

**MANDATORY REPORTING: THE LEGAL PROTECTION OF CHILD VICTIMS OF
TRAFFICKING FOR THE EXPLOITATION OF CHILD LABOUR IN SOUTH AFRICA**

by

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This thesis is submitted in partial requirement of the fulfillment of the requirements of the degree of Masters in Constitutional and Human Rights Litigation in the College of Law and Management Studies, School of Law, University of KwaZulu-Natal.

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NOVEMBER 2014

DECLARATION

I, Phumla Nontsikelelo Alpman, declare that:

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DEDICATION

This thesis is dedicated in loving memory of my parents, the late Dr. Siggibo Dwane, the first Bishop of the Ethiopian Episcopal Church, and Mrs Ntombezintlanu (Ntombi) Roberta Dwane, who died tragically in a car accident in King William's Town in the Eastern Cape on the 2nd July 2006. This work is in recognition of their dedication and devotion to the advancement of their children's education as a means of empowering them to be independent agents of change. It is my wish to use their investment to contribute my learning, skills and knowledge to a better South Africa for all who live in it.

I salute you Tshawe, Mpondwezimemntwini and Mandlovu, Ndlovu ezidl'ekhaya ngokuswela uMalusi. May your souls rest in peace.

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ABSTRACT

On the 29th July 2013 the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (hereafter referred to as the “Trafficking Act”) was published, criminalising trafficking in persons and associated crimes as required by article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000¹ (hereafter referred to as the “UN Trafficking Protocol”), to which South Africa is a party.² One of its objectives is the provision of assistance and protection to victims of trafficking in persons through mandatory reporting provisions and through the entering of premises known or suspected to be involved in the commission of a trafficking offence or related trafficking offence.³

This thesis analyses the reporting provisions contained the Trafficking Act in relation to child victims of trafficking in persons for the purposes of labour exploitation in the domestic services sector.⁴ The study attempts to show the challenges posed by the definition of child trafficking for the purposes of child labour exploitation for the lay person required to identify and report a child victim of trafficking to the police. Firstly, an analysis of the concepts comprising the trafficking process are analysed to illustrate the layperson’s predicament in understanding child trafficking for exploitative purposes. The research then examines the reporting standard imposed on such persons in order to identify and report child trafficking and the role of public awareness and coherent guidelines to ensure and enhance identification and reporting. Lastly, an assessment is made as to whether the process associated with mandatory reporting, namely the entering into premises by the police based on a “reasonable belief”⁵ that the child’s safety is at risk or that the endangered child may be moved from those premises advances and upholds the “best interests of

¹ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf accessed on 18 March 2014.

² Department of International Relations and Cooperation Republic of South Africa ‘International agreements and / or conferences signed by South Africa in relation to the youth, children and people with disabilities, particularly with regard to the United Nations and the African Union’ available at http://www.dfa.go.za/docs/2005/pq/pq2_455.htm accessed on 10 July 2014.

³ Preamble and section 18(1) and 18(4) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

⁴ Ibid section 18(1) (a).

⁵ Ibid section 18(4) (a).

the child”⁶ It then concludes that the mandatory reporting provisions and the processes related to reporting promotes the “best interests of the child”. Recommendations are made to address the identified flaws in the legislation in order to ensure that the legislation is impregnable and ensures the effective protection of child victims of human trafficking.

⁶ Section 28(2) of the Constitution of the Republic of South Africa, 1996 requires that in all matters concerning the child, the child’s best interests are supreme.

LIST OF ABBREVIATIONS AND ACRONYMS

Constitution	Constitution of the Republic of South Africa, 1996
FICA	Financial Intelligence Centre Act 38 of 2001
NPA	National Prosecuting Authority
OWP	Office for Witness Protection
SADC Region	South African Development Community Region
Trafficking Act	Prevention and Combating of Trafficking in Persons Act 7 of 2013
UN	United Nations
UNODC Trafficking Law Model	United Nations Office on Drugs and Crime Model Law against Trafficking in Persons
UN ECOSOC	United Nations Economic and Social Security Council
UN Trafficking Protocol	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

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CHAPTER 1

BACKGROUND

1.1 INTRODUCTION

The International Labour Organisation's Worst Forms of Child Labour Convention No. 182 of 1999, which has been ratified by South Africa⁷, considers the trafficking of children for the purposes of exploitative labour practices the worst form of child labour.⁸ Although there have been reports in South Africa about this unlawful practice, its extent is unknown.⁹ Children are substituted for adults because of the high demand for cheap labour. This demand creates a scenario of unemployed adults who resort to bartering their own children to traffickers to alleviate their economic conditions.¹⁰

Child labour is rife in both the formal and informal sectors of the economy, of which South Africa is no exception. One of the sectors that employs children is the domestic service sector.¹¹ Domestic work is defined by the Domestic Workers Convention as work performed by a person in a household.¹²

The employment of children is not prohibited *in toto* but to a certain extent. International¹³ and South African law prohibit the employment of children below the age of 15 years or below the

⁷ International Labour Organization 'Ratifications for South Africa' available on http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 accessed on 18 August 2014; paragraph 2(4) of GN 7 of GG 32862, 15 January 2010; 5 which states that the regulations must be interpreted correspondingly with the Convention.

⁸ Worst Forms of Child Labour Convention 182 of 1999 available on http://www.internationalresourcecentre.org/en_X2/27_ILO_Convention_C182.pdf accessed on 16 June 2014. Article 3(a) and (d) of the Convention considers the worst forms of child labour as including " all forms of slavery or practices similar to slavery such as the sale and trafficking of children...forced or compulsory labour..." and work which is "likely to harm the health, safety or morals of children. "

⁹ Molo Songololo 'Trafficking in children in the Western Cape Province'(2005) 39.

¹⁰ Ibid.

¹¹ According to M Van Zyl & J Horne, children are trafficked for forced labour and domestic servitude, 'A policing perspective on the investigation challenges of child trafficking in South Africa ' (2009) 10 *Child Abuse Research a South African Journal* 12-13.

¹² Article 1(a) of the Domestic Workers Convention 189 of 2011 available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C189 accessed on 18 August 2014.

¹³ Articles 2(1) and 2(3) of the Minimum Age Convention 138 of 1973. Employment is prohibited where it is below the age of completion of compulsory schooling, which must not be less than 15 years available at http://www.ilocarib.org.tt/cariblex/pdfs/ILO_Convention_138.pdf accessed on 16 June 2014.

age of compulsory school education.¹⁴ On the other hand, the employment of children who are legally permitted to work is strictly regulated.¹⁵ What is forbidden is hazardous work which is considered as the worst form of child labour.¹⁶ The type of work must be such that it ensures the health, safety or morals of the child are sufficiently protected and child must have undergone some form of training in the specific field.¹⁷ The concern with regard to hazardous work is not the contravention of labour laws *per se* but the circumstances of the child which could be tantamount to slavery or forced labour conditions.

The International Labour Organisation estimated that in 2008, 15.5 million children under the age of 18 years performed paid or unpaid domestic work¹⁸ in other people's homes globally. 10.5 million of those children were either below the minimum legal working age or worked under hazardous working conditions or conditions amounting to slavery.¹⁹ In the period between August 2011 and August 2013, the LexisNexis Human Trafficking Index's findings²⁰, showed that there were 540 potential victims of trafficking who were trafficked from outside the borders of South Africa and internally. Amongst these victims were 67 children, in comparison to 105 adult female victims, who accounted for 12.4% of the reported victims. There were 271 victims of forced labour, who constituted 50.1% of the reported victims. Persons who were trafficked for forced labour were mainly refugees and migrants.²¹

¹⁴ Section 43(1) (a) and (b) of the Basic Conditions of Employment Act 75 of 1997 Act read with section 3(1) of the South African Schools Act 84 of 1996. The minimum school going age is from 7 to 15 years or the 9th grade, whichever comes first; paragraph 23(1) of the Sectoral Determination 7: Domestic Worker Sector, South Africa GN 1068 of GG 23732, 15 August 2002; 25.

¹⁵ Article 4(1) of the Domestic Workers Convention No.189 of 2011 requires State Members to establish a minimum age for domestic workers to be in accordant with the set minimum age in the Minimum Age Convention No.138 of 1973 (hereafter referred to as the "Minimum Age Convention") and the Worst Forms of Child Labour Convention No.182 of 1999 (note 8 above). In terms of article 2(3) of the Minimum Age Convention, the minimum age for a child to be employed is when a child's age is above the completion of compulsory education or 15 years of age. Article 2(4) of the said Convention makes an exception is made for countries whose "economies and educational facilities" are under-developed to lower the age of employable children to be over 14 years of age.

¹⁶ Article 3(d) of the Worst Forms of Child Labour Convention.

¹⁷ The Worst Forms of Child Labour Recommendation 190 of 1999 paragraph 4 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R190 accessed on 18 August 2014.

¹⁸ International Labour Office 'Ending child labour in domestic work and protecting young workers from abusive working conditions' (2013) 1 available on http://www.ilo.org/ipecc/Informationresources/wcms_207656/lang-en/index.htm accessed on 12 August 2014.

¹⁹ Ibid.

²⁰ The findings are based on media reports.

²¹ LexisNexis 'The LexisNexis Human Trafficking Awareness (HTA) *Index*TM' (2014) 4-6 available at <http://www.lexisnexis.co.za/pdf?lexisNexis-Human-Trafficking-Index.pdf> accessed on 22 July 2014.

Children who are trafficked for the purposes of domestic labour are considered one of the most vulnerable groups²² and difficult to protect because they are not easily detectable.²³ For instance, where domestic work is involved in a private residence, the person's freedom of movement is limited²⁴ and he or she is removed from the public eye and kept behind closed doors. In other cases, the trafficking is disguised through working for relatives, which is not questioned as it is seen as a norm and culturally acceptable.²⁵ Victims of trafficking are also unable to report trafficking themselves for fear of retribution from the traffickers or simply being unaware of their trafficking situation due to ignorance or immaturity.²⁶ Labour inspectors also face challenges in accessing private homes.²⁷ The people better positioned to detect and identify such a situation are neighbours, relatives, friends, persons residing within the household of the trafficker or people utilising the services of the trafficked child. It is thus imperative that a reporting duty be placed on such people who would usually come into contact with a child victim of trafficking.

South Africa enacted the Prevention and Combating of Trafficking in Persons Act (hereafter referred to as the "Trafficking Act"), *inter alia*, in order to implement South Africa's international obligations; criminalise trafficking in persons and related offences; and to provide for "measures to protect and assist victims of trafficking in persons."²⁸ The most relevant international agreement to this study is the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000²⁹ (hereafter referred to as

²² This applies to children who are prohibited from being employed and those who are legally permitted to work but their circumstances are tantamount to servitude and forced labour, UNICEF 'Reference guide on protecting the rights of child victims in Europe' 25 available on http://www.unicef.org/ceecis/UNICEF_Child_Trafficking14-43.pdf accessed on 24 July 2014.

²³ Molo Songololo (note 9 above) 43.

²⁴ A child does not have the option to leave the work place, Department of State United States of America 'Trafficking in Persons Report June 2014' (2014) 34 available at <http://www.state.gov/documents/organization/226844.pdf> accessed on 23 June 2014.

²⁵ D Thorsen 'Workers: Evidence from West and Central Africa' (2012) 3 available at http://www.unicef.org/wcaro/english/Briefing_paper_No_1_child_domestic_workers.pdf accessed on 12 August 2014.

²⁶ Department of State United States of America (note 24 above) 30.

²⁷ They are either inaccessible or they do not have the mandate to access such homes. *Ibid.*

²⁸ Prevention and Combating of Trafficking in Persons Act 7 of 2013.

²⁹ Preamble of the Trafficking Act.

the “UN Trafficking Protocol”) which South Africa signed and ratified.³⁰ Its main objective is to combat and criminalise human trafficking, especially against women through legislation as a three-fold measure namely prevention, prosecution and protection of victims of trafficking and their human rights.³¹ The UN Trafficking Protocol supplements the United Nations Convention against Transnational Organized Crime of 2000³² applicable to trafficking of a transnational nature and involving an organized criminal group³³, which South Africa also signed and ratified.³⁴ Nevertheless, domestic legislation is not required to incorporate the transnational or the criminal syndicate elements, unless there is the presence of an organised criminal group.³⁵

The Trafficking Act is not yet operational and will only be effective on a date to be fixed by the President.³⁶ Accordingly, the provisions relating to human trafficking in the Children’s Act³⁷ and the Criminal law (Sexual Offences and Related Matters) Amendment Act³⁸ are currently applicable.³⁹

Some of the criticisms of the afore-mentioned statutes are their inconsistency with the definition of human trafficking as directed by the UN Trafficking Protocol.⁴⁰ And, that they, together with

³⁰ It was signed on the 14th December 2000 and ratified on the 20th February 2004, see Department of International Relations and Cooperation Republic of South Africa ‘International agreements and / or conferences signed by South Africa in relation to the youth, children and people with disabilities, particularly with regard to the United Nations and the African Union’ 1 available at http://www.dfa.gov.za/docs/2005pq/pq2_455.htm accessed on 10 July 2014.

³¹ UN Trafficking Protocol of 2000 (note 1 above).

³² Ibid preamble.

³³ Article 3 of the United Nations Convention against Transnational Crime of 2000 available at https://www.unodc.org/documents/middleeastandnorthafrica//organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf accessed on 22 April 2014.

³⁴ South Africa signed it on 14 December 2000 and ratified it on the 20 February 2004, United Nations Treaty Collection ‘United Nations Convention against Transnational Crime’ 1 available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en accessed on 22 April 2014.

³⁵ Note 33 above, article 34(2); UNODC ‘Legislative guides for the implementation of the United Nations Convention against Transnational Organized and the Protocols thereto’ (2004) 258 available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html#trafficking> accessed on 13 July 2014; UNODC ‘Model Law against Trafficking in Persons’ (2009) 8 available at http://www.unodc.org/documents/human_trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf accessed on 16 July 2014.

³⁶ Section 50 of the Trafficking Act.

³⁷ The Children’s Act 38 of 2005.

³⁸ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³⁹ The Children’s Act deals with child trafficking for exploitative purposes and the latter Act is for human trafficking dealing solely with sexual exploitation purposes.

⁴⁰ DC Subramanien ‘Bought at a price’: Trafficking in human beings – a brief study of the law in South Africa and the United States’ (2011) 3 *SACJ* 245, 252. The author contends that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 has a limited definition of trafficking in persons focusing on sexual

the common law, do not adequately address “the problem of trafficking in persons.”⁴¹ Despite the fact that the Trafficking Act has attempted to address these inadequacies, it will be argued that its implementation, such as the identification and reporting child victims of trafficking, will pose numerous challenges in the protection of child victims of human trafficking.

1.2 PROBLEM STATEMENT

Section 18(1) of the Trafficking Act regulates the identification and reporting of child victims of trafficking.⁴² A mandatory reporting duty is imposed on the general public and a specific category of person⁴³ to report trafficking in persons for various exploitative purposes to the South African Police Services.⁴⁴ Section 4 of the said Act criminalises trafficking in persons and acts associated with trafficking are made separate offences.⁴⁵ The latter aspect will not be the focus of this study.

The purpose of this study is to ascertain the adequacy of the reporting provisions in the Trafficking Act in ensuring the protection and safety of a child victim of trafficking. The main objective is to make recommendations, where required, to assist in the effective implementation of the Act.

Research indicates numerous challenges which impact on the reporting of human trafficking cases to law enforcement officers. Human trafficking is difficult to detect because of its clandestine and complex nature.⁴⁶ The knowledge of the trafficking offence is determined by a person’s exposure, or lack thereof.⁴⁷ Further, there is a perception that there is an equal limited understanding of trafficking for lay persons and professionals⁴⁸. In some instances, people are

exploitation; Kruger argues that the Children’s Act, contrary to the United Nations Protocol on Trafficking, includes the means in its trafficking definition; B Kruger ‘In the firing line: The South African Legislative response designed to combat trafficking’ (2012)2 *SACJ* 254.

⁴¹ Preamble of the Trafficking Act.

⁴² A child is defined as being a person who is under 18 years of age, section 1 of the Trafficking Act

⁴³ Ibid section 18(1) (b) expressly provides for a designated child protection organisation.

⁴⁴ Sections 18(1), 8 and 9 of the Trafficking Act.

⁴⁵ Ibid sections 5-9.

⁴⁶ DN Swart describes trafficking as a hidden crime which is not easily identifiable, ‘Problems surrounding the combating of women and child trafficking in Southern Africa and South Africa’ 2012 *Child Abuse Research A South African Journal* 27.

⁴⁷ LG Bermudez ‘No experience necessary: the internal trafficking of persons in South Africa’ (2008) 29 available at <http://southafrica.iom.int/publication/no-experience-necessary-the-internal-trafficking-of-persons-in-south-africa/> accessed on 16 February 2014.

⁴⁸ NPA ‘Tsireledzani: Understanding the dimensions of human trafficking in Southern Africa’ (2010) xvi available at <http://www.hsrc.ac.za/en/research-outputs/ktree-doc/8277> accessed on 3 April 2014

merely ignorant about trafficking or deny that it exists.⁴⁹ The National Prosecuting Authority (the “NPA”) reports that law enforcement officials such as labour inspectors do not regard themselves as suitably qualified to identify potential cases of human trafficking when they conduct their inspections.⁵⁰ Furthermore, they are unable to make a distinction between forced labour and human trafficking with the purposes of exploiting child labour.⁵¹ Public awareness on the issue of trafficking has been limited thus making it difficult to enforce mandatory reporting.⁵²

This is an indication that all these mentioned challenges will also have a bearing on members of the public who are required to report cases of child trafficking for any exploitative purposes including child labour in the domestic services.

1.3 RATIONALE OF THE STUDY

Research conducted on child trafficking for labour exploitation, prior to the author’s research, has focused on the provisions of the Children’s Act, the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Prevention and Combating of Trafficking in Persons Bill 7 of 2010 and internal trafficking.⁵³ Moreover, research conducted into the Trafficking Act is of a different dimension namely the prosecution of a child trafficking case from an organised crime perspective⁵⁴ and the critical examination of key concepts such as consent and the abuse of power within the context, *inter alia*, of the child trafficking definition.⁵⁵

This research will add a new dimension onto existing research assessing as to whether the Trafficking Act’s reporting provisions adequately protect a child victim of trafficking labour exploitation in the domestic service sector.

⁴⁹ B Cook ‘People Trafficking, Twenty-first century slavery’ (2013/2014)67 *IBA Global Insight* (6) 44; *ibid* xvi.

⁵⁰ Footnote 46, 141.

⁵¹ *Ibid*.

⁵² South African Human Rights Commission ‘Written comments on South African Law Reform Commission Discussion Paper, Trafficking in Persons, Issue Paper 25 Project 131’, March (2004) 12 available at <http://www.sahrc.org.za/home> accessed on 1 April 2014.

⁵³ Subramanien (note 40 above) 245; Swart (note 46 above) 23; van Zyl & Horne (note 11 above) 10 ; Kruger (note 40 above) 252; Bermudez (note 47 above) 1.

⁵⁴ V Dafele ‘The Prevention and Combating of Trafficking in Persons Act 7 of 2013: A Critical Analysis of its Potential Impact on Child Trafficking Prosecutions in South Africa’ (LLM Thesis, University of KwaZulu-Natal, 2014) 1-96

⁵⁵ SS Kreston ‘Human trafficking legislation in South Africa: Consent, coercion and consequences’ *SACJ* (2014)1, 20-36.

In terms of the Trafficking Act, “any person” is obliged to report a victim of child trafficking to the police.⁵⁶ The standard required is the knowledge of a fact, of which there are different forms or that the “person ought to have reasonably known or suspected a fact”⁵⁷ Ironically, a lower standard of suspicion is required from a “designated child protection organisation”⁵⁸, which deals with trafficking victims. Different reporting standards also apply to persons required to report human trafficking cases in sections 8 and 9 of the Trafficking Act, comparatively. But, the latter aspect will not be the focus of this paper.

The study will consider whether the high standard placed on ordinary members of the public (hereafter referred to as “lay persons”) will be burdensome for the implementation of mandatory reporting without a concerted effort of education and awareness programmes or other measures as anticipated by the Trafficking Act.⁵⁹

1.4 RESEARCH METHODOLOGY

The principal methodology employed in this research is literature review on primary and secondary sources. Consequently, there are limitations to the undertaken study as questionnaires or in-depth interviews have not been conducted with the relevant role players.

1.5 RESEARCH QUESTIONS

The research was initiated due to the challenges to mandatory reporting which pose limitations on the prevention and combating of human trafficking. The aim of this research is to look at the reporting challenges in the implementation of this new law. The research questions that emanated from the problem are the following:

1. How will a lay person identify a victim of child trafficking for the exploitation of labour in the domestic service?
2. Is the Act clear as to who the mandatory reporters are and what is required of them? And, what are the legal implications of non-reporting for the mandatory reporter?
3. Are the best interests of the child addressed in the section 18 process related to mandatory reporting?

⁵⁶ Section 18(1) (a) of the Trafficking Act.

⁵⁷ Ibid section 2(1) and (2).

⁵⁸ Ibid section 18(1) (b).

⁵⁹ Ibid section 41(1) (d).

CHAPTER OUTLINE

The first chapter of the dissertation has provided an introduction, and outline of the problem statement, the rationale, research questions and this chapter outline of the chapters to follow.

Chapter 2 will outline the definitions of child trafficking and child labour in the Prevention of Trafficking in Persons Act, the Children's Act⁶⁰ and the Basic Conditions of Employment Act⁶¹ for the purposes of identification of a child victim of trafficking for the purposes of labour exploitation in the domestic service.

Chapter 3 will identify the mandatory reporters in the afore-mentioned Trafficking Act; the requirements for reporting child trafficking offences; the legal implications of non-reporting and the challenges posed by the standard of reporting in relation to lay persons.

Chapter 4 will assess whether or not the best interests of the child in terms of the Constitution and the Children's Act are addressed in the section 18 process related to mandatory reporting.

Chapter 5 will contain the conclusions and recommendations on the mandatory reporting provisions of the Trafficking Act to enhance the protection of child victims of trafficking for purposes of labour exploitation in the domestic service.

1.6 CONCLUSION

The next chapter, chapter 2, will outline the definitions of child trafficking and child labour as laid out in the Trafficking Act, the Children's Act and the Basic Conditions of Employment Act for the purposes of identification of a child victim of trafficking for labour exploitation in the domestic service.

⁶⁰ The Children's Act.

⁶¹ The Basic Conditions of Employment Act 75 of 1997.

CHAPTER 2

DEFINITIONS OF CHILD TRAFFICKING AND CHILD LABOUR

2.1 INTRODUCTION

This chapter will ascertain whether the definition of child trafficking for purposes of labour exploitation in the Trafficking Act complies with the definition of child trafficking as contained in the United Nations' Trafficking Protocol. The definition of child labour in terms of the Basic Conditions of Employment Act⁶² will also be outlined.

In order for effective reporting, the definition of child trafficking needs to be understood. The pertinent issue is the ability of a lay person to identify and report a child victim of trafficking for the exploitation of labour in the domestic service. The study will show that in order for identification to occur, a person must have the requisite knowledge or suspicion. This in turn requires a good understanding of the definition of trafficking, more especially child trafficking. The various definitions that will be explained demonstrate the dilemma that faces a lay person in understanding whether a child is a victim of trafficking for the purposes of labour exploitation. The concepts that will be analysed are some of the components of the trafficking process; the methods used to trigger the process and the end result, which is the exploitation of the victim of trafficking.

2.2 CHILD TRAFFICKING DEFINITION

The Trafficking Act, more like the Children's Act,⁶³ considers two forms of child trafficking. The first, which will be the focus of this research, is defined as:

“the delivery, recruitment, transportation, harbouring, selling, exchanging, leasing or receiving of [a child] within or across the borders of the Republic, by means of a threat of harm; the threat or use of force or other forms of coercion; the abuse of vulnerability; fraud; deception; abduction; kidnapping; the abuse of power; the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over [a child] or the direct or indirect giving or receiving of payments or compensation, reward, benefits or any other advantage aimed at

⁶² The Basic Conditions of Employment Act.

⁶³ Section 284 read with section 1 of the Children's Act 38 of 2005. But, the Trafficking Act has a broader list of acts than the Children's Act. The additional concepts in the Trafficking Act are the delivery exchanging and leasing of [a child], section 4(1) of the Trafficking Act.

either [the child] or an immediate family member of [the child] or any other person in close relationship to [child] for the purpose of any form or manner of exploitation.”⁶⁴

The second form of trafficking, which is consistent with the United Nations Trafficking Protocol⁶⁵ is “[t]he illegal adoption of a child, within or across the borders of the Republic, for the purposes of any form or manner of exploitation.”⁶⁶

The forms of exploitation range from slavery or practices similar to slavery to child labour.⁶⁷ As the focus of this study is on trafficking for the purposes of child labour, the other forms of exploitation will not be elaborated upon and discussed.

Child labour is defined in section 1 of the Children’s Act⁶⁸ as:

“work by a child which is exploitative, hazardous or otherwise inappropriate for a person that age; and places at risk the child’s well-being, education, physical or mental health or spiritual, moral, emotional or social development.”⁶⁹

The Act also defines a child as a person below the age of 18 years.⁷⁰

The first form of trafficking contains three elements namely the action, means and purpose of exploitation. All three elements must be present to constitute trafficking⁷¹ and child trafficking in this instance. It is evident that no distinction lies between child trafficking and the trafficking of adults for purposes of exploitation, which is contrary to the requirements of the UN Trafficking

⁶⁴ Section 4(1) of the Trafficking Act.

⁶⁵ United Nations General Assembly ‘Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ (A/55/383/Add.1) (2000) 12 available at https://www.unodc.org/pdf/crime/final_instruments/383ale.pdf accessed on 17 June 2014.

⁶⁶ Note 61, section 4(2).

⁶⁷ Ibid section 1 definition.

⁶⁸ The Children’s Act. The Trafficking Act stipulates that the definition of child labour is in terms of section 1 of the Children’s Act, section 1(g) in the definition of “exploitation”. The Act also defines a child as a person below the age of 18 years.

⁶⁹ Section 1 of the Children’s Act.

⁷⁰ UNODC ‘Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ 347 available at https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf accessed on 17 June 2014.

⁷¹ UNODC (note 35 above) 245, 268.

Protocol, which do not require the involvement of the means.⁷² “Means” refers to the methods used by traffickers to facilitate trafficking, whether violent or subtle, for example the use of force or other forms of coercion, or abuse of power or of vulnerability.⁷³ The methods used vitiate consent for both adults and children. However, in relation to children who are less than eighteen years of age both consent and the methods used to obtain consent are irrelevant,⁷⁴ because they could lack the capacity to consent.⁷⁵

A further complication is the provision in section 11(a) of the Trafficking Act which states that when the defence of consent is raised to a charge of child trafficking, a child is presumed not to have consented to the intended exploitation or act irrespective of whether or not the means have been used. Therefore, it remains unclear as to whether the means, the most relevant to child trafficking being the abuse of vulnerability and the abuse of power⁷⁶, is a requirement in the definition of child trafficking.

Acts or actions such as harbouring are not defined nor can guidance be sought from the UN Trafficking Protocol to ascertain their meaning.⁷⁷ The only exception is the phrase “transports”. Section 9 of the Trafficking Act, which deals with carriers conveying a person “within or across the borders of the Republic, read together with the definition of a “carrier”⁷⁸ implies that the unlawful act must involve the movement of victims of trafficking using any mode of transportation.⁷⁹ The Trafficking Act is to be commended for adopting a wider approach⁸⁰ than the UN Trafficking Protocol⁸¹ and the Criminal Law (Sexual Offences and Related Matters)

⁷² Article 3(c) of the UN Trafficking Protocol states as follows: “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article; UNODC (note 35 above) 270; SS Kreston (note 55) 25.

⁷³ Section 4(1) of the Trafficking Act and article 3(a) of the UN Trafficking Protocol (note 1 above).

⁷⁴ Ibid article 3(b) read with article 3(c); K Touzenis ‘Trafficking in Human Beings: Human rights and trans-national criminal law, developments in law practices’ (2010) 33 available at <http://unesdoc.unesco.org/images/0018/001883/188397e.pdf> accessed on 19 June 2014; UNODC (note 71 above).

⁷⁵ Touzenis (note 73 above) 33.

⁷⁶ Section 4(1) (c) and (h) of the Trafficking Act.

⁷⁷ The words “adoption”, recruits”, “harbours” and “transports” for example are not defined in the Act.

⁷⁸ Section 1 of the Trafficking Act.

⁷⁹ A “carrier” is defined as “an owner or the owner’s employee, an agent, an operator or charterer of any means of transport”, see section 1 of the Trafficking Act.

⁸⁰ “[C]arrier in the Trafficking Act can be interpreted to include ordinary owners or drivers of transport who are not in the line of business of transporting passengers, which has implications for mandatory reporting.

⁸¹ Article 11(2) of the UN Trafficking Protocol.

Amendment Act⁸² which limits “carrier” to the means of transport operated by commercial carriers. The United Nations Office on Drugs and Crime Model Law against Trafficking in Persons (hereinafter the “UNODC Trafficking Law Model”) defines a commercial carrier as “a legal or natural person who engages in transportation of goods or people for commercial gain.”⁸³ The commercial carriers that the UN Trafficking Protocol is referring to are “common carriers”⁸⁴ which are in the business of regularly transporting goods and people in contrast to “private carriers”, who do so occasionally or once off.⁸⁵

The definition of a child victim of trafficking refers to a procedural aspect which affords the child the status of being a victim of trafficking after an assessment by the provincial department of social development.⁸⁶ For purposes of reporting child trafficking, the definition does not provide assistance in terms of factors that might help identify trafficking victims, particularly not for lay persons.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides a definition of a victim of crime.⁸⁷ A victim of crime is defined as a person who suffers harm or whose fundamental rights have been infringed by the unlawful act or omission of another person.⁸⁸ By the same token a person may be regarded as a victim irrespective of whether the offender has been identified, arrested, prosecuted or convicted.

⁸² Section 70(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁸³ Article 5(1) (d) of UNODC Model Trafficking Law (note 35 above).

⁸⁴ UNODC (note 69 above) 409 paragraph 4.

⁸⁵ Definitions of “common carrier and “private carrier” available at <http://le.al-dictionary.thefreedictionary.com/carrier> accessed on 29 July 2014.

⁸⁶ Section 1 read with s.18 (6) of the Trafficking Act. In terms of section 1 of the Trafficking Act, a child victim of trafficking is defined as “child who is found to be a victim of trafficking after an assessment in terms of section 18(6)”. Section 18(6) requires the provincial department of social development to assess the child to ascertain whether he or she is a victim of trafficking after taking into account “the prescribed information obtained from the South African Police Service.”

⁸⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 UN DOC A/RES/40/34(1985) available on <http://www.un.org/documents/ga/res/40/a40r034.htm> accessed on 18 September 2014.

⁸⁸ A victim is defined as:

“[a] person [who] ha[s] suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of [his or her] fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”, article 1, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 UN DOC A/RES/40/34 (1985) available on <http://www.un.org/documents/ga/res/40/a40r034.htm> accessed on 19 June 2014.

The South African Service Charter for Victims of Crime makes mention of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which implies that South Africa is bound by its provisions.⁸⁹ Therefore, the definition of a victim of crime, in this instance a child victim of trafficking, would have to comply with the definition of a victim of crime as defined in the United Nations Declaration on Victims of Crime and Abuse of Power. As the definition stands in the Trafficking Act, it is not sufficiently clear.

2.3 MEANS

As has been indicated earlier, section 11(1) (a) of the Trafficking Act casts doubt as to whether the means are relevant to the definition of child trafficking. But, some of the means will be analysed to further illustrate the difficulties posed by the definition of child trafficking.

Despite the variety of the means, some of the concepts used are unclear because the Act and the UN Trafficking Protocol have failed to define them.⁹⁰ It should also be noted that terms such as “fraud”, “abduction” and “kidnapping”, although undefined in the Trafficking Act, are common law crimes in South Africa and their meaning can be ascertained from their definitions.⁹¹

Abuse of power is not defined in the Trafficking Act⁹² or in the UN Trafficking Protocol, to offer some form of guidance.⁹³ The UN *travaux préparatoires*’ interpretation of authority, in relation to abuse of power, is that it includes power which may be held by male family members over the female ones and that of parents over their children⁹⁴. However, this does not imply that this is a closed list of categories of persons who may have power of children over children. For example,

⁸⁹ The then Minister of Justice and Constitutional Development, Mrs. Bridgette Mabandla, was of the opinion that the Service Charter for Victims of Crime in South Africa or the Victims Charter, complied with the Constitution and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Department of Justice and Constitutional Development, ‘Service Charter for Victims of Crime in South Africa (2004)1, 3 available at <http://www.justice.gov.za/vc/docs/vc/vc-eng.pdf> accessed on 18 September 2014.

⁹⁰ The concepts that have been undefined in the Trafficking Act, *inter alia*, include coercion; deception; the abuse of power, “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; “the direct or indirect giving or receiving of payments, compensation, rewards or any other advantage”, see section 4(1) (b)-(j) of the Trafficking Act; see also, SS Kreston (note 55) 28-30.

⁹¹ Fraud, for example, is defined as the unlawful and intentional making of a misrepresentation to another person causing him or her prejudice or potential prejudice, G. Kemp et al, ‘Criminal Law in South Africa’ (2012), 404.

⁹² See also SS Kreston (note 55) 30.

⁹³ See also SS Kreston (note 55) 25.

⁹⁴ UNODC (note 69 above) 319, 343.

children could be enticed by an adult, who is in a position of trust, into child trafficking for labour exploitation.⁹⁵

The abuse of vulnerability is defined in terms of the Act as being “any abuse that leads a person to believe that that he or she has no reasonable alternative to submit to exploitation, and includes but is not limited to, taking advantage of that person resulting from, *inter alia*, being a child or the social circumstances or economic circumstances.”⁹⁶ The Act mentions the kinds of vulnerability peculiar to an individual that can be abused, which are not exhaustive⁹⁷. The abuse of vulnerability flows from a victim of trafficking’s belief that he or she does not have a “reasonable” alternative but to submit to exploitation because he or she has been subjected to any form of abuse. Therefore, it can be implied that a subjective test would be applied to assess the victim’s state of mind.⁹⁸ The abuse of vulnerability is further clarified by stating that such abuse includes where the “trafficker” takes advantage of the peculiar vulnerability of the victim, be it disability or for being a child. The circumstances and / or factors that make the child vulnerable are vaguely set out. It is unclear as to whether the age and / or the mental capacity of the child to make a particular choice are relevant in this instance. The UNODC Trafficking Law Model states in its definition that the contributory factor to a child’s vulnerability is his or her “reduced capacity to form judgements by virtue of being a child.”⁹⁹ It recommends that the definition should rather focus on the trafficker’s intention to take advantage of the victim’s vulnerability so as to avoid enquiring into the victim’s state of mind. This would require the offender to be aware of the victim’s situation and have the intention to take advantage of the said situation.¹⁰⁰ It should be noted that the initial draft of the Trafficking Act, namely the Combating of Trafficking

⁹⁵ South African Law Reform Commission ‘Issue Paper 25 Project 131 Trafficking in Persons’ (2004) 40 available at http://www.justice.gov.za/salrc/ipapers/ip25_prj131_2004.pdf accessed on 18 March 2014.

⁹⁶ Sections 4(1) read with section 1 of the definition of “abuse of vulnerability.”

⁹⁷ The Act uses the term “and includes but not limited to” in its definition of “abuse of vulnerability”

⁹⁸ The words “any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation...” ; section 1(a) to (g) of the definition of “abuse of vulnerability” of the Trafficking Act (emphasis added).

⁹⁹ The definition states as follows:

“Abuse of a position of vulnerability means such abuse that the person believes he or she has no reasonable alternative but to submit to the labour or services demanded of the person, and includes but is not limited to taking advantage of the vulnerabilities resulting from the person having entered the country illegally or without proper documentation, pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance, or *reduced capacity to form judgments by virtue of being a child.*” (emphasis added), UNODC (note 35 above) 10.

¹⁰⁰ Ibid 9, 10.

in Persons Bill¹⁰¹ contained the same provision as adopted by the UNODC Trafficking Law Model.

2.4 CHILD LABOUR DEFINITION

The Trafficking Act lists a number of forms of exploitation, which are not exhaustive and are more expansive than the UN Trafficking Protocol.¹⁰² The form of exploitation that the research focuses on is child labour in the domestic services.

The Trafficking Act does not define child labour but refers to section 1 of the Children's Act. The Children's Act defines it as work which is exploitative, hazardous or inappropriate for that child's age and the work "places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development."¹⁰³ The relevant portion of the child labour definition for the current research purposes is work which is exploitative and is considered as child labour in terms of section 141 of the Children's Amendment Act which includes the using, acquisition or offering of a child for slavery or practices similar to slavery or the using, acquisition, offering or employing of a child for child labour.¹⁰⁴ Section 141 furnishes a non-exhaustive list of slavery or practices similar to slavery which include debt bondage, servitude, serfdom or forced or compulsory labour or services.¹⁰⁵

When applying the definition of child trafficking for the purposes of child labour in the domestic services sector, provisions of the Basic Conditions of Employment Act and its regulations must also be borne in mind¹⁰⁶. The Act defines a domestic worker as being "an employee who performs domestic work in the home of his or her employer."¹⁰⁷ This category includes "a gardener"; "a driver", a person specifically employed to be a driver; and a "person who takes

¹⁰¹ Clause 1 in the Combating in Trafficking in Persons Bill [B...2006] in South African Law Reform Commission 'Discussion Paper 111 Project 131 Trafficking in Persons' (2006) 274 available at <http://www.justice.gov.za/salrc/dpapers/dp111.pdf> accessed on 1 April 2014.

¹⁰² Section 1 of the Trafficking Act states that: "exploitation includes, *but is not limited to*" whereas the UN Trafficking Protocol provides the minimum requirements and gives State Parties the discretion to list exploitative practices. It makes use of the terms "at a minimum" when it refers to exploitation, article 3(a) of the UN Trafficking Protocol (note 1 above).

¹⁰³ Definition of "exploitation", sections 4(1) read with s.1 of the Trafficking Act read with section 1 of the Children's Act.

¹⁰⁴ Section 141(1) (a) and (b) of the Children's Amendment Act 41 of 2007.

¹⁰⁵ Ibid, section 141(1) (a).

¹⁰⁶ The Basic Conditions of Employment Act.

¹⁰⁷ Ibid section 1.

care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker.”¹⁰⁸

Section 43 of the above-mentioned Act prohibits two categories of children from being employed. A distinction is made between the said categories which has legal implications for mandatory reporting. The first category relates to children who are less than 15 years of age or are under the minimum school leaving age¹⁰⁹. The second category applies to children under 18 years, who are 15 years and older, who are prohibited from being employed in work which is unsuitable for their age or places their welfare, “education, physical or mental health, or spiritual, moral or social development” at risk.¹¹⁰ Therefore, it is permissible to employ children who are 15 years or older as long as the work does not fall within the ambit of the above-mentioned second category and is subject to regulations either prohibiting or placing conditions on their employment by the Minister of Labour.¹¹¹ Furthermore, section 48 of the Basic Conditions of Employment Act and its’ regulations also prohibits forced labour.¹¹² A lay person would easily notice a child who is under the age of 15 years, who is not attending school, because by law he or she is required to attend school.¹¹³ In light of the second category, a labour inspector would be better equipped to identify a child victim of trafficking than a lay person.¹¹⁴

The Basic Conditions of Employment Act’s Regulations on Hazardous Work by Children in South Africa regulates child labour and places certain conditions on work done by children¹¹⁵

¹⁰⁸ Ibid.

¹⁰⁹ The minimum school leaving age is when a child is 15 years or has reached Grade 9, whichever comes first, at the end of the last school day of the year, section 3(1) of the South African Schools Act 84 of 1996.

¹¹⁰ Section 43 of The Basic Conditions of Employment Act; Basic Conditions of Employment GN1438 of GG 19453,13 December 1998; 9 and GN 936 of GG 23610 ,25 July 2002;11.

¹¹¹ Note 103, section 44(1).

¹¹² “Forced labour” is defined in the Trafficking Act as labour or services obtained without that person’s consent and “through threats or perceived threats of harm, the use of force, intimidation or other forms of coercion, or physical restraint to that person or another person”, s.1 of the Trafficking Act; see also regulation 23(4) and (5) Sectoral Determination 7: Domestic Worker Sector (note 14 above) 25.

¹¹³ South African Schools Act (note 106 above).

¹¹⁴ A labour inspector has the power to monitor and enforce compliance of employment law, namely the Basic Conditions of Employment Act 75 of 1997, and “to inspect or question about any work performed” in a person’s home, if he or she has obtained prior authorization from the Labour Court. In respect of a worker who is below 18 years and employed in a person’s household, the Labour Inspector has the power to request the employer’s records containing the child’s details., sections 65(2) (b) read with section 65(3) and 66(1)(f) of the Basic Conditions of Employment Act 75 of 1997; also paragraph 23(3) of the Sectoral Determination 7: Domestic Worker Sector (note 14) 25.

¹¹⁵ Basic Conditions of Employment Act 75 of 1997: Regulations on hazardous work in South Africa GR 1068 of GG 23732, 15/01/2010; 21, 24, 31.

For example, overnight work is permissible if both the parents or legal guardians and employers adhere to certain conditions, but they commit an offence when contravening the conditions.¹¹⁶ The following forms of work, which are relevant to the research, are regulated: overnight work; piecework and task work; maximum working time; and night work.¹¹⁷ The worst form of labour considered by the regulations is “work in circumstances which it is reasonably foreseeable that the child will be exposed to physical, psychological or sexual abuse” and the employment of a child “in circumstances in which the child is unreasonably confined to the employer’s premises.”¹¹⁸ The first aspect on the worst forms of child labour is unclear. The Worst of Forms of Child Labour Convention of 1999, which the regulations make reference to, has a limited list of the worst forms of child labour. The list includes, *inter alia*, slavery and similar slavery practices; the sale and trafficking of children; debt bondage and serfdom and forced or compulsory labour which includes the forced or compulsory recruitment of children for use in armed conflict¹¹⁹ and hazardous work.¹²⁰ Article 4 of the 1999 Convention gives a directive to the competent authority to determine its domestic or national laws or regulations when considering the worst forms of child labour and the work which is likely to harm the health, safety or morals of children.¹²¹

Neither the Trafficking Act nor the Children’s Act refer to the Basic Conditions of Employment Act and its regulations. Therefore, it is critical that lay persons are aware of such provisions in order to ensure effective reporting to the police.

¹¹⁶ A child worker is permitted to work away from parents or legal guardian overnight on two conditions, if a child's parent or legal guardian has consented in writing and if the work will not negatively impact on the child's schooling, if a child worker is a scholar. The employer, in turn, is required to furnish full details, amongst other conditions, of accommodation arrangements to the parent or legal guardian of the child employee for their approval, Regulations on Hazardous work in South Africa (note 112 above) 28.

¹¹⁷ Ibid 28, 29.

¹¹⁸ Regulation 11(1) (xiii) and 11(3) Schedule 2: Summary of regulations on the health and safety of children at work and on hazardous work by children and 9(1) (a) (xiii) and (b) Regulations on Hazardous work in South Africa.

¹¹⁹ Article 3(a) of the Worst Forms of Child Labour Convention (note 8 above).

¹²⁰ Ibid article 3(d) "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."

¹²¹ Ibid article 4(1).

2.5 CONCLUSION

The analysis of the definition of child trafficking and ancillary definitions serves to illustrate that there are numerous interpretative challenges to the definition. As a starting point, the person sought to be identified and protected by the law is identified merely on the basis of an assessment and finding by the provincial department of social development, after the trafficking event has occurred. This does not provide any guidance or assist the lay person in the identification of a child victim of trafficking for child labour exploitation in the domestic service sector. It is conceivable that the educational campaigns or awareness initiatives aimed at the general public may not shed light either as they would be dependent on the vaguely phrased definitions in the Trafficking Act.

Many of the concepts which are crucial to the elements of the child trafficking and to the identification of a victim of child trafficking for child exploitation at the different stages of the trafficking process are undefined, which further compounds the problem. One of the shortfalls of the Act is its failure to make reference to the Basic Conditions of Employment Act and its regulations which are relevant to the exploitative aspect of the definition of child trafficking.

It is clear that the lack of clarity on the definition of child trafficking for the purposes of labour exploitation will adversely impact on the level of reporting by ordinary members of the public.

Chapter 3 will identify the mandatory reporters in the Trafficking Act; the requirements for reporting child trafficking offences for the purposes of labour exploitation in the domestic service; the legal implications of non-reporting and the challenges posed by the standard of reporting required in section 18(1)(a) of the Trafficking Act in relation to lay persons.

CHAPTER 3

MANDATORY REPORTING

3.1 INTRODUCTION

The Constitution, amongst others, entrenches the right of a child to be protected from ill-treatment, abuse, exploitative labour practices and performing work or services that are inappropriate for the child's age or places the child at risk.¹²² An obligation is placed on the State to “respect, promote and fulfill the rights in the Bill of Rights”¹²³ which applies to all law and binds the legislature.¹²⁴ In its aspiration to protect the fundamental rights inculcated in the Bill of Rights¹²⁵ the Trafficking Act criminalises human trafficking¹²⁶ and conduct associated with trafficking in persons.¹²⁷ It further establishes a protection and assistance mechanism for child victims of trafficking by imposing a reporting duty on various persons.¹²⁸

Mandatory reporting for human trafficking cases is not unique to South Africa and other countries. Provision is made for mandatory reporting in other statutes dealing with offences other than trafficking.¹²⁹ The Children's Act, on the other hand, does not make provision for such a mechanism. Instead, it obliges a certain category of persons who come into contact with a child who is a victim of trafficking in the Republic to refer the child to a designated social worker.¹³⁰ Other countries within the Southern African Developmental Community (SADC) region, with similar problems of human trafficking, make provision for various mandatory reporting mechanisms in their legislation.¹³¹

¹²² Section 28(1)(d) - (f) of the Constitution.

¹²³ Ibid section 7(2).

¹²⁴ Ibid section 8(1).

¹²⁵ Ibid paragraph 4 of the preamble enunciates the rights mentioned in the introduction of Chapter 3, excluding the right to equal protection and benefit of the law.

¹²⁶ Section 4 of the Trafficking Act.

¹²⁷ Ibid sections 5, 6, 7, 8, 9 and 10.

¹²⁸ Ibid sections 18(1) (a), 8(1) (b), 8(2) (b) (ii) and 9(2).

¹²⁹ Sections 28, 29 and 31 and the preamble of the Financial Intelligence Centre Act 38 of 2001 requires certain transactions such as suspicious and unusual transactions to be reported to the Financial Intelligence Centre in order to prevent money laundering and the “financing of terrorist and related activities”; see also section 2(1) of the Inquests Act 58 of 1959 which places a legal duty on “any person” to report a death not due to natural causes.

¹³⁰ Section 288 of the Children's Act.

¹³¹ Articles 8 and 9 of Law No 6 of 2008 of Mozambique available at http://www.protectionproject.org/wp-content/uploads/2010/09/Law-no-6-2008_EN-Mozambique-Human-Trafficking.pdf accessed on 16 February 2014; section 25(1) and (2) of The Anti-Human Trafficking Act No.11 of 2008 of Zambia available at

The crucial role of mandatory reporting is not to be underestimated. It plays a critical role in ensuring the protection of a child victim of trafficking from further human rights violations by the perpetrator.¹³² It also imposes a legal duty on persons to report child trafficking, including child trafficking for the purposes of labour exploitation in the domestic service. The imposition of such an obligation is consistent with section 8(2) of the Constitution.¹³³

In most instances, as has been indicated in the previous chapters,¹³⁴ it is improbable that children will approach the police and report that they are victims of child trafficking. The people who are bound to be suspicious that a child is a victim of trafficking for the purposes of labour exploitation in the domestic service are people who would have regular contact with the trafficker. Although not an exhaustive list, such people could be neighbours, close friends and relatives.¹³⁵

The other category of persons who would be effective reporters is people working with children in a professional capacity.¹³⁶ This is recognised by section 288 of the Children's Act which imposes a legal duty on a specific category of professionals who come into contact with a child who is a victim of trafficking to refer that child to a designated social worker for investigation to ascertain whether he or she is in need of care and protection and to be placed in temporary safe

http://www.protectionproject.org/wp-content/uploads/2010/09/Zambia_Anti-Trafficking-Act_2008.pdf accessed on 26 September 2014; section 36 of The Child Care, Protection and Justice Act 22 of 2010 of Malawi available at http://www.ilo.org/wcmsp/groups/public/---ed_protect/---protrav/---ilo.aids/documents/legaldocument/wcms_190731.pdf accessed on 26 September 2014.

¹³² M Makoae, et al 'Child Maltreatment Prevention Readiness Assessment: South Africa' Human Sciences Research Council Report (2012) 4 available at http://www.hsrc.ac.za/uploads/pagecontent/3320/ChildMaltreatmentPreventionReadinessAssessmentinSouthAfrica_final_report.pdf accessed on 8 July 2014.

¹³³ Section 8(2) of the Constitution also binds natural or juristic persons to the provision of the Bill of Rights "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

¹³⁴ Chapter 1, 3.

¹³⁵ *C Cobley Child Abuse and the Law* 2ed (1995) 25; *D v National Society for the Prevention of Cruelty to Children* 1978 AC 171, 3 available at <http://www.bailii.org/uk/cases/UKHL/1977/1.html> accessed on 22 September 2014. Lord Diplock stated that "neighbours, school-teachers, health visitors and the like who will continue to be neighbours or to maintain the same relationship with the suspected person after the matter has been investigated and dealt with.

¹³⁶ These would be people in the medical profession, teachers, law enforcement officials, social services and people in the community, for example the clergy and community workers, Colbey (note 132 above)32.

care.¹³⁷ Labour inspectors, in the execution of their duties to monitor and enforce compliance of employment law, are also in a position to report such incidents.¹³⁸

This chapter will identify the mandatory reporters in the Trafficking Act; the requirements for reporting child trafficking offences for the purposes of labour exploitation in the domestic service; the legal implications of non-reporting and the challenges posed by the standard of reporting required in section 18(1)(a) of the Trafficking Act in relation to lay persons. The importance of raising public awareness and having adequate guidelines to ensure effective and rapid identification of a child victim of trafficking will be discussed. Other factors which might adversely affect mandatory reporting like the protection of the identity of the reporters and / or potential witnesses and the implications of reporting will also be discussed.

3.2 MANDATORY REPORTERS

Notwithstanding the shortcomings in the definitions of child trafficking and a victim of child trafficking, the Trafficking Act imposes a legal duty on the general public¹³⁹ and a specific category of persons¹⁴⁰ to report the trafficking in persons for various exploitative purposes of trafficking activities to the South African Police Services. Although the language in section 18(1) (a) is not explicit, it can be implied that professionals who are in usual contact with or have information on child victims of child trafficking are required to report such cases to a police official.¹⁴¹ Section 18(1) (b) of The Trafficking Act explicitly mentions an appointed child protection organisation by the Department of Social Development which is mandated to perform all or specified designated child protection services in the relevant province to report a child

¹³⁷ Section 288 read with 289(1) and 155 of the Children's Act.

¹³⁸ In terms of section 65(2)(b) read with sections 65(3) and 66(1) of the Basic Conditions of Employment Act, the labour inspector is authorised to enter a home in terms of written authorisation by the Labour Court in order to monitor and enforce compliance of labour law. He or she has the power to inspect or question a person about any work performed. In terms of paragraph 23(3) of the Sectoral Determination: Domestic Worker Sector Regulation, the labour inspector has the power to inspect the record of an employed under the age of 18 years which has to be maintained by the employer for a period of 3 years (note 14 above) 25.

¹³⁹ Section 18(1) (a) of the Trafficking Act employs the phrase "any person"

¹⁴⁰ Ibid sections 18(1) (a), (b), 8(1) and 9(2).

¹⁴¹ Ibid section 18(1) (a) qualifies "any person" and uses the phrase "[d]espite any law, policy or code of conduct prohibiting the disclosure of personal information..." This conclusion is also confirmed in the 'Memorandum on Objects of The Prevention and Combating of Trafficking in Persons Bill which states that the phrase is meant to encourage professionals to report "without fear of contravening the law, policies and codes of conduct relevant to their profession." See, paragraph 3.18 in the Prevention and Combating of Trafficking in Persons Bill [B7B-2010]43 available on http://jutralaw.co.za/media/filestore/2012/06/b_7B_-_2010_-_Prevention_and_Combating_of_Trafficking_in_Persons_Bill.pdf accessed on 19 September 2014.

victim of trafficking.¹⁴² The person who would report such a matter is a “designated social worker” in the employ of the appointed child protection organisation.¹⁴³ Other persons who are required to report are lessors and sub-lessors of property;¹⁴⁴ an electronic communications service provider operating within the Republic of South Africa;¹⁴⁵ and a transport carrier.¹⁴⁶

3.3 REPORTING REQUIREMENTS

A person making a report is required to provide reasons for that knowledge or suspicion to a police official.¹⁴⁷ This can be seen a mechanism to prevent unfounded allegations and the abuse of the process. Further, the report has to be made in good faith, which will absolve the reporter from civil and disciplinary action.¹⁴⁸ The Trafficking Act does not extend the protection to possible criminal proceedings being instituted against such persons. The omission of criminal action might be a deterrent to potential “reporters” and will undermine the mandatory reporting purpose of ensuring the protection and safety of the child. Although the Financial Intelligence Centre Act (hereinafter “FICA”)¹⁴⁹ does not make provision for immunity from disciplinary action to people who have made a report in good faith to the Financial Intelligence Centre, it exempts them from, *inter alia*, “criminal” action.¹⁵⁰ The Trafficking Act thus ought to consider this aspect.

3.3.1 IDENTITY DISCLOSURE OF THE REPORTER

Where, the safety of the person making a report is at risk, he or she has the right to have his or her identity kept confidential “unless the interests of justice demand the contrary”.¹⁵¹ This implies that the Trafficking Act does not give an absolute guarantee that a person’s identity will

¹⁴² Section 18(1) (a) read with section 1 of the Trafficking Act , sections 1, 107 of the Children’s Amendment Act 41 of 2007 and section 310 and 311 of the Children’s Act 38 of 2005.

¹⁴³ Section 1 definition of “designated social worker” which includes a social worker working for a designated child protection organization], Children’s Act.

¹⁴⁴ Section 8(1) (b) of the Trafficking Act.

¹⁴⁵ Ibid section 8(2) (a) and (b).

¹⁴⁶ Ibid section 9(2).

¹⁴⁷ Ibid section 18(3) (a).

¹⁴⁸ Ibid section 18(3) (b).

¹⁴⁹ Financial Intelligence Centre Act 38 of 2001.

¹⁵⁰ Section 38(1) of the FICA states “[n]o action, whether criminal or civil, lies against an accountable institution, reporting institution...or any other person complying in good faith with a provision of this Part, including any director, employee, or other person acting on behalf of such accountable institution, reporting institution...or such other person.”

¹⁵¹ Section 18(3) (c) of the Trafficking Act.

not be revealed once that report is made. For example, a reporter may be required to testify in subsequent criminal proceedings or his or her identity might come to the fore in other ways.¹⁵² The Witness Protection Act¹⁵³ does not apply to potential reporters but to persons who have already reported matters to the police. The definition of witness is limited to persons who “[are] or may be required to give evidence, or who [have] given evidence in any proceedings.”¹⁵⁴ Even if a person were to receive witness protection, numerous considerations such as relocation and the changing of identity have to be taken into account.¹⁵⁵ This, no doubt, has the potential to destabilise the life of a witness and his or her family who might be required to be uprooted from his or her familiar surroundings to be in protective custody. Witness protection also does not extend beyond the criminal trial process.¹⁵⁶ Once a witness has testified, he or she is removed from the programme.¹⁵⁷

The South African Law Reform Commission has raised concerns about the witness protection programme and called for its review. Amongst its recommendations were that the programme needs to be strengthened “to cater for the unique needs of victim witnesses and other witnesses assisting with the investigation of alleged traffickers or testifying in criminal proceedings against such traffickers.”¹⁵⁸ It also proposed that the National Director of Public Prosecutions extend the programme beyond the criminal trial process where the witnesses continued to be at risk of retaliation.¹⁵⁹ This challenge is also acknowledged by the Office for Witness Protection (hereafter referred to as “OWP”) in the NPA.¹⁶⁰

The abovementioned concerns are bound to impact on mandatory reporting which will be to the detriment of the victim of child trafficking and the preventative purposes of the Trafficking

¹⁵² *D v National Society for the Prevention of Cruelty to Children* 1978 AC 171, 12 available at <http://www.bailii.org/uk/cases/UKHL/1977/1.html> accessed on 22 September 2014.

¹⁵³ The Witness Protection Act 112 of 1998.

¹⁵⁴ Ibid sections 1 and 7(1); section 66(2) (a) (ii) of the Criminal law (Sexual Offences and Related Matters) Amendment.

¹⁵⁵ According to the NPA, people on the witness protection programme may be placed in safe houses and may be offered a new identity “in appropriate circumstances”, National Prosecuting Authority *Annual Report 2012/2013 Vote 24*, 19 available at <http://www.npa.gov.za/UploadedFiles/Annual%20Report%202012%202013.pdf> accessed on 1 October 2014.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ South African Law Reform Commission ‘Project 131 Trafficking in Persons Report’ (2008) 45 available at http://www.justice.gov.za/salrc/reports/r_pr131_trafficking_2008.pdf accessed on 18 March 2014.

¹⁵⁹ Ibid.

¹⁶⁰ According to the OWP, witnesses who have testified continue to face danger and are unable to return home, footnote 150, 61.

Act. It is hoped that the directives on measures to be taken with to ensure, amongst others, the safety of potential witnesses, which will be issued by the Director-General of the Department of Justice and Constitutional Development¹⁶¹ will be informed by the concerns of the South African Law Reform Commission.

The FICA has managed to overcome the difficulty of disclosing the identity of the person who has made a report or furnished additional information to the Financial Intelligence Centre. It prohibits the adducing of evidence concerning the identity of such a person in criminal proceedings unless he or she testifies. This applies to reports and additional information in respect of cash transactions above a prescribed limit;¹⁶² suspicious and unusual transactions;¹⁶³ and electronic transfers in and out of the Republic exceeding the prescribed amount.¹⁶⁴ Section 38(2) expressly states that a person who has made such report or provided additional information is not required to give evidence in criminal proceedings emanating from the report.¹⁶⁵ If regulations are to be enacted to supplement the Trafficking Act, they should consider incorporating similar provisions as those contained in the FICA in order to overcome this challenge.

Failure to comply with one's reporting duties has serious legal implications and attracts criminal sanction which has severe ramifications.¹⁶⁶ Omission to report a person's knowledge or suspicion that a child is a victim of trafficking constitutes an offence.¹⁶⁷ If a person is convicted, he or she is liable to a fine or be imprisonment for a period not exceeding 5 years or both.¹⁶⁸ It is clear from the sanctions that the withholding of such knowledge and information is viewed in a serious light and that the safeguarding of children from trafficking is paramount.

This brings us to the vexed question of the appropriate standard of belief upon which a person must base their suspicion that a child is in fact being trafficked.

¹⁶¹ Section 44(1) (a) (ii) of the Trafficking Act.

¹⁶² Ibid section 38(3) read with section 28.

¹⁶³ Ibid section 38(3) read with section 29.

¹⁶⁴ Ibid section 38(3) read with section 31.

¹⁶⁵ Ibid. Section 38(2) states "A person who has made, initiated or contributed to a report in terms of section 28, 29 or 31, or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part is *competent, but not compellable*, to give evidence in criminal proceedings arising from the report."

¹⁶⁶ Section 13 of the Trafficking Act.

¹⁶⁷ Ibid section 18(9) read with section 18(1) (a).

¹⁶⁸ Ibid section 13(e). A lay person would fall in the category of section 18(9) of the Act.

3.4 REPORTING STANDARD

Section 18(1) (a) requires “any person”, which includes members of the public, to report cases of child trafficking to the police and the standard required is the knowledge of a fact, of which there are different forms. The person is expected to either know a fact or suspect a fact.¹⁶⁹ This standard applies to both the lay person and professionals. However, a different criterion applies to a “designated child protection organisation” which requires suspicion.¹⁷⁰ Different reporting standards also apply to persons required to report human trafficking cases in sections 8 and 9, comparatively, lessors, sub-lessors and electronic communications service providers.¹⁷¹ However, the latter aspect will not be the focus of this research paper. Instead, the standards pertaining to “knowledge of a fact” and “ought to have reasonably known or suspected” will be considered.

3.4.1 “KNOWLEDGE OF A FACT”

A person is considered as having knowledge when he or she possesses actual knowledge or where the court is satisfied that the person held a belief that there was a reasonable possibility of the existence of a fact and that he or she did not verify that fact,¹⁷² which amounts to *dolus eventualis*.¹⁷³ The Trafficking Act directs that the terms “knows” or “knowing” must be interpreted in the above-mentioned context.¹⁷⁴ In terms of section 2(3) reference to “act” in the Trafficking Act includes an omission. A person would thus be guilty of contravening section 18(9) read with sections 18(1) (a) and (2) of the Trafficking Act if he or she intentionally or

¹⁶⁹ The Trafficking Act uses the term a “person ought to have known...a fact.” The expression “ought” is “used to indicate what is expected” or a “moral obligation”, <http://www.merriam-webster.com/dictionary/ought?show=0&t=1416636831> accessed on 22 November 2014; section 2(1) and (2) of the Trafficking Act.

¹⁷⁰ Ibid section 18(1) (b).

¹⁷¹ The standards of knowledge required for the lessor and sub-lessor require awareness and “ought to have reasonably known or suspected” that the premises are being used “to facilitate or promote trafficking.” Electronic communications service providers are required to be aware or become aware that the published or printed or advertised information in their electronic communications system facilitates or promotes trafficking., Transport carriers, on the other hand, are required to have suspicion that any passenger is a victim of human trafficking, sections 8(2) (b) and 9(2) of the Trafficking Act.

¹⁷² Section 2(1) (a); (b) (i) and (ii) of the Trafficking Act.

¹⁷³ According to Burchell & Milton, *dolus eventualis* is present when there is a “reasonable possibility of the existence of that fact” and a person fails to obtain information to confirm or rebut the existence of that fact, see *Principles of Criminal Law* 3ed (2005) 986; J. Burchell *Principles of Criminal Law* 4ed (2013) 613-4. According to Burchell “reasonableness” implies that the negligent fault criterion is required.

¹⁷⁴ Section 2(1) of the Trafficking Act.

negligently failed to report that a child is a victim of trafficking.¹⁷⁵ A person who would possess such knowledge would be a person who is in regular contact with child victims of trafficking.

3.4.2 “OUGHT REASONABLY TO HAVE KNOWN OR SUSPECTED A FACT”

The second alternative reporting standard that is required for reporting a child as a victim of trafficking is that of a person who “ought reasonably to have known or suspected a fact”.¹⁷⁶ The same provision can be found in the FICA¹⁷⁷ but it is restricted to a specific sector, namely the business sector, and is not applicable to general members of the public.¹⁷⁸

In *Savoi and Others v National Director of Public Prosecutions and Another*,¹⁷⁹ the High Court held that the test to be applied to determine whether or not the accused “ought reasonably to have known” is an objective test. The comparator is a fictitious reasonable person in a similar position of the reporter. Therefore, the fact that the reasonable fictitious person would have known that his or her conduct constituted an unlawful act would constitute negligence and not *dolus* in any form.¹⁸⁰ The Constitutional Court in *Savoi and Others v National Director of Public Prosecutions and Another*¹⁸¹ held that there is a subjective element in the phrase “the general knowledge, skill, training and experience that he or she in fact has.”¹⁸² In *toto*, the negligence criterion consisted of both an objective and subjective test.¹⁸³ It would appear that this standard would be more relevant to persons who are exposed to regular trafficking as opposed to a lay person.

¹⁷⁵ *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (1) SACR 545 (CC) 86, the Constitutional Court held that the fault element may either take the form of intention or negligence, which applies to both common law and statutory offences; *S v Coetzee and Others* 1997 (3) SA 527 (CC) 176 as per O’Regan J:

“...as a general rule people who are not at fault should not be deprived of their freedom by the state...when a person has committed an unlawful act intentionally or negligently, the state may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule. Where culpability has been established, and the conduct is legitimately deemed unlawful, then no such breach arises.”

¹⁷⁶ Section 18(1) (a) read with section 2(2) of the Trafficking Act.

¹⁷⁷ Section 29(1) read with section 1 of the Financial Intelligence Act 38 of 2001.

¹⁷⁸ *Ibid.* Section 29(1) identifies four categories of people who are obliged to report suspicious and unusual transactions namely a person who carries on a business; is in charge of a business; manages a business and is employed by a business.

¹⁷⁹ *Savoi and Others v National Director of Public Prosecutions and Another* (2013) 3 All SA 548 (KZP) 90.

¹⁸⁰ The Constitutional Court in *Savoi and Others v National Director of Public Prosecutions and Another* (2014 (1) SACR 545 (CC) 85 held that the High Court was correct in its interpretation of the term “ought reasonably to have known” indicated negligence as the fault element (*mens rea*).

¹⁸¹ *Ibid* 91.

¹⁸² Section 2(2) (b) of the Trafficking Act.

¹⁸³ *Savoi* (note 178 above).

3.4.3 “SUSPECTED A FACT”

The Trafficking Act does not define suspicion. The ordinary meaning of suspicion is “a feeling or thought that something is possible, likely, or true.”¹⁸⁴ In *S v Bogaards*,¹⁸⁵ the court adopted the definition laid down in *Powell NO v Van der Merwe NO*:¹⁸⁶

“This Court has endorsed and adopted Lord Devlin’s formulation on the meaning of ‘suspicion’:

‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.’”

The said comments illustrate that suspicion cannot form the basis of a criminal trial and that additional evidence would have to be obtained. But, suspicion could fulfill a dual purpose of firstly, prompting a report to the police and secondly, triggering the police to make a decision and act on such information which would benefit a victim of trafficking in that he or she would be removed from circumstances which violate his or her rights.

3.5 COMMENTARY ON THE REPORTING STANDARD

Notwithstanding the challenges in the definition of child trafficking, the lay person is required to base his or her report, that a child is a victim of trafficking, on knowledge or suspicion. As has been previously indicated, having knowledge depends on one’s exposure to trafficking activities.¹⁸⁷ Persons who are most likely to be in regular contact with such victims are professionals in the health sector, law enforcement officials¹⁸⁸, social services, teachers, the clergy and community leaders and designated protection child protection organisations. Moreover, persons who are not exposed to daily activities of trafficking are most likely to have

¹⁸⁴ Oxford Dictionaries available at <http://www.oxforddictionaries.com/definition/english/suspicion> accessed on 25 September 2014.

¹⁸⁵ *S v Bogaards* 2012 (1) SA 376 (SCA)] 59; *Duncan v Minister of Law and Order for the Republic of South Africa* 1986 (2) SA 241 (A) in Case No 38/1985,28.

¹⁸⁶ *Powell NO v Van der Merwe* 2005 (5) SA 62 (SCA) 36, 37.

¹⁸⁷ Chapter 1 of dissertation, 5.

¹⁸⁸ For example, labour inspectors in the case of child trafficking for the purpose of labour exploitation in the domestic service sector.

limited knowledge on the matter¹⁸⁹ and a lesser standard such as suspicion or awareness would suffice.¹⁹⁰

Cognisance needs to be taken of reporting challenges in relation to child trafficking matters. Limited public awareness on trafficking makes it difficult to enforce mandatory reporting and must be supported by education and guidelines as to what trafficking entails¹⁹¹ and how to identify a child victim of trafficking.

The Trafficking Act does not contain guidelines on identifying a victim of trafficking as was initially provided in the Combating of Trafficking in Persons Bill¹⁹² and contained in the *Zambian Anti-Human Trafficking Act 11 of 2008*.¹⁹³ Nor does it have awareness programmes in place to educate members of the public on trafficking. Nonetheless, it has given the Department of Justice and Constitutional Development (now the Department of Justice and Correctional Services)¹⁹⁴ the responsibility, in consultation with other relevant government departments,¹⁹⁵ to “develop and review guidelines on the identification of victims of trafficking and traffickers”¹⁹⁶ and to establish public awareness programmes or other measures “within available resources”¹⁹⁷. Socio-economic jurisprudence has interpreted the phrase “within available resources”. The performance of a state obligation is dependent on the availability of resources for such purposes.¹⁹⁸ This implies that if the Department of Justice and Correctional Services does not have the budget to do so, such programmes are most likely not to be implemented.

¹⁸⁹ Bermudez (note 47 above) 29.

¹⁹⁰ A Fouche & JMC Joubert ‘Facilitating disclosure of child sexual abuse victims in the middle of childhood: A seven-year phase forensic interview protocol’ 2009 *Acta Criminologica* 22(2) 42. The authors support the standard of suspicion for parents, professionals and community members in sexual abuse cases of children.

¹⁹¹ South African Law Reform Commission *Issue Paper 25, Project 131 Trafficking in Persons* (2004) 7, 12 available at http://www.justice.gov.za/salrc/ipapers/ip25_prj131_2004.pdf accessed on 18 March 2014.

¹⁹² *Ibid*, clause 4 of the Combating of Trafficking in Persons Bill provides guiding principles when deciding whether a person is a victim of trafficking. One is required to look out for particular signs with respect to an exploitative situation and the means used; different methods of restricting a person’s movement and so on.

¹⁹³ Section 22 of the *Zambian Anti-Human Trafficking Act 11 of 2008* has the same provision as that contained in the Combating of Trafficking in Persons Bill [B...2006] available at http://www.protectionproject.org/wp-content/uploads/2010/09/Zambia_Anti-Trafficking-Act_2008.pdf accessed on 26 September 2014.

¹⁹⁴ News24 ‘The New Department of Justice & Correctional Services’ 28 May 2014 at 1 available at <http://www.news24.com/MyNews24/The-new-Department-of-Justice-Correctional-Services-20140528> accessed on 22 November 2014.

¹⁹⁵ Section 41(1) of the Trafficking Act.

¹⁹⁶ *Ibid* section 41(1) read with section 41(1) (c).

¹⁹⁷ *Ibid* section 41(1) (d) read with section 41(2) (b).

¹⁹⁸ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) 11

The establishment of public awareness programmes geared towards children should not be dependent on the availability of state resources. Such a programme should be readily available in schools as part and parcel of the education curriculum. Children who are subject to compulsory school education¹⁹⁹ are entitled to basic education which is an unqualified and an “immediately realisable” right.²⁰⁰ Section 28 of the Constitution, pertaining to the rights of children, including protection from maltreatment, neglect abuse or degradation,²⁰¹ protection from exploitative labour practices,²⁰² or protection from performing work or services inappropriate for his or her age, or that places the child at risk,²⁰³ is not subject to progressive realisation, nor to available resources – it is immediately realisable.

The lack of involvement of civil society, especially designated child protection organisations, community based organisations and other relevant organisations dealing with child trafficking, in the consultative process prior to the establishment of such programmes or measures²⁰⁴ is of great concern. It is also contrary to the United Nations Trafficking Protocol²⁰⁵ and the initial proposal of the Trafficking Act²⁰⁶ The advantage of involving civil society is that it will ensure that additional expertise, experience and knowledge on child trafficking issues will inform the guidelines and public awareness programmes or other measures as an effective tool of preventing and combating child trafficking. Further, civil society is often the implementers of awareness

¹⁹⁹ Section 3(1) of the Schools Act stipulates that children from the age of seven to the age of fifteen years or grade 9, whichever comes first, are obliged to attend school.

²⁰⁰ Section 29 (a) of the Constitution.; *Governing Body of the Juma Masjid Primary School v Essay NO and Others* 2011 (8) BCLR 761 (CC) 37.

²⁰¹ Ibid section 28(1) (d).

²⁰² Ibid sub-paragraph (e).

²⁰³ Ibid sub-paragraph (f).

²⁰⁴ The Trafficking Act places responsibility on the Department of Justice and Constitutional Development and Correctional Services to consult with Heads of various government departments within the South African police Services, NPA, Government Communication and Information System, South African Revenue Service, Health, Home Affairs, International Relations and Cooperation, Labour, Social Development, State Security Agency and Women, Children and People with Disabilities, section 41(1) of the Trafficking Act.

²⁰⁵ Article 9(3) of UN Trafficking Protocol read with articles 9(1) and (2) which requires that [government] collaborates with the relevant stakeholders namely “non-governmental organizations, other relevant organizations and other elements of civil society” available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf accessed on 18 March 2014.

²⁰⁶ Clause 37(1) of the Combating of Trafficking in Persons Bill [B...2006] made provision for the Minister of Justice and Constitutional Development to consult with state agencies and “where appropriate,” to consult with relevant non-governmental organisations, South African Law Reform Commission ‘Discussion Paper 111 Project 131 Trafficking in Persons’ (2006) available at <http://www.justice.gov.za/salrc/dpapers/dp111.pdf> accessed on 1 April 2014.

and education drives, including advocacy on special issues, and therefore they have knowledge of what works and does not work in practice.

3.6 CONCLUSION

Between the lack of public knowledge of exactly what constitutes trafficking and the lack of protection to those who report it, the mandatory reporting section may have serious and substantial challenges to overcome in its quest to protect children and those who assist them. In order for mandatory reporting to be effective, a lesser standard for lay persons based on suspicion should be considered. Mandatory reporting can only be successful if the safety of potential reporters and witnesses is guaranteed. The trafficking legislation must consider incorporating provisions similar to the FICA exempting the reporter from possible criminal prosecution and protecting the disclosure of the identity of the reporter. Possessing knowledge on trafficking is crucial to mandatory reporting. The only way of engendering such knowledge is through awareness and education. It is thus imperative that the State, in its drafting of the guidelines and awareness programmes, consult with the relevant non-governmental stakeholders to inform such guidelines and programmes. Further, the inclusion of trafficking in persons in persons as part of the educational curriculum should be considered. This would ensure that the children who are also “vulnerable or at risk of becoming victims of trafficking”²⁰⁷ are informed and educated in the initiative to prevent and combat trafficking.

Chapter 4 will assess whether or not the best interests of the child in terms of the Constitution and the Children’s Act are addressed in the section 18 process related to mandatory reporting.

²⁰⁷ Section 41(1) (d) (i) of the Trafficking Act.

CHAPTER 4

BEST INTERESTS OF THE CHILD

4.1 INTRODUCTION

Mandatory reporting must and should be perceived in the context of protecting and ensuring the safety of a child victim of human trafficking, which is in the child's best interests. In order for such reporting to be meaningful and effective, the provision of police powers to safeguard the best interests of the child is comprehensible.²⁰⁸ But, section 18(4) of the Trafficking Act has the potential to undermine the best interests of the child in two scenarios. Firstly, the rapid identification of a child victim of trafficking²⁰⁹ could be hampered by provisions in the South African Police Services Act²¹⁰. Secondly, the wide police powers given to the police, in upholding the best interests of the child, could possibly be open to constitutional attack and would need to be circumscribed. On the reverse side, the police need to be clear on the purpose of the entry into the premises.

The United Nations Convention on the Rights of the Child²¹¹ of which South is a State Party²¹², acknowledges that a child "by reason of his [or her] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."²¹³ Article 3(1) of the Convention of the Rights of the Child requires that in all actions concerning children, the best interest of the child must be a primary consideration. Amongst the

²⁰⁸ Section 18(4) of the Trafficking Act gives the police the discretion to enter premises without a warrant if there is a belief "on reasonable grounds" that a child's safety is at risk or that the child may be moved from those premises.

²⁰⁹ Office of the High Commissioner for Human Rights 'Recommended Principles and Guidelines on Human Rights and Human Trafficking E /2002/68 Add.1 paragraph 1 available at <http://www.ochr.org/Documents/Publications/Trafficking.pdf> accessed on 19 June 2014.

²¹⁰ Section 13(2) of the Police Services Act 68 of 1995 as amended by the South African Police Services Amendment Act 10 of 2012.

²¹¹ Convention on the Rights of the Child (1989) available on http://www.unicef.org/albania/CRC_report.pdf accessed on 22 April 2014

²¹² Department of International Relations and Cooperation Republic of South Africa "International Agreements and/or Conferences Signed by South Africa in Relation to the Youth, Children and People with Disabilities, Particularly with Regard to the United Nations and the African Union" (2005) available at http://www.dfa.gov.za/docs/2005pq/pq2_455.htm accessed on 10 August 2014.

²¹³ Note 211 above.

actions envisaged by this Convention are those of “administrative authorities or legislative bodies.”²¹⁴

According to the United Nations Committee on the Rights of the Children’s General Comment No.14 of 2013²¹⁵, every action, namely “all implementation measures, administrative and judicial proceedings”, of State Parties’ public institutions which directly or indirectly affect children must apply the best interests of the child.²¹⁶ Furthermore, the best interests of the child have to be shown as a primary consideration in legislation concerning children.²¹⁷ Therefore, both legislation impacting on children and laws concerning children have to incorporate the best interests of the child.²¹⁸

A similar provision is contained in the African Charter on the Rights and Welfare of the Child.²¹⁹ But, the said provision applies horizontally and vertically in that it requires “any person or authority to apply the best interests of the child principle in “all actions concerning the child.”²²⁰

The Office of the High Commissioner for Human Rights in its Recommended Principles and Guidelines on Human Rights and Trafficking goes further and requires that there be a procedure for rapid identification of a child victim of trafficking.²²¹

The Constitution²²² and the Children’s Act²²³ encapsulate the “best interests of the child” principle in their provisions which require that they be paramount in “every matter concerning

²¹⁴ Convention on the Rights of the Child (1989) available on http://www.unicef.org/albania/CRC_report.pdf accessed on 22 April 2014; UN Committee on the Rights of Children ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3,para.1) paragraph 25, 8 available on http://www2.org/English/bodies/crc/docs/CRC_C_GC_14_ENG.pdf accessed on 6 March 2015.

²¹⁵ United Nations Committee on the Rights of Children ‘General comment No. 14 of 2013 , note 214 above.

²¹⁶ Ibid, paragraph 14(a), 5.

²¹⁷ Ibid, paragraph 14 (b).

²¹⁸ Ibid, paragraph 31, 9.

²¹⁹ Article 4(1) of the African Charter on the Rights and Welfare of the Child (1990) which stipulates as follows: “[i]n all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration”, available at http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf accessed on 11 July 2014.

²²⁰ African Charter on the Rights and Welfare of the Child (1990) available at http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf accessed on 11 July 2014.

²²¹ Office of the High Commissioner for Human Rights ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (2002) 2 available at <http://www.ochr.org/Documents/Publications/Trafficking.pdf> accessed on 19 June 2014.

²²² Section 28(2) of the Constitution.

²²³ Sections 7 and 9 of the Children’s Act.

the child.”²²⁴ According to the Constitutional Court, the provisions in section 28(2) of the Constitution were “inspired” by international and regional instruments. South Africa is obliged to give effect to these instruments by taking legislative and other measures.²²⁵

This chapter will assess whether or not the best interests of the child in terms of the Constitution and the Children’s Act are addressed in the section 18(4) process of the Trafficking Act related to mandatory reporting. This implies that the best interests of the child standard needs to be ascertained. This chapter will also consider the implications of such a standard for mandatory reporting and the process responding to mandatory reporting in section 18(4) of the Trafficking Act. In particular, the connotations of possible human rights violations²²⁶ through warrantless searches by the police and lack of immediate identification of a child victim of trafficking will be considered.

4.2 CONSTITUTION

The Constitution enjoins the best interests of the child to be considered “in every matter concerning the child.”²²⁷ The Constitutional Court’s interpretation of the said standard can be summarised as follows. It is a self-standing right, independent of the specified rights in section 28(1) of the Constitution.²²⁸ Its’ purpose is to protect the interests of children²²⁹ and in every matter concerning the child, the child’s best interests are paramount.²³⁰ This as a guiding principle applies to “all laws, public action and private actions”²³¹ in all matters affecting

²²⁴ Note 212 above.

²²⁵ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009(4) SA 222 (CC) 76; article 3(2) of the United Nations Convention on the Rights of the Child (note 208 above); article 16 of the African Charter on the Rights and Welfare of the Child (note 209 above).

²²⁶ The rights referred to are the right to privacy and right of the child to be protected from ill-treatment and exploitative labour practices.

²²⁷ Section 28(2) of the Constitution.

²²⁸ *S v M* 2008 (3) SA 232 (CC) 22 relying on *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) 17; *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) 65.

²²⁹ *Teddy Bear Clinic* (note 218 above) 67.

²³⁰ *S v M* (note 218 above) 22; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009(4) SA 222 (CC) 72.

²³¹ *S v M* (note 218 above) 25. The court interpreted the word “paramount” and adopted a literal interpretation consistent with African Charter on the Rights and Welfare of the Child Article 4(1) of the African Charter of the Rights and Welfare of the Child provides that “[i]n all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration”, African Charter on the Rights and Welfare of the Child (note 209 above).

children²³² and in each case dealing with a particular child. It is also a standard against which to test provisions or conduct which affect children in general.²³³

Hence, general and individual decisions affecting a child must be assessed and guided by the best interests of the child principle, which are further elaborated in the Children's Act and will be discussed further. Secondly, the legislative provision or conduct must be consistent with the best interests of the child, otherwise it can be declared unconstitutional and invalid to extent of its inconsistency.²³⁴

The best interests of the child are not absolute.²³⁵ They are capable of being limited in terms of section 36 of the Constitution and their ambit might be limited by their relationship with other rights.²³⁶ According to the court in *De Reuck v Director of Public Prosecutions and Another*,²³⁷ section 28 (2) of the Constitution is not a superior right to other rights but "interrelated and interdependent" with them.²³⁸

The obligation created by the Constitution is that "[people] making decisions concerning a child have to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and the protection of children."²³⁹ Thus, the legal and judicial processes are required to be "child sensitive. This means that "statutes must be interpreted ... in a manner which favours protecting and advancing the interests of children."²⁴⁰

The court in *Director of Public Prosecutions, Transvaal*²⁴¹ confined the processes which are supposed to be "child sensitive" to the judicial process, namely the interpretation of statutes and the application of the principle by the courts. It is silent on the application of the standard in

²³² *Teddy Bear Clinic* (note 218 above) 35.

²³³ *Ibid* 69.

²³⁴ Section 2 of the Constitution.

²³⁵ *S v M* (note 218) 26; *Director of Public Prosecutions, Transvaal* (note 215 above) 72.

²³⁶ Section 36(1) of the Constitution states that the rights in the Bill of Rights may only be limited in terms of the law of general application and the limitation must be reasonable and justifiable. Various factors also have to be taken into account, section 36(1) (a)-(e) of the Constitution; *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 406 (CC) 55; *Director of Public Prosecutions, Transvaal* (note 215 above) 72.

²³⁷ *De Reuck* (note 226 above) 19.

²³⁸ *Ibid* 55.

²³⁹ *Director of Public Prosecutions, Transvaal* (note 215 above) 73.

²⁴⁰ *Ibid* 74.

²⁴¹ *Ibid*.

other legal processes prior to the judicial process.²⁴² In terms of the United Nations Economic and Social Council's Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, the justice process includes the *detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures.*²⁴³

Flowing from this premise is that the mandatory reporting framework is obliged to take into account the "best interests of the child" principle. The Constitution instructs the State to "respect, protect and promote and fulfill the rights in the Bill of Rights."²⁴⁴ The Bill of Rights applies to all law and binds the legislature, and amongst others, all organs of state."²⁴⁵ The South African Police Services is a state organ and one of its objects is "to protect and secure the inhabitants of the Republic".²⁴⁶ The Bill of Rights also "binds a natural person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."²⁴⁷

It is apparent that both the State and individuals are required to adhere to the best interests of the child principle. This applies to persons who are required to report child trafficking cases to the police and the decisions and actions made by the police. Besides, enacted legislation is required to embrace the principle of the best interests of the child especially where it also applies to children.

4.3 CHILDREN'S ACT 38 OF 2005

The Children's Act 38 of 2005 supplements²⁴⁸ and gives effect to the children's rights contained in the Bill of Rights.²⁴⁹ It directs that the best interests of the child standard²⁵⁰ guide the

²⁴² The legal processes referred to are the detecting of the offence and the identification of a victim of child trafficking and the reporting of such a child victim to the police.

²⁴³ UN ECOSOC Resolution 2005/20 of 22 July 2005 paragraph 9(c), 'Guidelines on Justice in Matters involving child Victims and Witnesses of Crime' available at http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf accessed on 1 October 2014.

²⁴⁴ Section 7(2) of the Constitution.

²⁴⁵ Ibid section 8(1).

²⁴⁶ Ibid section 205(3).

²⁴⁷ Ibid section 8(2).

²⁴⁸ Section 8 of the Children's Act.

²⁴⁹ Ibid section 2(b).

²⁵⁰ Ibid sections 6 read with section 7.

enforcement of all legislation applying to children²⁵¹ and “all proceedings, *actions and decisions by any organ of state* in any matter concerning a child or children in general”.²⁵² It develops the principle by the assertion that it applies “[i]n all matters concerning the care, *protection* and well-being of a child”.²⁵³ This is in consonance with the international instruments²⁵⁴, the Constitution²⁵⁵ and the South African Law Reform Commission’s vision on the legislation dealing with children.²⁵⁶

Regarding actions and decisions pertaining to a child, the Children’s Act, amongst others, provides that the standard of the best interests of the child²⁵⁷ set out in [the Children’s Act] must be respected, protected and promoted.²⁵⁸ By the same token, delay in any action or decision which must be taken, “must be avoided as far as possible.”²⁵⁹ The child, depending on “his or her age, maturity and stage of development” and the person having parental responsibilities and rights in respect of the child has to be informed of the “any action or decision taken in a matter concerning the child which significantly affects the child.”²⁶⁰

When considering the best interests of the child, some factors have to be taken into consideration “where relevant”.²⁶¹ In the case of trafficking the most relevant factor that would need to be taken into consideration by the police, to whom a report has been made, is the necessity “to protect the child from any physical or psychological harm” which may be either caused by “subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior.”²⁶² In *S v M*, the court held that the best interests of the child principle, is a flexible standard and each case will determine which factors secure the best interests of a particular child. It further stated that “[t]o

²⁵¹ Ibid section 6(1) (a).

²⁵² Ibid section 6(1) (b).

²⁵³ Ibid section 9 .

²⁵⁴ It is in line with articles 3(1) of the United Convention of the Rights of the Child (1989) and 4(1) of the African Charter on the Rights and Welfare of the Child (1990).

²⁵⁵ Section 28(2) of the Constitution.

²⁵⁶ It had proposed that children’s legislation should set minimum standards to which all laws affecting children must conform. See, South African Law Reform Commission Project 110 Review of the Child Care Act Report (December 2002) 19 available at http://www.justice.gov.za/salrc/reports/r-pr_110_01_2002dec.pdf accessed on 1 October 2014.

²⁵⁷ The “best interests of the child standard” is set out in section 7 of the Children’s Act.

²⁵⁸ Ibid section 6(2) (a).

²⁵⁹ Ibid section 6(4) (b).

²⁶⁰ Ibid section 6(5).

²⁶¹ Ibid section 7.

²⁶² Ibid sections 7(1) and 7(1) (l).

apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would be in fact be contrary to the best interests of the child concerned.”²⁶³

4.4 ANALYSIS OF SECTION 18(1) AND RELATED PROVISIONS

The Constitutional and Children’s Act provisions and South African jurisprudence dictate that the child trafficking provisions in the Trafficking Act should be guided by the best interest of the child principle.²⁶⁴ Whilst, the Trafficking Act’s is silent on or fails to make reference to the principle of the best interests of the child in the Children’s Act, it does not mean that it does not apply.

Two important procedures that require analysis to determine whether the best interests of the child is facilitated by the Trafficking Act’s procedures, are firstly, the speed at which the South African Police Services will react to the section 18(1) report. Secondly, the powers of the police in terms of section 18(4) of the Trafficking Act namely the type of premises that the police may enter in order to protect and assist an identified of child trafficking and the warrantless entry of premises.

As the Trafficking Act requires mandatory reporting, responsible reporting is imperative to safeguarding the safety and security as well as the best interests of the child. The Trafficking Act ensures this happens by requiring a person making a report to a police official to substantiate his or her knowledge or suspicion by providing reasons to the police official.²⁶⁵ Likewise, the report has to be made in good faith.²⁶⁶

The protection and promotion of the best interests of the child is also dependent on the response of law enforcement by acting on the report made in terms of section 18(1) (a) of the Trafficking Act. This requires two processes, the taking of an informed decision and the acting upon such decision.

²⁶³ *S v M* (note 218 above) 24.

²⁶⁴ In this instance the relevant provision is section 18 of the Trafficking Act.

²⁶⁵ Section 18(3) (a) of the Trafficking Act.

²⁶⁶ *Ibid*.

The Trafficking Act gives a police official discretionary powers in terms of the steps that he or she may take after receiving a report from a mandatory reporter, in this case a lay person.²⁶⁷ Yet section 13(2) of the Police Act requires a police official who "becomes aware" of the commission of a "prescribed offence" to report that to his or her superior "as soon as possible".²⁶⁸ This suggests that the speed at which the South African Police Services will respond to the section 18(1) report will be determined by the decision of the "Commanding Officer". This is dependent on his or her knowledge on child trafficking.

The lack of uniform formal training in the investigation of child trafficking cases has been identified as a growing concern.²⁶⁹ According to the South African Police Service, attempts are being made to address this aspect. A "learning programme" has been developed for "frontline personnel at community service centres and ports of entry".²⁷⁰ But, the finalization of such a programme is awaiting approval.²⁷¹ A further constraint has been the lack of policy guidelines and national instructions on child trafficking for investigators²⁷², which also has a bearing on the frontline police officials at police stations. The South African Police Services' perception is that this challenge has been progressively addressed through the anti-Trafficking strategy and the "process flow charts which serve as a "draft...guideline for trafficking in persons."²⁷³ What remains to be seen is whether such guidelines will be sufficient and effective in assisting in the rapid identification of a child victim of trafficking.

The Trafficking Act obliges the Director-General of the Department of Justice and Constitutional Development to issue directives to the relevant organs of state, including the South African Police Services, on the manner of dealing with reported cases of trafficking. They will provide guidance to the implementation of safety measures in cases where harm may ensue as a result of

²⁶⁷ Sections 18(4) (a) read with section 18(1)(a) of the Trafficking Act.

²⁶⁸ A person can be made aware of an occurrence of an event either through exposure to such an event or reports made to him or her.

²⁶⁹ van Zyl & Horne (note 11 above) 16.

²⁷⁰ Department of Police 'Annual Report for 2013/14 Financial Year - Vote 25' 132 available at http://www.saps.gov.za/about/stratframework/annual_report/2013_2014/ar2014_02_partb.pdf accessed on 15 October 2014.

²⁷¹ Ibid.

²⁷² van Zyl & Horne (note 11 above) 17.

²⁷³ South African Police Service 'Annual Report 2012/2013' 95 available at http://govza.gcis.gov.za/sites/www.gov.za/files/SAPS_Annual_Report_2012-2013_FullDoc_a.pdf accessed on 15 October 2014.

the reporting.²⁷⁴ These directives are crucial in ensuring uniformity in the manner child victims of trafficking are protected. But, they are currently pending.

It cannot be gainsaid that mandatory reporting advances the best interests of the child. Likewise, the legislative provision of entering the premises to protect and assist a child at risk not only upholds the best interests of the child²⁷⁵ but also protects the child's human rights.²⁷⁶

The Trafficking Act authorises a police official to enter "any premises" if he or she "on reasonable grounds" is of the belief that a child is at risk or that the child may be moved from those premises. The main concern with section 18(4) (a) is the wide powers given to the police which need to be circumscribed and should not be open to constitutional challenge. A restriction of entry powers is particularly needed because a challenge to a removal of a child following a potentially unlawful entry could conceivably result in the child being returned to the very premises he or she was removed from in the first place.

Unlike the Children's Act²⁷⁷, the Trafficking Act only makes provision for a warrantless entry into any premises in order to enter premises for the removal of a child who is at risk. The Constitutional Court's view is that if there is time to obtain a warrant, the police official must take steps to get one.²⁷⁸ Although *Gaertner and Others v Minister of Finance and Others*²⁷⁹ related to search warrants, the Court insisted on legislation making provision for warrants where searches concerned people's homes. It held that warrantless searches should apply in exceptional circumstances and similar provisions as in section 22 of the Criminal Procedure Act should apply.²⁸⁰ An inference that can be drawn is that legislation should make provision for both warrantless entries and entries authorised by court orders. This should also be considered in the Trafficking Act.

²⁷⁴ Section 44(1) (a)(i) and (ii) of Trafficking Act. All police officials are required to comply with such directives, which are required to be published on the Department of Justice's website, which must be submitted to Parliament 30 days before they are issued, section 44(1)(a) read with section 44(1)(b) and (c) of the Trafficking Act.

²⁷⁵ *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC) 75, 116.

²⁷⁶ Section 28(1) (d) and (e) of the Constitution.

²⁷⁷ The Children's Act makes provision for the removal of a child to temporary safe care by a court order, section 151. Section 152 makes provision for a warrantless removal of a child to temporary safe care.

²⁷⁸ *C and Others* (note 265 above) 68

²⁷⁹ *Gaertner and Others v Minister of Finance and Others* 2014(1) SA 442 (CC) 73.

²⁸⁰ *Ibid.*

The basis of entering and removing a child from the premises in the Trafficking Act is on the belief that the child's safety is at risk or that the child may be removed from the premises and that the child's safety and well-being has to be secured.²⁸¹ The test in section 152 of the Children's Act is that the belief must be based on four requirements which are "the child is in need of care and needs immediate emergency protection; that the delay in obtaining a court order will jeopardise the child's safety and well-being; and that the removal of the child from his "home" environment" is the best way to secure that child's safety and well-being; and safety and well-being of the child must be a first priority in the decision to remove the child."²⁸² These are sufficient safeguards to ensure the safety of the child and should be included in the national directives²⁸³ or the regulations of the Trafficking Act.

The phrase "any premises" is undefined in the Trafficking Act. The definition is vital in that it gives clarity to law enforcement powers as to the ambit of their powers with respect to the premises they may enter, even forcefully when required. Even though the Constitutional Court has interpreted this phrase in cases involving warrantless searches, the interpretation of the phrase still remains relevant to the Trafficking Act. In *Gaertner* the court held that the word was broad in that it did not, *inter alia*, indicate the type of premises in the impugned provision of the Customs and Excise Act 91 of 1964.²⁸⁴ In order to remedy this defect, consideration should be taken of other legislation which define a similar concept as that contained in the Trafficking Act. The Criminal Procedure Act²⁸⁵ and the South African Human Rights Commission Act²⁸⁶ both define "premises" in their legislation. Even though both Acts concern warrantless entry and searches, they also articulate the purpose of the entry.

²⁸¹ Section 18(4) (b) of the Trafficking Act read with section 110(40(a) of the Children's Amendment Act.

²⁸² *C and Others* (note 265 above) 63.

²⁸³ The safeguards are relevant to section 44(1) (a) (i) and (iii) of the Trafficking Act.

²⁸⁴ *Gaertner* (note 269 above) 40.

²⁸⁵ Section 1, Criminal Procedure Act 51 of 1977 as amended by the Criminal procedure Second Amendment Act 85 of 1996.

²⁸⁶ Section 1 of the South African Human Rights Commission Act 40 of 2013. For example, "premises" is defined in the Criminal Procedure Act as including "land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft."

4.5 CONCLUSION

The State has a duty to protect the safety and security of members of the public,²⁸⁷ including a child victim of trafficking. The duty imposed on the State and all the organs of State is not to perform any act that infringes these rights.²⁸⁸ They are obliged “to provide appropriate protection to everyone through laws and structures designed to afford such protection.”²⁸⁹ In relation to children, the law also has a special duty especially towards child victims of trafficking.²⁹⁰ It is of the essence that the law processes are also adequate.²⁹¹ One of the rights of a child victim of trafficking is the “best interests of the child”²⁹² embedded in the Constitution. The State is obliged to protect this right. The primary duty of the State is to secure these rights by establishing effective legislative provisions which must be supported by law enforcement. The obligation on law enforcement is to take “operational preventative measures to protect [a child] whose life is at risk from the criminal acts of another individual.”²⁹³ Police are “one of the primary agencies of the state responsible for the protection of the public” especially against the intrusion of fundamental human rights by perpetrators of violent crime against women and children.²⁹⁴

Because of the often clandestine nature of trafficking in children (whether for sexual exploitation or child labour), swift intervention is most likely needed in most instances to protect both the child concerned and to apprehend the perpetrators. The entry onto the premises is in the best interests of the child, but the Trafficking Act must not leave any loopholes for possible constitutional attack. It must also inform the police of the scope of their powers. Following the decisions of the Constitutional Court in *C and Others* as well as in *Gaertner*,²⁹⁵ the Trafficking Act should incorporate a provision for warrants of entry, in addition to warrantless entries, especially where the opportunity exists for a police official to obtain one. The regulations and

²⁸⁷ *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22 at paragraph 57; section 7(2) of the Constitution, 1996.

²⁸⁸ *Ibid* 45; Touzenis (note 73 above) 105.

²⁸⁹ *Carmichele* (note 277 above) 44.

²⁹⁰ Section 28(2) of the Constitution; section 7 read with section 6 of the Children’s Act.

²⁹¹ Touzenis (note 73 above) 104.

²⁹² “It is trite that section 28(2) is both a *self-standing right* and a guiding principle in all matters affecting children”; *Teddy Bear Clinic* (note 218 above) 65.

²⁹³ *Carmichele* (note 277 above) 45; section 205(3) of the Constitution; sections (a) and (b) in preamble of the South African Police Service Act 68 of 1995.

²⁹⁴ *Ibid* 62.

²⁹⁵ *C and Others* (note 265 above) ; *Gaertner* (note 269 above).

national directive must include the requirements set out in section 152 of the Children's Act. And, lastly "any premises" must be defined to clarify the ambit of police powers to enter premises.

The final chapter will contain the conclusions and recommendations on the mandatory reporting provisions of the Trafficking Act.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

Child trafficking for the purposes of labour exploitation is a serious violation of children's human rights.²⁹⁶ The Trafficking Act must be applauded for its endeavour in preventing and combating human trafficking and for making special provision for victims of child trafficking through its provision of mandatory reporting and warrantless entries of premises.

The study has shown that there are certain flaws in the Trafficking Act. Firstly, the definition of child trafficking and various phrases in the Trafficking Act which are relevant for the identification purposes of a child victim of trafficking are unclear and need to be defined. Secondly, the absence of clear guidelines and public awareness programmes on human trafficking in general will defeat the purpose of mandatory reporting in the detection, identification, protection and assistance of a child victim of trafficking. Thirdly, there are constraints to the rapid identification of a child victim of trafficking in terms of the guidelines and training of the police. And lastly, the safeguards which have been put in place in the best interests of the child could be open to constitutional challenge or attack.

5.2 RECOMMENDATIONS

In order for the Trafficking Act to pass constitutional muster and for its provisions to be accordant with the Constitution and the United Nations Trafficking Protocol, it is recommended that consideration is made to the amendment of the Trafficking Act in the form of regulations.

5.2.1 DEFINITIONS

It is proposed that the regulations pursuant to the Trafficking Act incorporate the definition of child trafficking as is prescribed in article 3(a) of the said Protocol excluding the means. The words such as "recruitment" and "harbour" must be defined. With respect to "exploitation", the

²⁹⁶ It violates rights contained in sections 10, 11, 12(1) (c), (d) and (e), 13, 28(1) (b), (d), (e) and (f) of the Constitution.

definition of child labour should also make reference to the Basic Conditions of Employment Act 75 of 1997²⁹⁷ and its regulations which prohibit and regulate child labour.²⁹⁸

The definition of a victim of trafficking should be re-phrased in the following manner

“victim of trafficking” means

- (a) a child *who has been subject to trafficking in persons and* has been found to be a victim of trafficking after an assessment in terms of section 18(6).

5.2.2 GUIDELINES ON THE IDENTIFICATION OF VICTIMS OF TRAFFICKING

The proposed guiding principles contained in the Combating of Trafficking in Persons Bill²⁹⁹ should be used to inform the identification of child trafficking victims generally, including those child victims who are exploited for labour purposes. These guiding principles would play a dual role in empowering lay persons to report child trafficking incidents and for the police to act expeditiously in ensuring the protection and safety of the child. These guidelines should be incorporated in both the regulations and national directives issued by the Office of the Director-General of the Department of Justice and Constitutional Development and Correctional Services, after consulting the relevant state departments, including the South African Police Services and Social Development as required by the Trafficking Act³⁰⁰ and non-governmental stakeholders. The same directives can then inform the national instructions of the National Commissioner of the South African Police Service, especially to inform “the manner in which trafficking cases are investigated.”³⁰¹

²⁹⁷ Reference should be made to sections 1, 43, 44 of the Basic Conditions of Employment Act 75 of 1997.

²⁹⁸ GN 1068 of GG 23732, 15 August 2002; 25-26; GN 7 of GG 32862, 15 January 2010; 20-21; GN 1438 of GG 19453, 13 November 1998; 9; GN 936 of GG 23610, 25 July 2002; 11.

²⁹⁹ See, section 4 of the Combating of Trafficking in Persons Bill [B...2006] in South African Law Reform Commissions ‘Discussion Paper 111 Project 131 Trafficking in Persons’ (2006) available at <http://www.justice.gov.za/salrc/dpapers/dp111.pdf> accessed on 1 April 2014. The same provision is contained in the Zambia anti-trafficking legislation. See, section 22 of the Zambian Anti-Human Trafficking Act 11 of 2008 available at http://www.protectionproject.org/wp-content/uploads/2010/09/Zambia_Anti-Trafficking-Act_2008.pdf accessed on 26 September 2014.

³⁰⁰ Section 44(1) (a) of the Trafficking Act.

³⁰¹ Ibid section 44(1) (a), 44(2) and 44(2) (b).

5.2.3 PUBLIC AWARENESS PROGRAMMES OR OTHER MEASURES

Input from the relevant stakeholders including non-governmental organisations and other advocacy groups within civil society should be obtained in the designing of public awareness programmes in order to be able to infiltrate into all segments of society. Such participation will ensure that effective preventative measures contribute to the curbing of trafficking in persons. The public awareness programmes should also consider including human trafficking as part of the school curriculum from grade R to Grade 9.

5.2.4 MANDATORY REPORTERS

In order to facilitate adequate mandatory reporting and to ensure the protection of witnesses and potential witnesses, the Trafficking Act should amend section 18(3) and incorporate similar provisions contained in section 38(1) and (3) of the FICA. This in effect would mean that the lay persons who report in good faith to the police about a child victim of trafficking would also be immune from criminal action. The identity of the person making such a report will be restricted from disclosure in subsequent criminal proceedings unless that person testifies.

5.2.5 ENTRY INTO PREMISES

Section 18(4) of the Trafficking Act should be amended to ensure that warrantless provisions are in accordance with “the values that underlie an open and democratic society based on human dignity, equality and the advancement of human rights and freedoms.”³⁰²

As has been indicated in chapter 4, the grounds of exercising a warrantless entry into premises based either on the belief that a child is at risk or that he or she may be removed from the said premises. It is recommended that the national instructions of the National Commissioner of the South African Police Services be guided by the section 152 requirements in the Children’s Act which bases the belief on four requirements. The first being, the child requires emergency protection; secondly, the delay in obtaining a court order will jeopardise the child’s safety; thirdly, the removal of the child from his or her “home” environment is the best way to secure

³⁰² Section 1(a) of the Constitution.

the child's safety and well-being; and, lastly, that the well-being of the child must be a first priority in the decision to remove the child.

The definition of "premises" should be included to inform the police officials as to the type of establishment they are able to enter in the exercise of their powers to safeguard the child. A similar provision contained in section 1 of the Criminal Procedure Act could be adopted.³⁰³ In addition, the purposes for which warrantless entries are based must be included in section 18(4) of the Trafficking Act.

Further provision should be made for the entry of a police official into premises into premises authorised in terms of a warrant³⁰⁴ to cater for situations where there is an opportunity to obtain such a warrant.

5.3 CONCLUSION

In light of the fact that the Trafficking Act is not yet operational, the above-mentioned provisions could be incorporated in regulations and guidelines to ensure that the best interests of the child are enhanced. The amendments would also ensure that some of the concepts which have been undefined are clarified, including child trafficking for labour exploitation purposes. The rapid identification of a child victim of trafficking, which is also the role of lay persons, is crucial in ensuring the safety and security of the child.

As has been pointed out, mandatory reporting forms an important component of preventing and combating human trafficking. Through education and awareness, members of the public, especially lay persons, will increase their knowledge base as to what constitutes trafficking. In order to effectively exercise their constitutional and statutory obligations³⁰⁵, it is the duty of the state to ensure that such and education and awareness take place.³⁰⁶ But, sole reliance should not be placed on the state taking "reasonable steps within available resources"³⁰⁷ The State must also be proactive and creative in establishing public-private partnership with relevant stakeholders to

³⁰³ Section 1 of the Criminal Procedure Act 51 of 1977 as amended defines "premises" as including "land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft".

³⁰⁴ Ibid section 22.

³⁰⁵ Section 8(2) of the Constitution read with section 18(1)(a) of the Trafficking Act.

³⁰⁶ Section 41(1) (d) of the Trafficking Act.

³⁰⁷ Ibid section 41(2) (b).

raise awareness. It should also be the role of each citizen to contribute to the objective of the Trafficking Act to prevent and combat trafficking in persons through awareness in places of worship, religious or faith-based organisations, the work place, schools, and radio and television stations.

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