

REPUBLIC OF SOUTH AFRICA

PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL¹

*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill
published in Government Gazette No. 32906 of 29 January 2010)*

(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 7—2010]

ISBN 978-1-77037-632-8

No. of copies printed 1 800

¹ Portfolio Committee to take a decision on the short title of the Bill

BILL

To give effect to 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] Republic's obligations concerning the trafficking of persons in terms of international instruments to which the Republic is a signatory²; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to prevent and combat the trafficking in persons within or across the borders of the Republic; to provide for measures to protect and assist victims of trafficking in persons; to provide for the establishment of the Intersectoral Committee on Prevention and Combating of Trafficking in Persons; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING that the search for improved socio-economic [opportunities contributes] circumstances and the demand for the services of victims of trafficking contribute³ to making persons vulnerable to becoming victims of trafficking;

CONCERNED by the increase of trafficking in persons, especially women and children, and the role played by organised criminal networks in the trafficking of persons globally;

SINCE the South African common law and statutory law do not deal with the problem of trafficking in persons adequately;

AND SINCE the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the right to human dignity, equality⁴, the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, and not to be treated in a cruel, inhuman or degrading way, the right not to be subjected to slavery, servitude or forced labour, and the right of children to be protected from maltreatment, neglect, abuse or degradation; and

MINDFUL of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against

² Proposed amendment was accepted by the Portfolio Committee on 16/8/2011. Submissions were received that the long title of the Bill should also reflect other international instruments. If clause 2 is amended to refer to the Republic's obligations in terms of international instruments to which the Republic is a signatory, the long title should be amended accordingly to be in line with the objects of the Bill set out in clause 2.

³ Insertion based on submissions at public hearings.

⁴ Insertion based on submissions at public hearings.

Transnational Organised Crime, 2000, and other international instruments which place obligations on the Republic of South Africa towards the combating and ultimately, the eradication of trafficking in persons,

Parliament of the Republic of South Africa therefore enacts as follows:—

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2. Objects of Act

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PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS

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- [5]4. Debt bondage
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⁵ The Portfolio Committee suggested that this chapter should be moved to the chapter dealing with the responsibilities, functions and duties of the Intersectoral Committee.

⁶ The Portfolio Committee indicated that the penalties should be dealt with separately. See new clause 39 under general provisions.

~~Clause 3(2) provides for the offence of involvement in trafficking in persons.~~

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¹⁰ See proposed amendments to clause 14.

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SCHEDULE 1

Laws repealed or amended

¹³ Portfolio Committee suggested separate clause dealing with penalties.

¹⁴ With regard to clauses 45- 47, SAPS indicated that section 15 of the Police Service Act, 1995 (Act No.68 of 1995) already provides for delegation of powers and therefore it is unnecessary to provide for the delegation of powers in respect of SAPS.

SCHEDULE 2¹⁵

Text of United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons

CHAPTER 1

DEFINITIONS, INTERPRETATION AND OBJECTS OF ACTDefinitions and interpretation

1. (1) In this Act, unless the context indicates otherwise—
"abuse of vulnerability" for purposes of the definition of trafficking, means any **[physical or psychological]**¹⁶ abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from—

- (a) the person having entered or remained in the Republic illegally or without proper documentation;
- (b) pregnancy;
- (c) any disability of the person;
- (d) addiction to the use of any dependence-producing substance;
- (e) being a child; **[and]**
- (f) **[socio-economic]** social¹⁷ circumstances; and
- (g) economic circumstances.

"accredited organisation" means an organisation accredited in terms of section 20 to provide services to adult victims of trafficking;

"carrier" **[includes a company, or]** means a person who is the owner or employee of the owner, an agent, an operator, a lessor, a driver, a charterer or a master, of any means of transport¹⁸;

"child" means a person under the age of 18 years;

"Children's Act" means the Children's Act, 2005 (Act No. 38 of 2005);

"children's court" means a children's court referred to in section 42 of the Children's Act;

"court" means a High Court or a magistrate's court for any district or for any regional division;

¹⁵ The UNODC cautions against the inclusion of the Protocol as a schedule to the Bill as it could open the State to litigation if anything in the Bill is in conflict with the provisions of the Protocol.

¹⁶ The Portfolio Committee agreed that the words "physical or psychological" be removed.

¹⁷ As proposed by the NPA at their briefing of the Portfolio Committee in February 2011.

¹⁸ Amendment as requested by Portfolio Committee. NPA supports this amendment.

"Criminal Law (Sexual Offences and Related Matters) Amendment Act" means the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);

"Criminal Procedure Act" means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

"debt bondage" means the involuntary status or condition that arises from a pledge by a person of—

- (a) his or her personal services; or
- (b) the personal services of another person under his or her control, as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given, by that person if the—
 - (i) debt owed or claimed to be owed, as reasonably assessed, is manifestly excessive;
 - (ii) length and nature of those services are not respectively limited and defined; or
 - (iii) value of those services as reasonably assessed is not applied towards the liquidation of the debt or purported debt;

"designated child protection organisation" has the meaning ascribed to it in section 1 of the Children's Act;

"exploitation" includes, but is not limited to—

- (a) all forms of slavery or practices similar to slavery;
- (b) forced marriage;
- (c) sexual exploitation;
- (d) servitude;
- [(e) debt bondage;]¹⁹**

[(f)](e) forced labour;

[(g)](f) child labour as defined in section 1 of the Children's Act;

[(h)](g) the removal of body parts; and

[(i)](h) the impregnation of a female person against her will for the purpose of selling her child when the child is born;

"forced labour" means labour or services of a person obtained or maintained—

- (a) without the consent of that person;²⁰ and**

¹⁹ The NPA supports this amendment. The NPA is of the view that "debt bondage" should be deleted from the definition of "trafficking" as it is a separate offence from trafficking in persons, but that it should remain in the definition of "exploitation", as a person can be kept in debt bondage for exploitative purposes. The Department is of the view that "debt bondage" should rather be deleted from the definition of "exploitation". It is rather a form of control to keep a person in an exploitative situation until the debt is paid. See SALRC Report par 3.94.

²⁰ Amendments as requested by Portfolio Committee. The NPA supports this amendment. The Department of Labour is of the view that a reference to consent is unnecessary as forced labour will be without consent. The word "valid", as suggested by the Portfolio Committee, was removed as the view is held that the word "valid" is superfluous, as validity is implied in consent.

- (b) through threats or perceived threats of harm, the use of force, intimidation or other forms of coercion, or physical restraint to that person or another person;
- "forced marriage"** means a marriage concluded **[against the will and]** without the valid consent of **[both]** each of the parties to the marriage;²¹
- "foreigner"** means a person who is not a citizen or permanent resident of the Republic;
- "guardian"** has the meaning ascribed to it in section 1 of the Children's Act;
- "illegal foreign child"** means a child who is present in the Republic in contravention of the Immigration Act;
- "internet service provider"** means an internet service provider as defined in section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002);²²
- "immediate family member"** means the spouse, civil partner or life partner and dependent family members of a victim of trafficking;²³
- "Immigration Act"** means the Immigration Act, 2002 (Act No. 13 of 2002);
- "internet service provider"** means an internet service provider as defined in section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002);
- "letter of recognition"** means a formal written recognition that an adult person is a victim of trafficking issued in terms of section 14²⁴.
- "MEC"** means the member of the Executive Council of a province to whom the powers and functions relating to social development in that province have been assigned by the Premier of that province;²⁵
- "Minister"** means the Cabinet member responsible for the administration of justice;
- "National Director of Public Prosecutions"** means the person referred to in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);
- "parent"** has the meaning ascribed to it in section 1 of the Children's Act;
- "parental responsibilities and rights"**, in relation to a child, means the responsibilities and rights referred to in section 18 of the Children's Act;

²¹ Amendments as requested by Portfolio Committee. The Committee may also wish to consider the addition in clause 1 of a provision: "consent" means voluntary or uncoerced consent. See section 71(3) of the Sexual Offences Amendment Act, 2007.

²² Moved below: alphabetical arrangement.

²³ On the recommendation of the NPA at its briefing in June 2011, which was accepted by the Portfolio Committee.

²⁴ Based on submissions at the public hearings and the Portfolio Committee's views that an alternative word should be used in stead of referring to the certification of a victim which may lead to the stigmatization of a victim. The NPA supports this amendment.

²⁵ Clause 14 provides for an appeal mechanism in cases where a letter of recognition is refused or withdrawn. It is proposed that the appeal should be to the MEC of social development, to keep it on a provincial level. The NPA supports this amendment.

"person", for purposes of this Act, includes a natural person, a juristic person and a partnership, unless the context indicates otherwise;

"prescribe" means prescribe by regulation in terms of section [43] 44 of this Act;

"protective custody", for the purposes of section 14, means the detention or confinement of a person by the South African Police Service for the purpose of protecting that person in any place which is used for the reception, detention or confinement of a person who is in custody of the South African Police Service and includes all land, buildings and premises adjacent to that place and used in connection therewith;²⁶

"provincial department of social development" has the meaning ascribed to it in section 1 of the Children's Act;

"provincial head" has the meaning ascribed to it in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994);

"removal of body parts" means the removal of the possession of²⁷ or trade in any organ or other body part from a living person who has been trafficked or the body of a deceased person who has been trafficked and killed for the **[sole]**²⁸ purpose of removing the organ or other body part in contravention of the National Health Act, 2003 (Act No. 61 of 2003)²⁹;

"Republic" means the Republic of South Africa;³⁰

"servitude"³¹ means a condition in which the labour or services of a person are provided or obtained through threats or perceived threats of harm to that person or another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person does not perform the labour or services in question, that person or another person would suffer harm;

"sexual exploitation"³² means the commission of any sexual offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any offence of a sexual nature in any other law against a victim of trafficking, and includes

²⁶ SAPS and DSD agreed that it should be possible to take a victim of trafficking into protective custody if there is a real danger to that person. The question arose whether "protective custody" should not be defined to stress the fact that that victim is taken into custody for his or her protection. The wording was borrowed from the Child Justice Act.

²⁷ According to the Dept of Health the possession of body parts will be dealt with in the Regulations in terms of the National Health Act that will replace the Human Tissue Act. The DOH agrees to the inclusion of "possession" in the definition of "removal of body parts".

²⁸ At its briefing of the Portfolio Committee in February 2011, the NPA suggested that the word "sole" be deleted in order to not encounter difficulties in proving the purpose for the removal of the organs or body parts.

²⁹ The Dept of Health advised that it is not sure when the rest of the Human Tissue Act will be repealed as provided for in section 93 of the National Health Act, but indicated that it is working hard to finalise the Chapter of the NHA which will lead to the repeal of the Human Tissue Act. It might be necessary to frequently check with the DoH for progress, otherwise we might need to refer to the Human Tissue Act as well.

³⁰ Amendment as requested by Portfolio Committee.

³¹ Portfolio Committee enquired whether there is a similar definition in other legislation, but we could not find any.

³² Portfolio Committee indicated that a decision will be taken after consideration of the definition and offence of trafficking in persons.

forcing/compelling³³ 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;

OPTION

"sexual exploitation" means the commission of any sexual offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any offence of a sexual nature in any other law against a victim of trafficking[, and includes 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];³⁴

OPTION

"sexual exploitation" means the commission of –

- (a) any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act; or
- (b) any offence of a sexual nature in any other law against a victim of trafficking;

"slavery" means reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person;

["social service professional" has the meaning ascribed to it in section 1 of the Children's Act;]³⁵

"social worker" means a person registered as a social worker in terms of section 17 of the Social Service Professions Act, 1978 (Act No. 110 of 1978);

"temporary safe care" for the purposes of section 12, means care of an adult person suspected of being a victim of trafficking in an approved shelter, private home or any other place where that person can be accommodated safely pending the placement of that person in an accredited organisation

OPTION

"temporary safe care" for the purposes of section 12, means care of an adult person suspected of being a victim of trafficking in a shelter, private home or any other place approved by the Director-General: Social Development where that person can be accommodated safely pending the placement of that person in an accredited organisation.³⁶

³³ The word "compel" is used in the Sexual Offences Act.

³⁴ This option is for consideration of the Portfolio Committee which had a problem with the portion that is deleted. The opinion is held that the deleted portion is covered by the Sexual Offences Act.

³⁵ If the suggested amendments to clauses 11 and 12 (previously 12 and 13) are accepted, this definition is unnecessary.

³⁶ A definition of temporary safe care is inserted as clause 12 is amended to provide that a police official may place a suspected victim of trafficking in temporary safe care pending the transfer of that victim to an accredited organization. This was agreed upon at a meeting with SAPS and DSD. The definition was borrowed from the definition of "temporary safe care" in the Children's Act. There are norms and standards in place in terms of which a shelter etc is approved.

~~"trafficking"~~³⁷ ~~includes the delivery, recruitment, [procurement, capture, removal,] transportation, transfer, harbouring, sale, exchange, lease, [disposal]³⁸ 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]³⁹, by means of—~~

- ~~(a) — a threat of harm;~~
- ~~(b) — the threat or use of force [intimidation]⁴⁰ or other forms of coercion;~~
- ~~(c) — the abuse of vulnerability;~~
- ~~(d) — fraud;~~
- ~~(e) — deception [or false pretences]⁴¹;~~
- ~~(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 advantage⁴²;~~

~~aimed at either the person or an immediate family member of that person, 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]⁴³ of that person; and ///~~

"trafficking in persons" has the meaning assigned to it in section 3.

"trafficking-related activities" for the purposes of section 11B, means activities which are intended to facilitate the commission of an offence provided for in Chapter 2;

"UN Protocol to Prevent, Suppress and Punish Trafficking in Persons" means the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons,

³⁷ The NPA does not seem to have a problem with a definition, but has suggested certain amendments at its briefing of the Portfolio Committee.

³⁸ NPA is of the view that "lease" should be deleted as a human being cannot be leased. For the same reason a human being cannot be sold and we might need to reconsider "sale". At the briefing by the NPA on 15 June 2011, the Committee indicated that both "lease" and "sale" should remain.

³⁹ The words "of a person" are duplicated and the placement of the words "or an immediate family member..." here, in fact means that the immediate family member is also a victim of trafficking.

⁴⁰ In an attempt to make the definition more user-friendly, it is suggested that "intimidation" will be covered by "the threat or use of force or other forms of coercion".

⁴¹ "false pretences" will be covered by "fraud" and "deception".

⁴² The question has arisen whether paragraphs (j) and (k) are necessary. The NPA is of the view that both should remain as they focus on different aspects and are also in line with the Kenyan definition.

⁴³ Amendment proposed by Portfolio Committee in response to the Department's comment that this places a strong focus on trafficking for purposes of sexual exploitation and that the inclusion of this last part of the definition is unnecessary as it is already covered by the definition of sexual exploitation.

especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000, the English text of which is replicated in Schedule 2⁴⁴; and

"victim of trafficking" means

- (a) 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
- (b) an adult person who has been issued with a letter of recognition⁴⁵ to be a victim of trafficking as provided for in this Act.⁴⁶

(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.

Objects of Act⁴⁷

2. The objects of this Act are to—

- (a) give effect to the [UN Protocol to Prevent, Suppress and Punish Trafficking in Persons] Republic's obligations concerning the trafficking of persons in terms of international instruments to which the Republic is a signatory;⁴⁸

⁴⁴ See footnote 14 above

⁴⁵ See definition of letter of recognition.

⁴⁶ The Bill provides in several clauses for "a victim of trafficking" where reference is made to either a child victim of trafficking or an adult victim of trafficking and the NPA suggested that it is necessary to provide for a definition. See for eg. clauses 8, 14, 26, 29, 31. The Committee in June 2011, however, questioned the need for such a definition?

⁴⁷ Portfolio Committee decided to take a decision on this clause at a later stage.

- (b) provide for the prosecution of persons involved in trafficking and for appropriate penalties;
- (c) provide for the prevention of trafficking in persons and for the protection of and assistance to victims of trafficking⁴⁹;
- (d) provide services to victims of trafficking;
- (e) provide for effective enforcement measures;
- (f) establish an Intersectoral Committee on the Prevention and Combating of Trafficking in Persons, which must develop a draft national policy framework; and
- (g) combat trafficking in persons in a co-ordinated manner.

[CHAPTER 2 PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS⁵⁰

Public awareness

3. (1) The Intersectoral Committee established by section 40 must, and where appropriate, after consultation with relevant non-governmental organisations, establish public awareness programmes or other measures for the prevention and combating of trafficking in persons designed to—

- (a) inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, and South African citizens or permanent residents who apply for South African passports or who depart abroad, on issues relating to trafficking in persons, including—
 - (i) common recruitment techniques used by traffickers;
 - (ii) practices used to keep victims of trafficking in exploitative situations;
 - (iii) the forms of abuse to which victims of trafficking may be subjected; and
 - (iv) organisations, institutions or law enforcement agencies that may be approached for assistance or information;
- (b) inform and educate victims of trafficking on—
 - (i) their rights as victims;
 - (ii) legal or other measures in place to ensure their safety, recovery and repatriation; and

⁴⁸ Possible amendment based on suggestion by Portfolio Committee in response to public hearing submissions proposing that reference should also be made to other international instruments such as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

⁴⁹ The question arises if this paragraph should still refer to the prevention of trafficking if chapter 2 dealing with prevention is deleted. The same goes for paragraph (g).

⁵⁰ The Portfolio Committee suggested that this chapter should be moved to the chapter dealing with the responsibilities, functions and duties of the Intersectoral Committee.

- (iii) organisations, institutions or law enforcement agencies that may be approached for assistance or information; and
- (c) discourage the demand for and the supply of victims of trafficking that fosters the exploitation of those victims, especially women and children.

(2) The programmes or other measures referred to in subsection (1) must—

- (a) include appropriate measures aimed at reaching rural communities;
- (b) where possible, be provided in a language understood by the persons at whom they are directed; and
- (c) be reviewed every second year in order to determine their effectiveness.

(3) The Director-General: Justice and Constitutional Development must take all reasonable steps within available resources to ensure that the programmes or other measures referred to in subsection (1) are implemented throughout the Republic.]

CHAPTER [3] 2

OFFENCES, PENALTIES⁵¹ AND EXTRA-TERRITORIAL JURISDICTION

OPTION PROPOSED BY THE NPA

Trafficking in persons

- [4] 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;
 - (b) the threat or use of force or other forms of coercion;
 - (c) the abuse of vulnerability;
 - (d) fraud;
 - (e) deception;
 - (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,
- aimed at either the person or an immediate family member or that person for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.

⁵¹ PC indicated that it wants the penalties in a separate clause. It is suggested that the penalty clause be inserted at the end of this Chapter and not in clause 42 under general provisions.

(2) Any person who—(a) adopts a child, facilitated or secured through legal or illegal means;(b) concludes a forced marriage with another person,within or across the borders of the Republic, for the purpose of the exploitation of that other person in any form or manner, is guilty of an offence.(3) It is no defence to a charge of contravening subsection (1) or (2) that—(a) a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or that the intended exploitation or action did not occur, even if none of the means referred to in subsection 1 have been used;(b) an adult person who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or that the intended exploitation or action did not occur, if one or more of the means referred to in subsection 1 have been used.(4) In order to establish the liability in terms of subsection (1) or 2 of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting—(a) within the scope of his or her employment;(b) within the scope of his or her actual or apparent authority; or(c) with the express or implied consent of a director, member or partner of the employer or principal.(5) Subsection (4) does not exclude the liability of an employee or agent of or any other person acting on behalf of the employer or principal for committing the offence of trafficking in persons.(6) (a) A finding by a court that an employer or principal has contravened subsection (1) or (2) serves as a ground for the revocation or cancellation of any licence or registration that the employer or principal may require in order to conduct its business.(b) The clerk or registrar of the court which made the finding referred to in paragraph (a) must, in writing notify the authority that granted the licence or registration of the finding.(c) The authority that granted the licence or registration must review the licence or the registration and, where necessary, revoke or cancel the licence or registration.

Note: The rest of the options relating to clause 3 below could be deleted as agreement has been reached on the above proposed option.

Trafficking in persons⁵² and acts aimed at committing, acquiring another person to commit, or conspiring to commit [an offence under this Chapter] the offence of trafficking in persons

OPTION IN RESPECT OF HEADING OF CLAUSE 3

Trafficking in persons and involvement in trafficking in persons⁵³

[4]3. (1) A person is guilty of an offence of trafficking in persons if that person trafficks another person **[and is subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both]**⁵⁴.

(2) A person is guilty of an offence of involvement **[of] in** trafficking in persons **[and is subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable on conviction to a fine or imprisonment, or such imprisonment without the option of a fine or both,]** if that person—

- (a)** performs any act aimed at committing **[an offence under this Chapter]**⁵⁵ an offence of trafficking in persons;
- (b)** incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit **[an offence under this Chapter]** an offence of trafficking in persons; or
- (c)** conspires with any other person to commit **[an offence under this Chapter]** an offence of trafficking in persons or to aid in the commission thereof.

(3) It is no defence to a charge of contravening subsection (1) or (2) that—

- (a)** a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation, or the action which was intended to constitute trafficking or, that the intended exploitation or action did not occur, even if none of the means referred to in the definition of trafficking have been used;
- (b)** an adult person who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or that the intended exploitation or action did not occur, if one or more of the means referred to in the definition of trafficking have been used.

⁵² See separate document on definition and offence of trafficking.

⁵³ This heading will be in line with the provisions of subclause (2).

⁵⁴ The PC indicated that it wants the penalties in a separate clause. See new clause 39 under general provisions.

⁵⁵ The reference to "an offence in terms of this Chapter" is wrong as it will mean that an offender will receive a more severe penalty for the "attempt" or "conspiracy" to commit an offence under this Chapter than an offender who commits an actual offence in terms of this Chapter. In a previous draft Bill a separate clause was included to make the "attempt" clause applicable to all the offences in this Chapter and not only to the offence of trafficking in persons. To bring it in line with the Sexual Offences Amendment Act, it was inserted by the State Law Advisers as clause 4(2) but the wording was not changed accordingly.

(4) In order to establish the liability in terms of subsection (1) or (2) of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting—

- (a) within the scope of his or her employment;
- (b) within the scope of his or her actual or apparent authority; or
- (c) with the express or implied consent of a director, member or partner of the employer or principal.

(5) Subsection (4) does not exclude the liability of an employee or agent of or any other person acting on behalf of the employer or principal for committing the offence of trafficking in persons.

(6) (a) A finding by a court that an employer or principal has contravened subsection (1) or (2) serves as a ground for the revocation or cancellation of any licence or registration that the employer or principal may require in order to conduct its business.

(b) The clerk or registrar of the court which made the finding referred to in paragraph (a) must, in writing notify the authority that granted the licence or registration of the finding.

(c) The authority that granted the licence or registration must review the licence or the registration and, where necessary, revoke or cancel the licence or registration.

OPTION⁵⁶

Trafficking in persons [and acts aimed at committing, acquiring another person to commit, or conspiring to commit an offence under this Chapter]

[413]. (1) A person is guilty of an offence of trafficking in persons if that person trafficks another person [and is subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both].

(2) Subject to section 51 of the Criminal Law Amendment Act, 1997 (Act no. 105 of 1997), a person who is found guilty of an offence referred to in subsection (1), is liable on conviction to a fine not exceeding R100 million or to imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.⁵⁷

[(2) A person is guilty of an offence of involvement of trafficking in persons and is subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable on conviction to a fine or imprisonment, or such imprisonment without the option of a fine or both, if that person—

⁵⁶ This option is the NPA's recommendation which it presented to the Portfolio Committee in June 2011 and which was found to be acceptable.

⁵⁷ This subclause should be under the penalty clause later in the Bill. The NPA was requested by the Portfolio Committee to revert to it on the question of the proposed maximum fine.

- (a) performs any act aimed at committing an offence under this Chapter;
- (b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit an offence under this Chapter; or
- (c) conspires with any other person to commit an offence under this Chapter or to aid in the commission thereof.

(3) It is no defence to a charge of contravening subsection (1) or (2) that—

- (a) a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or, that the intended exploitation or action did not occur, even if none of the means referred to in the definition of trafficking have been used;
- (b) an adult person who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or that the intended exploitation or action did not occur, if one or more of the means referred to in the definition of trafficking have been used.

(4) In order to establish the liability in terms of subsection (1) or (2) of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting—

- (a) within the scope of his or her employment;
- (b) within the scope of his or her actual or apparent authority; or
- (c) with the express or implied consent of a director, member or partner of the employer or principal.

(5) Subsection (4) does not exclude the liability of an employee or agent of or any other person acting on behalf of the employer or principal for committing the offence of trafficking in persons.

(6) (a) A finding by a court that an employer or principal has contravened subsection (1) or (2) serves as a ground for the revocation or cancellation of any licence or registration that the employer or principal may require in order to conduct its business.

(b) The clerk or registrar of the court which made the finding referred to in paragraph (a) must, in writing notify the authority that granted the licence or registration of the finding.

(c) The authority that granted the licence or registration must review the licence or the registration and, where necessary, revoke or cancel the licence or registration.]⁵⁸

⁵⁸ At the suggestion of the NPA, these provisions have been shifted to clauses 9A and 9B.

Debt bondage

[5]4. Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence **[and is liable on conviction to a fine or imprisonment for a period not exceeding 15 years]**⁵⁹.

Possession, destruction, confiscation, concealment of or tampering with documents

[6]5. Any person who has in his or her possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in facilitating or promoting trafficking in persons is guilty of an offence **[and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years]**.

Using services of victims of trafficking

[7]6. Any person who intentionally benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another person to use the services of a victim of trafficking and knows or ought reasonably to have known that such person is a victim of trafficking, is guilty of an offence **[and is liable on conviction to a fine or imprisonment for a period not exceeding 15 years]**.

Conduct facilitating trafficking in persons

[8]7. (1) (a) Any person who **[is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years if the person]**—
[(a)](i) intentionally leases or subleases any room, house, building or establishment for facilitating or promoting trafficking in persons or allows it to be used or ought reasonably to have known that it will be used **[for facilitating or promoting] to facilitate or promote** trafficking in persons;
[(b)](ii) subsequent to the lease or sublease of any room, house, building or establishment, becomes aware or ought reasonably to have known that it is being used to facilitate or promote trafficking in persons and fails to report that knowledge to a police official⁶⁰;
[(b)](iii) advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that facilitates or promotes

⁵⁹ The Portfolio Committee indicated that it will consider appropriate penalties in respect of the offences.

⁶⁰ Portfolio Committee proposed that the provision should also address the instances where a person becomes aware of trafficking being conducted on his premises subsequent to leasing it.

trafficking in persons by any means, including the use of the internet or other information technology, and knows or ought reasonably to have known that it will be used **[for facilitating or promoting]** to facilitate or promote trafficking in persons; or (iv) finances⁶¹, controls⁶² or organises⁶³ the commission of an offence under this Chapter, is guilty of an offence.

(b) A person who is found guilty of an offence referred to in paragraph (a) is liable on conviction to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years or both.⁶⁴

- (2) An internet service provider operating in the Republic—
- (a) must take all reasonable steps to prevent the use of its service for the hosting of information referred to in subsection (1)~~[(b)](iii)~~; and
 - (b) that has knowledge that any internet address on its server contains information referred to in subsection (1)~~[(b)](iii)~~ must—
 - (i) without delay report that internet address, as well as the particulars of the person maintaining or in any manner contributing to that internet address, to the South African Police Service;
 - (ii) take all reasonable steps to preserve any evidence for purposes of investigation and prosecution by the relevant authorities; and
 - (iii) without delay take all reasonable steps to prevent access to that internet address by any person.⁶⁵

⁶¹ Organised crime groups have access to vast amounts of money to finance trafficking in persons and including the financing act will ensure that they are covered by the provisions of the Bill. It is also in line with the wording used in the Kenya Act, which the Portfolio Committee seems to prefer.

⁶² Controlling is linked to financing and will also address the actions of the kingpins of the crime. It is also in line with the wording used in the Kenya Act.

⁶³ Organising the crime of trafficking is in line with the Protocol.

⁶⁴ This penalty clause emanates from the NPA's briefing in June 2011. The Portfolio Committee requested the NPA to revert to it on the maximum fine. This penalty clause should, however, be shifted to the penalty clause later in the Bill.

⁶⁵ The Department was referred to the Films and Publication Amendment Act, 3 of 2009 which inserted section 24C into the Films and Publications Act, 65 of 1996 and which provides that any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet, must monitor such services and take such reasonable steps necessary to ensure that those services are not used for the commission of offences against children. Section 24C came into operation on 14 March 2010. A further discussion was held with an official of the Films and Publications Board (the FPB) regarding the effective monitoring of services as required by section 24C. The Department was advised that it is difficult to monitor the services directly as issues, such as personal privacy and communications have to be taken into account. More focus is placed on awareness-raising. In terms of section 24C, service providers must also put mechanisms in place to enable the reporting of suspicious behaviour and provide children and their parents with tools which can be used to filter or block access to services. The Internet Service Providers Association of South Africa (IPSA) also has a code of conduct in which specific provision is made for the protection of minors. The FPB advised that internet service providers generally comply with the contents of the code of conduct. The Committee's views as to whether the provisions of clause 7 should be amended in accordance with section 24C of the Films and Publications Act and whether the inputs of IPSA should be obtained in this regard, will be appreciated.

(3) An internet service provider who fails to comply with the provisions of subsection (2) is guilty of an offence **[and is liable on conviction to a fine or to imprisonment for a period not exceeding five years]**.

(4) (a) A finding by a court that an internet service provider has contravened subsection (2) serves as a ground for the revocation or cancellation of that licence.

(b) The clerk or registrar of the court which made the finding referred to in paragraph (a) must, in writing, notify the authority that granted the licence of the finding.

(c) The authority that granted the licence must review the licence and, where necessary, revoke or cancel the licence.

Liability of carriers⁶⁶

[9]8. (1) A carrier who—

(a) knows that a person is a victim of trafficking;

(b) ought to have known that a person is a victim of trafficking,

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 visa⁶⁷ 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 who, on reasonable grounds, suspects that any of its passengers is a victim of trafficking must immediately report that suspicion to a police official for investigation.⁶⁸

(3) A carrier who fails to comply with the provisions of subsection (2) is guilty of an offence.⁶⁹

[(2)] (4) 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)] (5)⁷⁰ (a) **[In addition to any other offence under this section, a] A carrier is liable to pay the expenses incurred or reasonably expected to be incurred in**

⁶⁶ The Portfolio Committee proposed that the heading reads "Liability of cross-border carriers". The Department, however, proposes that the heading should not be amended in light of the proposed subsection (2) which will also apply to carriers within the Republic.

⁶⁷ There are views that the word "valid" is superfluous as only a valid visa will be accepted for entry or departure. The Immigration Act, however, refers to a "valid visa".

⁶⁸ The proposed amendment is based on the Portfolio Committee's suggestion that carriers should be held liable despite the fact that a victim of trafficking is in possession of legal travel documents. The Department has, however, formulated the amendment in such a way to also place an obligation on internal carriers to report cases of trafficking. Reference to the proposed clause 8(2) is also made in clause 11(4) and 12(4).

⁶⁹ The proposed penalty is in line with the penalty provided for offences in terms of clause 11(6) and 12(16), in new clause 39.

⁷⁰ The Portfolio Committee is of the view that carriers should be ordered on a balance of probabilities to compensate the State for expenses, it should not be in addition to a conviction.

connection with the care, accommodation, transportation and repatriation of the victim, **[as provided for in section 28.]** if the court finds, on a balance of probabilities, that the carrier has knowingly transported a victim of trafficking or ought reasonably to have known that it was transporting a victim of trafficking.

(b) An order for the payment of the expenses referred to in paragraph (a) has the effect of a civil judgment of a magistrate's court and the provisions of section 27(4) apply with the necessary changes required by the context.

OPTION

Note: The option below was proposed in the NPA's presentation of 15 June. It is suggested that this option be deleted as the Portfolio Committee has agreed to the NPA's proposed amendment as outlined above.

Liability of carriers⁷¹

- [9]8. (1) (a)** A carrier **[who]** which –
- (i) brings, delivers, transports or transfers a [victim of trafficking] person into or removes such a [victim of trafficking] person from the Republic [knowing] and which knows, suspects or ought reasonably to have known or suspected that the person is a 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.] ; or
 - (ii) delivers, transports or transfers a person from one place to another in the Republic and which knows, suspects or ought reasonably to have known or suspected that the person is a victim of trafficking,
- must, without delay, report this knowledge or suspicion to a police official for investigation.

(b) A carrier which fails to report as provided for in paragraph (a) is guilty of an offence and is liable on conviction to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years to both.

(c) A court which convicts a carrier of an offence referred to in section 35(7), read with section 50(3) of the Immigration Act, may, in addition to the administrative fine referred to in section 50(3) of the Immigration Act, impose a penalty referred to in paragraph (b) if the court finds that the carrier knew, suspected or ought reasonably to have known or suspected that the foreigner in question was a victim of trafficking.

⁷¹ This option was recommended by the NPA in June 2011 and seems to have been accepted by the Portfolio Committee.

(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.⁷²

(3) (a) **[In addition to any other offence under this section, a]** 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]** if the court finds, on a balance of probabilities, that the carrier knew, suspected or ought reasonably to have known or suspected that it was transporting a victim of trafficking.

(b) An order for the payment of the expenses referred to in paragraph (a) has the effect of a civil judgment of a magistrate's court and the provisions of section 27(4) apply with the necessary changes required by the context.⁷³

Involvement in trafficking of persons

X. (1) Any person who—

- (a) performs any act aimed at participating in the commission;
- (b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or
- (c) conspires with any other person to commit,
an offence under this Chapter, is guilty of an offence.

(2) It is no defence to a charge of contravening subsection (1) that—

- (a) a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or that the intended exploitation or action did not occur, even if none of the means referred to in subsection 1 have been used;
- (b) an adult person who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or that the intended exploitation or action did not occur, if one or more of the means referred to in subsection 1 have been used.

(3) In order to establish the liability in terms of subsection (1) of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting—

- (a) within the scope of his or her employment;
- (b) within the scope of his or her actual or apparent authority; or

⁷² The NPA suggested that this subclause be deleted but the Portfolio Committee was of the view that it should remain.

⁷³ The Portfolio Committee is of the view that carriers should be ordered on a balance of probabilities to compensate the State for expenses, it should not be in addition to a conviction.

(c) with the express or implied consent of a director, member or partner of the employer or principal.

(4) Subsection (3) does not exclude the liability of an employee or agent of or any other person acting on behalf of the employer or principal for committing the offence of trafficking in persons.

(5) (a) A finding by a court that an employer or principal has contravened subsection (1) serves as a ground for the revocation or cancellation of any licence or registration that the employer or principal may require in order to conduct its business.

(b) The clerk or registrar of the court which made the finding referred to in paragraph (a) must, in writing notify the authority that granted the licence or registration of the finding.

(c) The authority that granted the licence or registration must review the licence or the registration and, where necessary, revoke or cancel the licence or registration.

Involvement in trafficking in persons⁷⁴

~~9. (1) A person is guilty of the offence of involvement in trafficking in persons if that person—~~

~~(a) attempts to commit an offence under this Chapter;~~

~~(b) incites, instigates, commands, directs, aids, abets, promotes, advises, recruits, encourages or procures any other person to commit an offence under this Chapter;~~

~~(c) conspires with any other person to commit an offence under this Chapter or to aid in the commission thereof.~~

~~(2) A person who is found guilty of an offence referred to in subsection (1) is liable on conviction to the penalties for the offence in question, as provided for in this Chapter/section 39.~~

Liability of persons for offences under this Chapter⁷⁵

~~10. (1) It is no defence to a charge of contravening section 3, 4, 5, 6, 7, 8 or 9 that—~~

⁷⁴ The NPA, in its June 2011 briefing to the Portfolio Committee, suggested that clause 4(2) of the introduced Bill, dealing with involvement in trafficking persons, should be a stand-alone offence, which the Committee accepted.

⁷⁵ The NPA, in its June 2011 briefing to the Portfolio Committee, suggested that clause 4(3), (4), (5) and (6) of the introduced Bill, dealing with the liability of persons, should be a stand-alone clause, and should also be extended to all offences under the Chapter, over and above the offences of trafficking and involvement in trafficking, which the Committee accepted.

~~(a) — a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation or the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur, even if none of the means referred to in the definition of trafficking have been used; or~~

~~(b) — an adult person who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur, if one or more of the means referred to in the definition of trafficking have been used. (Lowesa, let's please check these two paragraphs):~~

~~(2) — In order to establish the liability in terms of section 3, 4, 5, 6, 7, 8 or 9 of an employer or principal, the conduct of an employee or agent of, or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting —~~

~~(a) — within the scope of his or her employment;~~

~~(b) — with the scope of his or her actual or apparent authority; or~~

~~(c) — with the express or implied consent of a director, member or partner of the employer or principal.~~

~~(3) — Subsection (2) does not exclude the liability of an employee or agent of, or any other person acting on behalf of the employer or principal for committing an offence under this Chapter.~~

~~(4) (a) — A finding by a court that an employer or principal has contravened section 3, 4, 5, 6, 7, 8 or 9 serves as a ground for the revocation or cancellation of any licence or registration that the employer or principal may require in order to conduct its business.~~

~~(b) — The clerk or registrar of the court which makes the finding referred to in paragraph (a) must, in writing, notify the authority that granted the licence or registration of the finding.~~

~~(c) — The authority that granted the licence or registration must review the licence or registration and, where necessary, revoke or cancel the licence or registration.~~

Extra-territorial jurisdiction

[10]11. (1) A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence in terms of this Act had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the person to be charged—

(a) is a citizen of the Republic;

- (b) is ordinarily resident in the Republic;
- (c) has committed the offence against a citizen of the Republic or a person who is ordinarily resident in the Republic;
- (d) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic;
- (e) is, for any reason, not extradited by the Republic or if there is no application to extradite that person; or
- (f) is a juristic person or a partnership registered in terms of any law in the Republic.

(2) Only a High Court has jurisdiction in respect of **[an offence]**⁷⁶ a person referred to in subsection (1)(d).

(3) A person who commits an offence referred to in subsection (1) is liable on conviction to the penalty prescribed for that offence.

(4) ~~The [Minister must, in consultation with the Chief Justice and after consultation with the]~~⁷⁷ ~~National Director of Public Prosecutions must, in writing, designate an appropriate court in which to conduct a prosecution against any person accused of having committed an offence in a country outside the Republic as provided for in subsection (1).~~

(a) Subject to paragraph (b), the National Director of Public Prosecutions must, in writing, designate an appropriate court in which to conduct a prosecution against any person accused of having committed an offence in a country outside the Republic as provided for in subsection (1).

(b) For the purposes of determining the jurisdiction of a court to try the offence, the offence is deemed to have been committed –

- (i) at the place where the accused is ordinarily resident; or
- (ii) at the accused person's principal place of business.

[(5) No prosecution may be instituted against a person in terms of this section with respect to conduct which formed the basis of an offence under this Act in respect of which that person has already been convicted or acquitted by a court of another jurisdiction.]⁷⁸

[(6)] **(5)** The institution of a prosecution in terms of this section must be authorised in writing by the National Director of Public Prosecutions.

Penalties⁷⁹

⁷⁶ Clause 9(1)(d) refers in fact to a person, not to an offence.

⁷⁷ This deletion was proposed by the NPA in its June 2011 briefing.

⁷⁸ Amendment proposed by Portfolio Committee as the double jeopardy rule is a recognized principle and need not be specifically provided for.

⁷⁹ Portfolio Committee suggested separate clause dealing with the penalties. The view of the Portfolio Committee on the NPA's recommendation relating to penalties is awaited. The Committee also wants the contravention of or failure to comply with the regulations to be prescribed as offences in the Bill itself instead of in the regulations. See the footnote at clause 44.

- 41.** (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 or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both;
 - (b) section 4 is liable to a fine or imprisonment for a period not exceeding 15 years;
 - (c) section 5 is liable to a fine or imprisonment for a period not exceeding 10 years;
 - (d) section 6 is liable to a fine or imprisonment for a period not exceeding 15 years;
 - (e) section 7(1) is liable to a fine or imprisonment for a period not exceeding 10 years;
 - (f) section 7(3) is liable to a fine or imprisonment for a period not exceeding five years;
 - (g) section 8(1) is liable to a fine of R1 million or imprisonment for a period not exceeding five years;
 - (h) section 8(3) is liable to a fine or imprisonment for a period not exceeding one year;
 - (i) section 11(6) is liable to a fine or imprisonment for a period not exceeding one year;
 - (j) section 12(16) is liable to a fine or imprisonment for a period not exceeding one year;
 - (k) section 17 is liable to a fine or imprisonment for a period not exceeding 15 years; and
 - (l) section 44(5) is liable to a fine or imprisonment for a period not exceeding one year.

THE NPA PROPOSES THE FOLLOWING PENALTY CLAUSE:

- 11.** (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 not exceeding 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 not exceeding R50 million or imprisonment for a period not exceeding 15 years;
 - (c) sections 5 or 7(1) is liable to a fine not exceeding R30 million or imprisonment for a period not exceeding 10 years;
 - (d) sections 7(3) or 8(1) is liable to a fine not exceeding 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 not exceeding R3 million or imprisonment for a period not exceeding one year;

Factors to be considered in sentencing

11. If a person is convicted of any offence under this **[Act] Chapter⁸⁰**, the court that imposes the sentence must consider, but is not limited to, the following aggravating factors:

- (a) The significance of the role of the convicted person in the trafficking process;
- (b) previous convictions relating to the crime of trafficking in persons;
- (c) whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance;
- (d) the conditions in which the victim was kept;
- (e) whether the victim was held captive for any period;
- (f) whether the victim suffered abuse and the extent thereof⁸¹, **[and the physical and psychological effects the abuse had on the victim;]⁸²**
- (g) the physical and psychological effects the abuse had on the victim;
- [(g)](h)** whether the offence formed part of organised crime; **[and]**
- [(h)](i)** whether the victim was a child;
- (j) the nature of the relationship between the victim and the convicted person⁸³;
- (k) the state of the victim's mental health; and
- (l) whether the victim had any physical disability.⁸⁴

CHAPTER [4] 3

IDENTIFICATION AND PROTECTION OF VICTIMS OF TRAFFICKING

Reporting **[and referral]** of and dealing with⁸⁵ child victim of trafficking

[12]13. (1) Despite any **[other]** law, policy or code of conduct prohibiting the disclosure of personal information, **[an immigration officer, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional health practitioner, traditional healer or traditional leader]** any person⁸⁶ who[, on reasonable grounds,] knows, suspects or ought reasonably to have known or suspected⁸⁷ that a child is a victim of trafficking must immediately report that knowledge or suspicion to a police official for investigation

⁸⁰ This clause should not apply to all offences in terms of this Act as offences are created where officials or professionals fail to perform duties allocated to them in terms of the Bill. It was not the intention to make this clause applicable to these officials.

⁸¹ Inserted at the request of the NPA at the June 2011 briefing.

⁸² Deleted at the request of the NPA at the June 2011 briefing and inserted as a stand-alone paragraph.

⁸³ Portfolio Committee requested that this factor be included. NPA supports inclusion.

⁸⁴ Inserted at the request of the NPA at the June 2011 briefing.

⁸⁵ Certain amendments regarding the duties of a police official as agreed to by SAPS and DSD, necessitate the amendment of the heading. The clause also provides for more than the reporting and notification of a child victim of trafficking.

⁸⁶ Proposed amendment by the Portfolio Committee to refer in general terms to persons who are prohibited from disclosing personal information. The proposed wording will result in subclause (2) being superfluous.

⁸⁷ As recommended by the NPA at its briefing in June 2011 and approved by the Portfolio Committee.

[(2) Any person other than the persons referred to in subsection (1) who on reasonable grounds suspects that a child is a victim of trafficking, must report that suspicion to a police official for investigation.]

(2) Subsection (1) does not apply to the right to legal professional privilege as between a legal practitioner and his or her client in respect of communications made in confidence between that legal practitioner and—

- (a) his or her client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or
- (b) a third party for the purposes of litigation which is pending or contemplated or which has commenced.⁸⁸

(3) A person referred to in subsection (1) [or (2)] —

- (a) must provide reasons for that knowledge or suspicion to a police official;**
- (b) who makes the report in good faith, is not liable to civil action on the basis of the report; and**
- (c) is entitled to have his or her identity kept confidential if his or her safety is at risk as a result of the report, unless the interests of justice require otherwise.**

(4) A police official to whom a report has been made in terms of subsection (1) [or (2)] or section 7 or 8⁸⁹/any other provision of this Act in respect of a child or a police official who, on reasonable grounds, knows, suspects or ought reasonably to have known or suspected⁹⁰ that a child is a victim of trafficking—

- (a) may, despite the proviso contained in section 26 of the Criminal Procedure Act, without a warrant, enter any premises if he or she, on reasonable grounds, believes that the safety of that child is at risk or that the child may be moved from those premises and may use such force as may be reasonably necessary to overcome any resistance against entry to the premises, including the breaking of any door or window of those premises, on condition that the police official must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter those premises⁹¹;**
- (b) must [, within 24 hours, refer that child to a designated child protection organisation or the provincial department of social development,] deal with that**

⁸⁸ The Portfolio Committee agreed that legal practitioners should be excluded from the duty to report. The wording of the subclause was borrowed from section 37 of the Financial Intelligence Centre Act, 38 of 2001, although section 37 of FICA refers to an attorney and not a legal practitioner. Also see section 201 of the Criminal Procedure Act, 51 of 1977, which excludes a legal practitioner from giving evidence against his or her client.

⁸⁹ Clauses 7 and 8 impose obligations on certain persons to report any suspicion of trafficking-related offences to police officials.

⁹⁰ As recommended by the NPA at its briefing in June 2011 and approved by the Portfolio Committee.

⁹¹ SAPS requested that provision be made to enable them to enter premises without a warrant and to use force to obtain entry if necessary.

child in terms of section 110(4) of the Children's Act⁹², pending a police investigation into the matter; or

- (c) may place that child in temporary safe care in terms of section 152 of the Children's Act, pending the transfer of the child to a designated child protection organisation or provincial department of social development⁹³.

(5) The procedure provided for in section 110(5) to (8) of the Children's Act applies in respect of a child **[referred to a designated child protection organisation or the provincial department of social development]** who has been dealt with in terms of/ referred to in subsection (4)(b).

(6) A person who fails to comply with the provisions of subsections (1)[, (2)] or (4)(b), is guilty of an offence **[and is liable on conviction to a fine or imprisonment for a period not exceeding one year].**

Reporting [and referral] of and dealing with⁹⁴ adult victim of trafficking

[13]14. (1) [(a)] An immigration officer, a labour inspector, **[social worker, social service professional, medical practitioner, nurse, traditional health practitioner, traditional healer or]** a traditional leader or/and any other person not bound by a law, policy or code of conduct prohibiting the disclosure of personal information, who[, on reasonable grounds,] knows, suspects or ought reasonably to have known or suspected⁹⁵ that an adult person is a victim of trafficking must[, subject to paragraph (b),] immediately report that suspicion to a police official for investigation.

[(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

⁹² This amendment is made based on agreements reached at a meeting with SAPS and DSD when SAPS suggested that the clause should follow the wording of the Children's Act in terms of which SAPS has clear duties in respect of a child in need of care and protection. Section 110(4) of the Children's Act provides that "A police official to whom a report has been made in terms of subsection (1) (that a child has been abused) or (2) (that a child is in need of care and protection) or who becomes aware of a child in need of care and protection must—

(a) ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk; and

(b) within 24 hours notify the provincial department of social development or a designated child protection organisation of the report and any steps that have been taken with regard to the child." SAPS agrees with the changes.

⁹³ This gives a police official the option to place a child in temporary safe care in instances where the nearest child protection organisation or provincial department of social development is far from the police station. Section 152 of the Children's Act provides for the removal of a child to temporary safe care without a court order. SAPS agrees with these provisions.

⁹⁴ Amendment of heading in accordance with the amendment of clause 11. Also, the clause provides for more than the reporting and notification of a victim, but deals also with the assessment of a person to determine if that person is a victim of trafficking, the issue of a letter of recognition, etc.

⁹⁵ As recommended by the NPA at its briefing in June 2011 and approved by the Portfolio Committee.

has given his or 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 person's consciousness or judgement is adversely affected.]⁹⁶

OPTION

(1) Despite any law, policy or code of conduct prohibiting the disclosure of personal information, any person who knows, suspects or ought reasonably to have known or suspected that an adult person is a victim of trafficking must immediately report that suspicion to a police official for investigation.

[(2) Any person, other than the persons referred to in subsection (1)(a), who on reasonable grounds suspects that an adult person is a victim of trafficking, may report that suspicion to a police official for investigation.]⁹⁷

(2) Subsection (1) does not apply to the right to legal professional privilege as between a legal practitioner and his or her client in respect of communications made in confidence between the legal practitioner and —

- (a) his or her client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or
- (b) a third party for the purposes of litigation which is pending or contemplated or which has commenced.⁹⁸

(3) A person referred to in subsection (1) [or (2)]—

- (a) must provide reasons for that knowledge or suspicion to a police official;
- (b) who makes [a] the report in good faith, is not liable to civil action on the basis of the report; and
- (c) is entitled to have his or her identity kept confidential if his or her safety is at risk as a result of the report, unless the interests of justice require otherwise.

(4) A police official to whom a report has been made in terms of subsection (1) or [(2),] section 7 or 8⁹⁹/any other provision of this Act in respect of an adult person¹⁰⁰ or a police official who[, on reasonable grounds,] knows, suspects or ought reasonably to have known or suspected¹⁰¹ that an adult person is a victim of trafficking [must, within 24 hours, refer that person to an accredited organisation or the provincial department of social development, pending a police investigation into the matter] —

⁹⁶ The Portfolio Committee does not support the requirement of consent by a victim.

⁹⁷ Subclause (2) does not seem to be necessary as everyone may report crime.

⁹⁸ The Portfolio Committee agreed that legal practitioners should be excluded from the duty to report. The wording of the subclause was borrowed from section 37 of the Financial Intelligence Centre Act, 38 of 2001.

⁹⁹ Clauses 7 and 8 impose obligations on certain persons to report any suspicion of trafficking-related offences to police officials.

¹⁰⁰ See the proposed amendments to clause 8.

¹⁰¹ As recommended by the NPA at its briefing in June 2011 and approved by the Portfolio Committee.

(a) may—

(i) despite the proviso contained in section 26 of the Criminal Procedure Act, without a warrant, enter any premises if he or she on reasonable grounds believes that the safety of that person is at risk or that the person may be moved from those premises and may use such force as may be reasonably necessary to overcome any resistance against entry to the premises, including the breaking of any door or window of those premises on condition that the police official must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter those premises;

(ii) as a measure of last resort and with the consent of the person concerned, take him or her into protective custody if there is an immediate threat to the safety of that person, for a period until the station commander of the police station in question is satisfied that the threat has ceased to exist, whereafter the police official may place that person in temporary safe care referred to in subsection (5)¹⁰²; and

¹⁰³(b) must within 24 hours, notify an accredited organisation or the provincial department of social development of that person.

(5) A police official may place an adult person referred to in subsection (4) in temporary safe care, pending the transfer of that person to an accredited organisation or provincial department of social development.

(6) A police official must, if it is reasonably possible to do so, render such assistance to to an adult person referred to in subsection (4), as may be necessary in the circumstances, including, but not limited to—

(a) assisting that person to obtain medical treatment; and

(b) transporting that person to a place of temporary safe care, an accredited organisation or a provincial department of social development which has been notified in terms of subsection (4)(b)¹⁰⁴.

¹⁰² The question was raised who will determine if the threat has ceased to exist and it is suggested that a senior police official for eg the station commander where the victim is held in protective custody should be satisfied that the threat has ceased to exist.

¹⁰³ Subclauses (4)(a)(ii), (5), (6), (7) and (8) seek to address the proposals made at a meeting with SAPS and DSD, namely, to notify an accredited organisation or the provincial department of social development of a suspected victim of trafficking, the possibility of taking a suspected victim of trafficking into protective custody, to place a victim in temporary safe care, to place a duty on a police official, if it is reasonably possible to do so, to render assistance to a victim in obtaining medical treatment and transporting the victim to the place of temporary safe care, the accredited organisation or provincial department of social development. SAPS agrees in principle with these amendments, but wishes new subclause (6)(b) to read: "(b) transporting that person to the accredited organisation or provincial department of social development which has been notified in terms of subsection (4)(b)(i), if the accredited organisation or provincial department of social development is within a reasonable distance from the police station concerned." SAPS indicated that it does not have the capacity to transport victims of trafficking to a shelter which has been accredited to accommodate victims of trafficking, which may be for example, 300 km away. The concern is, however, who will determine what a reasonable distance is? It is submitted that the introductory part of subclause (6) is wide enough to address SAPS proposal.

¹⁰⁴ Subclause (6) was borrowed from section 2 of the Domestic Violence Act, 1998.

[(5)] (7) An accredited organisation or the provincial department of social development **[to which a referral has been made in terms of subsection 4]** which has received an adult person referred to in subsection (4), must [—

- (a)** **within 24 hours, where necessary with the assistance of the South African Police Service, ensure the safety of the person concerned if the person's safety is at risk¹⁰⁵; and**
- (b)]** without delay, in the prescribed manner, assess whether the person concerned is a victim of trafficking.

(8) An accredited organisation or the provincial department of social development which has an adult person who is a victim of trafficking in its care and whose safety is at risk, may, as a measure of last resort and with the consent of the person concerned, request the South African Police Service to take the person into protective custody, for a period until the station commander of the police station in question is satisfied that the threat has ceased to exist, whereafter that person must, without delay, be returned to the accredited organisation or provincial department of social development, as the case may be.

[(6) An adult person referred to in subsection (1), (2) or (4) may temporarily be accommodated at an accredited organisation pending a decision in terms of subsection (5)(b) on whether he or she is a victim of trafficking.]¹⁰⁶

[(7)] (9) [If, a] After an assessment referred to in subsection [(5)(b)] (7) by an accredited organisation, 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.] it must, in the prescribed manner and together with the prescribed documentation, submit the outcome of the assessment and its recommendations to the relevant provincial department of social development for consideration/confirmation¹⁰⁷.**

(10) If the provincial department of social development in question, after having —

- (a)** considered the outcome of the assessment by an accredited organisation; or
- (b)** completed the assessment itself.

¹⁰⁵ The provision as it read created uncertainty as to where SAPS was supposed to assist with the safety of the victim as they cannot put a guard at the place where the victim is accommodated. Hence the provision that a victim could be taken into protective custody in the new subclause (8).

¹⁰⁶ Provisions regarding appeals must be inserted and it seems advisable to move this subclause more towards the end of the clause to include that a person may be accommodated at the accredited organization also when an appeal is pending, otherwise where will the victim be accommodated?

¹⁰⁷ The subclause has been changed in line with the Portfolio Committee's views that an accredited organization should not be allowed to issue a letter of recognition to a victim of trafficking, but that it should be done by a government institution. It is suggested that the procedure regarding the submission of the outcome of the assessment and the withdrawal of a letter of recognition and appeals be prescribed in the regulations to be issued by DSD.

is satisfied that the person is a victim of trafficking, it/the provincial head must —

- (i) issue a letter of recognition, as prescribed, to the victim; and
- (ii) inform the victim of the right to apply for a recovery and reflection period in terms of section 17, if he or she is a foreigner.

(11) The provincial head may, at any time, withdraw a letter of recognition in the prescribed manner if he or she receives evidence/information that a person in respect of whom a letter of recognition was issued, was not a victim of trafficking at the time the letter of recognition was issued.¹⁰⁸

(12) If the provincial department of social development/provincial head rejects the outcome of an assessment referred to in subsection (9)/ is not satisfied that the person is a victim of trafficking, or if the provincial head withdraws a letter of recognition in terms of subsection (11)—

- (a) that provincial department of social development or provincial head must provide written reasons to the person affected by its or his or her decision; and
- (b) a person aggrieved by the decision may lodge an appeal in the prescribed manner to the MEC having jurisdiction¹⁰⁹.

(13) The MEC must deal with the appeal in the prescribed manner.

(14) If the appeal is unsuccessful or the affected person does not wish to lodge an appeal, the accredited organisation or provincial department of social development must deal with the person in the prescribed manner.

(15) An adult person —

- (a) suspected of being a victim of trafficking referred to in subsection (1);
 - (b) in respect of whom a letter of recognition has been withdrawn as provided for in subsection (11); or
 - (c) has lodged an appeal as provided for in subsection (12)(b).
- may be accommodated temporarily at an accredited organisation, pending a decision in terms of subsection (10) or (13).

[(8)] (16) An immigration officer, [or] a labour inspector or traditional leader who fails to comply with the provisions of subsection (1) or a police official who fails to comply with the provisions of subsection (4)(b) is guilty of an offence [and is liable on conviction to a fine or imprisonment for a period not exceeding one year].¹¹⁰

OPTION 1 IN RESPECT OF SUBCLAUSE (16)

¹⁰⁸ Portfolio Committee requested that provision be made for an appeal mechanism and the withdrawal of a letter of recognition.

¹⁰⁹ It is suggested that the appeal be heard by the MEC to keep the matter on provincial level. It is further suggested that a definition be inserted to define "Member of the Executive Council"

¹¹⁰ Portfolio Committee indicated that non-reporting by professionals should not be criminalised, unless they have been asked by the victim to report him or her. Such a provision will be in contradiction with subclause (1) which provides that professionals must report suspected victims of trafficking. How will a professional prove that a victim has requested to be reported or has not asked to be reported?

(16) An immigration officer, a labour inspector a traditional leader or any person bound by a law, policy or code of conduct prohibiting the disclosure of personal information¹¹¹, who fails to comply with the provisions of subsection (1) or a police official who fails to comply with the provisions of subsection (4)(b), is guilty of an offence.

OPTION 2 IN RESPECT OF SUBCLAUSE (16)(READ WITH THE OPTION TO SUBCLAUSE (1))

(16) Any person who fails to comply with the provisions of subsection (1) or a police official who fails to comply with the provisions of subsection (4)(b), is guilty of an offence.

OPTION 3 IN RESPECT OF SUBCLAUSE (16)

(16) (a) An immigration officer, a labour inspector or traditional leader who fails to comply with the provisions of subsection (1) or a police official who fails to comply with the provisions of subsection (4)(b) is guilty of an offence.

(b) Any person bound by a law, policy or code of conduct prohibiting the disclosure of personal information who fails to report a person suspected of being a victim of trafficking to a police official, despite that person's request to be reported, is guilty of an offence.

[(9) A social worker, social service professional, medical practitioner, nurse, traditional health practitioner, traditional healer or traditional leader is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year if he or she fails to—

- (a) request the written consent referred to in subsection (1)(b) of an adult person referred to in subsection (1)(a) whilst he or she on reasonable grounds suspects that that person is a victim of trafficking; or**
- (b) make a report referred to in subsection (1)(a) after he or she has obtained the written consent referred to in subsection (1)(b).]**¹¹²

Child suspected of being¹¹³ a victim of trafficking found in Republic

[14]15. [(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.]**¹¹⁴

¹¹¹ Amendment in line with clause 11(1).

¹¹² The Portfolio Committee has indicated that all persons should have a duty to report, no matter what, with the possible exception of legal practitioners.

¹¹³ Portfolio Committee pointed out that at the stage the child is found, it has not yet been ascertained that he/she is a victim of trafficking, but is suspected to be such.

¹¹⁴ It seems that clause 15(1) is not necessary as a child is in any event covered by the provisions of the Children's Act.

[(2)] (1) If, after an investigation as provided for in **[subsection (1)]** section 155(2) of the Children's Act, an illegal foreign child who is suspected of being a victim of trafficking 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)] (2) 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.

(3) An illegal foreign child referred to in subsection (1) must be assisted by a designated social worker in applying for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998), at least six months before the children's court order made in respect of that child expires if the Director-General: Home Affairs is of the view that it is not in the best interests of that child to return him or her to his or her country of origin or the country from where he or she has been trafficked.

OPTION IN RESPECT OF SUBCLAUSE (3)

(3) An illegal foreign child referred to in subsection (1) must be assisted by a designated social worker in applying for temporary residence as provided for in section 18(1) at least six months before the children's court order made in respect of that child expires if the Director-General: Home Affairs is of the view that it is not in the best interests of that child to return him or her to his or her country of origin or the country from where he or she has been trafficked.¹¹⁵

Provision of health care services¹¹⁶

[15]16. 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.

Criminal prosecution of [against] victim of trafficking [prohibited]¹¹⁷

¹¹⁵ Submissions were received that provision should be made to accommodate a child victim who was under the age of 18 when he or she has been trafficked and has reached the age of 18 years. The DHA was asked for its views. They indicated that they would discuss with their Refugee Officers and their views are awaited.

¹¹⁶ A member of the Portfolio Committee indicated that this clause should be inserted under the chapter dealing with services to victims. If inserted under the chapter dealing with services to adult victims, it will exclude foreign child victims. The Portfolio Committee also requested that information from the Dept of Health be obtained on what public health services are currently available to victim of crime and the problems that illegal foreigners experience in accessing public health services. The Dept of health advised that public health services currently available to victims of crime are—Medical intervention in case of injuries sustained to stabilise a victim; HIV/AIDS counselling; reproductive health; HIV testing and provision of Post Exposure Prophylaxis to HIV positive victims and collection of forensic evidence. Illegal foreigners are treated in emergency circumstances, but the problem lies with those who do not have any form of identification that is required to open a file if they go to public health facilities for routine services. The Dept of Health agrees that either the Refugees Act or the Immigration Act should address the access of public health services by illegal foreigners.

[16]17. (1) [No criminal prosecution may be instituted against] When deciding whether to prosecute a victim of trafficking, the prosecutor must give due consideration to whether the offence was committed as a direct result of the person's position as a victim of trafficking.

[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 a victim of trafficking in terms of section 13(7)(a), for—

- (a) entering or remaining in the Republic in contravention of the Immigration Act;**
- (b) assisting another person to enter or remain in the Republic in contravention of the Immigration Act;**
- (c) possessing any fabricated or falsified passport, identity document or other document used for the facilitation of movement across borders; or**
- (d) being involved in an illegal activity to the extent that he or she has been compelled to do so,**

as a direct result of his or her situation as a victim of trafficking.]

(2) If, during a criminal prosecution of a person [child or an adult person in respect of any matter referred to in subsection (1),] the prosecutor on reasonable grounds suspects that that [child or adult] person is a victim of trafficking, the prosecutor must—

- (a) apply to the court for a postponement; and**
- (b) refer¹¹⁸ that child to a designated child protection organisation or provincial department of social development for an investigation in terms of section 110 of the Children's Act; or**
- (c) refer that adult person to an accredited organisation or provincial department of social development for an assessment referred to in section [13(5)] 14(7).**

OPTION IN RESPECT OF SUBCLAUSE (2)(b) AND (c)

- (b) in the prescribed manner/in accordance with directives issued by the National Director of Public Prosecutions under section 36??, in the case of a child –**
 - (i) notify the designated child protection organisation or provincial department of social development of that child, which must conduct an investigation in terms of section 110 of the Children's Act; and**
 - (ii) facilitate the child's referral to the child protection organisation or provincial department of social development, as the case may be; or**

¹¹⁷ Proposed amendment based on the Portfolio Committee's comment that the decision whether or not to prosecute a victim of trafficking for offences committed should be with the prosecuting authority. The NPA, in February 2011, proposed that clause 15(2) becomes 15(1) and section 71(5) of the Sexual Offences Amendment Act be incorporated as 15(2).

¹¹⁸ It is suggested that an amendment should be considered in the light of the amendments to clauses 13 and 14 with regard to the referral of victims. How will a prosecutor get the victim to the accredited organisation or child protection organisation? The option suggests that this be addressed in the directives. The NPA is also of the view that this can be addressed in directives.

(c) in the prescribed manner/ in accordance with directives issued by the National Director of Public Prosecution under section 36??, in the case of an adult person –

(i) notify the accredited organisation or provincial department of social development of that adult person, which must conduct an assessment referred to in section 14(7); and

(ii) facilitate the adult person's referral to the accredited organisation or provincial department of social development, as the case may be.

(3) A **[certificate]** letter of recognition that an adult person is a victim of trafficking or a finding by a children's court that a child is a victim of trafficking serves as a ground for the withdrawal of the criminal prosecution or the discharge of the victim of trafficking if the prosecutor is satisfied that the offence was committed as a direct result of the person's position as a victim of trafficking.

(4) No criminal prosecution may be instituted against a person referred to in subsection (1) or be proceeded with against a person referred to in subsection (2) without the written authorisation of the Director of Public Prosecutions having jurisdiction.

Unauthorised access and disclosure of information¹¹⁹

18. (1) Any person who—

(a) allows any unauthorised person to gain access to a victim of trafficking or suspected victim of trafficking or to a child in the care of that victim or suspected victim; or

(b) except for the purpose of giving effect to the provisions of this Act or required by a competent court to do so, discloses—

(i) the identity of a victim of trafficking or suspected victim of trafficking or the identity of a child in the care of that victim of trafficking or suspected victim of trafficking;

(ii) the place where a victim of trafficking or suspected victim of trafficking or child in the care of that victim or suspected victim is accommodated or treated;

(iii) any information which could lead to the identification of a victim of trafficking or suspected victim of trafficking or child in the care of that victim or suspected victim or the place where the victim of trafficking or suspected victim of trafficking or child is accommodated or treated; or

(iv) any information which undermines or compromises or could undermine or compromise the investigation or prosecution of a case of trafficking.

is guilty of an offence.¹²⁰

¹¹⁹ The Portfolio Committee enquired about the protection of the confidentiality of information and requested the Dept to consider a provision in this regard. It is suggested that a stand-alone clause be inserted which deals with the identification and protection of victims of trafficking. The wording was adapted from the wording in section 22 of the Witness Protection Act, 112 of 1998.

¹²⁰ The penalty in the Witness Protection Act is a maximum of 30 years imprisonment. Apart from the life sentence for the offence of trafficking in persons in clause 3, the other offences carry more lenient

CHAPTER [5] 4

STATUS OF FOREIGN VICTIMS OF TRAFFICKING

Recovery and reflection period

[17]19. (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 a victim of trafficking in terms of section 13(7)]** issued with a letter of recognition, regardless of his or her status, to remain in the Republic for a non-renewable recovery and reflection period not exceeding 90 days / 6 months ¹²¹

(2) 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 or unable ¹²² 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 or unable 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.

(4) If the Director-General: Social Development is unable to complete an investigation referred to in subsection (2) before the expiration of the recovery and reflection

sentences and the penalty in this clause must be in accordance with those penalties. See clause 39(k). The Portfolio Committee is to consider appropriate penalties.

¹²¹ We indicated in the Portfolio Committee that we initially supported the extension of the 90 day period to 6 months, but that it will have cost implications and shelters may not be able to accommodate victims for so long. The response of DSD on this submission is as follows: "Normally shelters accommodate victims of crime for a period of 3 to 6 months. The exit of a victim from a shelter depends entirely on the following factors:

- The healing process (recovery) of the victim to the programme designed for her needs. Victims respond differently depending on the extent of the trauma experienced.
- The pending investigations and court processes.

The readiness of the victim to exit is evaluated on a monthly basis usually by a multidisciplinary team. A victim is also not discharged if there is no alternative accommodation or alternative placement. Shelters are geared to take victims longer as long as there is a valid reason for their stay. I will suggest that a victim should stay for 6 months for a recovery and reflection period and perhaps an additional 3 months extended by Home Affairs DG. In total it will mean 9 months stay i.e 6 + 3 depending on the reasons given. Meaning that clause 17 (1) be 6 months and clause 17(4) be 3 months". A member of the Portfolio Committee requested that the Dept of Home Affairs' views be obtained which are still awaited.

¹²² Mr Holomisa's suggestion.

period, he or she must, in the prescribed manner, request the Director-General: Home Affairs to extend, in the prescribed manner, that period to six/nine months

(5) The granting of a non-renewable recovery and reflection period referred to in subsection (1) does not—

- (a) depend upon the willingness of a victim of trafficking to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons; and
- (b) prevent or prejudice the competent authority from conducting any relevant investigation, provided that due regard is given to the emotional state of the victim.

Temporary residence

[18] 20. (1) Despite the provisions of section 11(1) of the Immigration Act, a visitor's permit may be issued to a victim of trafficking—

- (a) who—
 - (i) is present in the Republic; and
 - (ii) has agreed to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons; **[or]**
- (b) if an investigation referred to in section 17(2) indicates that it is not safe to return him or her to his or her country of origin or the country from where he or she has been trafficked; or
- (c) in respect of whom a children's court order has expired or is about to expire, if the Director-General: Home Affairs is of the view that it is in the best interests of that victim to remain in the Republic.¹²³

(2) Despite the provisions of section 11(1) of the Immigration Act, a visitor's permit may be renewed by the Director-General: Home Affairs for the duration of the investigation of and the prosecution of a case of trafficking in persons.

(3) A visitor's permit referred to in subsection (1) may be issued to a victim of trafficking regardless of—

- (a) his or her status; or
- (b) whether a recovery and reflection period as provided for in section 17 was granted or has expired.

(4) For purposes of this Act, the Director-General: Home Affairs may, on humanitarian grounds, extend a visitor's permit referred to in subsection (1). **[, taking into account the likelihood that the holder of that permit may be harmed, killed or trafficked]**

¹²³ Par (c) should be inserted if clause 14 does not provide for refugee status to a child who becomes 18 years of age. It may be mentioned that at a meeting with officials of DHA they indicated that they are in favour of providing for refugee status, but wanted to discuss it with their refugee officers. Their views are still awaited.

again if he or she is returned to his or her country of origin or the country from where he or she has been trafficked.]¹²⁴

(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)]**¹²⁵ may conduct work or study in the Republic.

Permanent residence

[19]21. (1) A victim of trafficking is entitled to apply for a permanent residence permit in terms of section 27 of the Immigration Act, after five years' continuous residence in the Republic from the date on which a visitor's permit referred to in section 18 was issued to him or her, **[upon proof by that victim to the satisfaction of]** if the Director-General: Home Affairs, after considering all the relevant factors, is of the view that he or she may be harmed, killed or trafficked again if he or she is returned to his or her country of origin or the country from where he or she has been trafficked.

(2) When considering the factors referred to in subsection (1), the Director-General: Home Affairs may—

- (a)** request any information or clarification he or she deems necessary from the victim of trafficking; and
- (b)** consult with and invite any other person to furnish information as may be required.¹²⁶

CHAPTER [6] 5

SERVICES TO ADULT VICTIMS OF TRAFFICKING

Accreditation of organisations to provide services

[20]22. (1) Subject to subsection (7)(b), [An] an adult victim of trafficking may only be referred/dealt with in terms of section **[13]14(4)(b)** to an organisation that has been accredited in terms of this section and has a valid certificate of accreditation, referred to in subsection (4)(a).

(2) The Minister of Social Development must prescribe—

- (a)** **[must prescribe]** a system for the accreditation of organisations **[who]** which will provide services to adult victims of trafficking; and

¹²⁴ The Portfolio Committee indicated that it must be left to the DG: Home Affairs to decide on what humanitarian grounds a visitor's permit issued to a victim of trafficking will be extended.

¹²⁵ There were submissions which indicate that a victim of trafficking who has been issued with a visitor's permit, must be allowed to work or study in order to contribute to his/her care. No objections for this provision were received from the DHA. The Portfolio Committee's guidance on this is requested.

¹²⁶ There were submissions that the onus to prove that a victim of trafficking might be harmed, killed or trafficked again if returned to his or her country of origin, should not be placed on that victim. The wording was borrowed from section 27 of the Refugees Act.

- (b) **[may prescribe]**¹²⁷ the circumstances in which accredited organisations qualify for financial assistance, within available resources.

(3) The system for accreditation referred to in subsection (2) must contain—

- (a) criteria for the evaluation of the programmes offered by organisations to ensure that they comply with the minimum norms and standards referred to in section 21;
- (b) mechanisms to monitor the programmes in question; and
- (c) measures for the removal of organisations from the system, where appropriate.

(4)¹²⁸ (a) The Minister of Social Development must, in the manner and within the time limits set out in the system of accreditation, subject to subsection (7)(c), consider all applications by organisations for accreditation and issue a prescribed certificate to each organisation that is accredited in terms of this section.

(b) A certificate of accreditation referred to in paragraph (a) is valid for a maximum of four years from the date of accreditation.

(5) **[(c)]** A developmental¹²⁹ quality assurance process must be conducted in the prescribed manner in respect of each accredited organisation.

(6) **[(d)] (a)** The Minister of Social Development/ Director-General: Social Development¹³⁰ must compile and maintain a [report] list containing the particulars of each accredited organisation or organisation placed on or removed from the system within 30 days of accreditation or removal.

[(e)] (b) The Director-General: Social Development must, without undue delay, provide a copy of the **[report] list** referred to in **[subsection (4)(d)] paragraph (a)** when it is compiled and every time it is amended in accordance with paragraph (a) to—

- (i) the relevant role players in his or her Department who are involved in the administration of this Act¹³¹;

¹²⁷ The submissions showed that there was confusion regarding the provisions of paragraph (b), which provides that the Minister may prescribe the circumstances in which organisations qualify for financial assistance. It is suggested that the word “may” be replaced with the word “must” providing therefore that the Minister must prescribe the circumstances in which organisations qualify for financial assistance. It does not provide that the Minister must grant financial assistance.

¹²⁸ The Portfolio Committee may wish to consider splitting subclause (4) as it deals with different matters in the sub clause: Paragraphs (a) and (b) refer to the certificate of accreditation; paragraph (c) refers to the quality assurance process and (d) and (e) provide for the report containing the particulars of accredited organisations and the distribution thereof.

¹²⁹ DSD requested that consideration be given to refer to a developmental quality assurance process which will be in line with the terminology used by the DSD in its processes.

¹³⁰ Is this not a function for the DG: Social Development – the purpose of this report is to provide particulars of organizations where a victim of trafficking must be placed. It is also suggested to refer to a list in stead of a report?

¹³¹ The question arises whether the words “who are involved in the administration of this Act” found at the end of paragraph (b) is correct in respect of subparagraphs (ii) and (iii) as clause 15 provides that a prosecutor who suspects that an accused is a victim of trafficking, must refer that person to a child protection organization, accredited organization or provincial department of social development, therefore such a report should be available to all prosecutors. In the same vein should all police stations be in possession of such a list for them to be able to take a victim to a child protection organization or accredited organisation.

- (ii) the National Director of Public Prosecutions who must distribute the **[report] list** to all prosecutors; and
- (iii) the National Commissioner of the South African Police Service, who must distribute the **[report] list** to all relevant role players in the South African Police Service[.

who are involved in the administration of this Act].

(7) (a) The Minister of Social Development must –

- (i) within 2 months after the commencement of this Act, table the first regulations envisaged under subsection (2)(a), prescribing a system for the accreditation of organisations, in Parliament for approval;
- (ii) not later than 14 days after Parliament has approved the regulations as provided for in subparagraph (i), make/promulgate the regulations and publish a notice in the *Gazette*, inviting applications for the accreditation of organisations as provided for in the system of accreditation, which applications must be submitted within 2 months from the publication of the notice; and
- (iii) within 2 months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of organisations which existed at the time of the commencement of this Act.

(b) Every organisation which existed at the time of the commencement of this Act and which provided services to victims of trafficking may continue to operate and provide such services until it has been informed of the decision in respect of its application in terms of this section.¹³²

(8) (a) The Minister of Social Development may delegate any power or assign any duty conferred or imposed on him or her by this section to any MEC, except the powers and duties referred to in subsection (2).

(b) A delegation or an assignment in terms of paragraph (a) –

- (i) is subject to any limitation, condition and direction that the Minister of Social Development may impose;
- (ii) must be in writing; and
- (iii) does not divest the Minister of the responsibility concerning the exercise of the power or the performance of the duty.

(c) The Minister may –

- (i) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and

¹³² Proposed new subsection (7) and the insertion in subsection (4)(a) are intended to address the concerns raised by the Portfolio Committee regarding timeframes within which accreditation must take place and to make provision for interim/transitional arrangements.

- (ii) at any time withdraw a delegation or assignment.¹³³

Minimum norms and standards

[21]23. (1) The Minister of Social Development must, after consultation with interested parties, the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Basic Education, Finance, Health, Home Affairs, Justice and Constitutional Development, Labour, Police, **[and] State Security, and Women, Youth, Children and People with Disabilities**¹³⁴, prescribe minimum norms and standards for accredited organisations.

- (2) The norms and standards referred to in subsection (1) must deal with—
- (a) the safety of victims of trafficking, especially those at risk of harm;
 - (b) access to and provision of adequate health care;
 - (c) the provision of separate facilities for male and female victims of trafficking;
 - (d) hygienic and adequate toilet facilities;
 - (e) access to refuse disposal services or other adequate means of disposal of refuse generated at the facility;
 - (f) the drawing up of action plans for emergencies; and
 - (g) the manner in which information relating to a victim of trafficking's particulars should be kept confidential.

(3) An accredited organisation that provides services to adult victims of trafficking who have children in their care must, in addition to the norms and standards referred to in subsection (1), provide—

- (a) a safe environment for children;
- (b) proper care for sick children **[or children that become ill]**¹³⁵; and
- (c) safe storage of anything that may be harmful to children.

Programmes offered by accredited organisations

- [22]24.** (1) An accredited organisation—
- (a) must offer a programme aimed at—
 - (i) the provision of accommodation to adult victims of trafficking;
 - (ii) the provision of **[counselling] holistic psycho-social care**¹³⁶ to adult victims of trafficking; and

¹³³ Proposed new subsection (8) is in line with an amendment being proposed in respect of section 56 of the Child Justice Act, at the request of DSD in order to facilitate the implementation of this section.

¹³⁴ Need to include Minister of Women, Youth, Children and People with Disabilities as stakeholder.

¹³⁵ Subclause (3) contains similar provisions to section 79 of the Children's Act, but the question arises whether "children that become ill" are not already included in "sick children"?

- (iii) the reintegration of adult victims of trafficking into their families and communities; and
- (b) may offer a programme aimed at—
 - (i) the provision of rehabilitation services to adult victims of trafficking¹³⁷; or
 - (ii) the provision of education and skills development training to adult victims of trafficking.

(2) An accredited organisation may refer an adult victim of trafficking to an organisation that offers a programme referred to in subsection (1)(b) for purposes of obtaining those rehabilitation services or education and skills development training.

(3) An accredited organisation that provides services to an adult victim of trafficking who has a child in his or her care must offer a programme aimed at the reception, care and development of that child.

(4) Subject to subsection (5), a child referred to in subsection (3) may be cared for at any other premises only with the explicit consent of the adult victim in whose care he or she is.

(5) A child referred to in subsection (3) must be referred to a designated child protection organisation or the provincial department of social development for investigation in terms of section 155(2) of the Children's Act, to determine whether the child is in need of care and protection.

Access to programmes offered by accredited organisations

[23] **25.** A person who has been [certified to be a victim of trafficking in terms of section 13(7)] issued with a letter of recognition is entitled to access to a programme offered by an accredited organisation.

Plans to address needs of victims of trafficking

[24] **26.** An accredited organisation must, having due regard to the views of a person who has been [certified to be a victim of trafficking in terms of section 13(7)] issued with a letter

¹³⁶ Although DSD supports the replacement of "counseling" with "holistic psycho-social care" as "counseling" forms part of "holistic psycho-social care", it must be pointed out that subclause (1)(a) is aimed at the minimum that an accredited organisation must offer to a victim of trafficking. It is doubted if any given accredited organisation will be in a position to offer a holistic approach to a victim of trafficking. It is with this in mind that subclause (1)(b) provides for organisations to offer rehabilitation programmes and training programmes.

¹³⁷ The question was raised regarding drug rehabilitation. DSD indicated that organizations under their control do not offer these services which normally also require medical assistance. They are also very costly.

of recognition, draw up a plan to address the immediate and long-term/future needs of that victim.¹³⁸

Return of adult victims of trafficking within Republic

[25]27. An accredited organisation may not return an adult victim of trafficking to an area within the Republic from where he or she has been trafficked, without giving due consideration to—

- (a) the safety of the person during the process of returning him or her; and
- (b) the possibility that the person might be harmed, killed or trafficked again if returned to that area.

Information management

[26]28. (1) An accredited organisation must in the prescribed manner¹³⁹ collect information on victims of trafficking relating to—

- (a) the number of foreign victims of trafficking who have accessed a programme referred to in section 22;
- (b) the number of South African citizens or permanent residents who are victims of trafficking and who have accessed a programme referred to in section 22;
- (c) the number of victims who have accessed a programme referred to in section 22 and who have not been reported to the South African Police Service;
- (d) the countries from which foreign victims have been trafficked;
- (e) the countries to which South African citizens or permanent residents have been trafficked;
- (f) the areas in the Republic to and from which victims have been trafficked¹⁴⁰;
- [(f)](g)** the purposes for which the victims have been trafficked;
- [(g)](h)** the methods used to recruit and transport the victims;
- [(h)](i)** the methods and routes used for trafficking the victims to and from and within the Republic; **[and]**
- (j) methods used to keep victims of trafficking in exploitative situations¹⁴¹; and

¹³⁸ The Portfolio Committee raised the question who monitors these plans. DSD advised that the monitoring of these plans will be covered under its developmental quality assurance process.

¹³⁹ A suggestion was made that information be collected in a prescribed manner to ensure a standardised manner to collect data.

¹⁴⁰ New paragraph (f) is inserted to ensure that information is collected on trafficking in persons within the Republic and to highlight the issue of in-country trafficking. Paragraphs (g) – (j) will then also apply to internal trafficking.

¹⁴¹ A suggestion was made that information on the methods that are used to keep victims in exploitative situations should be collected.

[~~(i)~~] (~~k~~) the types of travel documents that victims have used or attempted to use to cross the borders of the Republic and how these documents were obtained.

(2) An accredited organisation must provide an annual report on the information referred to in subsection (1) to the Director-General: Social Development on a date determined by him or her.

(3) The Director-General: Social Development must provide an annual report on the information referred to in subsection (2) to the Intersectoral Committee established by section 41, as determined by the Intersectoral Committee.

CHAPTER [7] 6 COMPENSATION¹⁴²

Compensation to victim of trafficking

[27] 29. (1) (a) The court may, subject to paragraph (c), on its own accord or at the request of the complainant or the prosecutor, in addition to any sentence which it may impose in respect of any offence under this Act, order a person convicted of that offence to pay appropriate compensation to any victim of the offence for—

- (i) damage to or the loss or destruction of property, including money;
- (ii) physical, psychological or other injury;
- (iii) being infected with a life-threatening disease; or
- (iv) loss of income or support,

suffered by the victim as a result of the commission of that offence.

(b) Appropriate compensation includes expenses reasonably expected to be incurred in relation to the matters referred to in subparagraphs (i) to (iv) of subsection (1)(a).

(c) A magistrate's court established under section 2 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), may not make an order for the payment of compensation, as provided for in paragraph (a) which exceeds the monetary jurisdiction determined by the Minister from time to time by notice in the *Gazette*, as provided for in section 300 of the Criminal Procedure Act.

(2) In cases where the amount of the damage, injury or loss suffered exceeds an order for compensation made in terms of subsection (1), a civil action may be instituted by the victim for the recovery of the excess.

(3) (a) Where the court makes an order for compensation to be paid in terms of this section, it must also determine the time within which payment is to be made and the

¹⁴² The views of the Portfolio Committee on the NPA's proposed amendment of clause 27 are awaited.

method of payment, including whether it is to be paid in instalments or not and if it is to be paid in instalments, the intervals between the payment of instalments.

(b) A magistrate or judge may, on application of the convicted person on good cause shown, vary the conditions and instalments according to which compensation is to be made.

(c) A court that has acted in terms of paragraph (b), whether differently constituted or not, or any court of equal or superior jurisdiction may, on good cause shown, reconsider any decision that it has made regarding the payment of compensation and substitute it with a new order.

(4) (a) An order for the payment of compensation as provided for in subsection (1) has the effect of a civil judgment of a magistrate's court and the person in whose favour the compensation order was made is deemed to be the judgment creditor and the convicted person against whom the compensation order was made is deemed to be the judgment debtor.

(b) The judgment creditor referred to in paragraph (a) may, where a compensation order has not been complied with, file with the clerk of the court or registrar of the court which made the compensation order, an affidavit setting out the details of the compensation order and stating that the compensation order has not been complied with or has not been complied with in full, as the case may be, and the amount outstanding, and must request that clerk of the court or registrar to furnish him or her with a certified copy of that compensation order.

(c) The clerk of the court or registrar of the court that made the compensation order must, after having inspected the court record concerned to verify the contents of the affidavit referred to in paragraph (b), furnish the judgment creditor with a certified copy of the compensation order in question and record on the court record that the judgment creditor has been furnished with a certified copy of the compensation order in question.

(d) The judgment creditor must file the certified copy of the compensation order with the clerk of the civil court of the magisterial district in which he or she or the judgment debtor resides, carries on business or is employed.

(e) The compensation order must then be executed in accordance with the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and the Magistrates' Courts Rules, regarding warrants of execution against movable and immovable property and the issuing of emolument attachment orders and garnishee orders.

(5) (a) Where the court makes an order for compensation to be paid in terms of this section, it may, in its discretion, issue a warrant addressed to the sheriff authorising him or her to recover the amount of the compensation by the attachment and sale of any movable property belonging to the person in question.

(b) The amount which may be recovered in terms of paragraph (a) must be sufficient to cover, in addition to the amount of the compensation, the costs and expenses of the warrant and of any attachment and sale of property.

(c) If the proceeds of the sale of the movable property are insufficient to satisfy the amount referred to in paragraph (b), a High Court may issue a warrant, or in the case of a compensation order being made by a magistrate's court, authorise that magistrate's court to issue a warrant for the levy against the immovable property of the person in question of the amount unpaid.

Compensation to State¹⁴³

[28] **30.** (1) The court may—

- (a) in addition to any penalty which it may impose in respect of any offence in terms of this Act;
- (b) in addition to any order for the payment of compensation to a victim in terms of section 27; and
- (c) upon application of the prosecutor, make an order for payment by the convicted person to the State of an amount in compensation for expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim of the offence.

(2) An order for the payment of compensation as provided for in subsection (1) has the effect of a civil judgment of a magistrate's court and the provisions of section 27(4) apply with the changes required by the context.

CHAPTER [8] Z

DEPORTATION AND REPATRIATION OF VICTIMS OF TRAFFICKING

Summary deportation of victim of trafficking prohibited

[29] **31.** Subject to section 30, the summary deportation of —

- (a) a victim of trafficking;
- (b) a child who is suspected of being a victim of trafficking who has been referred to a designated child protection organisation for an investigation in terms of section 110 of the Children's Act or a children's court order in terms of section 155 of the Children's Act; or
- (c) an adult person who is suspected of being a victim of trafficking and in the process of being assessed in terms of section 14(7) or (9)¹⁴⁴.

¹⁴³ The views of the Portfolio Committee on the proposed amendments by the NPA are awaited.

¹⁴⁴ Amendment is based on concerns of members of the Portfolio Committee who indicated that suspected victims who have not yet been assessed, are being or could be deported.

is prohibited.

Repatriation of victim of trafficking from Republic

[30] 32. (1) The Director-General: Social Development may not return a foreign child who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to the—

- (a) best interests of the child standard as provided for in section 7 of the Children's Act;
- (b) safety of the child during the repatriation process;
- (c) availability and suitability of care arrangements and the safety of the child in the country to which the child is to be returned; and
- (d) possibility that the child might be harmed, killed or trafficked again.

(2) The Director-General: Home Affairs—

- (a) may not return an adult who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to the—

- (i) safety of the person during the repatriation process;
- (ii) safety of the person in the country to which the person is to be returned; and
- (iii) possibility that the person might be harmed, killed or trafficked again; and

(b) must—

- (i) before returning a person referred to in paragraph (a) to his or her country of origin or the country from where he or she has been trafficked, request the Director-General: Social Development to take reasonable steps as provided for in section 31(a); and
- (ii) inform a person referred to in paragraph (a), in the prescribed manner, of any arrangements that have been made for his or her reception in the country to which he or she is to be returned.

(3) This section does not prohibit the voluntary return of an adult who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked on condition that the victim has been given—

- (a) information on the protective measures offered to victims of trafficking in terms of this Act; and
- (b) a clear explanation of the procedures to be followed in respect of repatriation¹⁴⁵.

Assistance to foreign victims of trafficking

[31] 33. The Director-General: Social Development must—

¹⁴⁵ It was suggested that additional safeguards must be built into the repatriation procedures.

- (a) take reasonable steps to find suitable family members or an institution or organisation that renders assistance to victims of trafficking in the country to which a person referred to in section 30(1) or (2) is to be returned and that is willing to provide assistance to such a person; and
- (b) without undue delay, provide the Director-General: Home Affairs with information in respect of a request made in terms of section 30(2)(b)(i).

Repatriation of victims of trafficking to Republic

- [32] **34.** With due regard to the safety of the person and without delay—
- (a) the Director-General: International Relations and Co-operation must—
 - (i) in co-operation with the Director-General: Social Development assess the risks to the safety and life of a person who is a citizen or permanent resident of the Republic and who is on reasonable grounds considered to be a victim of trafficking, if he or she is returned to the Republic;
 - (ii) facilitate the return of a person referred to in subparagraph (i) to the Republic; and
 - (iii) advise the Director-General: Home Affairs on measures to secure the reception of a person referred to in subparagraph (i) at a South African port of entry;
 - (b) the Director-General: Home Affairs must—
 - (i) facilitate and accept the return of a person referred to in paragraph (a);
 - (ii) where necessary, take measures to secure the reception of a person referred to in paragraph (a) at a South African port of entry;
 - (iii) issue travel documents or other authorisations as may be necessary to enable that person to travel to and enter the Republic;
 - (iv) at the request of another State that is a party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons or to an agreement relating to trafficking in persons to which the Republic is a party, verify that a person who is on reasonable grounds considered to be a victim of trafficking is a citizen or permanent resident of the Republic;
 - (v) upon entry into the Republic of a child who is on reasonable grounds considered to be a victim of trafficking **[refer the child to]** notify¹⁴⁶ a designated [social worker for] child protection organisation or provincial department of social development¹⁴⁷ of that child, which must conduct an investigation in terms of section 155(2) of the Children's Act; and

¹⁴⁶ The same question arises as in clauses 13 and 14 as to what "refer" means and the clause is amended to reflect the amended position.

¹⁴⁷ It is suggested that subparagraph (v) should be in line with clause 13 which provides that a child victim of trafficking must be taken to a designated child protection organization or provincial department of social

- (vi) upon entry into the Republic of a person who is on reasonable grounds considered to be an adult victim of trafficking ~~[refer the person to]notify an accredited organisation or provincial department of social development [for]of that adult person, which must conduct an assessment referred to in section [13(5)]14(7).~~

Escorting of child victim of trafficking

~~[33]~~ **35.** (1) If it is considered to be in the best interests of a child who has been trafficked, the Director-General: Social Development must authorise an adult at State expense to escort the child from the place where the child was found to the place from which the child was trafficked.

(2) The Director-General may not act in terms of subsection (1) unless he or she is satisfied that the parent, guardian or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

CHAPTER [9] 8 GENERAL PROVISIONS

Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

~~[34]~~ **36.** (1) If a children's court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child, the court may—

- (a) suspend all the parental responsibilities and rights of that parent, guardian or other person; and
- (b) place that child in temporary safe care, pending an inquiry by a children's court.

(2) Any action taken by a children's court in terms of subsection (1) does not exclude a person's liability for committing the offence of trafficking in persons as provided for in section 4.

International co-operation

~~[35]~~ **37.** (1) The President may on the conditions as he or she deems fit—

development. The child must in any event be accommodated somewhere if he or she cannot be returned to his or her family. It will also be in line with subparagraph (vi).

- (a) enter into an agreement with a foreign State that is not a State Party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons in respect of any matter pertaining to trafficking in persons; or
- (b) enter into an agreement with a foreign State that is a State Party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons in respect of any matter pertaining to trafficking in persons for the purpose of supplementing the provisions of that protocol or to facilitate the application of the principles contained therein.

(2) An agreement referred to in subsection (1) may not be in conflict with the provisions of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.

(3) The President may agree to any amendment or revocation of an agreement referred to in subsection (1).

(4) An agreement referred to in subsection (1) or any amendment or revocation thereof, is not of any force or effect until that agreement, amendment or revocation has been approved by Parliament.

National instructions and directives¹⁴⁸

[36] 38. (1) (a) The chairperson of the Intersectoral Committee established in terms of section 43?? must, after consultation with all members of the Intersectoral Committee, issue directives regarding the following matters with which all police officials, members of the prosecuting authority and officials of the Departments of Home Affairs, Labour and Social Development must comply in the execution of their functions in terms of this Act:

- (i) The manner in which the reporting of cases related to trafficking in persons must be dealt with;
- (ii) the manner in which victims of trafficking must be identified, interviewed and treated, with particular attention to the vulnerability of children;
- (iii) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic;
- (iv) the referral of victims of trafficking to social, health care and psychological services; and
- (v) measures to be taken to ensure the safety of victims of trafficking or other potential witnesses if there is a likelihood that harm might result to them as a result of the reporting and consequent investigation of and prosecution of the case.

(b) The Minister must—

- (i) submit all directives provided for in paragraph (a) to Parliament 30 days before they are issued; and

¹⁴⁸ A submission was received that clause 36 should be amended to provide that the ISC should issue directives on cross-cutting issues. The various stakeholder Departments agreed that there should be standardised directives in place. The Portfolio Committee's guidance on the insertion of deadlines is requested.

(ii) after the expiry of the 30-day period, publish them in the *Gazette*.

(c) The members of the Intersectoral Committee must provide information emanating from the directives referred to in paragraph (a) to the Committee as it may determine.

[(1)](2) The National Commissioner of the South African Police Service must, after consultation with the Directors-General: Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, **[National Intelligence Agency and]**¹⁴⁹, Social Development, State Security Agency and Women, Youth, Children and People with Disabilities and the Chief Executive Officer: Government Communication and Information System and the National Director of Public Prosecutions, issue national instructions as provided for in section 25 of the South African Police Service Act, 1995 (Act No. 68 of 1995), regarding the following matters with which all police officials must comply in the execution of their functions in terms of this Act:

- (a) The division or divisions within the police to be tasked with the investigation of trafficking cases;
- (b) **[the manner in which the reporting of an alleged trafficking case is to be dealt with;**
- (c) the manner in which trafficking cases are to be investigated;
- [(d) the manner in which victims of trafficking should be identified, interviewed and treated with particular attention to the vulnerability of child victims;**
- (e) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic;
- (f) the referral of victims of trafficking to social, health care and psychological services;
- (g) measures to be taken to ensure the safety of victims of trafficking or other potential witnesses if there is a likelihood that harm might result to them as a result of the reporting and consequent investigation of and prosecution of the case;]
- [(h)](c)** the circumstances in which consultation with the prosecuting authority is required with the view to guiding the investigation of trafficking cases for purposes of obtaining the required evidence and to identify relevant witnesses;
- [(i)](d)** measures to be taken in order to ensure the detection of trafficking in persons at South African ports of entry and borders;
- [(j)](e)** the kind of information that must be obtained from a victim of trafficking with the view to provide such information to the prosecuting authority for purposes of determining the quantum of the damages suffered by the victim for which he or she may claim compensation in terms of section 27; and

¹⁴⁹ The Chairperson of the Portfolio Committee requested that we make sure of the correct title. Proclamation 59 of 2009 reflects the correct title as "Director-General: State Security Agency".

~~[(k)](f)~~ the collection and analysis of information on reported cases of trafficking in persons, including information relating to—

- (i) the countries from which victims are being trafficked to the Republic;
- (ii) the countries to which South African citizens and other residents are being trafficked;
- (iii) the nationality of victims transiting the Republic and the countries to which they are being trafficked;
- (iv) the areas in the Republic to and from which victims are being trafficked¹⁵⁰;
- ~~[(iv)](v)~~ the purposes for which the persons who have been identified as victims of trafficking have been trafficked;
- ~~[(v)](vi)~~ the profiles of the traffickers and their victims, including their age, gender, nationality and sex;
- ~~[(vi)](vii)~~ the routes used by traffickers to enter and exit the Republic;
- ~~[(vii)](viii)~~ the methods used by traffickers to recruit and transport their victims;
- (ix) the methods used by traffickers to keep victims in exploitative situations¹⁵¹;
- (x) the methods and routes used for trafficking victims within the Republic;
- ~~[(viii)](xi)~~ the types of travel documents that traffickers and their victims have used or attempted to use to cross the borders of the Republic and how those documents were obtained; and
- ~~[(ix)](xii)~~ the link between trafficking operations and those involved in other forms of organised crime.

~~[(2)](3)~~ The National Commissioner of the South African Police Service must provide an annual report on the information referred to in subsection (1)~~[(k)](f)~~ or any other relevant information to the Intersectoral Committee established by section **[40]41**, as determined by the Intersectoral Committee.

~~[(3)](4)~~ The Director-General: Home Affairs must, after consultation with the Directors-General: Health, International Relations and Cooperation, Justice and Constitutional Development, Labour, **[National Intelligence Agency and]**, Social Development, State Security Agency and Women, Youth Children and People with Disabilities and the Chief Executive Officer: Government Communication and Information System, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, issue directives regarding **[the following matters with which all immigration officers must comply in the execution of their functions in terms of this Act:**

- (a) **The manner in which the reporting of an alleged trafficking case is to be dealt with;**

¹⁵⁰ Provisions inserted to deal with internal trafficking.

¹⁵¹ We have inserted in clause 26 "the methods used to keep victims of trafficking in exploitative situations". It seems advisable to insert it here too.

- (b) the manner in which victims of trafficking must be identified, interviewed and treated, with particular attention to the vulnerability of child victims;
 - (c) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic;
 - (d) the referral of victims of trafficking to social, health care and psychological services;
 - (e) the referral of victims of trafficking or other potential witnesses to the South African Police Service or relevant institutions or organisations if there is a likelihood that the victims or witnesses may be harmed or killed; and
 - (f) the collection and analysis of information on victims of trafficking who have been repatriated to the Republic in terms of section 32 relating to—
 - [(i)](a) the number of victims who have been repatriated to the Republic and the countries to which they have been trafficked;
 - [(ii)](b) the profiles of the victims, including the age, gender and sex of the victims;
 - [(iii)](c) the purposes for which the victims were trafficked;
 - [(iv)](d) the routes used by traffickers to exit the Republic and to enter the countries to which the victims were trafficked;
 - [(v)](e) the methods used by traffickers to recruit and transport the victims; [and]
 - (f) the methods used by traffickers to keep victims in exploitative situations; and
 - [(vi)](g) the types of travel documents that traffickers and their victims have used or attempted to use to exit the Republic and to enter the countries to which the victims were trafficked and how these documents were obtained.
- [(4)](5) (a) The Minister of Home Affairs must—
- (i) submit all directives provided for in subsection [(3)](4) to Parliament 30 days before they are issued; and
 - (ii) after the expiry of the 30-day period, publish them in the *Gazette*.
- (b) The Director-General: Home Affairs must provide an annual report on the information referred to in subsection [(3)](f)(4) or any other relevant information to the Intersectoral Committee established by section [41]41, as determined by the Intersectoral Committee.
- [(5) The Director-General: Labour must, after consultation with the Directors-General: Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, National Intelligence Agency, [and] Social Development, the Chief Executive Officer: Government Communication and Information System, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, issue directives regarding the following matters with which all labour inspectors must comply in the execution of their functions in terms of this Act:

- (a) The manner in which the reporting of an alleged trafficking case is to be dealt with;
- (b) the manner in which victims of trafficking should be identified, interviewed and treated, with particular attention to the vulnerability of child victims;
- (c) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic;
- (d) the referral of victims of trafficking to social, health care and psychological services; and
- (e) the referral of victims of trafficking or potential witnesses to the South African Police Service or relevant institutions or organisations if there is a likelihood that the victim or witnesses may be harmed or killed.

(6) (a) The Minister of Labour must—

- (i) submit any directives provided for in subsection (5) to Parliament 30 days before they are issued; and
- (ii) after the expiry of the 30-day period, publish them in the *Gazette*.

(b) The Director-General: Labour must provide an annual report on any relevant information to the Intersectoral Committee established by section 40, as determined by the Intersectoral Committee.]¹⁵²

[(7)](6) The National Director of Public Prosecutions must, ~~[after]~~in consultation with the Minister and after consultation with the Directors-General: Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, [National Intelligence] State Security Agency, [and] Social Development, and Women, Youth, Children and People with Disabilities and the National Commissioner of the South African Police Services and the Chief Executive Officer: Government Communication and Information System, issue directives regarding all matters which are necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in cases relating to trafficking in persons, including the following:

- (a) The manner in which cases relating to trafficking in persons should be dealt with;
- (b) the criteria to be used and the circumstances in which the prosecution must apply to court for an order that a witness and, in particular, child complainants/witnesses give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, if the court does not make an order on its own accord in terms subsection (2)(a) of that section or if an application in terms of subsection (2)(b) of that section is not made;

¹⁵² The directives mentioned in this subclause are all reflected in the proposed new subclause (1) which specifically refers to the Dept of Labour.

- (c) the criteria to be used and the circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provided for in section 170A of the Criminal Procedure Act, in respect of a child witness;
 - (d) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act;
 - (e) the circumstances in which the prosecution must request the court to consider directing that the identity of a witness should not be revealed or that it should not be revealed for a period specified by the court as provided for in section 153 of the Criminal Procedure Act;
 - (f) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant/witness in the case as provided for in section 154 of the Criminal Procedure Act or of the complainant's/witness's family, including the publication of information that may lead to the identification of the complainant/witness or the complainant's/witness's family;
 - (g) the need to inform victims of trafficking about their right to and the process to claim compensation in terms of section 27;
 - (h) the kind of information that must be obtained from a victim of trafficking for purposes of determining the quantum of the damages suffered by the victim for which he or she may claim compensation in terms of section 27;
 - (i) the manner in which a designated child protection organisation, accredited organisation or provincial department of social development must be notified of a child or adult person referred to in section 15(2);
 - (i) the manner in which the referral of a child or adult person referred to in section 15(2) must be facilitated; and
 - [(j)](k) the collection and analysis of information relating to—
 - (i) the number of trafficking prosecutions, convictions and the form of sentences imposed on traffickers;
 - (ii) the number of victims of trafficking awarded compensation orders in terms of section 27; and
 - (iii) the number of cases where the courts did not provide compensation orders in terms of section 27 and the reasons for doing so.
- [(8)](7) (a) The Minister must—
- (i) submit any directives provided for in subsection [(7)](6) to Parliament 30 days before they are issued; and
 - (ii) after the expiry of the 30-day period, publish them in the *Gazette*.
- (b) The National Director of Public Prosecutions must provide an annual report on the information referred to in subsection [(7)](6)(i) or any other relevant

information determined by the Intersectoral Committee established by section ~~[40]~~⁴¹ as determined by the Intersectoral Committee.

~~[(9)](8)~~ The National Commissioner of the South African Police Service, the National Director of Public Prosecutions and the Directors-General: Home Affairs, Labour and Social Development must each develop training courses which must—

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

~~[(10)](9)~~ The national instructions or directives referred to in this section must provide that adequate disciplinary steps are taken against any police official, prosecutor or other functionary who fails to comply with any duty imposed on him or her in terms of this Act or the national instructions or directives issued in terms of this Act.

~~[(11)](10)~~ Any national instruction or directive issued under this section may be amended or withdrawn in like manner.

Legitimacy and validity of documents

~~[37]~~ ³⁹. The Director-General: Home Affairs must, at the request of another State that is a party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons or to an agreement relating to trafficking in persons, verify, within a reasonable time, the legitimacy and validity of travel or identity documents issued or purported to have been issued by the Department of Home Affairs and suspected of being used in the commission of an offence in terms of Chapter 2 of¹⁵³ this Act.

Annual report on abuse or deliberate neglect of child and findings by children's court that child is in need of care and protection

~~[38]~~ ⁴⁰. The Director-General: Social Development must submit to the Intersectoral Committee established by section ~~40~~⁴¹, as determined by the Intersectoral Committee, an annual report on all cases of abuse or deliberate neglect of a child and all findings by a children's court that a child is in need of care and protection because of abuse or deliberate neglect of the child as contained in Part A of the National Child Protection Register provided for in Part 2 of Chapter 7 of the Children's Act insofar as those cases and findings relate to child victims of trafficking.

¹⁵³ The failure to report a victim of trafficking is also an offence, whilst the purpose of this clause is to address offences related to trafficking in persons.

CHAPTER [10] 9 ADMINISTRATION OF ACT

National Policy Framework

[39]42. (1) The Minister must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Home Affairs, Health, International Relations and Cooperation, Labour, Police, Social Development, **[and]** State Security, and Women, Youth Children and People with Disabilities and the National Director of Public Prosecutions **[adopt]** approve¹⁵⁴ a national policy framework, relating to all matters dealt with in this Act, in order to—

- (a) ensure a uniform, coordinated and cooperative approach by all government departments, organs of state and institutions in dealing with matters relating to the trafficking of persons;
- (b) guide the implementation and administration of this Act; and
- (c) enhance service delivery as envisaged in this Act by the development of a plan within available resources.

(2) The Minister must—

- (a) within two years¹⁵⁵ after the commencement of this Act, **[adopt]**approve and table the policy framework in Parliament;
- (b) publish the policy framework in the *Gazette* within two months after it has been tabled in Parliament;
- (c) review the policy framework within three years after its publication in the *Gazette* and at least once every five years thereafter; and
- (d) amend the policy framework when required, in which case the amendments must be tabled in Parliament and published in the *Gazette* within two months after it has been tabled in Parliament.

Establishment of Intersectoral Committee on Prevention and Combating of Trafficking in Persons¹⁵⁶

¹⁵⁴ Portfolio Committee raised a concern on whether the Minister has the power to “adopt” the national policy framework. The word is widely used in SA legislation – adopt policies, good quality control practices, legislative measures, etc. According to Dictionary.com, “adopt” in the context of clause 39 means, “to accept or act in accordance with (a plan, principle, etc.). Words such as “approve” or “endorse” are given as synonyms.

¹⁵⁵ Portfolio Committee to guide on whether we should provide for time frames.

¹⁵⁶ Clauses 43 and 44 could be replaced by the new clause 43, given as an option, if the Portfolio Committee agrees with the approach in the new clause 43. If the Committee agrees with the approach, the Sexual Offences Act and Child Justice Act could be amended along the same lines as the proposed new clause 43 by means of consequential amendments in Schedule 1 to this Bill.

[40]43. (1) There is hereby established a Committee to be known as the Intersectoral Committee on the Prevention and Combating of Trafficking in Persons.

(2) The Intersectoral Committee consists of the—

- (a) Director-General: Justice and Constitutional Development, who is the chairperson of the Committee;
- (b) National Commissioner of the South African Police Service;
- (c) Director-General: Home Affairs;
- (d) Director-General: International Relations and Cooperation;
- (e) Director-General: Social Development;
- (f) Director-General: Health;
- (g) Director-General: Labour;
- (h) Director-General: **[National Intelligence] State Security** Agency;
- (i) Director-General: Women, Youth, Children and People with Disabilities;
- ~~[(j)]~~(j) National Director of Public Prosecutions; and
- ~~[(k)]~~(k) Chief Executive Officer: Government Communication and Information System.

(3) A member of the Intersectoral Committee may designate a senior official as an alternate to attend a meeting of the Committee in his or her place.

(4) (a) The members of the Intersectoral Committee must designate one of its members as deputy chairperson of the Committee, and when the chairperson is not available, the deputy chairperson acts as chairperson.

(b) If neither the chairperson nor the deputy chairperson is available, the members present at a meeting must elect a person from their own ranks to preside at that meeting.

(5) The Intersectoral Committee may invite—

- (a) representatives from the Commission for Gender Equality, the South African Human Rights Commission and the National House of Traditional Leaders to its meetings with the view to obtaining their views on issues relating to the responsibilities, functions and duties of the Committee;
- (b) representatives from **[the non-governmental sector and]**¹⁵⁷ civil society to its meetings with the view to fostering co-operation between government and civil society in the implementation of this Act; and
- (c) persons and organisations¹⁵⁸ to its meetings, when necessary, for technical assistance, support or advice.

(6) The Intersectoral Committee must—

¹⁵⁷ The question arose whether non-governmental organizations are not included in the term "civil society".

¹⁵⁸ A member of the Portfolio Committee was concerned that universities seem not be included in the list of institutions which could be invited to the meetings of the ISC and it was suggested that "and organisations" be included to address the concern.

- (a) meet at least twice every year on a date and at the time and place determined by the chairperson; and
- (b) report in writing to the Minister within one month of every meeting.

Responsibilities, functions and duties of Intersectoral Committee

[41]44.

- (1) The Intersectoral Committee is responsible for—
 - (a) developing a draft national policy framework, referred to in section [39]40(1), which must include guidelines for—
 - (i) the implementation of the priorities and strategies contained in the national policy framework;
 - (ii) measuring progress on the achievement of the national policy framework objectives;
 - (iii) ensuring that the different organs of state comply with the roles and responsibilities allocated to them in terms of the national policy framework and this Act; and
 - (iv) monitoring the implementation of the national policy framework and this Act;
 - (b) the establishment of an integrated information system to facilitate the effective monitoring and implementation of this Act and to recommend interventions relating to trafficking in persons by collating and analysing the information obtained in terms of sections 26(3), 36[(1)(k)](2)(f), 36[(3)(f)](4), 36[(7)(f)](6)(k) and 38 with the view to determining, among others—
 - (i) from which countries victims are being trafficked to the Republic;
 - (ii) to which countries South African citizens and other residents are being trafficked;
 - (iii) the nationality of victims transiting the Republic and the countries to which they are being trafficked;
 - (iv) the number of victims that have been repatriated to the Republic and the countries to which they were trafficked;
 - (v) the areas in the Republic to and from which victims are being trafficked;¹⁵⁹
 - [(v)](vi) the purposes for which persons who have been identified as victims of trafficking have been trafficked;
 - [(vi)](vii) the profiles of the traffickers and their victims, including the age, gender, nationality and sex of the victims;
 - [(vii)](viii) which routes are used by traffickers to cross the borders of the Republic;

¹⁵⁹ It is suggested that information regarding trafficking in persons within the Republic should be included in the information management system.

~~[(viii)](ix)~~ which routes are used by traffickers to enter the countries to which South African citizens and other residents were trafficked;

~~[(ix)](x)~~ the methods used by traffickers to recruit and transport their victims;

~~(xi)~~ the methods and routes used for trafficking victims within the Republic;

~~(xii)~~ the methods used by traffickers to keep victims in exploitative situations;

~~[(x)](xiii)~~ the types of travel documents traffickers and their victims have used or attempted to use to cross the borders of the Republic and to enter the countries to which South African citizens and other residents were trafficked and how these documents were obtained;

~~[(xi)](xiv)~~ whether there is a link between trafficking operations and those involved in other forms of organised crime;

~~[(xii)](xv)~~ the number of trafficking prosecutions, convictions and the form of sentences imposed on perpetrators;

~~[(xiii)](xvi)~~ the number of victims of trafficking who are awarded compensation orders in terms of section 27 of the Act; and

~~[(xiv)](xvii)~~ the number of cases the courts refrained from providing compensation orders and the reasons for doing so:

Provided/on condition that information which identifies victims of trafficking must be kept confidential; and

(c) developing and reviewing guidelines on the identification of victims of trafficking and traffickers.

(2) (a) The Intersectoral Committee must, and where appropriate, after consultation with relevant civil society organisations, establish public awareness programmes or other measures for the prevention and combating of trafficking in persons designed to –

(i) inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, and South African citizens or permanent residents who apply for South African passports or who depart abroad, on issues relating to trafficking in persons, including –

(aa) common recruitment techniques used by traffickers;

(bb) practices used to keep victims of trafficking in exploitative situations;

(cc) the forms of abuse to which victims of trafficking may be subjected; and

(dd) organisations, institutions or law enforcement agencies that may be approached for assistance or information;

(ii) inform and educate victims of trafficking on –

(aa) their rights as victims;

- (bb) legal or other measures in place to ensure their safety, recovery and repatriation; and
 - (cc) organisations, institutions or law enforcement agencies that may be approached for assistance of information; and
 - (iii) discourage the demand for and the supply of victims of trafficking that foster the exploitation of those victims, especially women and children.
- (b) The programmes or other measures referred to in paragraph (a) must—
- (i) include appropriate measures aimed at reaching rural communities;
 - (ii) where possible, be provided in a language understood by the persons at whom they are directed; and
 - (iii) be reviewed every second year in order to determine their effectiveness.

(c) The Director-General: Justice and Constitutional Development must take all reasonable steps within available resources to ensure that the programmes or other measures referred to in paragraph (a) are implemented throughout the Republic.¹⁶⁰

[2] (3) The Intersectoral Committee may make recommendations to the Minister with regard to the amendment of the national policy framework.

OPTION IN RESPECT OF CLAUSE 43

Establishment of Intersectoral Committee and Subcommittees relating to Sexual Offences, Child Justice and Trafficking in Persons

43. (1) There is hereby established a Committee to be known as the Intersectoral Committee relating to Sexual Offences, Child Justice and Trafficking in Persons (hereafter referred to as the Intersectoral Committee).

- (2) (a) The Intersectoral Committee is responsible for –
- (i) developing a draft national policy framework, as prescribed by the Minister;
 - (ii) establishing an integrated information system, as prescribed by the Minister, in order to facilitate effective monitoring and implementation; and
 - (iii) establishing public awareness programmes or other measures, as prescribed by the Minister.

for purposes of this Act, the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Child Justice Act, 2008 (Act No. 75 of 2008).

(b) The Intersectoral Committee must also guide, monitor, oversee and endorse the activities and work of the Subcommittees of the Intersectoral Committee established in terms of this Act, the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Child Justice Act, 2008 (Act No. 75 of 2008).

¹⁶⁰ This clause was moved from clause 3 at the request of the Portfolio Committee

- (3) The Intersectoral Committee, for purposes of this Act, consists of the –
- (a) Director-General: Justice and Constitutional Development, who is the chairperson;
 - (b) National Commissioner of the South African Police Service;
 - (c) Director-General: Home Affairs;
 - (d) Director-General: International Relations and Cooperation;
 - (e) Director-General: Social Development;
 - (f) Director-General: Health;
 - (g) Director-General: Labour;
 - (h) Director-General: State Security Agency;
 - (i) Director-General: Women, Youth, Children and People with Disabilities;
 - (j) National Director of Public Prosecutions; and
 - (k) Chief Executive Officer: Government Communications and Information System.

(4) The Minister must, after consultation with the Ministers responsible for the portfolios/institutions/organs of state referred to in subsection (3), prescribe the following relating to the functioning of the Intersectoral Committee for purposes of this Act:

- (a) The election or designation of a deputy chairperson and his or her powers and functions;
- (b) alternate members;
- (c) the participation of other roleplayers in the Intersectoral Committee; and
- (d) meetings of the Intersectoral Committee.

(5) The Intersectoral Committee must meet at least twice every year and report in writing to the Minister within one month of every meeting.

(6) (a) There is hereby established a Subcommittee on the Prevention and Combating of Trafficking in Persons, which consists of appropriately qualified officials in the Departments or organs of state referred to in subsection (3) at the rank of Director or above, or their equivalent, the chairperson of which is the official of the Department of Justice and Constitutional Development designated by its Director-General.

(b) ~~The object/aim of the Subcommittee is to/~~ The Subcommittee must assist the Intersectoral Committee in complying with subsection (2)(a), in addition to any other powers, duties or functions this Act may confer on or assign to it.

(c) The regulations made under subsection (4) apply to the Subcommittee with the changes required by the context.

(7) The Director-General: Justice and Constitutional Development is responsible for the establishment of a secretariat to assist the Intersectoral Committee and its Subcommittees in the exercise of their powers and the performance of their duties and functions.

Report to Parliament

[42]43. The Minister must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Home Affairs, International Relations and Cooperation, Labour, Police, Social Development, **[and]** State Security and Women, Youth, Children and People with Disabilities and the National Director of Public Prosecutions—

- (a) within one year after the commencement of this Act, submit—
 - (i) reports to Parliament by each Department or institution referred to in this section on the implementation of this Act;
 - (ii) a report to Parliament reflecting information relating to trafficking in persons referred to in subsection 41(1)(b); and
- (b) every year thereafter submit reports referred to in paragraph (a)(i) and a report referred to in paragraph (a)(ii) to Parliament¹⁶¹.

Regulations

[43]44. (1) The Minister of Home Affairs must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Health, International Relations and Cooperation, Justice and Constitutional Development, Labour, Police, Social Development, **[and]** State Security and Women, Youth, Children and People with Disabilities, make regulations regarding—

- [(a)]** the certificate to be issued to a person who is certified to be a victim of trafficking as provided for in section 13(7)(a);¹⁶²
- [(b)]** (a) the manner in which a foreigner who has been **[certified to be]** issued with a letter of recognition as a victim of trafficking will be granted approval to remain in the Republic for a non-renewable recovery and reflection period and the conditions upon which that approval is granted, as provided for in section 17(1);
- [(c)]**(b) the manner in which the Director-General: Social Development must request an extension of the recovery and reflection period as provided for in section 17(4);
- [(d)]**(c) the manner in which any extension of the recovery and reflection period must be granted as provided for in section 17(4); and
- [(e)]**(d) the manner in which a person must be informed of arrangements that have been made for his or her reception in the country to which he or she is to be returned, as provided for in section 30(2)(b)(ii).

(2) (a) The Minister of Social Development¹⁶³ must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the

¹⁶¹ Portfolio Committee to guide as to deadlines

¹⁶² This function falls within the duties of the DSD and not Home Affairs.

¹⁶³ As many changes have been made to clause 12 relating to DSD line functions in terms of this Bill, it is advisable to obtain DSD's comments thereon.

Ministers of Health, Home Affairs, International Relations and Co-operation, Justice and Constitutional Development, Labour, Police, **[and]** State Security and Women, Youth, Children and People with Disabilities, make regulations regarding—

- [(i)] the form of the written consent referred to in section 13(1)(b);**¹⁶⁴
- [(ii)](i)** the assessment of a person to determine whether he or she is a victim of trafficking as provided for in section **[13(5)(b)] 12(7)**;
- (ii)** the manner in which the outcome of the assessment as provided for in section 12(9) must be submitted to the relevant provincial department of social development;
- (iii)** the letter of recognition to be issued to a person who has been confirmed/found to be a victim of trafficking as provided for in section 12(10)(a)¹⁶⁵;
- (iv)** the manner in which a provincial head may withdraw a letter of recognition as provided for in section 12(11);
- (v)** the manner in which a person must lodge an appeal as provided for in section 12(12)(b);
- (vi)** the manner in which the Member of the Executive Council must deal with an appeal as provided for in section 12(13);
- (vii)** the manner in which an accredited organisation or provincial department of social development must deal with a person as provided for in section 12(14);
- [(iii)](viii)** the system of accreditation of organisations to provide services to adult victims of trafficking, as provided for in section 20(2)(a);
- [(iv)] (ix)** the form of the certificate of accreditation to be issued to an organisation which provides services to adult victims of trafficking, as provided for in section 20(4)(a);
- [(v)] (x)** the manner in which the developmental quality assurance process must be conducted in respect of each accredited organisation, as provided for in section 20(4)(c); and
- [(vi)] (xi)** the minimum norms and standards for accredited organisations, as provided for in section 21(1).

(b) The Minister of Social Development **[may] must**¹⁶⁶, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Finance, Health, Home Affairs, International Relations and Co-operation, Justice and Constitutional Development, Labour, Police, **[and]** State Security and Women, Youth, Children and People with Disabilities, make regulations regarding the circumstances in which accredited organisations qualify for financial assistance, as provided for in section 20(2)(b).

¹⁶⁴ This must be deleted if there is agreement that the requirement of written consent by a victim to be reported is to fall away.

¹⁶⁵ See the deletion of clause 44(1)(a). Wording is in line with our proposal to refer to a letter of recognition in stead of a certificate.

¹⁶⁶ The word "may" in clause 20(2)(b) was changed to "must" and accordingly it must be changed in clause 43 as well.

(3) Subject to subsections (1) and (2)¹⁶⁷, the Minister may after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Health, Home Affairs, International Relations and Cooperation, Labour, Police, Social Development, State Security and Women, Youth, Children and People with Disabilities and the National Director of Public Prosecutions, make regulations regarding any matter that this Act requires or permits to be prescribed¹⁶⁸.

[(3)] (4) Any regulation made under this section—

- (a) must be submitted to Parliament for approval¹⁶⁹ prior to publication thereof in the Gazette; and
- (b) which may result in expenditure for the State, must be made in consultation with the Minister of Finance; and
- (c) **may provide that any person who contravenes a provision thereof or fails to comply therewith, is guilty of an offence and on conviction is liable to a fine or to imprisonment for a period not exceeding one year]¹⁷⁰**

(5) A person who—

- (a) contravenes a regulation which prohibits certain conduct prescribed in the regulations; or
- (b) fails to comply with a regulation which obliges certain conduct prescribed in the regulations.

is guilty of an offence¹⁷¹.

[(4) The Minister may, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Health, Home Affairs, International Relations and Cooperation, Labour, Police, Social Development and State Security and the National Director of Public Prosecutions, make regulations regarding any matter that this Act requires or permits to be prescribed.]

Delegation of powers and assignment of duties by [National Commissioner of South African Police Service or]¹⁷² Director-General to senior officials

¹⁶⁷ See subclause (4) as deleted. According to this subclause, it seems that the Minister may make regulations also in respect of aspects that the Ministers of Home Affairs and Social Development must make regulations for.

¹⁶⁸ It is suggested that subclause (4) moves up to (3) so that the duties of the Ministers to make regulations are grouped together.

¹⁶⁹ When regulations just have to be submitted to Parliament before publication in the Gazette, it will be for information. The Portfolio Committee suggested that they should be submitted for approval, especially because a contravention of some regulations might give rise to a criminal sanction.

¹⁷⁰ Portfolio Committee suggested separate clause dealing with the penalties. It also wants the contravention of or failure to comply with the regulations to be prescribed as offences in the Bill itself instead of in the regulations.

¹⁷¹ The PC wants the offences relating to the regulations to be prescribed in the Bill. This might prove difficult as we do not know what will constitute offences in the regulations and for eg, a person completing a form wrongly, may contravene or fails to comply with a regulation.

¹⁷² SAPS indicated that sec 15 of the South African Police Service Act already provides for delegation of powers and that the reference to SAPS should be removed from clauses 45 – 47.

[44]45. (1) [The National Commissioner of the South African Police Service or any] Any Director-General referred to in this Act may, subject to subsection (4), delegate any power or assign any duty conferred on or assigned to him or her by this Act to an official in the employ of his or her **[Service or]** Department above the rank of director.

(2) A delegation or assignment in terms of subsection (1)—

- (a) is subject to any limitations, conditions and directions which **[the National Commissioner or] a** Director-General may impose;
- (b) must be in writing; and
- (c) does not divest **[the National Commissioner or] a** Director-General of the responsibility concerning the exercise of the power or the performance of the duty.

(3) **[The National Commissioner or] A** Director-General may—

- (a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
- (b) at any time withdraw a delegation or assignment.

(4) **[The National Commissioner or] A** Director-General may not delegate a power or assign a duty conferred on or assigned to him or her by section 36, 37 or 38 of this Act.

Delegation of powers and assignment of duties by [National Commissioner of South African Police Service or] Director-General to [provincial commissioner or] provincial head

[45]46. (1) [The National Commissioner of the South African Police Service or any] Any Director-General referred to in this Act may, subject to subsection (4), delegate any power or assign any duty conferred on or assigned to him or her by this Act **[to a provincial commissioner of the South African Police Service or]** to a provincial head of the corresponding provincial department, **[respectively,]** by agreement with that **[provincial commissioner or] provincial head[, as the case may be].**

(2) A delegation or assignment in terms of subsection (1)—

- (a) is subject to any limitations, conditions and directions which **[the National Commissioner or] a** Director-General may impose;
- (b) must be in writing;
- (c) may include the power to delegate or assign; and
- (d) does not divest **[the National Commissioner or] a** Director-General of the responsibility concerning the exercise of the power or the performance of the duty.

(3) **[The National Commissioner or] A** Director-General may—

(a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and

(b) at any time withdraw a delegation or assignment.

(4) **[The National Commissioner or a]** A Director-General may not delegate a power or assign a duty conferred on or assigned to him or her by section 36, 37 or 38 of this Act.

Delegation of powers and assignment of duties by [provincial commissioners of South African Police Service or] provincial heads

[46]47. (1) A **[provincial commissioner of the South African Police Service or a]** provincial head to whom a power or duty has been delegated or assigned in terms of section **[45]46** may delegate that power or assign that duty to an officer at director level or above in the employ of the **[South African Police Service or]** provincial department concerned.

(2) A delegation or assignment in terms of subsection (1)—

- (a) is subject to any limitations, conditions and directions which the **[provincial commissioner or]** provincial head may impose;
- (b) must be in writing; and
- (c) does not divest **[the provincial commissioner or]** a provincial head of the responsibility concerning the exercise of the power or the performance of the duty.

(3) **[The provincial commissioner or]** A provincial head may—

- (a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
- (b) at any time withdraw a delegation or assignment.

CHAPTER [11] 10 MISCELLANEOUS MATTERS

Laws repealed or amended

[47]48. The laws referred to in the second column of Schedule 1 are hereby repealed or amended to the extent indicated in the third column of the Schedule.

Short title and commencement

[48]49. This Act is called the Prevention and Combating of Trafficking in Persons Act,
[2010]2011, and takes effect on a date fixed by the President by proclamation in the *Gazette*.