

**BRIEFING DOCUMENT: PREVENTION AND COMBATING OF TRAFFICKING  
IN PERSONS BILL, 2010****1. PURPOSE**

The purpose of this document is to provide background information for a media briefing on the Prevention and Combating of Trafficking in Persons Bill, 2010, which has recently been introduced into Parliament.

**2. INTRODUCTION**

- 2.1 There is speculation that trafficking in persons will increase during the FIFA 2010 Soccer World Cup, with specific reference to trafficking in persons for sexual purposes. As we have no reliable empirical data due to the clandestine nature of trafficking in persons, it is difficult to assess the extent of the problem. It must be pointed out that this Bill has not been prepared exclusively with the FIFA 2010 Soccer World Cup in mind. The Bill emanates from an investigation by the South African Law Reform Commission (the Law Reform Commission) into trafficking in persons which already started early in 2003. The Law Reform Commission consulted very widely at workshops countrywide and issued both an issue paper and discussion paper for comments. A final report was officially handed to Minister Surty in November 2008. The Bill was again published for general comments in May 2009 and the comments received were evaluated and, where appropriate, incorporated in the current Bill.
- 2.2 There is furthermore a perception that there is no current domestic legislation in place which could be used in the prosecution of trafficking in persons cases. Although the Republic lacks an Act which deals extensively and specifically with trafficking in persons, reference is made to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (the Sexual Offences Amendment Act), and the Children's Act, 2005 (Act No. 38 of 2005) (the Children's Act),

which contain provisions relating to trafficking in persons. The Sexual Offences Amendment Act, however, criminalises the act of trafficking in persons for sexual purposes only, while the Children's Act addresses more comprehensively the trafficking of children. The provisions of the Children's Act relating to trafficking of children are to come into operation in April 2010. Other Acts which could currently be used to prosecute persons suspected of trafficking in persons include the Sexual Offences Act, 1957; the Riotous Assemblies Act, 1956; the Immigration Act, 2002; the Basic Conditions of Employment Act, 1997; the Intimidation Act, 1982; the Domestic Violence Act, 1998; the Films and Publications Act, 1996 and the Prevention of Organised Crime Act, 1998. Under the common law, depending on the circumstances of each case, persons suspected of trafficking could be charged with kidnapping, common assault, assault with intent to do grievous bodily harm, extortion, attempted murder and murder.

- 2.3 The Republic is also a signatory to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000 and is required to pass domestic legislation which deals with trafficking in persons in order to fulfill its international obligations.

### 3. **PURPOSE OF BILL**

According to the Law Reform Commission, some of the main factors causing trafficking in persons, are poverty, war and political instability. Trafficking in persons is a worldwide problem and is one of the most lucrative criminal businesses globally. People are trafficked mainly for sexual exploitation and forced labour. Victims of trafficking are subjected to numerous ordeals, such as physical and emotional damage, health problems, drug and alcohol abuse and post-traumatic stress disorder.

#### 4. OBJECTS OF BILL

- 4.1 The Bill aims to give effect to the United Nations Protocol and to provide for the prosecution of persons involved in trafficking and for appropriate sentences; for the prevention of trafficking and the protection and assistance of victims of trafficking; for effective enforcement measures and generally to combat trafficking in persons.
- 4.2 In seeking to prevent trafficking in persons, clause 3 of the Bill provides that public awareness programmes and other measures must be implemented across the country. These programmes must inform and educate the public, especially those who are vulnerable or at risk of becoming victims of trafficking, on various issues relating to trafficking, such as common recruitment techniques, practices used to keep victims in exploitative situations and organisations that may be approached for assistance and information.
- 4.3 Chapter 3 of the Bill creates various new offences such as trafficking in persons in clause 4; debt bondage in clause 5; the possession, destruction, confiscation, concealment of and tampering with travel documents of victims of trafficking in clause 6; using the services of victims of trafficking in clause 7; and conduct facilitating trafficking in persons in clause 8. In terms of clause 9 carriers which transport victims across the borders of the Republic also commit an offence if the victims do not have the required travel documents with them. Given the global nature of the crime, South African courts will have jurisdiction in terms of clause 10 in respect of acts committed outside the Republic if those acts would have been an offence under the Bill had they been committed in the Republic. Acts aimed at committing an offence under chapter 3, or acts which incite, instigate, command, direct, aid, promote, advise, recruit, encourage or procure any other person to commit an offence under

chapter 3 or any person who conspires with any other person to commit such an offence, will be an offence of involvement in trafficking in persons. The serious nature of trafficking in persons and the related offences should be impressed on the courts to ensure that appropriate sentences are imposed. The Bill provides therefore in clause 11 that the court must take the following aggravating factors into account when considering an appropriate sentence: The significance of the perpetrator's role in the trafficking process; previous convictions relating to the crime of trafficking in persons; the conditions in which the victim was kept and the period the victim was held captive; whether the convicted person caused the victim to become addicted to any dependence-producing substance; the kind of abuse suffered and the effects thereof on the victim; whether the offence was part of the activities of an organised criminal group and whether the victim was a child. Penalties which may be imposed in terms of these offences range from fines and imprisonment for a period not exceeding five years to life imprisonment. A carrier may be fined up to R1 million.

- 4.4 The Bill emphasises the importance of protecting and assisting victims of trafficking. Clause 12 places a duty on immigration officers, labour inspectors, certain professionals, traditional health practitioners, traditional healers or traditional leaders to report a child who they reasonably suspect to be a victim of trafficking, to a police official, for investigation, notwithstanding any law, policy or code of conduct prohibiting the disclosure of personal information. The confidentiality of personal information between a professional person and the child as his or her patient or client must be respected and a professional person might contravene laws, policies or codes of conduct when information regarding a patient or client is disclosed to a police official. The phrase "despite any law, policy or code of conduct" therefore seeks to enable professional persons to report child victims without fear of contravening the law, policies and codes of conduct relevant to their professions. The clause

makes it compulsory for every other individual to report suspected child victims of trafficking to a police official for further investigation. Child victims of trafficking will fall under all the protective measures of the Children's Act. Clause 12 provides, for example, that the procedure in section 110 of the Children's Act, dealing with the reporting of abused or neglected children or children in need of care and protection, must be followed. Clause 14 provides that an investigation in terms of section 155 of the Children's Act must be conducted in respect of a child victim of trafficking which means that a social worker must investigate the matter and compile a report on whether the child is in need of care and protection. Child victims of trafficking must also be brought before the children's court. Clause 30 provides that a foreign child may not be repatriated unless the best interests of the child standard as provided for in section 7 of the Children's Act, among others, have been taken into consideration. Section 7 of the Children's Act provides for certain factors to be taken into account, such as the nature of the relationship between the child and his or her parents or other care-givers, the capacity of the parents or other care-giver to care for the child, the child's age and maturity. The Bill itself also provides in clause 33 for the escorting of a child from the place the child was found to the place from where the child was trafficked. Clause 34 provides that if a children's court has reason to believe that the parent or other person with parental responsibilities and rights in respect of a child, has trafficked that child, the court may suspend those parental responsibilities and rights and place the child in temporary safe care. The parent or other person with parental responsibilities and rights is, however, still liable for the commission of the offence of trafficking in persons.

- 4.5 Clause 13 places a duty on certain officials, professionals, traditional health practitioners, traditional healers and traditional leaders to report an adult who they reasonably suspect is a victim of trafficking in persons, to a

police official for further investigation. Certain categories of persons who are required to report, must, however, first obtain the consent of the adult person concerned, except where the person is mentally disabled or in an altered state of consciousness. The reason for this provision is that an adult person has the right to decide whether to lay a charge against the perpetrator or not. These persons must also, by virtue of their profession and their relationship with the alleged victim, have to respect the privacy of their "patients" and treat information they obtain in the course of their duties with the necessary confidentiality. This is not necessarily the case with immigration officers, labour inspectors and police officials who are required to uphold the law and ensure that transgressors are brought to book. Clause 13 further provides that members of the public may report an adult person who is reasonably suspected to be a victim of trafficking to a police official for further investigation.

- 4.6 Other protective measures provided for in the Bill include the following:
- (a) Foreign victims of trafficking are entitled to the same public health care services as to which citizens of the Republic have access (clause 15).
  - (b) The prosecution of persons who are found to be victims of trafficking for certain offences committed by them as a direct result of their situation as victims of trafficking, is prohibited by clause 16. This will also enable law enforcement agencies to investigate and prosecute traffickers by using these victims as witnesses. Provision is also made for a criminal case to be postponed and withdrawn, or for the discharge of the victim, where the prosecutor suspects that the person who is prosecuted, is a victim of trafficking.
  - (c) Foreign victims of trafficking may be granted a 'recovery and reflection period', to remain in the Republic for up to 90 days (clause 17). Temporary residence permits (clause 18) and, in certain circumstances, permanent residence permits (clause 19) can be issued to foreign victims.

- (d) In terms of clause 20, organisations that provide services to victims of trafficking must be accredited according to an accreditation system to be prescribed and a victim may only be referred to an organisation that has a valid certificate of accreditation. Accredited organisations—
- must comply with minimum norms and standards to be prescribed by the Minister of Social Development (clause 21);
  - must offer certain programmes to victims (clause 22);
  - may not return a victim of trafficking who has been trafficked within the borders of the Republic, to the area from where he or she was trafficked without giving due consideration to the safety of that victim (clause 25); and
  - must submit certain information on victims in their care, to the Director-General: Social Development (clause 26).
- (e) Clauses 27 and 28 provide for the payment of compensation by convicted persons to victims of trafficking and to the State. Clause 27 provides that the compensation may be for damages to or the loss or destruction of property and money, for physical, psychological or other injury, for being infected with a life-threatening disease or for the loss of income or support, suffered by the victim. The court may in its discretion, issue a warrant of execution, authorizing the sheriff to recover the amount of the compensation by the attachment and sale of movable property belonging to the convicted person. Provision is also made for an alternative option, namely that a victim may use the execution procedure in the civil court, to recover the amount of the compensation, where a compensation order has not been complied with. Clause 28 provides that a court may, in addition to any penalty it may impose on a convicted person, and in addition to any compensation order it may make in favour of a victim, and on application by the prosecutor, order the convicted person to pay compensation to the State for expenses in connection with the care,

- (f) The Bill further prohibits the summary deportation of foreign victims in clause 29 and, if repatriated, clauses 30 and 31 provide for a proper repatriation process, taking cognisance of the safety of the victims in each case.
  - (g) Clause 32 provides for the reception of and assistance to a victim of trafficking who is a citizen or permanent resident of the Republic who returns to the Republic.
- 4.7 Clause 35 lays the foundation for bilateral, regional and multilateral agreements on trafficking in persons between the Republic and other states and is in accordance with the Trafficking in Persons Protocol. It provides for the President to enter into agreements with foreign states in respect of trafficking in persons matters.
- 4.8 Clause 36 provides that the National Commissioner of SAPS, the National Director of Public Prosecutions and the Directors-General: Home Affairs and Labour must issue national instructions and directives with which their officials must comply when dealing with trafficking-related matters. These instructions and directives must, among others, provide for the manner in which trafficking cases are to be reported, investigated and prosecuted, the manner in which victims of trafficking should be identified, interviewed and treated and measures to ensure the safety of victims and witnesses. The clause further provides for the development of training courses which must include training on the national instructions and directives. It provides for and promotes the use of uniform norms, standards and procedures to ensure that all functionaries are able to deal with matters relating to trafficking in an appropriate, efficient and sensitive manner. The national instructions and directives must provide that adequate disciplinary steps are taken against any functionaries who fail to comply with any duty imposed on them in terms of the Bill, the national instructions or directives. Certain information must be collected and

analysed and forwarded to the Intersectoral Committee which is established by the Bill.

- 4.9 As the Republic has ratified the Trafficking in Persons Protocol, it is obliged to adopt measures to ensure the protection of victims of trafficking, the prosecution of traffickers and the prevention of trafficking in persons, including assisting other State Parties in this regard. International co-operation with State Parties that are not parties to the above-mentioned Protocol is, however, also necessary for the effective combating, prevention and prosecution of trafficking in persons. Clause 37 therefore provides that the Director-General: Home Affairs must, at the request of a State which is a party to the Trafficking in Persons Protocol or to an agreement relating to trafficking in persons, verify 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 under the Bill.
- 4.10 In order to ensure a uniform, co-ordinated and cooperative approach by all government departments and institutions in dealing with trafficking in persons matters and to guide the implementation and administration of the Bill, clause 39 provides that the Minister of Justice and Constitutional Development must, after consultation with other relevant ministers of cabinet and the National Director of Public Prosecutions, adopt a national policy framework relating to all matters dealt with in the Bill. In terms of clause 40 an Intersectoral Committee will be established to develop a draft national policy framework and to establish an integrated information system to facilitate the effective monitoring and implementation of the Bill (clause 41). Clause 43 provides that the Ministers of Social Development and Home Affairs may make regulations with regard to aspects of this Bill which fall under their respective departments. It further contains an umbrella provision by providing that the Minister of Justice and

Constitutional Development may make regulations regarding any matter that the Bill requires or permits to be prescribed.

- 4.11 The Bill further proposes amendments to other Acts, such as the Criminal Procedure Act, 1977, the Immigration Act, 2002, the Children's Act and the Sexual Offences Amendment Act, to bring them into line with the provisions of the Bill and to insert provisions in those laws to deal more effectively with trafficking in persons. Certain consequential amendments are made to the provisions of various other Acts which are necessitated by the provisions of the Bill.