should a certificate not be issued or should the issuing of a certificate for some reason be delayed.

Recommendation:

We would recommend that the section be amended to reflect that:

"No criminal prosecution may be instituted against a child who is found to be victim of trafficking after and investigation in terms of section 110(5)(c) of the Children's Act, or against an adult person while the investigation and assessment for the issuing of a certificate is pending in terms of section 13(7)(a) for - ..."

Chapter 5

Section 17(1)

"Despite the provisions of the Immigration Act, the Director General: Home Affairs must in the prescribed manner and subject to the prescribed conditions, allow a foreigner who has been

certified to be victim of trafficking in terms of section 13(7)(a), regardless of his or her status, to remain in the Republic for a non-renewable recovery and reflection period not exceeding 90 days."

Once again the LRC does not provide psycho social support to victims; however we do represent clients in cases of abuse and violence. Our experience in these matters leads us to believe that victims are unable to engage with service providers unless a relationship of trust has been established. Victims of trafficking like victims of any violent crime cannot be grouped together in a homogenous grouping with a one size fits all approach.

We will find that some are able to express themselves and to deal with the ramifications of being trafficked faster than others. The 90 day period might in those cases suffice, but we are more concerned with the victim that is too traumatized to engage with the proposed/prescribed process of recovery and reflection. The Bill anticipates that 90 days will be sufficient in all cases of trafficking for a victim to recover from the trauma that she has suffered, to be able to reflect on what has happened and to participate in an investigation and prosecution of a trafficking matter. This raises the question of what happens to the individual who is not able to meet the 90 day requirement due to the extent of the trauma suffered. The Bill in its current form does not provide that any status be conferred on this individual. In fact the reporting period is non renewable and we can then only presume that the individual becomes an illegal foreigner with no rights to remain in the country.

Recommendation:

We recommend that the period cannot be fixed at 90 days non renewable. We would suggest instead that the 90 days be the benchmark in terms of the minimum time that a victim would need to recover and reflect. There would therefore be no need to state that the period is non-renewable.

Section 17(2)-(3)

"If a foreigner referred to in subsection (1) after a period of 30 days since he or she has been granted a recovery and reflection period, is unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker, an investigation into his or her circumstances must be conducted by the Director General: Social Development in order to determine whether it is safe to return him or her to his or her country of origin or the country from where he or she has been trafficked.

(3) if a foreigner referred to in subsection (2) is still unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker upon expiration of the recovery and reflection period, the information obtained as a result of an investigation referred to in subsection (2) must be provided to the Director General: Home Affairs to be taken into account when deciding whether to repatriate the foreigner."

We once again raise the issue of prescribed time periods as problematic in implementation. A 30 day period is not sufficient for a victim to make a rational decision on the participation in an investigation or a prosecution of an offender. The mental state, the emotional capacity as well as the victim's understanding of a foreign concept of law and the criminal justice system cannot be properly formulated in such a short period of time. We could find that the co-operation that is provided ends up being coerced or under duress for fear of being repatriated especially if this is to a country or conditions from which the victim was trafficked and fears repatriation.

Recommendation:

We recommend that the 90 day period should be used to indicate in this case whether a victim is in a position to participate in the investigation or the prosecution of a trafficker. The overwhelming emphasis here should be on Governments obligation to provide protection and sanctuary for victims of trafficking. The current wording in these sections make it clear that should a victim even if traumatized not wish to participate in the investigation or prosecution this individual faces repatriation. This would almost certainly amount to a punishment of victims for not wanting to co-operate with law enforcement and prosecuting authorities. This section can even be used in order to manipulate victims into participating in investigations and prosecutions and sets in our opinion a dangerous precedent.

We advocate for investigations into the historical background as well as current circumstances to determine whether the victim is safe to be repatriated, however this should form part of an obligation on government to ensure the continued safety of a victim and not be linked to the cooperation of the victim in the investigation or prosecution of traffickers. This area of obligation should ideally be dealt with under another section or the reference to cooperation should be removed to bring it in line with the UN Protocol to Prevent Suppress and Punish Trafficking in Persons Especially Women and Children.

Section 17(4) – (5)

These sections are contradictory to Sections 17 (1), (2) and (3) which precedes it in terms of the non-renewable period which can be renewed (4) as well as the guaranteed 90 day period (1).

Section 18(4) – (5)

Section 18(4) of the Bill speaks to the extension of a visitor's permit issued by the Director General: Home Affairs. However this extension will only be granted should humanitarian grounds allow for it. Our concern is that the visitor's permit will only be extended, and no sense of permanence is granted to the victim. The victim will have to approach the Department and the Director General on a continuous basis in order to apply for an extension.

Further Section 18(5) allows that the victim can work and study while in the Republic but only once a renewal has been granted. We are concerned that the victims of trafficking will have no means of income and will not be allowed to become contributing members of society while participating in the investigation and prosecution. There is no reference to specific social grants being made available to victims of trafficking and the concern rests with how victims are meant to care for themselves financially.

Recommendation:

We suggest that once the victim has established that humanitarian grounds exists for not being able to return to their country of origin the victim be allowed to apply for permanent residence in the Republic.

Upon the issuing of the Visitor's Permit in terms of Section 18(1) victims should be allowed to work and or study within the Republic so as to contribute to their recovery and rehabilitation.

Chapter 7

Section 27

Section 300 of the Criminal Procedure Act, 51 of 1977 makes provision for a judicial officer in his or her discretion to award compensation to a victim. We believe that this Section is amounts to nothing more than a duplication of what the law currently already allows for and is not necessary to incorporate it into this Bill. It is also an optional process, which a presiding officer may choose to enact. If it was a compulsory provision it would strengthen the provision as it

would provide for compensation without the victim having to engage in expensive civil litigation at his/her own cost.

Further our Law of Delict is comprehensive in allowing victims of any crime to approach a Court of their choice in order to claim compensation and damages arising from a delict. Victims could find themselves confused by two different laws allowing for the same redress. We therefore recommend that our Law of Civil Procedure and Delict be allowed to deal with the aspect of compensation and not to introduce an alternative through this legislation.

In cases involving trafficking we might find that the Asset Forfeiture Unit will become involved and bring an application for the assets of perpetrators to be forfeited to the State. In those cases Victims will have difficulty in any event to execute judgments and claim compensation.

D: OMISSIONS IDENTIFIED IN THE BILL

We have identified the following issues that are not addressed by the Bill in its current form. We therefore recommend that further attention is paid to these areas in order to ensure effective implementation of the objectives of the Bill.

Chapter 3

This Chapter deals with the offence of Trafficking, the penalties that can be imposed as well as the jurisdiction of the legislation.

The Chapter under Section 5, 6, 7, 8 and 9 all make reference to maximum imprisonment and fines that can be levied or imposed against offenders of trafficking. This Chapter however does not make provision for minimum sentencing, which we suggest should be looked at in order to ensure justice for victims of trafficking. It would also serve as a deterrent and indication of Government dedication to combating and punishing offenders of trafficking.

Chapter 4

Section 14(3) seeks to provide some form of status to be conferred on a foreign child. Section 14 as a whole speaks to assisting a child through the Children's Court process, however it remains unclear whether the child can remain in the country indefinitely after the duration of the court order or the prosecution of the matter and the Bill does not speak to a minor child approaching the age of majority who could while in the process of the Children's Court or the investigation become a major.

Chapter 5

Status of Foreign Victim of Trafficking

The Chapter is intended to provide certainty to foreign victims of trafficking, however from reading it and seeking to apply it practically no such certainty is provided.

The Chapter approaches the conferring of status in stages.

Stage One:

The initial assessment period after the victim has been rescued from traffickers. The Bill does not specify at this stage that the foreign victim has any legal status in the country. Status is wholly based upon the assessment of whether the individual has been trafficked. This should

according to the Bill be assessed without delay, but as we are unsure of what the prescribed manner is that will determine the assessment there is no way of knowing how long the victim will remain without status.

Stage Two:

After assessment if an individual is found to have been trafficked a certificate will be issued to them. It is unclear who issues the certificate and what legal status the certificate confers on a victim. The Certificate appears to enable the victim to rely on a number of protective mechanisms and services; however none of these are in any way related to the victim's status within the borders of South Africa.

The status of an individual who has not been certified as trafficked is not addressed in the Bill and one can only presume that this person is an illegal foreigner in terms of the Immigration Act, and subject to summary deportation and any other recourse in terms of that Act.

Stage Three

Once the Certificate is issued the victim may apply for a recovery and reflection period.¹ This application is to the Director General: Home Affairs and will allow the victim to remain in the country for a non renewable period of 90 days. However it is unclear what the legal status of the victim is during the period of 90 days.

Stage Four:

Should the victim agree to co-operate with the investigation and prosecution of the offenders he/she is entitled to apply for Visitors permit, which confers temporary residents' status. It is unclear how long the Visitors permit is for and whether the victim will be allowed to travel outside of the country with this permit.

In the event that the victim does not cooperate for whatever reason the Bill is silent on the victim's status following such a decision. One can only presume that the victim becomes an illegal foreigner and will be subject to deportation in terms of the Immigration Act. This is very alarming as the country from where the person is trafficked might not be safe for the victim to return to. Section 17(2) and (3) speaks to investigations to establish safety and security, but the

¹ Section 13(7)(b) of the Bill

Bill remains silent on what recourse is available to a victim who chooses not to cooperate, but where the victim also cannot be repatriated.

Recommendation:

The Bill currently allows for a minor child to apply for Refugee Status in terms of the Refugees Act. There is no similar provision made for adult victims of trafficking. We would recommend that the same provision be made for adult victims, which would then seek to clarify any ambiguity in respect of status of those who choose not to cooperate or even those who choose to do so. This off course would be the case in light of trafficking being added as a ground for refugee status in the Refugees Act.

E: CONCLUDING REMARKS

The Legal Resources Centre appreciates the need for comprehensive legislation to address the growing number of trafficking cases that are appearing in South African society. We also commend the Department of Justice and Constitutional Development on the dedication shown in researching and leasing with Civil Society Organizations in order to meet its obligations to victims of trafficking.

In general we would support the reformatting of the Bill to allow for those Sections dealing with children and those with adults to be grouped under the same Chapters. This would enable friendlier usage and reading of the legislation.

The Legal Resources Centre has focused its submissions on addressing legal and implementation constraints and omissions as this is our area of expertise. We however note that a number of civil society organisations specialize in providing psychosocial support and assistance to women and children who are victims of trafficking. We recommend that in terms of those chapters dealing with services and resources to accredited institutions particular attention is paid to submissions from these civil society organisations.

We note however that this process has been ongoing for a number of years, and would encourage the Department to apply the needed resources in order to finalize the legislation as soon as possible. Comprehensive legislation such as the Bill requires the promulgation of a number of regulations in order to give effect to the principles of the Bill. We therefore urge the Department to engage with the relevant government department to ensure that the Bill once enacted can be implemented as soon as possible.