

Combating human trafficking in South Africa: A critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013*

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OPSOMMING

Die bestryding van mensehandel in Suid-Afrika: 'n Kritiese evaluasie van die Voorkoming en Bestryding van Mensehandel Wet 7 van 2013

Tarwyl die meeste lande oorhaastig op mensehandel as 'n dreigende krisis gereageer het, het Suid Afrika – as gevolg van die juridisistiese se stadige reaksie om wetgewing in te stel om mensehandel te kriminaliseer – die unieke geleentheid gehad om uit die fonte van hierdie lande te leer. Die juridisistiese het dus die kans gehad om effektiewe wetgewing te verskaf wat op feite gebaseer is asook uniek is aan die land se omstandighede; om die oorsake van mensehandel-slagoffers en ander immigrante in ag te neem en ook die mensehandel in Suid-Afrika te bestry – die Wet op die Voorkoming en Bestryding van Mensehandel – uiteengesit en ondersoek ten einde die toereikendheid en doeltreffendheid daarvan te evalueer. Die definisie van mensehandel soos in hierdie Wet uiteengesit word verduidelik en met die van die Palermo Protokol vergelyk. Voorstelle word gemaak om die wetgewing uit die perspektief van misdaadvoorkoming, oortreder- vervolging en die beskerming van slagoffers te verbeter.

1 INTRODUCTION

The Prevention and Combating of Trafficking in Persons Bill was introduced into Parliament on 16 March 2010 but passed only in May 2013. President Zuma signed the Prevention and Combating of Trafficking in Persons Act (TIP Act) into law on 29 July 2013.¹ However, until the final implementation of the Act, the combating of human trafficking in South Africa is still reliant on fragmented

auxiliary laws as well as specific transitional legislation against trafficking in persons. In this regard, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Children's Act 38 of 2005 contain transitional provisions dealing with certain aspects of trafficking in persons, yet both have limited scope since they do not target all forms of human trafficking.²

The inspiration behind the TIP Act is to bridge the gaps left by common-law and statutory provisions,³ to provide a clear definition of the crime and a comprehensive approach to the fight against trafficking in persons. In creating a specific and separate crime of human trafficking, it is anticipated that a regulatory framework based on concrete and understandable legal provisions will be clearer and easier to work with. Specific legislation may also promote responsible efficiency in the justice system as it "may assist under-trained prosecutors to have a single codified piece of legislation to refer to in handling these cases".⁴ Consequently, the investigation and prosecution of trafficking will be accomplished with more ease and focus, which again will result in shortened investigations of possible offenders, as well as shortened trials. The legislation on trafficking in persons also gives domestic legal effect to South Africa's international obligations under the Palermo Protocol.⁵ It draws from international best practices, while also being relevant and tailored to local realities.

2 DEFINITION OF TRAFFICKING IN THE TIP ACT

The TIP Act describes trafficking crimes and anti-trafficking measures with great precision. The Act consists of nine substantive law chapters, while Chapter 10 deals with miscellaneous matters. Section 1 contains the definitions of terms discussed in the Act. The TIP Act adopts the definition of human trafficking provided in the Palermo Protocol⁶ verbatim, yet has widened it in scope:

2 In the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act 2007), ss 70–71 focus on trafficking for sexual exploitation, and in the Children's Act 38 of 2005 ss 281–291 centre on child trafficking. The TIP Bill duplicates the provisions of both transitional Acts, but also improves on the transitional anti-trafficking legislation in many regards as will be illustrated in the research.

3 Pithey "Do new crimes need new laws? Legal provisions available for prosecuting human trafficking" 2004 *SACQ* 9 maintains that "given the complexity of identifying the appropriate legal provisions that need to be applied to any particular case, it may be argued that there is a need for a single piece of legislation that encapsulates all the above provisions, with alterations where necessary". Although some existing legislation is unclear or difficult to use in practice to combat human trafficking, the penal provisions provided for these crimes are not serious enough. With this patchwork-approach victims sometimes only receive partial justice when evidence of other criminal activities cannot be found.

4 Leggett "Hidden agendas? The risks of human trafficking legislation" 2004 *SACQ* 4. The author surmises (4) that a single trafficking law may also be necessary for the comprehensive prosecution of non-sexual trafficking crimes as "there may be a need for more flexibility in prosecuting slavery or organ removal cases".

5 UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children 2000 (Palermo Protocol). The TIP law specifically refers to the international obligations entered into when the state became a signatory to the Palermo Protocols in the Preamble and in the Objects of the Act. See also Dept of Justice and Constitutional Development GG 29 Jan 2010 No 32906 GN 61 (2010) 3.

6 The TIP Act makes reference to the Palermo Protocol in the Preamble and, under the Ch 1 definitions, Trafficking is defined in the Palermo Protocol in a 3(a): "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by

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1 Act 7 of 2013. This process was preceded by two discussion papers and an issue paper on human trafficking investigated and presented by the South African Law Review Commission (SALRC). See SALRC *Report on trafficking in persons* (2002); SALRC *Trafficking in persons* (2004); SALRC *Trafficking in persons* (2006). The operationalisation of the Act is still "dependent on regulations that are required to be made by a number of role-playing departments such as Home Affairs". See Maharaj "President Jacob Zuma signs into law the Prevention and Combating of Trafficking in Persons Bill" <http://bit.ly/15ZuG62> (accessed 2013-10-01).

- ⁴ (1) Any person who 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) abduction;
 - (g) kidnapping;
 - (h) the abuse of power;
 - (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
 - (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,
- aimed at either the person or an immediate family member of that person or any person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.
- (2) Any person who –
 - (a) adopts a child, facilitated or secured through legal or illegal means; or
 - (b) concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or any person in any form or manner, is guilty of an offence.⁹
- The South African TIP Act replicates the Palermo Protocol's acts of human trafficking as the recruitment, transportation, transfer, harbouring or receipt of persons. The TIP Act further extends these acts to include the delivery, sale, exchange and lease of persons, the adoption of a child facilitated or secured through legal or illegal means, or concluding a forced marriage with another person, within or across the borders of the Republic.⁸ The first quandary in both the Act and the Palermo Protocol is the fact that a number of the terms are vaguely defined or undefined.⁹ The TIP Act also contains many repetitions of related concepts. In this regard, the terms "exchange", "lease" and "sale" all involve the exchange of a commodity for a benefit and should perhaps be grouped together under a single concept for legal certainty.¹⁰

means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

⁷ TIP Act s 4 (own italics to indicate additional definitional elements in the South African Act which are absent in the Palermo Protocol's definition).

⁸ The draft TIP Bill B7-2010 contained additional acts such as procurement, capture, removal, and disposal of persons, as well as means such as intimidation, false pretences and debt bondage.

⁹ Eg, the Palermo Protocol does not define "servitude" or "serfdom". While the TIP Act does define "servitude", there is no corresponding definition or crime that could be identified in South African law.

¹⁰ See in this regard also Kruger *Combating human trafficking: A South African legal perspective* (2010) 514. The insertion of the phrase "an immediate family member of that person or any person in close relationship to that person" also seems redundant, as the continued on next page

A major development in the South African definition is the introduction of the concept of domestic human trafficking which makes the crossing of borders immaterial. This improves on a significant limitation of the Protocol and attempts to protect victims who have not been moved beyond a state border. This enhancement is particularly important because studies conducted by local and international organisations in South Africa suggest that domestic human trafficking is a significant problem.¹¹ Furthermore, from the perspective of victims, the harm can be just as great no matter whether the trafficking is cross-border or internal.

The means of control over human trafficking victims are also extended in the South African definition to include "a threat of harm", "kidnapping" and "the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage". It is submitted that some of these terms seem to be repetitions of one another. The term "a threat of harm" may already be incorporated in the Palermo Protocol's "the threat or use of force, intimidation or other forms of coercion" which implies a threat of injury. Although there is no harm in repetition, these additional elements make the definition clumsy and long. The crime of kidnapping was possibly included to differentiate from abduction, introduced in the original definition.¹² The final phrase "the giving or receiving of payments, compensation, rewards, benefits or any other advantage"¹³ is also very similar to the already included "giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person". However, the South African phrase is more comprehensive than that of the Palermo Protocol. The inclusion of the words "or any other advantage" serves as a catch-all phrase and is necessary in the definition as it is wider and could cover more possible human-trafficking situations. The segment "of a person having control or authority over another person" could perhaps be deleted, so as not to restrict the giving of consent to certain persons only. The related concepts may be confusing as the definition is very long, but on the other hand, the wide definition includes all types of possible conduct which makes it easier for the prosecution.

The methods of manipulation in the national definition centres mainly on the words "coercion" and "abuse of power"; "deception" or "abuse of vulnerability". As it requires extensive investigation of the human-trafficking situation, it is often difficult to prove. Although the state prosecutes and must prove all the elements of the offence, victims have to provide evidence that they were trafficked, coerced or deceived into a trafficking situation. This will naturally also involve a

description qualifies as "a person trafficked", which is already present in the definition. This phrase was apparently inserted to protect family or friends of trafficked victims.

¹¹ Kreson "Trafficking in children in South Africa: An analysis of pending legislation" 2007 *Child Abuse Research in South Africa* 36–37. It is argued that trafficking within some countries is as serious as, or more serious than, cross-border trafficking.

¹² The concept of "kidnapping" did not form part of the draft Prevention and Combating of Trafficking in Persons Bill published for comment in the GG No 32222 8 May 2009 GN 431 (2009), but were included in the Trafficking in Persons Bill B7-2010 and TIP Act 2013. In the draft TIP Bill of 2010, the concept of "false pretences" (which corresponds to "deception" already present in the Palermo Protocol's definition) was also inserted. This concept was eliminated in the final TIP Act.

¹³ This phrase is equivalent to the definition of trafficking in s 70(2)(b) of the Sexual Offences Act 2007.

police investigation into their alleged trafficking situations. This further underpins the importance of victim support and protection, as the victim's testimony is usually indispensable for the investigation and prosecution of traffickers as for effective prosecution stable witnesses are required.

While the Palermo Protocol incorporates the expression "at a minimum" to cover any future possible forms and means of exploitation, the TIP Act provides an extensive list of different types of exploitation,¹⁴ but the list remains open-ended. Although all exploitative practices covered by the international definition of trafficking are expressly included, the TIP Act lists many more exploitative situations than the Protocol. Nevertheless, it does not include forced prostitution.¹⁵ This is covered as it is included in the concept "sexual exploitation".¹⁶ Except for the crime of sexual exploitation, flexible terms in the definition such as "slavery or practices similar to slavery", "servitude" and "forced labour" indicate the wide ambit of the offence. Both the Protocol and the TIP Act fail to expressly include the worst forms of child labour as identified by the International Labour Organisation's (ILO) Convention 182 in its list of forms of exploitation. This is of course not necessary since "child labour" in any form is criminalised.¹⁷

The Protocol was criticised for containing a rather lengthy and difficult definition which has led to complications experienced by practitioners and researchers.¹⁸ The TIP Act includes an even longer definition. The drafters in South Africa seem to be cautious by including almost all relevant and locally appropriate exploitative contexts. The definition does not specifically require the involvement of organised crime groups, as domestic trafficking literature has shown that

14 According to s 1 of the TIP Bill, "exploitation" includes, but is not limited to "(a) all forms of slavery or practices similar to slavery; (b) sexual exploitation; (c) servitude; (d) forced labour; (e) child labour as defined in s 1 of the Children's Act; (f) the removal of body parts; or (g) the impregnation of a female person against her will for the purpose of selling her child when the child is born".

15 The Act does not directly refer to either voluntary or involuntary prostitution, and consequently also does not provide guidelines to distinguish between these two concepts. As prostitution is currently criminalised in South Africa, an issue of concern is the treatment of prostitutes who initially accept an offer of sex work which turns into an exploitative situation.

16 As defined in s 1 of the TIP Act, the TIP Act also does not specifically criminalise sex tourism. The offence is also not found in the Sexual Offences Amendment Act 2007. It is recommended that "sex tourism" be specifically included as a form of trafficking in the TIP Act. The TIP Act 2013 eliminated the forms of sexual grooming and sexual abuse found in the draft TIP Bill 2010. These forms were superfluous as they are contained in Bill 2010 to correlate with the trafficking definition of the Sexual Offences Act 2007 (s 70(2)(b)).

17 These forms include debt bondage, recruitment of children for prostitution, pornography, the use of children for illicit activities such as drug trafficking, and any work which would harm the health, safety or morals of children. The trafficking of children is specifically included among the "worst forms" prohibited by ILO 182 a 3(a) which calls for its criminalisation and suppression.

18 See Gallagher "Human rights and the New UN Protocols on Trafficking and Migrant Smuggling: A preliminary analysis" 2001 *HRQ* 986; Muntarhorn "Human rights versus human trafficking in the face of globalization" <http://bit.ly/17A0CXE> (accessed 2013-06-21).

the offence is only sometimes linked to organised crime in South Africa.¹⁹ It may be argued that an overly-broad definition could lead to problems such as distinguishing trafficking from mere assisted migration and people smuggling. This should not be problematic since the distinguishing features of trafficking are the means employed (for example, deception or abuse of a position of vulnerability) and the purpose, namely, an intention to exploit. The broad definition may, however, mean that the sexual abuse of students by teachers also amounts to human trafficking.²⁰ Pharoah, for instance, questions this wide ambit of the definition of trafficking by suggesting that limits are necessary for the practical application of the concept.²¹ It is thus submitted that an operational definition which clearly delineates all aspects is especially necessary for the purpose of effective prosecution, victim protection, research and data gathering.

3 PROSECUTING PERSONS INVOLVED IN HUMAN TRAFFICKING

Chapter 2 concerns the prosecution of persons involved in trafficking and appropriate penalties. Except for the newly-created crime of trafficking in persons, the TIP Act also creates the separate offences of debt bondage,²² the possession, destruction, confiscation, concealment of and tampering with travel documents of victims of trafficking,²³ using the services of victims of trafficking,²⁴ and facilitating trafficking in persons.²⁵ By specifying the nature of every type of trafficking offence and their corresponding penalties, the legislation will assist

19 Pharoah *Getting to grips with trafficking: Reflections on human trafficking research in South Africa* (2006) 51-52; 61-62.

20 Pharoah 32. The alleged sexual abuse of Lesotho children by Free State farmers arguably also falls into this category. Although trafficking activities suggest the movement of persons from one place to another, other core elements in the trafficking definition such as other means of trafficking and the purpose of trafficking may include acts which do not necessarily amount to "movement". These are, eg, "recruitment", "harbouring" and "receiving" of a person by, eg, abuse of a position of vulnerability or "deception" and with the purpose (intention) to exploit.

21 See Pharoah 77-78.

22 S 5 TIP Act. Debt bondage is defined in s 1 as "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".

The penalty for debt bondage may be a fine or imprisonment for a period not exceeding 15 years.

23 S 6 TIP Act. This offence is penalised with a fine or imprisonment of up to 10 yrs. This section could be utilised to even penalise border employees or agents who confiscate travel and immigration documents from persons entering a country legally.

24 S 7 TIP Act.

25 S 8 TIP Act. The penalty for facilitation is a fine or imprisonment for a period not exceeding 10 years or both (s 8(1)). An electronic communications service provider which fails to comply with the provisions is liable to a fine or imprisonment for a period not exceeding 5 years or both (s 8(3)).

the police and the courts in applying the law. The clear differentiation between the various offences should also ensure just and appropriate sentences.

The penalties envisioned in the Act vary from a fine or a maximum of five years imprisonment for the least severe offences to a maximum of life imprisonment or a fine of an amount not exceeding ZAR100 million, or both, for the most severe ones.²⁶ Section 4(1) criminalises trafficking irrespective of the victim's age or the type of trafficking involved.²⁷ Liability for the offence is also extended to include juristic persons and partnerships.²⁸ Upon conviction, a human trafficker will be liable to pay a fine or may be given a prison sentence, including imprisonment for life, or imprisonment without the option of a fine or both. The underlying philosophy of the text is thus to respond as best as possible to the principles of the Palermo Protocol.

Any type of involvement in human trafficking by way of attempting to commit trafficking, inciting or directing others and conspiring to commit the crime is criminalised in section 10(1).²⁹ Attempts to commit human trafficking as prohibited in the Palermo Protocol (in article 5(2)) initially appeared in the draft TIP Bill 2010 as occurring when a person "performs any act aimed at committing an offence". This was problematic because for a conviction of attempting to commit a crime, the prohibited conduct must not be "merely preparatory, but [must have] ... reached at least the commencement of the execution of the intended crime".³⁰ The phrase "any act aimed at" the commission of human trafficking seemed broad enough to also include acts that are merely preparatory. However, in the final Act of 2013, this phrase was replaced with the more unambiguous term of "attempt".³¹ Although attempt, incitement and conspiracy are criminalised in

26 These sanctions are severe enough to punish offenders appropriately and deter potential perpetrators, and consequently adhere to the prescriptions in the UN Convention on Transnational Organised Crime of 2000 (CTOC) a 11(6). The provision of sanctions in the Bill is an improvement on s 71 of the Sexual Offences Act where no specific sanctions for the violation of trafficking for sexual trafficking is prescribed. Based on the judgment in *Director of Public Prosecutions, Western Cape v Prins* (369/12) [2012] ZASCA 106; 2012 2 SACR 183 (SCA); 2012 10 BCLR 1049 (SCA); [2012] 3 All SA 245 (SCA) (15 June 2012) paras 37–38, any of the sentences listed in s 276(1) of the Criminal Procedure Act 51 of 1977 may be imposed. In addition, the Criminal Law Amendment Act 105 of 1997 also prescribes life imprisonment for s 71(1) and (2) of the Sexual Offences Act 2007, indicating very clearly how serious these crimes are regarded.

27 Unlike the Protocol, the TIP Act does not specifically specify that intention is the only form of fault required for this offence (although the words "for the purpose of" in the definition should indicate that intention is required). It has been submitted that in the absence of a clear indication that negligence is sufficient for criminal liability, intention is the only form of fault required by the legislature. See Burchell *Principles of criminal law* (2005) 499–500 for a discussion of *S v Van Dyk* 2000 1 SACR 239 (C) for a further explanation. See also Kruger 518.

28 This provision is in accordance with a 10 CTOC. S 1 of the TIP Act defines a "person" as "a natural person, a juristic person and a partnership, unless the context indicates otherwise". See also s 12(1)(f) TIP Act.

29 Much trafficking occurs with involvement of government officials such as police officers and immigration officials. Their participation as accomplices or organising or directing other persons to commit the offence is criminalised here. This offence did not form part of the draft TIP Bill of 2009, but was included in the current TIP Bill B37-2010 by the Office of the Chief State Law Advisor. See Kruger 519.

30 Snyman *Criminal law* (2008) 285.

31 Kruger 521–522.

section 10(1)(a) to 10(1)(c) respectively, the inclusion of these inchoate crimes seem superfluous as the crimes already exist in the Riotous Assemblies Act 17 of 1956, and could merely be applied to the TIP Act. However, the act of inciting others to commit the crime as in the TIP Act includes further conduct such as instigating, commanding, directing, aiding, promoting, advising, recruiting, procuring and encouraging others to commit human trafficking.³²

Section 7 prohibits the use of services procured from trafficking victims, and prescribes a punishment of up to fifteen years in prison for individuals who make use of such services. The section provides that:

"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 or suspected that such person is a victim of trafficking, is guilty of an offence."

This provision is said to be controversial as it would be difficult to assess a client's good faith with the standard reasonable-person test.³³ In the case of prostitution, for instance, clients already encounter practical difficulties in assessing the age of prostitutes. It will be highly unlikely that clients should know or suspect whether sex workers are freely engaging in the practice, or whether they are victims of trafficking. Nevertheless, the rationale behind the provision is undoubtedly to discourage the demand side of trafficking, as contemplated by section 8.

Conduct facilitating trafficking in persons is criminalised in section 8. This section is reminiscent of certain sections of the Sexual Offences Act and the Children's Act,³⁴ as it regulates the leasing of a building for use in trafficking, or the publication of information that facilitates trafficking in persons. An electronic communications service provider that fails to comply with certain duties in terms of the Act may be held liable to a fine or imprisonment for a period not exceeding five years.³⁵ Contravention of these provisions by service providers may also serve as a ground for the revocation or cancellation of its licence or registration required in order to conduct its business.³⁶ Electronic communications service providers are obliged to report electronic communications identity numbers on their servers which are suspected of containing information that facilitates or

32 The TIP Act has not included the "organising" of others to commit the crime as specified in the Palermo Protocol. This is regrettable because, as an organised crime, trafficking is organised by key players who use others to perform the actual activity.

33 See Snyman *Recommendations for new legislation in South Africa* (2007). The Act has attempted to correct this situation by inserting the words "or suspected" into the 2013 provision.

34 See eg ss 17–20 of the Sexual Offences Act 23 of 1957; s 285 of the Children's Act 38 of 2005.

35 Ss 8(2)–(5) and s 13(e) TIP Act. The duties required are the taking of all reasonable steps to prevent the use of its service for the hosting of information of trafficking, and if such an offender is detected, reporting the electronic communications identity number to the SAPS, preserving any evidence for later prosecution and preventing access to that electronic communications (internet address) by the online customers of the service provider, or any person if they are stored on the system of the service provider.

36 S 11(4)(a) TIP Act. This penalty also applies to any employer or principal who has contracted s 4, 5, 6, 7, 8, 9(1) or 10 of the Act.

promotes trafficking in persons. Carriers³⁷ which transport a victim of trafficking within or across the borders of South Africa while knowing, or ought reasonably to have known that the person is a victim of trafficking, also commit an offence.³⁸ A carrier may be fined an amount not exceeding ZAR1 million or imprisoned for a period not exceeding five years.³⁹

Extra-territorial jurisdiction is an important feature of the TIP Act. Given the global nature of the crime, South African courts will have extra-territorial jurisdiction in respect of acts committed outside South Africa if those acts would have been an offence under the Act had they been committed in South Africa.⁴⁰ Extra-territorial jurisdiction is limited by the fact that the offender has to be a South African citizen or ordinarily resident in South Africa, has committed an offence against a South African citizen or person ordinarily resident in the Republic, or who is present in the jurisdiction of the Republic after the commission of the offence. The Act also provides a list of aggravating factors a court must consider when imposing a sentence for trafficking.⁴¹ In respect of the extra-territoriality of jurisdiction, the reasoning developed under the Children's Act will prevail.⁴² In terms of clause 19(1)(a) of the Supreme Courts Act 59 of 1959, the High Court is empowered to exercise universal jurisdiction over international crimes such as slavery.⁴³ It is suggested that this jurisdiction be extended to include trafficking. Persons implicated in the commission of trafficking are also to be denied visa privileges.⁴⁴

4 PROTECTING VICTIMS OF TRAFFICKING

Victim protection and identification are given priority in Chapters 3 and 4 of the Trafficking Act. The guiding principles in these sections are to procure the best protection possible for trafficked victims who are often treated as tantamount to

37 The TIP Act employs the word "carrier", which is broader than the Palermo Protocol's "commercial carrier" in a 11(2), (3). A "carrier" is defined in TIP Act s 1 as "a company, or the owner, agent, operator, lesser, driver, charterer or master of any means of transport". The TIP Bill 2010 required carriers to also have known that the person does not have a valid passport, or where applicable, a valid visa.

38 S 9 TIP Act. This provision corresponds to the Palermo Protocol's s 11(2), (3).

39 A 13(e) TIP Act. The carrier is also liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation or return of the victim to his or her country of origin or country or place from where he or she was trafficked (see s 9(4) TIP Act).

40 S 12(1) TIP Act. This provision is in line with the standards set by the CTOC a 15 for extra-territorial jurisdiction.

41 S 14 of the TIP Act lists these factors as: (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 thereof; (g) the physical and psychological effects the abuse had on the victim; (h) whether the offence formed part of organised crime; (i) whether the victim was a child; (j) the nature of the relationship between the victim and the convicted person; (k) the state of the victim's mental health; and (l) whether the victim had any physical disability.

42 S 291 Children's Act 38 of 2005.

43 See Staunman 6.

44 As recommended in the Palermo Protocol a 11(5), and inserted in s 29(b)(1A) of the Immigration Act 13 of 2002.

criminals, thereby losing the benefit of appropriate protection of the law. Chapter 3 provides for the protective measures for foreign trafficked victims and include the granting of a recovery and reflection period⁴⁵ and, under certain circumstances, the issuing of temporary residence permits and permanent residence permits to foreign victims of trafficking.⁴⁶ A certified victim of trafficking is allowed a recovery or reflection period of not more than three months, which may be extended to six months if the investigation is not completed within the initially allocated time period. This period allows victims to cogitate on their current position and to make informed decisions as to whether they want to assist in the investigation and prosecution of their traffickers. As such, this residency is dependent on the co-operation of the victim in a case against the trafficker. If, after 30 days, it is noticeable that the victim is unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker, she may be repatriated to her country of origin.⁴⁷

Temporary residence may be issued to trafficked victims if they are cooperative, and if their continued presence in South Africa is essential for the successful prosecution of an alleged trafficker.⁴⁸ The temporary residence or visitor's visa may be renewed or extended for the duration of the investigation and the prosecution of a case of trafficking in persons. A victim of trafficking is entitled to apply for a permanent residence permit in terms of section 31(2)(b) of the Immigration Act. As observed from the provisos above, the recovery and reflection period is assessed on a case-by-case basis as, in practice, some victims have suffered more trauma than others and may be unwilling to suffer this again by exposing their experiences.

On the protection of child victims of trafficking, the Act provides in Chapter 4 for the mandatory reporting and referral to the SAPS for investigation of child trafficking victims by any person who knows or ought reasonably to have known or suspected that a child is a victim of trafficking.⁴⁹ Non-reporting of suspected child trafficking amounts to a crime. Any designated child protection organisation who

45 S 15(1) TIP Act. This provision follows the principles established in the Palermo Protocol a 6(3), CTOC a 25(1) and the OHCHR's *Recommended guidelines on human rights and human trafficking guidelines* 5(9).

46 Ss 16 and 17 TIP Act. See also s 27(d) of the Immigration Act 13 of 2002; s 27(c) of the Refugees Act 130 of 1998. This may require an amendment to s 3 of the latter Act in order that a trafficking victim qualifies for refugee status if that person proves to the satisfaction of the Department of Home Affairs that he or she may be harmed, killed or trafficked again if returned to his or her country of origin.

47 S 15(2) TIP Act.

48 S 16(1) TIP Act. This visitor's visa may be issued in terms of s 11(1)(b)(v) of the Immigration Act if the victims have agreed in writing to co-operate with law enforcement or prosecuting authorities in the investigation and prosecution of their trafficking cases. Whereas the draft TIP Bill 2010 stipulated that a victim who has been issued temporary residence may conduct work or study in the Republic, the Act provides no such benefits.

49 S 18(1) TIP Act. The TIP Bill 2010 listed specific persons who had to report known or suspected cases of child trafficking, which included police and immigration officials, labour inspectors, social workers and social service professionals, medical practitioners, registered nurses, traditional healers, and traditional leaders. If the listed persons are convicted of not reporting a case of child trafficking, they would have been liable to a fine or imprisonment for a period not exceeding 1 year (according to cl 12(6)). This stipulation has been discarded in the TIP Act, but can be found in a similar format in s 110(1) of the Children's Act (as referred to in TIP Bill s 18(4)(b)).

comes into contact with a child who is suspected of being a victim of trafficking must immediately report that suspicion to a police official for investigation. The person making the report must provide good reasons for the suspicion and make a *bona fide* report, otherwise the person will be liable to civil action on the basis of the report.⁵⁰ Similar requirements are stipulated in terms of the reporting of adult victims of trafficking.⁵¹ Whereas suspected child victims should be assisted without delay to ensure their safety, reported adult victims should be referred to accredited organisations or the provincial department of social development for an assessment as to whether the person concerned is a victim of trafficking.⁵² If identified as a verifiable trafficking victim, the adult will be issued with a letter of recognition. If not issued with this letter, or if the letter of recognition has been withdrawn by the provincial head, the adult person may appeal the decision within 14 days.⁵³

Identified child victims of trafficking will also fall under all the protective measures of the Children's Act.⁵⁴ In the case of child victims of trafficking found in the Republic, the primary responsibilities are to refer the child to a designated social worker for investigation in terms of section 155(2) of the Children's Act, and to place the child in temporary safe care in terms of section 151 of the Children's Act. The child is then brought before the children's court with the intention that assistance in applying for asylum in terms of the Refugees Act may be provided. In terms of section 156 of the Children's Act, an identified child trafficking victim is allowed to remain in the jurisdiction for the duration of the children's court order.⁵⁵ All foreign trafficked victims are entitled to the same public health care services as those provided to South African citizens.⁵⁶ The prosecution of child trafficking victims and recognised adult victims of trafficking for any illegalities committed as a direct result of his or her situation as a victim of trafficking is prohibited in section 22(4). The Act also establishes that, if a prosecutor has a reasonable suspicion that a child or adult in any criminal prosecution is a victim of trafficking, the trial must be postponed for verification of the trafficking status. If found to be accurate, the criminal prosecution must be withdrawn or the victim of trafficking discharged.⁵⁷ A new provision to the final

⁵⁰ S 18(3)(a), (b) TIP Act.

⁵¹ S 19(1), (2) TIP Act. The TIP Bill 2010 made the reporting subject to the written consent of the victim, unless the person is mentally disabled, or on any type of substance resulting in an altered state of consciousness. The TIP Act 2013 now only requires written consent from the victim to be taken into protective custody by police officials. This is only done as a measure of last resort if there is an immediate threat to the safety of the person concerned. See s 19(5)(a)(i) TIP Act.

⁵² Ss 19(5)(b), 19(8), (10) TIP Act. According to ss 24(1) and 27 of the TIP Act, an adult may only be referred to an accredited organisation if in possession of a valid letter of recognition.

⁵³ See s 19(12) TIP Act. Such an adult person will, pending the final decision of the MEC having jurisdiction, be temporarily accommodated at an accredited organisation. According to s 20 TIP Act, the appeal must be finalised within 30 days of the appeal being lodged.

⁵⁴ S 18(7) TIP Act.

⁵⁵ See s 18(8) TIP Act.

⁵⁶ S 21 TIP Act. The provision does not specify which health care services will be provided and whether such services are mandatory. Additional initiatives will have to be detailed in order to be compliant with the OHCHR's *Recommended guidelines on human rights and human trafficking guidelines* 8(7) and Palermo Protocol a 6(4).

⁵⁷ CI 16(2), (3) TIP Bill.

Act is the criminalisation of any person who allows unauthorised access to and disclosure of any type of information concerning trafficking victims.⁵⁸

Chapter 5 establishes inter-sectoral and co-ordinated service delivery to victims of trafficking. The Act stipulates that adult victims of trafficking are entitled to services provided to them by certified organisations. It is required that the organisations that provide services to adult victims must be accredited, must comply with certain norms and standards and must offer specific programmes to victims of trafficking.⁵⁹ These mandatory services include accommodation, medical care, counselling, and reintegration into their families and communities.⁶⁰ Adult trafficked victims may also request rehabilitation services, education and skills development training.⁶¹ The immediate and long-term needs of these victims must be attended to in a specific plan of action.⁶² Trafficked victims with children are to be provided with additional care and child-development programmes. The children may not be removed to another facility without the express consent of the trafficked adult victim in whose care the child is.⁶³

Of significance is the directive providing that the accredited organisation must systematically collect detailed information on the number of victims of trafficking treated, their countries of origin, purpose of trafficking, trafficking methods and routes, and the types of travel documents used in trafficking.⁶⁴ As South Africa does not have a centralised database on trafficking, this type of information is invaluable for further research and the prevention of the crime. There is also limited literature on the subject of human trafficking in South African, particularly a lack of research-based publications. To respond more effectively to the problem, concrete data based on sound empirical data is crucial. More sources of data could be included such as estimates (taken at point of origin or source area) of the number of women and children reported missing at community level. Of these, a proportion may be assumed to have been trafficked. Additionally, data regarding persons moving out of a country (which may be a destination or transit point) should be collected at border crossings or at the point of destination.

According to Chapter 6, victims of trafficking are entitled to the payment of appropriate compensation from a convicted trafficker but only at the discretion of the court or at the request of the complainant or the prosecutor.⁶⁵ The payment is for damage to or the loss or destruction of property (which includes money);

⁵⁸ S 23 TIP Act. This addition is to be welcomed as it will enhance the safety and security of trafficking victims.

⁵⁹ This is a questionable regulation, as any organisation willing to assist trafficking victims must be allowed to help. The prescribed minimum norms and standards for accredited organisations also seem rather stringent, especially for a country such as South Africa. See ss 25 and 26 TIP Act.

⁶⁰ Ss 25(2) and 26(1)(a) TIP Act.

⁶¹ S 26(1)(b) TIP Act. It seems that the TIP Act has provided fewer services to trafficked victims than in previous drafts. Eg, the TIP Bill 2010 made provision for mandatory legal assistance and devoted an entire chapter to inter-sectoral and co-ordinated service delivery to victims of trafficking.

⁶² S 28 TIP Act. This plan must "address the immediate and reasonable future needs" of the victim, it "must include an exit plan and be brought to the attention of the victim and be signed by him or her".

⁶³ S 26(3), (4) TIP Act.

⁶⁴ S 25(4)(a) TIP Act.

⁶⁵ S 29(1) TIP Act.

physical, psychological or other injury; being infected with a life-threatening disease; and loss of income or support. A civil action may also be instituted by the victim to recover any amounts not covered by the order for compensation.⁶⁶ The court may even order the convicted person to make a payment of compensation to the state for expenses incurred with regard to the care, accommodation, transportation, return and repatriation of the victim of the offence.⁶⁷

Chapter 7 concerns the return and repatriation of victims of trafficking. The Act clearly states that the summary deportation of foreign victims is strictly prohibited.⁶⁸ The repatriation of child victims to their country of origin is prohibited without due consideration of their best interests, safety and the possibility that the children might be harmed or killed.⁶⁹ Similarly, adult victims of trafficking may not be returned to their country of origin if there is any possibility that their safety will be in jeopardy, or that they may be hurt or murdered.⁷⁰ Before returning persons to their native countries, the Director-General of Social Development must attempt to find the victims' family members, or an institution or organisation that renders assistance to trafficking victims in their home country.⁷¹ The trafficked persons must also be informed of any arrangements that have been made for their secure reception in the country to which they will be returning to. Likewise, a South African victim who has been trafficked out of the country must immediately be repatriated to the Republic while giving due regard to the person's safety. The Director-General of International Relations and Co-operation together with the Director-General of Social Development must assess the risks to the wellbeing and life of such a person, and facilitate her safe return.⁷² Upon return in the country, a child must be referred to a designated social worker, while an adult must be referred to an accredited organisation for further assessment.

The Act also provides proper processes when returning a victim who has been trafficked within South Africa, taking cognisance of the safety of the victim and the possibility that the person might be harmed, killed or trafficked again if returned.⁷³ Section 35 clarifies the position of unaccompanied foreign trafficked minors and is in line with the provisions of the Children's Act 38 of 2005 which seeks to ensure that the maximum protection and assistance are afforded to such assurances.

66 S 29(2) TIP Act.

67 S 30(1) TIP Act. This may even be extended to carriers, as provided for in s 9(4) to the Criminal Assets Recovery Account (established under s 63 of the Prevention of Organised Crime Act 121 of 1998). In this regard, the TIP Bill complies with the standard set in the Palermo Protocol a 6(6), and even enhances the model.

68 S 15(6) TIP Act. This applies to trafficking victims who are still waiting to be recognised as victims by the Director-General of Home Affairs.

69 S 31(1) TIP Act. The draft Bill 2010 further stated that if there are reasons to believe that the children are at risk of re-victimisation or re-trafficking once back home, their interests would compel the Republic to offer a better alternative in South Africa. The Act offers no such assurances.

70 S 31(2)(a) TIP Act. Here the risk of being re-trafficked in the country of origin has also been omitted.

71 S 31(2)(b) and s 32 TIP Act.

72 S 33(a), (b) TIP Act. The Director-General of Home Affairs must verify that the suspected victim of trafficking is a citizen or permanent resident of South Africa.

73 S 34 TIP Act.

children.⁷⁴ The TIP Act logically prohibits discrimination against trafficking victims on the basis of gender, race, religion, nationality, and so forth.

Parental responsibility for the trafficking of children is considered in section 36 of Chapter 8. This provision pronounces that if a court has reason to believe that a 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 or allowed the child to be trafficked, the court may suspend all parental rights and responsibilities and place the child in temporary safe care, pending a children's court inquiry.⁷⁵ This, however, does not exclude that person's liability for committing the offence of trafficking in persons. This section is identical to section 287 of the Children's Act, except that in the Children's Act the entire case is, from its initial prosecution, the responsibility of a children's court. These sections have made the law with regard to parental responsibility very clear.

5 PREVENTING HUMAN TRAFFICKING

The TIP Act further contains provisions for the prevention and combating of trafficking in persons in Chapter 9.⁷⁶ Prevention is mainly to be undertaken by means of public awareness, developing an integrated information system and guidelines on the identification of victims of trafficking and traffickers. Whereas this was the responsibility of the Intersectoral Committee on Prevention and Combating of Trafficking in Persons in the previous draft Bill,⁷⁷ the Act charges the Director-General of Justice and Constitutional Development with this task.⁷⁸ The Director-General, after consultation with the National Commissioner of the SAPS, the National Director of Public Prosecutions, the Chief Executive Officer of the Government Communication and Information System, the Commissioner of SARS, and the Directors-General of Health, Home Affairs, International Relations and Co-operation, Labour, Social Development, State Security Agency and Women, Children and People with Disabilities, must establish public awareness programmes or other measures for the prevention and combating of trafficking in

74 S 35 TIP Act. A child victim may only be escorted home by an adult at state expense if the parent, guardian or person with parental responsibilities over the child do not have the financial means to travel to the child in order to return the child to his place of origin.

75 These sections adhere to the Convention on the Rights of the Child (CRC) of 1990 a 19(1), 32, 34, 36, and 37(1) as well as s 305(3) of the Children's Act.

76 Whereas the draft TIP Bill of 2010 included a separate section on "Preventing and Combating of Trafficking in Persons", the TIP Act 2103 has eliminated this chapter and included limited information in s 41. Seeing that proactive conduct is essential for the fight against human trafficking, this step is regrettable.

77 As established by s 40 of the TIP Bill 2010. This group would have been located within the agency of the National Prosecuting Authority (NPA) and headed by the Sexual Offences and Community Affairs (SOCA) office. It would have united various government departments as well as the SAPS Organised and Commercial Crime Unit, the SAPS Witness Protection Unit, border authorities such as the SAPS Ports of Entry Police, the International Organisation for Migration (IOM), the UN Office on Drugs and Crime (UNODC) and various other NGOs. This task team was mandated to develop a national strategy to combat human trafficking in keeping with the Palermo Protocol's directives, a directive currently issued to the Director-General of Justice and Constitutional Development.

78 It remains to be seen whether the Director-General will establish a special anti-trafficking committee which is essential for the combating of the crime. Unlike the draft Bill of 2010, the Act of 2013 also does not specifically require the input of NGOs in terms of public awareness and other programmes.

persons. These programs must focus on supplying the public, especially those at risk of trafficking, with information and educating them on trafficking practices as well as their legal rights. Programs must also be created in order to discourage the demand for trafficked persons.⁷⁹

6 NATIONAL AND INTERNATIONAL CO-OPERATION

Trafficking in persons is a criminal justice issue which must be dealt with in the criminal justice system with input from relevant national government departments and institutions, but it also involves international co-operation.⁸⁰ The Act acknowledges the necessity for close co-operation and co-ordination of government and civil society activities. A system of regulated service provision is envisioned in section 41. Currently, most of the assistance to victims of trafficking, both cross-border and in-country, is provided by local and international NGOs, various faith-based organisations and individual activists. The involvement of civil society will be crucial for the implementation of the TIP Act. The Act provides that the Director-General of Justice and Constitutional Development, the National Commissioner of the SAPS, the Department of Home Affairs, Labour and Social Development as well as the National Director of Public Prosecutions must issue national instructions and directives which must be followed by their respective officials in dealing with matters relating to trafficking in persons.⁸¹ Non-compliance by these functionaries may result in disciplinary steps, so ensuring the effectiveness of the Act.⁸² The National Commissioner of the SAPS must provide an annual report on all available information on trafficking in the region.⁸³ The Act further provides for the adoption of a National Policy Framework relating to all matters dealt with in the Act in order to ensure a uniform, co-ordinated and co-operative approach by all government departments and institutions in dealing with matters related to trafficking in persons.⁸⁴

7 SHORTCOMINGS AND RECOMMENDATIONS

Even though the TIP Act fully complies with the government's obligations under the Protocol, and indeed strengthens some of the Protocol's provisions, it still fails to address some gaps and ambiguities in its final version. For example, apart from mentioning the root causes of trafficking in the Preamble of the Act, these issues are not addressed anywhere else, thereby failing to bolster preventative

⁷⁹ S 41(1)(d)(iii) TIP Act. These programmes are in line with the Office of the High Commissioner of Human Rights' (OCHCR) *Recommended guidelines on human rights and human trafficking guidelines* I(2) 7-8.

⁸⁰ International co-operation is considered in s 37 TIP Act, which mainly provides for the President to enter into, amend or revoke agreements with foreign states pertaining to co-operation in human trafficking matters. No stipulations are made as to the specific types of mutual legal assistance as required by the Palermo Protocol a 6, 9(3) and 10 and CTCOC a 13, 16 and 18. The Act does provide for the verification of the legitimacy and validity of travel or identity documents by the Director-General of Home Affairs at the request of another state party to the Palermo Protocol (s 38).

⁸¹ S 44(1) TIP Act.

⁸² S 44(1) TIP Act.

⁸³ S 44(2)(f), (3) TIP Act.

⁸⁴ S 40 TIP Act.

measures. In order for human traffickers to continue their operations, a socio-legal environment conducive to the trafficking trade and related vice industry is required. Consequently, all aspects contributing to the vulnerability of people to trafficking recruitment must be examined. Policy should be formulated relating to socio-economic problems to eradicate the breeding ground for trafficking.

The Palermo Protocol requires states to adopt or strengthen legislative or other measures in order to discourage the demand that fosters all forms of exploitation of persons and which leads to trafficking. However, the instrument does not specify the initiatives and measures to be undertaken. This allows individual states to determine what measures to undertake in accordance with their domestic legislation and policies as well as their financial and human resource capabilities. Unfortunately, the TIP Act does not include such initiatives.⁸⁵

The Act also did not establish links between human trafficking and related crimes such as illegal migration. By not pointing out the differences between trafficking and smuggling of persons, the legislation risks a faulty understanding of what the concepts mean. It has been argued that this may lead to cases of smuggling being identified as human trafficking incidents. Although the TIP Act does not explicitly distinguish smuggling and illegal migration from trafficking, it is clear that the difference between trafficking on the one hand and smuggling or illegal migration on the other, lies mainly in the *means* employed and the *intent* of the trafficker or smuggler. It is submitted that it is clear from the definition of trafficking in the TIP Act that the means employed (for example, deception, abuse, etcetera) as well as the intent to "exploit" distinguish the trafficker from the smuggler or mere illegal migrant.

The Act also does not address issues arising from cultural and customary practices. Traditionally acceptable rituals and practices, such as *ukuthwala* or *lobola*, are misused to subsequently force females into domestic labour, or send young children to work with or for relatives in urban areas, or even sell children for illegal adoptions. These exploitative practices could – and arguably should – be brought under the definition of human trafficking or should be excluded as possible grounds of justification.⁸⁶ However, these issues are not expressly dealt with in the TIP Act (or the Protocol, for that matter). Thus, while the definition of trafficking has been expanded in the Act, it does not fully address issues that may arise in the South African context.

As regards prevention initiatives, the Act does not provide for the specialised training of persons who are to assist victims of trafficking, or for specialisation in the prosecution of these crimes.⁸⁷ For instance, specialist training should be offered to prosecutors to assist them in dealing with evidential and admissibility

⁸⁵ In this regard, s 41(1)(d)(iii) of the Act does provide that the Director-General of Justice and Constitutional Development develop programmes aimed at discouraging the demand for and the supply of trafficking victims.

⁸⁶ The TIP Act 2013 has included "forced marriage" in its definition of trafficking but does not reflect on the cultural ambiguities of a practice such as *ukuthwala*, for example.

⁸⁷ This is similar to both the Children's Act and the Sexual Offences Act. These pieces of legislation fail to contain any prevention programmes as regards the crime of trafficking, and do not contribute to bringing the jurisdiction into compliance with the Palermo Protocol. These initiatives could, however, be addressed on government policy level. According to s 44(1)(d), training courses must still be developed on the Act's national instructions or directives.

issues when prosecuting alleged traffickers.⁸⁸ The TIP Act also does not include any mandatory health care services for the victims of trafficking, except for a general provision in section 21.

Another potential weakness of the TIP Act is the introduction of accreditation requirements for organisations working with trafficking victims. The Act specifies that organisations providing accommodation, health, counselling and other services to victims of trafficking will have to secure government approval.⁸⁹ It is possible that many of the organisations currently working in the field, such as various church communities, might be unable to comply with all the accreditation requirements as they may provide only two or three of these services. For example, some organisations provide essential, but very basic accommodation for victims of trafficking. These facilities might not satisfy the Act's requirements for accreditation. Similarly, such organisations might not be able to fulfil the requirements relating to reporting, counselling and other specialist services, even though they have established themselves as trusted shelters for victims.

8 CONCLUSION

The South African legal response to human trafficking is comprehensive and on the whole aligned with international standards. The final implementation of the legislation will be a giant step forward towards combating the crime of human trafficking.⁹⁰ However, the South African anti-trafficking legislation still needs to acknowledge the jurisdiction's location-specific vulnerability factors, and provide more effective victim assistance. Gender dimensions and gender-based violence are also not dealt with adequately as a counter-trafficking strategy.

On the other hand, trafficking cannot be solved by legislation alone. Trafficking occurs because of serious social problems and enabling conditions such as poverty. This cannot be eradicated merely by the criminalisation of conduct. National and international NGOs have made copious contributions towards the fight against human trafficking in South Africa, but there are still many challenges facing the jurisdiction in its efforts to respond adequately to human trafficking. These include, amongst others, fragmented knowledge and research on trafficking, judicial disharmony within and between national and regional legislative systems, weak social institutions with logistic problems and inadequate professional capability to lend support to trafficked persons. Demand for trafficking has to be discouraged. Combating trafficking requires people to challenge prevailing patriarchal attitudes towards women. Given these realities it is important for legislation to be situated within an overall framework that promotes and strengthens basic human and constitutional rights. More specifically, there is a need to protect the human rights of all trafficked persons, whether trafficked for sexual exploitation or for other purposes.

88 See Kreston 47.

89 S 24(1)-(4) TIP Act.

90 For an effective implementation and operation of the domestic legal measures, reviews of or amendments to other related Acts of Parliament, such as the Criminal Procedure Act, the Immigration Act, the Children's Act and the Sexual Offences Act are still necessary to bring them into line with the provisions of the TIP Bill and to insert provisions in those laws to deal more effectively with trafficking in persons.

Nalatige veroorsaking van serebrale gestremdheid – 'n Regsmediese kwessie

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SUMMARY

Negligence causing cerebral palsy – A medico-legal issue

Claims against obstetricians are prevalent and it has even been said that it has never been safer to have a baby and never more dangerous to be an obstetrician. One of the main causes of litigation in this field of medicine is negligence leading to cerebral palsy. Even though this condition is mostly inexcusable, doctors can prevent this tragic occurrence in some instances by: vigilant use of oxytocin; very careful monitoring of the foetal heart rate; performing emergency caesarean sections when indicated; and meticulous conduct during both pregnancy and birth. The two cases discussed in the text below are helpful when considering the approach of the courts in these instances.

1 INLEIDING

Serebrale gestremdheid kom wêreldwyd voor onder tussen twee en twee-en-'n-half per duisend lewendige geboortes en kan dus beskou word as 'n baie algemene probleem.¹ Gebreke wat geassosieer word met die meerderheid van gevalle sluit verstandelike gestremdheid, sig- en gehoorprobleme, epilepsie, spraak- en oromotprobleme in. In die Verenigde State van Amerika word beweerde veroorsaking van serebrale gestremdheid beskou as die hoofvoorsaak van regsmediese eis teen verloskundiges en sesstig persent van die versettingspremie wat verloskundiges betaal, word aangewend vir litigasie wat verband hou met die veroorsaking van serebrale gestremdheid.² Fetale nood tydens kraam, wat lei tot hipoksiese isgemiese enkefalopatie en serebrale gestremdheid, is ook in Suid-Afrika een van die hoofredes vir litigasie in verloskunde.³ Die faktore wat lei tot die uitermatige hoë premies wat verloskundiges betaal vir professionele versekering, is al geverste in die Verenigde State van Amerika en Brittanje en in Suid-Afrika is dit tans 'n groeiende probleem.⁴ Dit is dus duidelik dat dieselfde tendens in Suid-Afrika voorkom as wat al reeds vir 'n geruime tyd in die Verenigde State van Amerika en Brittanje bestaan.

1 Rosen en Dickenson "The incidence of cerebral palsy" 1992 *Am J of Obstetrics and Gynecology* 417.

2 MacLennan *et al* "Who will deliver our grandchildren? Implications of cerebral palsy litigation" 2005 *J of the American Medical Association* 1688.

3 Odenaal *et al* "Obstetric litigation – time to reflect" Editorial 2011 1 *Obstetrics and Gynecology Forum* 1.

4 Craig en Rosenmann *Medicolegal experience in obstetrics and gynaecology* (2006) 2.