NPA PRESENTATION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

16 AUGUST 2011

BACKGROUND

- Following the meeting with the Portfolio Committee held on 15 June 2011, the NPA met to re-consider the issues raised and to prepare submissions in response thereto

- The NPA wishes to submit as follows:

BILL

The NPA supports the removal of the word ["Republic"] from the long title of the Bill

PREAMBLE

NPA proposes the insertion of the wording "not to be treated in a cruel, inhuman and degrading way" to the last paragraph of the preamble. This is in line with section 12 (1) (e) of the Constitution

CHAPTER 1

DEFINITIONS AND OBJECTS OF THE ACT

Definitions and Interpretation

NPA proposes that the heading be styled Definitions "and Interpretation" This is in line with Prevention of Organised Crime Act 121 of 1998; Prevention and Combating of Corrupt Activities Act, 12 of 2004 and Protection of Information Bill where Parliament thought it desirable to include interpretation to these expressions as there is reference to *"know or ought reasonably to have known"* in this Bill. The NPA is of the view that the same interpretation should be attached to these expressions in the Bill and additional sub-clauses (2) to (4) are proposed hereunder;

(2) For purposes of this Act a person is regarded as having knowledge of a fact if-

(a) that person has actual knowledge of the fact; or

(b) the court is satisfied that-

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) the person has failed to obtain information to confirm the existence of that fact,

and 'knows' or 'knowing' must be construed accordingly.

(3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both-

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.

(4) A reference in this Act to any act, includes an omission and "acting" must be construed accordingly

CLAUSE 1 - DEFINITIONS

"Protective custody"

The question arises as to whether this is necessary. Section 185 of the Criminal Procedure Act empowers a Director of Public Prosecutions to request the detention of a witness who amongst others is in danger or might abscond.

"Republic"

The NPA is of the view that this inclusion is superfluous. See section 1 of the Interpretation Act

"Sexual Exploitation"

OPTION 1

The NPA has no problem with this option as it creates an offence in the Bill of "forcing a victim of trafficking to participate in the production of pornographic material or to perform any act of a sexual nature in, but not limited to, a strip club, massage parlour, brothel or escort agency". The definition is in line with the sexual offences in the Sexual Offences and Related Matters Amendment Act or other offences of a sexual nature in other law.

OPTION 2

The NPA recommends that the Department of Social Development should comment on the definition of "temporary safe care"

"trafficking"

In view of the proposed amendment of clause 3 hereunder, the NPA proposes the deletion of this definition

"victim of trafficking"

The NPA proposes that this definition be divided in order to differentiate between a Child and an Adult victim

CLAUSE 2 – OBJECTS OF ACT

(a)'binding on the Republic'

The NPA is of the view that it is not necessary to include the words "binding on the Republic". It may be possible that there are provisions not binding on the Republic. For instance by virtue of conditions set by South Africa or as a result of our domestic laws. The mere fact that there is reference to the "Republic's obligations" is sufficient

CHAPTER 2 - OFFENCES, [PENALTIES] AND EXTRA-TERRITORIAL JURISDICTION

OPTION IN RESPECT OF HEADING OF CLAUSE 3

Trafficking in Persons

The NPA considered all the options proposed in the separate document. Taking into account the formulation of most of the other offences in the Bill (see, for example, clauses 4, 5, 6 and 8) and having regard to the formulation of the traditional creation of offences, the NPA proposes that the Legislation should be uniform and consistent and also criminalise the offence of "Trafficking in persons" in the transitional way. In other words by starting off with "Any person who ".See for

example, section 2 of the POCA and section 3 and all others offences of the Prevention and Combating of Corrupt Activities Act, 2004. Furthermore, it is proposed that one should insert the expression "directly or indirectly", because it is, for example, possible to make use of an intermediary to recruit children for exploitation. Therefore, the NPA proposes the wording as indicated hereunder. Please note, the expression "*directly and indirectly*" should also be considered for inclusion in the other offences.

NPA'S PROPOSED FORMULATION OF OFFENCE OF TRAFFICKING IN PERSONS:

CLAUSE 3.(1) Any person who, directly or indirectly, delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic by means of—

(a) a threat of harm to that person or an immediate family member of the person;

(b) the threat or use of force or other forms of coercion;

(c) the abuse of vulnerability;

(d) fraud;

(e) deception;

(f) abduction;

(g) kidnapping;

(h) the abuse of power;

(i) the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person,

for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.

The NPA proposes that sub-clauses 2 and 3 be combined into one sub-clause

"Involvement in trafficking in persons/offences" - it is recommended that this offence be Inserted after all the other offences as it may be relevant to all the offences.

CLAUSE 4 – DEBT BONDAGE

The insertion of the element of "intention" in respect of the offences in clauses 4, 5, 6 and 7, but not in the main offence, may be problematic. In SA Law we do not usually insert "intentionally, so as to cater for *dolus eventualis*. For example, a doctor who "ought reasonably to have known" that a child is a victim of trafficking may escape prosecution if we require "intention". It is proposed that we delete reference to "intentionally" and cater for persons "who ought reasonably to have known".

CLAUSE 5; 6 & 7 – the same submission with respect to "intention" applies to these clauses.

CLAUSE 7(d) The proposed paragraph (e) hereunder, is already contained in another clause. See 4 (1) (b)

Conduct facilitating trafficking in persons

CLAUSE 8(1) The NPA is of the view that the possession of a passport or visa is irrelevant. That in itself may constitute an offence. The question is whether the carrier knows or ought to have known that the person is a victim of trafficking and assisted in transporting such victim.

Liability of carriers

CLAUSE 9(4) The NPA does not support this sub-clause. Section 111 of the CPA had a similar provision prior to the establishment of a single NPA with the NDPP as head. At that stage (prior to 1998) there were various AG's and there was no uniformity. Now there is one NDPP determining policy. Section 111 was amended in 1998 and the Minister's powers to designate a court was replaced by that of the NDPP. See also section 22(3) of the NPA Act. The Terrorism and Corruption Act have similar extra-territorial provisions, without providing such a power to the Minister. In line with the *Glenister* decision it is proposed that this sub-clause be deleted, because it may create the *impression of interference by the executive.* In the Rome Statute legislation there is a similar provision, but one must take into account that that relates to concurrent jurisdiction with the International Criminal Courts.

Factors to be considered in sentencing

The NPA proposes that this clause should be inserted after the penalty clause.

CLAUSE 15(1) If we insert a definition of victim of trafficking as suggested, this sub-clause can only refer to "a victim of trafficking".
CLAUSE 17(1) Def of "letter of recognition" – unnecessary to refer to section
CLAUSE 20(1) The NPA proposes that the word "transferred" be used.
CLAUSE 20(7)(a) The relevant Department should comment on whether 2 months will be sufficient time.
CLAUSE 20(7)(b) The NPA proposes the insertion of the words "which applies for accreditation and", because every such organisation which existed at the time is not necessarily going to apply for accreditation.
CLAUSE 25 NPA proposes that Guidelines and Directives be issued by the responsible department.

CHAPTER 6
COMPENSATION

Compensation to victim of trafficking

CLAUSE 27(3)(b) The Committee should consider the inclusion of a proviso that in the case of the amendment of conditions the victim should be consulted.

CLAUSE 28 NPA previously recommended for the deletion of the clause as AFU processes cater for compensation to the State.

ASSET FORFEITURE PROVISIONS

At the hearing of 15 June 2011, the Committee requested further motivation for the NPA's proposed Clauses 11A and 11B on Asset Forfeiture. The NPA's motivation for their inclusion is presented hereunder:

Clause 11A: DECLARATION OF FORFEITURE

Although there are asset forfeiture provisions contained in the Prevention of Organised Crime Act, 121 of 1998 (POCA), having an additional asset forfeiture procedure in the TIP Bill has the following benefits:

Where POCA forfeiture procedures are not viable:

There will be instances where the Chapter 5 or Chapter 6 provisions of POCA are not viable. For instance if an omission has been made and an accused has already been sentenced before thought

has been given to the application of Chapter 5, or in the case of Chapter 6, where there would be difficulty in proving the direct nexus between property found in the possession of an accused and it being concerned in the commission of the offence and/or that it is proceeds of unlawful activities.

In such instances the TIP Bill declaration of forfeiture could be considered and may still be viable as it is not as prescriptive as Chapter 5 of POCA with regard to when application should be made and it is wider ranging than Chapter 6 of POCA as it can also be applied to property found in the possession of the accused.

Less onerous than POCA

It is also a more streamlined and expeditious procedure and it provides prosecutors who do not have specific expertise with regard to the asset forfeiture provisions of POCA with an easier option to apply for forfeiture without having to resort to the more complex and drawn out procedures contained in POCA.

The often international nature of the crime means that accused persons and witnesses/victims are not always available in South Africa for the period of time it may require to finalise POCA asset

forfeiture proceedings. Having a more expeditious and robust procedure should to some extent provide a solution to this difficulty.

Societies expectations and deterrent effect

Despite the existence of POCA the forfeiture provisions contained in section 25, 26 and 27 in the Drugs and Drug Trafficking Act, 140 of 1992, have been retained. The scourge of drugs in society is such that the legislation intended to combat drug trafficking retains its own forfeiture provisions and sends out a clear message that there is an unambiguous intention that persons engaged in drug trafficking activities should have a high expectation of having their assets forfeited and that in spite of the POCA forfeiture provisions there are even alternative provisions contained in the Drugs and Drug Trafficking Act to ensure that their assets do not escape attention. It signifies the level of outrage in which society regards the reprehensible conduct of such traffickers.

Human trafficking shares many similarities with drug trafficking. *Inter alia*, both forms of trafficking are usually engaged in by organised crime syndicates, they are the cause of unimaginable human suffering; the crimes are often transnational in nature and generate significant profit for the perpetrators. Society at large wants every possible action to be taken to combat these types of trafficking.

Retaining Clause 11A in the Bill will serve the purpose of both assuaging societies need to see government doing everything possible to act against human traffickers whilst simultaneously sending a clear message to traffickers that their conduct is considered at least on a par with that of drug traffickers and that in addition to prosecution, they will almost certainly also have one or another form of asset forfeiture applied against them. The overt intention to strip traffickers of their assets would conceivably act as a deterrent.

It also bears mentioning that subsequent to the enactment of POCA provisions relating to forfeiture were also included vide section 19, 20 and 21 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 33 of 2004.

Considering the seriousness of the offences set out in the Bill it certainly justifies asset forfeiture provisions which are, in certain respects, more robust than the POCA provisions.

Retention of Clause 11B: INVESTIGATION DIRECTION

This clause has been drawn from section 23 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PCCA). Despite section 23 of the PCCA having been on the statutes since 2004 and despite

it having the potential to be a useful tool for law enforcement investigators it has not once yet been applied.

The covert nature of the activities of persons engaged in activities which enrich them through corruption have warranted the inclusion of section 23 in the PCCA as an aid to asset forfeiture investigations where relevant. Similarly, the covertly sources of wealth generated by human traffickers would warrant similar legal tools being made available to investigators.

Conceivably situations may arise where for some reason Chapter 5 of POCA has not been applied before an accused is sentenced or he is acquitted or the matter is withdrawn because the criminal case is not viable. The application of Clause 11A is or may also not be viable or the application of Chapter 6 of POCA is preferable. It should be mentioned that there have been instances where the opportunity to apply Chapter 5 is not possible, the criminal investigation and case has been disposed of and Chapter 6 of POCA is the only remaining option. In such a scenario the application of the Criminal Procedure Act, 51 of 1977 (CPA), becomes problematic. However, evidence from recalcitrant witnesses or relating to bank accounts application may still be required. It is in such instance where the application of Clause 11B would remedy such a situation. It also goes beyond the scope of a hearing in terms of section 205 of the CPA in that at a Clause 11B enquiry even incriminating evidence is compelled, albeit with the proviso that it may not be used in criminal proceedings.

Inter alia, the Clause also provides for the seizure of evidence. This is not necessarily evidence which could be gathered or seized in terms of the CPA but relates to what amounts to an investigation into unexplained wealth. The possession of unexplained wealth is not criminalised but it may give rise to forfeiture proceedings.

If this Clause is applied, it will generate jurisprudence which will also be of relevance with regard to the similar clause in the PCCA.

CLAUSE 39 PENALTIES

39. (1) A person convicted of an offence referred to in—
(a) section 3(1) or (2) is, subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable to a fine of R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both;
(b) sections 4, 6 or 17 is liable to a fine of R50 million or imprisonment for a period not exceeding 15 years;
(c) sections 5 or 7(1) is liable to a fine of R30 million or imprisonment for a period not exceeding 10 years;

(d) sections 7(3) or 8(1) is liable to a fine of R15 million or imprisonment for a period not exceeding five years;

(e) sections 8(3), 11(6), 12(16) or 44(5), is liable to a fine of R3 million or imprisonment for a period not exceeding one year;

The NPA supports the sentence provisions for the following reasons:

The Bill should not rely on the provisions of the Adjustment of Fines Act 1991. Especially where legal persons are charged, the fines to be imposed will be insufficient. During South Africa's recent review of its compliance with the requirements of the Organisation for Economic Co-operation and Development Convention on Bribery, the Working Group pointed out that the fines are far too lenient. Therefore it is proposed that specific fine be prescribed. There are various recent pieces of legislation where Parliament adopted a similar approach. The best examples are contained in the following Acts:

- The National Environmental Management: Biodiversity Act, 10 of 2004: Fines up to R5 and R10 million may be prescribed by regulation.
- The Marine Living Resources Act, 18 of 1998: Fines up to R5 million are prescribed.
- Section 3 of the POCA prescribed a fine up to R1000 million.
- The Environment Conservation Act, 73 of 1989 prescribe fines up to R5 and R10 million.

- The Precious Metals Act, of 2005, prescribe fines up to R1 million.
- The Protection of Constitutional Democracy against Terrorist and Related Activities Act, 33 of 2004, prescribes a fine up to R100 million.
- The Financial Intelligence Centre Act, 38 of 2001, fine up to R100 million.