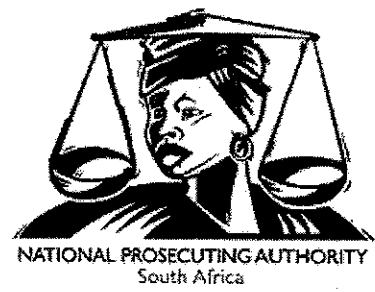


**Office of the
National Director of Public
Prosecutions**



7 September 2011

The Chairperson
Portfolio Committee on Justice
and Constitutional Development

**PROPOSED AMENDMENT BY NPA IN RESPECT OF CLAUSE 29 OF
PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL [B7 –
2010] AND FURTHER MOTIVATION FOR PROPOSED FINES IN BILL**

A. CLAUSE 29 OF BILL

1. During deliberations regarding the provisions of the above Bill on 6 September 2011, a representative of the NPA proposed an amendment to clause 29 of the Bill. The Portfolio Committee on Justice and Constitutional Development requested the NPA to put the proposal in writing and to indicate the effect of the proposed words *“with the necessary changes required by the context”* with reference to section 300(2), (3) and (4) of the Criminal Procedure Act.

2. At present, sub-clause (1) of clause 29 reads as follows:

“29. (1) (a) [The] A court may, subject to paragraph (c), on its own accord or at the request of the complainant/victim of trafficking or the prosecutor, in addition to any sentence which it may impose in respect of any offence under this [Act] Chapter 2, 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, whereafter the provisions of section 300(2), (3) and (4) of the Criminal Procedure Act apply.”.

3. It is proposed that subsection (1) be amended by the addition of the following words after the word “apply” in the last line:
“with the necessary changes required by the context with regard to an order for compensation made under this section”.
4. This proposal will have the following effect:
 - (a) **Section 300(3)(a)** of the Criminal Procedure Act, 1977 (CPA), does not refer to an “*order for compensation*” as in the Bill, but to an “*award made under this section*”. Therefore, the proposed amendment will mean that in the place of the word “award”, the reader must read in an “*order for compensation made under*” section 29 of the proposed Act.
 - (b) The above “*necessary changes*” expression will also apply in respect of the word “award” where referred to in **section 300(3)(b) and (4)** of the CPA.
 - (c) As indicated in subparagraph (a) above, **section 300(3)(a)** of the CPA, refers to an “*award made under this section*”. Meaning section 300 of the CPA. The proposed “*necessary changes*” expression will mean that the reader must read in an “*order for compensation made under section 29 of the Prevention and Combating of Trafficking in Persons Act*”.
 - (d) The above “*necessary changes*” expression will also apply in respect of the expression “*this section*” where referred to in **section 300(3)(b)** of the CPA.
5. The Committee is also referred to clause 28(2) of the original Bill, where the same wording is used.
6. The relevant provisions of the CPA, indicating the effected wording, are quoted direct hereunder for the convenience of the Committee.

“(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence

and the proceedings at the trial or hear further evidence either upon affidavit or orally.

- (3) (a) **An award made under this section—**
- (i) by a magistrate's court, shall have the effect of a civil judgment of that court;
 - (ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.
- (b) Where a superior court makes **an award under this section**, the registrar of the court shall forward a certified copy of the **award** to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon **such award** shall have the effect of a civil judgment of that magistrate's court.
- (4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of **the award**.". (Emphasis added)

B. PROPOSED FINES

7. A Committee member also indicated that he has certain concerns relating to the NPA's proposed fines and, in particular the fact that it proposes a fifty fold increase if compared to the provisions of the original Bill. The NPA wishes to submit the further motivation direct hereunder.
8. It is correct that the original Bill in clause 9(1) provides for a fine of "*not exceeding R1 million or to imprisonment for a period not exceeding five years*" in respect of the offence relating to carriers. It is, in particular, because of this provision that the NPA decided to propose the insertion of one clause dealing with all penalties as proposed in the Bill.

9. If having regard to the other penalties clauses in the Bill, the proposed fine of R1 million in clause 9(1) does not make sense. It is only in clause 9(1) that a specific fine is proposed and not in respect of the other clauses. In this regard the Committee is referred to the following original clauses:

• **Clause 4(1):** In this clause the penalty for the main offence of trafficking in persons is prescribed as “a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both”. The above wording will have the effect that the provisions of the Adjustment of Fines Act, 1991, apply, in terms of which the Regional Court may impose a fine up to R300 000 (R20 000 x 15) and a Magistrate’s Court a maximum of R60 00 (R20 000 x 3). If one compares these fines for the main offence with the proposed R1 million for the lesser offence in clause 9(1), it is clear that the penalty clauses require amendments. Furthermore, it is important to note that a magistrate’s court cannot impose “imprisonment for life” and the Regional Court is only allowed to impose imprisonment for life in respect of certain offences. Therefore, unless the Bill expressly provides for a higher imprisonment jurisdiction, the prescribed jurisdiction for a magistrate’s court in case of a conviction in respect of clause 4(1) will apply, namely, 3 years’ imprisonment.

• **Clause 4(2):** In this clause, namely, **the involvement** in the main offence of trafficking of in persons, the prescribed penalty is “a fine or imprisonment, or such imprisonment without the option of a fine or both”. The effect of this penal clause is the same as referred to in respect of clause 4(1) above. The question arises, why the penalty for this serious offence is less than the penalty prescribed in respect of carries as set out in clause 9(1) above.

• **Clause 5:** In respect of the offence of **debt bondage** the prescribed penalty is “a fine or imprisonment for a period not exceeding 15

years". The effect of this provision will be that a Regional Court may impose a fine of R300 000 (R20 000 x 15) and a magistrate's court R60 000 (R20 000 x 3). Again, if the intention is that this offence should be prosecuted in the magistrates' court, a provision is required expressly giving a magistrate's court such jurisdiction in which case the a magistrate's court may also impose a fine of R300 000.

- The above arguments are also, with the necessary changes, relevant to the penalties prescribed in **clauses 6** (a fine or 10 years' imprisonment); **7** (a fine or 15 years' imprisonment); **8(1)** (a fine or 10 years' imprisonment); **8(2)** (a fine or 5 years imprisonment); **12(6)** (a fine or one year imprisonment; **13(8) and (9)** (a fine or one year imprisonment; and **clause 43(3)** (a fine or one year imprisonment.

10. In the Prevention of Organised Crime Act, 1998, section 3(1) prescribes a fine of "**R1000 or imprisonment for a period up to imprisonment for life**". On 6 September 2011 the Committee members recognised and also heard from the police dealing with the offences of trafficking in persons, that almost all these offences are committed in a organised fashion. Furthermore, **clause 11(g)** of the original Bill lists one of the factors to be taken into account for purposes of sentencing "*whether the offence formed part of organised crime*". Therefore, the opinion is held that in such an instance it will be evident that sufficient funds are involved and that these perpetrators should be hit where it hurts most, name, very high fine. The NPA is of the view that the proposed fine of R100 million, when compared to the POCA legislation, is appropriate. It is further proposed that this amount of R100 should form the basis in deciding the amounts in respect of the other offence and be adapted accordingly.

11. The Committee was previously referred to other pieces of legislation prescribing fines of up to R100 million. Unfortunately there was not time to elaborate on these, but we shall do so witin a day of two.

Gerhard Nel

Office of the National Director