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SUBMISSION IN TERMS OF THE GENERAL NOTICE 2009, DEPARTMENT OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT REGARDING THE PREVENTION AND COMBATING  
OF TRAFFICKING IN PERSONS BILL

BY THE INSTITUTE FOR SECURITY STUDIES

11 June 2009

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The Honourable Minister of Justice and Constitutional Development  
Submission: Prevention and Combating of Trafficking in Persons Bill

The Institute for Security Studies thanks you for the opportunity to provide comments on the abovementioned Bill.

The Institute for Security Studies is an applied policy research institute committed to providing evidence-based policy recommendations on matters relating to human security on the African continent. Between 2006 and 2008 the Crime, Justice and Politics Programme conducted in-depth research into the sex work industry in Cape Town, with the purpose both of understanding the industry better and providing quantitative and qualitative data about the occurrence of human trafficking in the industry. Since 2007 the Organised Crime and Money Laundering Programme at the ISS has conducted research to determine the prevalence of human trafficking in twelve southern African countries. Our comments on this draft legislation are based on the knowledge and evidence gathered during the research. Below are comments on specific aspects of the Bill.

#### Preamble

We would like to recommend amendments to the first two statements in the preamble to the Bill. There is insufficient evidence to support the contention that poverty and unemployment are causes of trafficking, as suggested by the first statement in the Preamble. While this is a commonly held belief, it is not supported by evidence. We therefore recommend that the first statement be amended to read as follows:

*'Recognising that the search for improved socio-economic opportunities contributes to making people vulnerable to becoming victims of trafficking'*

In addition, the second statement suggesting that there is an increase in trafficking involving organised criminal networks, is also not based on clear evidence. In the absence of baseline data about the prevalence of human trafficking, it is not possible to infer an increase in the phenomenon. In addition, our research findings show that women and children are no more vulnerable to men when it comes to trafficking. We thus, propose the following rewording of the second statement in the preamble:

*'Concerned by the phenomenon of trafficking in person and the possible role played by organized criminal networks in the trafficking of persons globally'*



## Chapter 2: Prevention of Trafficking in Persons

This section of the Bill relates to the need to raise public awareness of the phenomenon of human trafficking. It is our submission that there is currently insufficient evidence about who is particularly vulnerable or at risk of becoming a victim of trafficking, nor sufficient evidence to allow for generalisations about the common recruitment techniques of traffickers. The evidence that does exist is largely anecdotal and does not allow for profiling. We, therefore, urge caution in the implementation of this aspect of Bill as we believe that raising awareness programmes must be firmly based on evidence. This also relates to the need for more evidence about what would discourage demand for human trafficking.

We strongly recommend the deletion of clause 3(1)(c), on the basis that there is no evidence that provides an adequate understanding of what would prevent the demand for human trafficking, nor evidence to support the contention that women and children are particularly vulnerable.

## Chapter 3: Offences and Penalties

We recommend amendment of Section 4(3)(b) to read as follows:

*An adult person who is a victim of trafficking as consented to the intended exploitation, or that the intended exploitation did not occur, ~~only~~ if one or more...*

## Chapter 4: Identification and protection of victims of trafficking

Section 11 and Section 12 relate to the reporting and referring of victims of trafficking. It is our submission that as it is now, the bill only allows for reporting of victims of trafficking by the officials and specified professionals as noted in Section 11(1) and Section 12(1)(a). It is our view that reporting should not be limited to this category of individuals, but should be extended to include all individuals. We propose the following amendments:

Section 11(1):

*Any individual, including an immigration official, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional health practitioner or traditional healer who, on reasonable grounds suspects that a child is a victim of trafficking must, within 24 hours, report that suspicion to a police official for investigation, if it is in the best interests of the child concerned.*

Section 12(1)(a):

*Any individual, including an immigration official, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional health practitioner or traditional healer who, on reasonable grounds suspects that an adult is a victim of trafficking must, within 24 hours, report that suspicion to a police official for investigation, if it is in the best interests of the child concerned.*

We additionally recommend amendment of Section 12(5)(a) as follows, so that an individual victim of trafficking is afforded the right to refuse assistance:

*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 risk, if the person concerned gives their consent; and...*



We would like to note our concern that although Section 12 allows for a victim of trafficking, once assessed as such, to receive services, the Bill does not make it clear what would happen to a person who was suspected of being a victim of trafficking, but who is not assessed as such. Such a person who may be a victim of labour exploitation or other form of abuse, and should receive the necessary support or service.

#### Chapter 5: Status of Foreign Victims of Trafficking

Section 16(1) refers to a non-renewable recovery and reflection period not exceeding 90 days. Section 16(3) states that after 30 days of the 90 day period, if the victim does not wish to co-operate with law enforcement or prosecuting authorities, the Director General of Social Development is required to undertake investigations to determine whether it is safe for the victim to return home.

It is our concern that restricting the response period of the Director General of Social Development to 60 days places the Department under enormous pressure. This may be an unrealistic time period in complicated cases where the victim's family is difficult to trace. We thus recommend that the recovery and reflection period should be renewable, upon submission of a report by the Director General of Social Development to the Director General of Home Affairs providing reasons for why the intended investigation could not take place within the stipulated period. Section 29(a) is also relevant.

Section 17 and 18 allow for the provision of temporary residence through a visitor's permit, later followed by permanent residence (if the victim has been in the country for a minimum of five years). We are concerned that granting a visitor's permit to a victim of trafficking for a long period of time (up to five years of continuous residence) places the state under an unrealistic burden, in that the visitor's permit does not allow the victim to study or work. As such, the state would be responsible for the victim's accommodation and needs. We recommend that a special visa that allows the victim to seek independent employment, or to study, be considered.

#### Chapter 8: Deportation and repatriation of victims of trafficking

We note that Section 28(2) makes the Director General of Home Affairs responsible for ensuring the safety of an adult victim of trafficking in the repatriation process. This seems to be inconsistent with Section 16(2)(3) that implies that this is the responsibility of the Director General of Social Development. It is our submission that Section 28(2) should refer to the Director General of Social Development to ensure consistency.

Section 30(b)(vi) states that upon entry into South Africa by a South African adult victim of trafficking, that the individual would be required to be referred to an accredited organization. We propose amendment to allow for the victim to not take advantage of these services, if they so choose:

*Upon entry into the Republic of a person who is an adult victim of trafficking refer the person to an accredited organization, **unless the person indicates that they do not wish to take advantage of these services.***

Section 34(1)(d) refers to the responsibility of the National Commissioner of Police (in consultation with relevant Ministers) to determine the manner in which victims of trafficking should be identified, interviewed and treated, with particular attention to the vulnerability of child victims. It should be noted that the manner in which trafficking victims are dealt with and identified by the SAPS should be in accordance with the regulations developed by the Department of Social Development as referred to in Section 40(1)(b).



## Chapter 10: Administration of Act

Section 39 refers to the obligations of relevant departments to report to parliament 12 months after the commencement of the Act, about actions taken to implement the Act and about information relating to victims of trafficking. It is our submission that the Act places enormous responsibilities and burdens upon a range of departments, and that these have financial consequences for the state. This cannot be avoided if South Africa is to take seriously its responsibility to protect victims of trafficking and act against traffickers. However, we believe that an annual assessment should be undertaken by parliament of the information gathered by the relevant departments about the nature and prevalence of trafficking in South Africa. This assessment should determine whether the resources allocated to the prevention of human trafficking, and the assistance and protection of victims is proportionate to the size of the problem.

We additionally submit that Section 40(2)(a) should be amended to include the National Commissioner of Police in consultations about the development of regulations, since the National Commissioner is responsible for determining the way in which the SAPS is to respond to cases of trafficking, as referred to in Chapter 9 s34.

### Conclusion

We would like to draw the attention of the Honourable Minister to the requirement to ensure that the regulations pertaining to the Act, in relation to the identification of a victim of trafficking, should place reasonable onus on the victims to provide evidence of exploitation. This is to avoid a situation in which any person found to be engaged in illegal activities (for example the sale of narcotics) can claim, in their defence, to be a victim of trafficking; and in which case the burden of caring for the individual will fall to the state.

We would also like to note that a number of statements made in the background note to this draft legislation, such as what the causes of trafficking are believed to be, and that the phenomenon is increasing, are not sufficiently supported by evidence.

We would like to draw the attention of the Honourable Minister to the findings of Jyoti Sanghera (advisor on trafficking at the office of the High Commissioner on Human Rights in Geneva) who argues that the contemporary anti-trafficking discourse is based on a mythology about the roles of perpetrator and victim. Because of the assumptions of this ‘mythology’, she says, interventions fail to adequately address the needs of the victims, and fail to recognise their own motivations. Those who want to help thus perpetuate inequalities and abuse, rather than ameliorating them. Sanghera’s list of assumptions that make up the ‘myth’ makes for interesting reading, especially as many of these are reflected in the draft Bill:

1. *Trafficking of children and women is an ever-growing phenomenon.*
2. *Increasing numbers of victims of trafficking are younger girls.*
3. *Most trafficking happens for the purpose of prostitution.*
4. *Poverty is the sole or principle cause of trafficking.*
5. *Trafficking [within the Asian subcontinent and the region] is controlled and perpetrated by organised crime gangs.*
6. *Based on the assumption that most women in prostitution are coerced and trafficked, it is then assumed that they would be only too happy to be rescued and reintegrated with their families, or rehabilitated.*

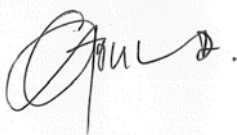


7. *Rehabilitation into families and communities is viewed as an unproblematic strategy, for it is assumed to provide adequate protection and safety to victims of trafficking.*
8. *Anti-migration strategies based upon awareness-raising campaigns which alert communities to the dangers of trafficking, by instilling fear of strangers and fear of big metropolises and cities, will curb migration and hence trafficking.*
9. *Strategies which club women and children together will be equally beneficial to both in extending protection against trafficking and redress after being trafficked.*
10. *Law enforcement is a neutral and unproblematic category and all it needs is sensitisation and training on issues of trafficking in order to intervene effectively to curb the problem of trafficking<sup>i</sup>.*

She notes that none of these assumptions assists in developing effective strategies to combat the labour exploitation of women, particularly migrant women.

Finally, we hope that the findings of our research may be of use to you, and would be pleased to make the research reports available to you, on request. In addition, we would be willing to make ourselves available to present the findings of our research, and further substantiate our submission, should this be required.

Yours sincerely



Chandré Gould



Annette Hübschle

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<sup>i</sup> Sanghera J 2005. 'Unpacking the trafficking discourse'. In Kempadoo, K (ed) 2005. *Trafficking and prostitution reconsidered: new perspectives on migration, sex work and human rights*. Boulder: Paradigm.

