



Anti-child Trafficking Legislation in Asia: A Six-country Review

Bangladesh, Nepal, Pakistan, Sri Lanka, Thailand & Indonesia



Regional Project on Combating Child Trafficking
for Labour and Sexual Exploitation (TICSA-II)

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A Six-country Review**
(Bangladesh, Nepal, Pakistan, Sri Lanka, Thailand & Indonesia)

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International Labour Office

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Foreword

ILO Convention No.182 on the Worst Forms of Child Labour classifies human trafficking amongst “forms of slavery or practices similar to slavery” which should be eliminated as a matter of urgency, irrespective of the country’s level of development. In spite of many efforts from different actors and numerous perspectives, both internal and cross-border trafficking of children for labour and sexual exploitation remains a significant problem in Asia.

This can be partly attributed to the lack of deterring punishments for the perpetrators. In many countries, the legal instruments and their enforcement mechanisms are inadequate to bring the traffickers to justice and to punish them. New laws have been introduced in some countries, but they are not sufficiently stringent and comprehensive to effectively deal with the problem. For instance, in many countries, the anti-trafficking laws cover only trafficking for sexual exploitation but do not cover trafficking for labour exploitation. Or where there are existing laws, they often are not enforced because of a lack of understanding and inappropriate attitudes toward the whole problem.

Human trafficking is generally considered as a crime by international standards. Anyone involved in the process is guilty of a crime that results in the unacceptable exploitation of people. Crimes require punishment. Countries that do not currently have comprehensive laws need them or need reforms of existing legislation to abide by international agreements they have made. Governments also need to be proactive to reform their enforcement mechanisms to target both internal and cross-border trafficking. Without enforcement and actual punishments, the abuse and exploitation of children and women will continue.

ILO-IPEC has been promoting national dialogue towards necessary legislative reforms and encourage bilateral collaboration between countries in addressing the problem of cross- border trafficking. To facilitate this process, ILO-IPEC commissioned a review paper that this document represents to highlight inadequacies of the legal frameworks in six countries of South and South-East Asia and the discrepancies between the national laws and international instruments. This paper was based on comprehensive review of the relevant laws in those countries and subsequent national consultations. ILO-IPEC then organized a regional consultation with government officials and representatives of employers’ and workers’ organizations to review the relevant contexts in their respective countries.

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Definitions & Abbreviations

AP	TICSA Action Programme on Child Trafficking
ASEAN	Association of Southeast Asian Nations
CRC	UN Convention on the Rights of the Child 1989
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Exploitation
FIA	Federal Investigative Agency of Pakistan
FIR	First Information Report (used by Pakistani Law Enforcement)
GOSL	Government of Sri Lanka
IGA	Income Generating Activities
ILO	International Labour Organization
INGOs	International Non-governmental Organizations
IOM	International Organisation for Migration
IPEC	International Programme on the Elimination of Child Labour
LHRLA	Lawyers for Human Rights and Legal Aid
LTTE	Liberation Tigers of Tamil Eelam
MOU	Memorandum of Understanding
MWCSW	Ministry of Women Children and Social Welfare of Nepal
NCCWD	National Commission for Child Welfare and Development of Pakistan
NCPA	National Child Protection Authority of Sri Lanka
NCTF	National Children's Task Force
NGOs	Non-governmental Organizations
NPA	National Plan of Action
SAARC	South Asian Association for Regional Cooperation
SHO	Station House Officer (a rank within the Pakistani police)
STIs	Sexually Transmitted Infections
TBP	Time Bound Programme
TICSA	Project on Combating Trafficking in Children for Labour and Sexual Exploitation
UNICEF	United Nations Children's Fund

Introduction

Introduction

Trafficking as an international legal concept is a twentieth century phenomenon, linked to the greater movement of people across borders. The basic elements of trafficking require that there be movement of a person from one location to another for the purpose of slavery, slavery like practices or exploitation. Earlier conventions were not concerned with the means by which trafficking was conducted, but recent legislation focuses on the means when it comes to women and requires such elements as force, coercion or abuse of vulnerability. With regard to children, there is international consensus that the means and consent are irrelevant. The mere taking of children across borders for the purpose of slavery, slavery like practices or exploitation is an international crime. In the case of children, the prosecution has merely to show the transport of the child and the exploitative nature of his predicament. This approach implies zero tolerance of child trafficking and an international consensus that no justification or excuse will be acceptable for the trafficking of children.

International human rights law requires that States exercise due diligence to prevent, prosecute and punish those who commit violence against women, and by implication children. The Declaration on the Elimination of Violence Against Women, Recommendation 19 of the Committee of the Convention on the Elimination of Discrimination Against Women and countless other documents point to the very specific nature of this duty. Though crimes against women and children are committed by private actors, the State is still responsible under international law to prevent, investigate, prosecute and punish crimes of violence against women and children. A failure to do so is a breach of the State's international obligations and the State may be found guilty of gross human rights violations.

The duty of due diligence requires States to adopt certain measures to ensure that the human rights of women and children are protected. First, the State must adopt effective legislation to ensure that trafficking is recognized as a crime, that it is defined effectively and that proper punishment is enshrined in the legislation to act as a deterrent to future traffickers. Most countries of the region have adopted or are in the process of adopting effective legislation. However, though a working definition has been adopted at the international level, the definitions in the region vary and sometimes lack conceptual clarity pointing to the conceptual confusion that often accompanies discussion on trafficking. In many countries trafficking is seen as an umbrella concept for sexual exploitation or abuse of children, not recognizing that trafficking is linked to the movement of people from one location to another. As a result trafficking is seen as some broad moral standard often linked to a general punishment for any unhealthy sexual practice.

This confusion is evident in the laws of some of the countries of the region. In other national frameworks, there is no distinction between women and children, ignoring decades of international debate on this issue. In some countries exploitation is either defined too narrowly to recognize the changing nature of the end products of trafficking, or too broadly to encompass every kind of abuse. In these cases, the practicality of the definition is called into question. There is also a lack of uniformity with regard to what constitutes a child for the purpose of trafficking and not all countries adopt the 18-year threshold recommended by the Convention on the Rights of the Child. The lack of conceptual clarity remains a major problem and points to the need for greater awareness and training at the regional level and timely intervention at the drafting stage by national and international experts who have a familiarity with the subject.

The duty of due diligence also requires that the State adopt measures to ensure that the criminal justice system is made more effective in prosecuting and punishing crimes against women and children. Though this is not in the purview of this study, the conviction rates for trafficking crimes remain low in the region. However, the recent counter trafficking campaign of the United States of America, which focuses on prosecution and conviction, has resulted in a marked improvement in conviction rates in many countries of the region. Despite this, the situation still requires improvement. This calls for greater training, awareness raising and the sharing of information and best practices at the international, regional and national levels.

The duty of due diligence as outlined in international documents also requires that the State provide support services for victims. The countries of the region appear to come from legal traditions that do not include welfare components in their legislation. The recent trend in social legislation at the international level is to include in the legislation social measures for legal, psychological and other kinds of assistance to the victim along with other measures to ensure the empowerment and protection of victims.

Most countries of the region do not include this at the legislative level but do include such programmes at the executive, programmatic level. However, because of the lack of resources and personnel, these programmes are often not very effective. Because trafficking has enormous economic, social and psychological consequences for the victim, it is essential that support services for the victim-survivor not be ignored. Prosecution gets rid of the perpetrator but the real focus should be on the victim-survivor and the need to empower him or her to deal with the future. Unless social legislation accompanies prosecution strategies, very little progress can be made in

realizing the rights of individual victims.

Regional child trafficking has caused other considerations to surface. These considerations must also be taken into account when evaluating a programme of legislative review. As mentioned earlier, women and children are treated differently at the international level when it comes to the issues of trafficking. However, some of the concerns that animated the discussion on women also remain true for children.

Like women, children in this region are caught in the crux between survival and exploitation. Often to survive they accept exploitative work to ensure that they can live another day. Unless we can immediately provide them with an alternative to this exploitation we must be careful about the way we deal with its consequences. Hazardous, dangerous and abusive conditions cannot be tolerated but there are situations that may need regulation rather than prohibition. In the case of children this is especially true of child labour. Many of the children that the authors spoke with in Nepal, part of a child workers' union, stated that they needed to be employed to survive but that they would appreciate arrangements being made for their education.

In this context a blanket prohibition may have disempowered these street children who often left their families because of abuse or poverty. It is therefore essential that exploitation be understood in context and that hazardous and dangerous activities be prohibited, but that other forms of employment be regulated and managed by the agencies of Governments, allowing children the ability to survive.

In Asia, and particularly in South Asia, blanket "protection" strategies exist for child victims of trafficking.

There is no consultation of children and they are often taken into safe custody. This safe custody is often to homes that provide substandard living conditions and is often akin to detention. In some cases they live with juvenile delinquents, are not provided with education and live in sanitary wastelands. Some NGOs have been working on minimum standards for care homes in the hope that Governments will implement them, thereby ensuring more humane treatment for children.

For these measures to succeed there has to be a reorientation of the whole administrative and policy framework. Children have to be recognized as individuals with rights and they must be consulted about their treatment as much as possible. Perhaps most importantly, large detention homes must be replaced by community oriented services that treat children of trafficking, who do not want to be returned home as rights bearing individuals. This reorientation is absolutely essential if the region is to move forward.

Most of the legal frameworks deal with trafficking as a criminal issue and there is little discussion of compensation for victims from the profits of the perpetrator. In recent times under international humanitarian law and human rights law there is an increasing belief that compensation and restitution should be given to the victim-survivors. Given the social and economic needs of the child survivor, this compensation may help create funds and other incentives to ensure that the child is provided for and given the basic amenities for a productive childhood. Many of the national consultations raised compensation as an issue. It is important to continue to raise this matter at the national level to ensure that appropriate amendments are made to the legislation.

Recently prosecution centred strategies have become the norm with regard to combating trafficking. Prosecution is important and serves as an important deterrent to

trafficking. However, there is no doubt that the final solution to trafficking must rest with ensuring the protection of children at the local level, to ensure a caring and nurturing environment in the home and to prevent poverty from becoming an excuse for the movement of people. Furthermore, it is important to address the root causes of trafficking for both women and children.

In many countries children have to become “adults” at a very early age because there is no one to take care of them. They have to survive and they often migrate to make ends meet. In this process of migration they are abused and trafficked by unscrupulous people. Measures must be taken to keep women and children at home so that they do not become illegal migrants, undocumented workers or street children. This includes fighting discrimination in society, violence in the family and poverty in the home country. Unless effective measures are taken to address these issues, the problem of trafficking will continue as prosecuting traffickers only deals with the tip of the iceberg.

International legal frameworks

1 International legal frameworks

1.1 Early trafficking conventions: evolution of the concept of trafficking in children

A few decades ago, the term trafficking had a very different connotation and was understood to be an issue that affected only women. As reflected by the term “White Slavery”, trafficking was closely linked to the kidnapping and abduction of women and their sale for sexual slavery. The image conjured was one of women in shackles being herded together against their will to provide sexual services for men in countries other than their own. Hence, the initial international treaties focused on “forced recruitment and transport of women”.

In 1895 the first international conference on trafficking of women was held. This was followed in 1904 by a meeting of 16 States where the first international agreement against “White Slavery”, the International Agreement for the Suppression of the White Slave Trade was formulated. The aim of the agreement was to combat “the procuring of women or girls for immoral purposes abroad”.¹ Six years later a new convention was drafted which broadened the scope by including “traffic in women within national boundaries” within its purview.² This Convention bound States to punish “any person who, to gratify the passions

of others, has by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed a woman of full age for immoral purposes”.

Both the 1904 and 1910 Conventions deal only with recruitment, the process through which the women are brought to the brothels or forced into prostitution, and do not address conditions in brothels. The closing statement of the Convention states the “case of retention against her will, of a woman or girl in a house of prostitution could not, in spite of its gravity, be included in the present Convention, because it is exclusively a question of national legislation”.³

The 1949 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the first trafficking convention to use gender-neutral language, also makes no mention of children. In Article 1 of the Convention parties are required to punish any person who, to gratify the passions of another:

1. procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; and
2. exploits prostitution of another person, even with the consent of that person.

1 Marian Wijers & Lin Lap Chew, “Trafficking in Women: Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution” Foundation Against Trafficking, The Netherlands, 1997, p.20.

2 Ibid. p 21

3 Ibid.

This Convention, which has been criticized for its narrow definition of trafficking and lack of an enforcement mechanism, continues the tradition of the “white slave” model by conflating trafficking with the exploitation of prostitution. Punishment is also extended to keeping, managing or financing a brothel [Article 2 (1)] and knowingly letting or renting a building or other place for the purpose of prostitution of others [Article 2 (2)]. The Convention was ratified by only 66 States, but this definition of trafficking was accepted by most of the countries in South Asia.

The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 is the first convention to specifically deal with the exploitation of children related to slavery and similar practices. In Article 1 (d) the Convention defines slavery as “any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or his labour”. This is the first Convention to identify the various practices that constitute slavery such as debt bondage and forced marriage.⁴

1.2 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime 2000

During the last few months of 2000, the United Nations Convention against Transnational Organized Crime,

added the Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children. The protocol was a consensus document that took form after many hours of deliberation. The Protocol defines trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

Though the definition is cumbersome, it is a major development in the law of trafficking, marking a significant departure from the earlier definition of trafficking in the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. First, the Protocol distinguishes between women and children and a child is defined as “any person under 18 years of age”.⁵ For women there must be transfer or transportation across borders but it must involve some form of coercion or abuse of vulnerability.

With regard to children, fraud, deception coercion or abuse is not necessary. Mere recruitment, transportation or transfer is enough⁶ to incur criminal liability. Accordingly Article 3 (c) states “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if it does not involve any of the means, such as fraud and coercion set forth in the previous paragraphs”.

4 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956, art.1.

5 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organised Crime 2000, article 3 (d) <available online at <http://www.uncjin.org>>

6 Ibid, Article (3) (c) .

In addition, the Protocol links trafficking to a wide variety of purposes and the definition is not limited to exploitation for prostitution. It includes among other end purposes, such practices as forced labour, removal of organs or other slavery-like practices. The language of the protocol itself is a compromise, reflecting the various positions of diverse groups and interests.

Further, the Protocol also pays heed to the special requirements of child survivors of trafficking and asks each State party to “take into account, in applying the provisions of this article (on assistance to and protection of victims of trafficking), the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care”.⁷

Moreover, States are bound to take measures to prevent trafficking. The Protocol requires parties to “protect...especially women and children, from re-victimization”⁸ and take measures through “bilateral and multilateral co-operation to alleviate factors that make ...children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.⁹ Hence, the Protocol pays attention to the underlying causes of trafficking of children and demands appropriate action from State parties. It is also required to sensitize and train immigration and other relevant officials on the needs of children. The Protocol explicitly states “the training should also take into account the need to consider...child sensitive issues...”.¹⁰ In comparison with previous trafficking conventions the 2000 Protocol is a major advancement towards the protection of the rights of trafficked children.

1.3 The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000

This Protocol provides definitions for the sale of children, child prostitution and child pornography¹¹ and requires each State party to ensure certain minimum legislative protections against certain acts. These acts include:

1. Offering, delivering or accepting, by whatever means, a child for the purpose of:
 - a. Sexual exploitation of the child;
 - b. Transfer of organs of the child for profit;
 - c. Engagement of the child in forced labour;
2. Improperly inducing consent, as an intermediary for the adoption of a child in violation of applicable international legal instruments on adoption;
3. Offering, obtaining, procuring or providing a child for child prostitution as defined in article 2;
4. Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

The Protocol also requires the needs of child victims to be met and focuses on ensuring they are not re-victimized by the justice system. To this end the Protocol requires States to adopt certain measures such as court procedures “to recognise their special needs, including their special needs as witnesses”,¹² “providing appropriate support services to child victims throughout the legal process”,¹³ “protecting

7 Ibid. art. 6 (4).

8 Ibid. art. 9 (1) (b).

9 Ibid, art. 9 (4).

10 Ibid. art. 10 (2).

11 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, A/Res/54/263, art.2.

12 Ibid. art. 8 (1) (a)

13 Ibid art. 8(1) (d)

...the privacy and identity of the child”¹⁴ and “providing ...for the safety of child victims, as well as that of their families and witnesses on their behalf from intimidation and retaliation”.¹⁵

1.4 The Convention on the Rights of the Child 1989 (CRC)

This Convention, which contains the core rights and standards relating to the rights of children, defines a child as “every human being below the age of 18 years”.¹⁶ Many provisions of the Convention deal with the issue of illegal transfer of children and many other acts that are performed during the course of trafficking or are the end products of trafficking. For example, article 11 requests States to take action to combat the illicit transfer and non-return of children abroad. Another provision of the Convention deals specifically with trafficking whereby States are bound to take measures to “prevent the abduction of, the sale of or the traffic in children for any purpose or in any form”.¹⁷

In relation to the end products of trafficking, such as labour or sexual exploitation or trafficking for adoption, several articles in the Convention explicitly deal with these issues. Article 32 focuses on the right of the child to be protected from “economic exploitation” and other work that might be “hazardous or interfere with the child’s education, or be harmful to the child’s health or physical, mental, spiritual, moral or social development”. This article also requires States to set a minimum age for employment, appropriate regulation and penalties for the

contravention of this provision.

While article 36 of the CRC requires States to “protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare”, article 34 obliges State parties to protect children from all forms of sexual exploitation and sexual abuse and take national and bilateral measures to prevent:

- a. The inducement or coercion of a child to engage in any unlawful sexual activity;
- b. The exploitative use of children in prostitution or other unlawful sexual practices;
- c. The exploitative use of children in pornographic performances and materials.

The Convention also deals with adoption and puts in place various safeguards to ensure adoption is conducted through legal means with the consent of the persons concerned and guarantees the best interests of the child.¹⁸ It also specifically mentions that adoption should not “result in improper financial gain for those involved in it”.¹⁹

The needs of victims of any violation of these rights are also addressed in the Convention. Article 20 is particularly relevant to child trafficking victims as it states “a child temporarily or permanently deprived of his or her family environment...shall be entitled to special protection and assistance...” The physical and psychological recovery of all child victims is the responsibility of the State, which has to ensure the “social integration of a child victim...in an environment which fosters the health, self-respect and dignity of the child”.²⁰

14 Ibid. art. 8 (1) (e)

15 Ibid. art. 8 (1) (f)

16 Convention on the Rights of the Child, GA Res 44/25, 1989, art.1.

17 Ibid. art. 35.

18 Ibid. art. 21.

19 Ibid. art. 21 (d).

20 Ibid. art. 39.

1.5 ILO Convention No. 182: Worst Forms of Child Labour Convention, 1999

Since the end products of trafficking are also the concern of this paper, Convention No. 182 is of particular importance, since it deals with various forms of labour exploitation to which trafficked children are subjected. As in the CRC and the ILO Convention on Minimum Age for Admission to Employment, in this Convention a child is also defined as a person under the age of 18.²¹ Worst forms of labour include slavery, sale and trafficking of children, debt bondage, forced or compulsory labour and use of children for prostitution and pornography.²² The Convention also requires States to “establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention”.²³ According to the Convention, States have to design and implement programmes to eliminate as a priority worst forms of child labour²⁴ and in doing so have to pay attention to the “special situation of girls”.²⁵

1.6 ILO Convention No. 138: Minimum Age Convention, 1973

This Convention requires State parties to abolish child labour and “raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons”.²⁶ Further, the Convention decrees that the minimum age should not be less than the age of

completion of compulsory schooling, which in any case should not be less than 15 years of age.²⁷ States “whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years”.²⁸

The protection of children from work that may jeopardize their health, safety or morals is also one of the concerns of the Convention, which clearly sets 18 as the admission age for any work “which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons”.²⁹ An exception to this exists in the Convention which allows such work for 16 year olds after extensive national consultation between local authorities, employers organizations and other relevant institutions on the proviso “the health, safety or morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity”.³⁰

1.7 Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the United Nations High Commissioner for Human Rights 2002

The United Nations High Commissioner for Human Rights has issued guidelines for States on the issue of

21 ILO Convention 182 - Worst Forms of Child Labour Convention, 1999, art. 2.

22 Ibid. art. 3.

23 Ibid. art. 5.

24 Ibid. art. 6.

25 Ibid. art. 7 (e).

26 ILO Convention No.138 on Minimum Age for Admission to Employment 1973, art. 1.

27 Ibid. art. 2 (3).

28 Ibid. art. 2 (4).

29 Ibid. art. 3 (1).

30 Ibid. art. 3 (3).

trafficking, which reiterate the “primacy of human rights” and the imperative to approach the issue from a human rights perspective. The principles deal with various issues related to trafficking such as prevention, identification of trafficked persons, protection and assistance to trafficked persons, research, analysis, evaluation and dissemination, the role of law enforcement and remedies.

The guidelines also contain a comprehensive section on special measures for the protection and support of child victims of trafficking which aim to ensure States provide adequate protection and assistance to child victims of trafficking.

Regional conventions

2 Regional conventions

2.1 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002

The Convention was drafted in 2002 and requires seven ratifications before it comes into force. So far Bangladesh, India, Sri Lanka, Maldives and Bhutan have ratified the Convention while Nepal has submitted its ratification to the SAARC Secretariat. In a region where there is increasing migration and trafficking it is important that a regional convention follows progressive international norms and developments and functions as a guide to member States in formulating laws and creating frameworks to deal with trafficking.

The SAARC Convention 2002, as its title clearly states, only deals with Trafficking in Women and Children for the purpose of Prostitution. Based upon article II of the Convention, which states the purpose is to enable member States to effectively deal with the various aspects of prevention, interdiction and suppression of trafficking in women and children, one might assume the Convention has a wide scope.

Despite this, the Convention defines trafficking narrowly. Furthermore, the Convention follows the early approach to trafficking, which linked trafficking only to prostitution and sexual exploitation. Hence, the Convention does not follow the 2000 Protocol, which understands trafficking to be an offence which involves coercion, fraud or abuse of vulnerability for the purpose of exploitation that takes many forms, such as forced labour and organ harvesting. Instead it focuses only on moving, buying or selling of women and children for prostitution.

Many SAARC member States also prefer to follow this approach and define end products of trafficking narrowly. Trafficking therefore is defined as “moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking”.³¹ States are required to punish those who keep, maintain, manage or finance a place used for trafficking and those who knowingly rent a building for such purpose.³²

The SAARC Convention defines traffickers as “persons, agencies or institutions engaged in any form of trafficking”, once again a narrow definition, especially when compared to the definition in the Guidelines issued by United

³¹ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, art. 1 (3).

³² Ibid. art. 3 (2).

Nations High Commissioner on Human Rights. The United Nations Guidelines definition of traffickers refers to recruiters, transporters, those who exercise control over trafficked persons, those who transfer and/or maintain trafficked persons in exploitative situations, those involved in related crimes and those who profit either directly or indirectly from trafficking, its component acts and related offences. This basically covers every person involved in any and every step of the trafficking process.

Where provision of services and assistance to trafficked persons is concerned the Preamble to the Convention emphasises the need to “strengthen cooperation in providing assistance, rehabilitation and repatriation” but only to “victims of trafficking for prostitution,”³³ thereby ignoring the scores of persons who are trafficked for purposes other than prostitution and are in need of the assistance of the State. Article V of the Convention requires member States to provide legal assistance and counselling to trafficked persons and ensure the confidentiality of the victim.

While this is a positive contribution, it cannot be denied that this is the bare minimum and falls short of the more detailed provisions relating to legal assistance stipulated in the 2000 Protocol and the High Commissioner's Guidelines. In light of this fact most, if not all, members of SAARC do not recognize the rights of the trafficked person to legal assistance. Therefore it is imperative for the Convention to provide specific guidelines. For example, no mention is made of a closed court to hear such cases or enabling trafficked persons to provide evidence in camera. The inclusion of specific guidelines in a regional convention might have a positive influence on members of SAARC, many of whom are wary of international conventions and standards.

Where training of officials is concerned the Convention does not explicitly require that relevant officials be given training to deal sensitively with victims of trafficking. Rather, it focuses on the law and order aspect and declares that officials should be given training to “effectively conduct inquiries, investigations and prosecution of offences”³⁴ and law enforcement agencies and judiciary be sensitized “in respect of the offences under the Convention and other related factors that encourage trafficking in women and children.”³⁵ This is a grave oversight by the Convention which sets a poor standard for members of SAARC. Most laws related to trafficking in the region do not make provision for sensitization of officials to help them deal with the crime of trafficking more effectively.

Repatriation, a contentious issue with regard to trafficked persons, is also inadequately dealt with by the Convention. The Convention merely states the parties should work out modalities for repatriation of the victims to the country of origin. There is no provision which makes it mandatory for the State to ensure the safety of the trafficked person or where possible engage in voluntary repatriation. Further, States are required to make provision for the care and maintenance of the victims only pending the completion of arrangements for such repatriation. Considering that many SAARC members repatriate the victims without any regard for their safety or well-being post-repatriation the SAARC Convention should follow the 2000 Protocol and the High Commissioner's Guidelines which stress that repatriation should preferably be voluntary and that it should consider the safety of the victim.

The SAARC Convention does not contain special provisions for dealing with trafficked children. The requirements set out in the 2000 Protocol and the High Commissioner of Human Right's Recommended

³³ Ibid.

³⁴ Ibid. art. 8 (1).

³⁵ Ibid. art. 8 (2).

Principles and Guidelines on Human Rights and Human Trafficking, stress the importance of providing for the special needs of victims of trafficking, especially children. Since in many instances children are re-trafficked when they are returned to their homes or after being released from welfare homes, the SAARC Convention should require States to take measures to ensure the safety of rescued children.

2.2 SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia 2002

The Convention follows the CRC and defines a child as a person below 18 years of age, unless under national law majority is attained earlier.³⁶ Furthermore, it requests that State parties “uphold the best interests of the child as a principle of paramount importance”. Trafficking and its end products are also dealt with in the Convention, which asks States to “ensure that their national laws protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence”.³⁷ The Convention also deals with worst forms of child labour and exploitation in a separate provision where it calls upon States to adopt a multi-pronged strategy to deal with the issue. Bangladesh, India, Sri Lanka, Maldives and Bhutan have ratified the Convention.

³⁶ SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia 2002, art. 1.

³⁷ *Ibid.* art. 3 (a).

Analysis of national legal frameworks

3 Analysis of national legal frameworks

3.1 Nepal

3.1.1 Introduction

The Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report of the Department of State of the United States of America has identified Nepal as a “Tier 2” country. “Tier 2” countries are those “whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards”.³⁸ It has identified Nepal as primarily a source country. In addition to trafficking outside Nepal, trafficking within Nepal for both labour and sexual exploitation is prevalent.³⁹

According to the estimates of ECPAT International (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Exploitation) there are 200,000 Nepali prostitutes in India, of which 20 per cent are under 16 years of age.⁴⁰ Another study claims that 50 per cent of 100,000 girls forced into prostitution in Mumbai are Nepali.⁴¹ The statistics on trafficking in girls should not detract from the fact that trafficking in boys is also on

the increase.⁴² Cultural practices also contribute to the trafficking of children. For example, in the Deuki system girls are given to temples where they are subject to sexual exploitation.⁴³

Child labour is another contentious issue as many children enter the labour market voluntarily in order to earn income to provide for their families. Because of this, they see the labour market as a means of empowerment. In the case of domestic child workers some families send their children to work in order to ensure they will at least be properly fed and provided with the basic necessities which they may lack at home. For these reasons, merely prohibiting child labour without providing better alternatives will rob the children of their survival strategies. Legislating therefore becomes a complicated task which requires sensitivity and awareness of reality on the ground.

3.1.2 Ratification of international conventions

Nepal has ratified the Convention on the Rights of the Child, ILO Convention No. 182 on Worst Forms

38 Department of State of the United States of America, “The Victims of Trafficking and Violence Act of 2000: Trafficking in Persons Report 2004”, (Washington D.C., U.S. State Department, 2004) Available online at <http://www.state.gov>.

39 Ibid.

40 Sapana Pradhan-Malla, “Report on Laws and Legal Procedures Concerning the Commercial Sexual Exploitation of Children, ECPAT” (Bangkok, ECPAT, 2004) p.4.

41 Central Department of Population Services, quoted in Supra n.39 at p.4.

42 Supra n.40, p.5

43 Ibid.

of Child Labour and ILO Convention No. 138 on Minimum Age. It has signed the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography. It has also submitted its ratification of the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution to the SAARC Secretariat.

3.1.3 The Constitution of Nepal

Article 20 of the chapter entitled, Fundamental Rights of the Constitution of the Kingdom of Nepal 1990 provides protection against trafficking and the end products of trafficking, such as forced labour. The section states:

“traffic in human beings, slavery, serfdom or forced labour in any form is prohibited. Any contravention of this provision shall be punished by law; provided that nothing herein shall be a bar to providing by law for compulsory service for public purpose. No minor shall be employed in any factory or mine or be engaged in any other hazardous work”.⁴⁴

Although this provision provides protection against forced labour its failure to explicitly mention sexual exploitation deprives adequate protection to victims of sexual exploitation.

Article 11 (3) of the Constitution provides for the formulation of special laws for the benefit of children while chapter four on Directive Principles and Policies of the State under Article 26 apart from Sub-article 8 in Sub-article 9 states “The State shall pursue such policies in matters of education, health and social security of orphans, helpless women, the aged, the disabled and incapacitated persons as will ensure their protection and

welfare”.⁴⁵ Article 26 (8) makes it mandatory for the State to ensure the rights of child are not violated.

3.1.4 Nepal Treaty Act 1991

Unlike many other countries in South Asia Nepal has a monist system whereby international treaties ratified by Nepal automatically become domestic law and take precedence over domestic law. In accordance with Article 6 of the Nepal Treaty Act apart from the matters provided by the Constitution of the Kingdom of Nepal under Article 126, Sub-article 2 like (a) peace and friendship (b) defense and strategic alliance (c) boundaries of the Kingdom of Nepal and (d) natural resources and the distribution of their use, other treaties come into immediate effect following the approval of His Majesty's Government and need not be ratified by the House of Representatives. In the event of a conflict between domestic law and international law, international law will prevail.

Theoretically this is a mechanism that can be used to incorporate international human rights standards and principles into domestic law. In practice however, national legal systems and specifically the judiciary often fail to apply international standards in domestic cases. However, recent decisions by the judiciary have upheld international standards and the judiciary has clearly ruled that the Conventions to which Nepal is a party take precedence over national laws.⁴⁶

3.1.5 Trafficking

Traffic in Persons (Crime and Punishment) Bill 2000

The Bill, which was drafted with the intention of replacing the Human Trafficking Control Act of 1986, does not

⁴⁴ Constitution of Nepal, 1992, Part 3 Art (20)

⁴⁵ Ibid.

⁴⁶ Reena Bajracharya case quoted in *Supra* n.40, p.9.

contain an explicit definition of trafficking. It should be noted it is still in bill form and not yet law. Prostitution is defined as “an act of purchasing, selling, letting or interchanging the body of a person with an objective of doing or causing to be done sexual activities for any kind of consideration”.⁴⁷ A child is deemed to be a person under the age of 16.

Section 4 prohibits the commission of the offence of trafficking in persons and sets out a series of offences, of which if any “one” is committed would be deemed to be trafficking in persons. These acts are:

- a. purchasing or selling of human beings for any purposes;
- b. holding as bonded labourers, making slaves or keeping as serfs;
- c. doing prostitution or causing othersto do prostitution;
- d. abducting a child or insane person from guardianship without the consent of his guardian
- e. except in the situations which are deemed to be an offenceunder the Country Code, abusing a child sexually by any manner or causing to be done the same;
- f. going whoring;
- g. making a woman conceive forcefully against her will or making her impotent to conceive by giving any kind of consideration orby persuading or enticing or by coercion or by putting pressure or influence on her;
- h. taking human body as hostage or kidnapping; and
- i. conducting traffic of human beings, creating obstruction or forcing or suppressing, attempting, enticing or being accomplice in order to commit or cause to be committed the offences mentioned from clauses (a) to (i) above;

There appears to be a lack of understanding regarding the offence of trafficking. Trafficking entails activities such as buying and transporting humans when these acts include coercion, fraud or abuse of vulnerability for the purpose of exploitation, such as bonded labour and sexual exploitation. This Bill however even deems offences such as soliciting prostitutes, sexually abusing a child and prostitution as trafficking, whereas each of these offences should be dealt with by other laws, which criminalize bonded labour, prostitution and the like.

In addition to section 4, which identifies certain offences as trafficking, section 9 sets out additional offences which the Bill states would be assumed to be trafficking: forcing a woman to remain in a brothel; abusing a child in a brothel or “in any house or in a room or in a public or lonely place”; taking a person outside Nepal by “persuading, enticing, intoxicating or by putting in fear or panic or by raising temptation” and taking or even finding a child or insane person and not informing the parents or the police within a reasonable period of time”.⁴⁸ Once again, these offences do not constitute trafficking and would only increase the conceptual confusion concerning the elements of the offence of trafficking.

Further proof of the conceptual confusion concerning what constitutes trafficking of persons is the fact that the production, sale and other activities related to pornography “with the objective of conducting or causing to conduct sexual abuse” are also prohibited by the Bill.⁴⁹

The Bill provides some form of protection for the victim by prohibiting the publication of matters “which may adversely affect the character of the victim”. However, the protection provided by this section is inadequate since it does not provide for safeguarding the identity of the

47 Traffic in Persons (Crime and Punishment) Bill 2000, Section 3 (a).

48 Ibid, Section 9.

49 Ibid. Section 7.

victim,⁵⁰ which is important in trafficking cases where the physical safety of victims is often in jeopardy. Provisions are made for court proceedings to take place in a closed session but only if the victim demands a closed session.⁵¹ Since many trafficked persons, especially children, do not have legal counsel they would not have knowledge of this provision nor understand its meaning. Hence, more attention should be paid to the rights of the victim and provisions should be made to ensure trafficked persons are provided with information regarding the case. They should also be given the choice to give evidence via camera.

Section 19 provides compensation for the victim and entitles victims to “receive half the amount of the sum of money to be obtained for fine from the offender pursuant to this Act as compensation”. Further, provision is made for legal aid to the victim but once again only “if demanded” by the victim. This is a step toward compliance with the Protocol of 2000 and the High Commissioner's Principles and Guidelines on Human Rights and Human Trafficking which state, trafficked persons should be provided with legal aid and other assistance.

The Bill also establishes rehabilitation centres “as per necessary for the social rehabilitation of a helpless woman” who has “suffered from traffic in person or returned or rescued from a brothel”.⁵² By stating that rehabilitation centers are to be constructed “for helpless women” the Bill implies that only women are trafficked and ignores the scores of children and even men who are trafficked every day. Moreover, the Bill seems to concentrate only on one end product of trafficking - prostitution - as it provides rehabilitation only for women rescued from brothels.

The law shifts the burden of proof to the accused, who has to prove “he has not committed the offence to be assumed under section 9”.⁵³ It is unclear why the burden of proof has been shifted to the accused only in cases of commission of offences set out in section 9.

Additional punishment is imposed for cases where public officials commit the offence.⁵⁴ Since, the abetment of traffickers by public officials has been identified as an obstacle to efforts to prevent and prosecute traffickers, the Bill has taken a positive step in acknowledging this and providing for additional penalties to act as a deterrent.

The Bill does not recognize the special needs of children hence it contains no provisions that stipulate how trafficked children are to be dealt with. This is particularly worrying, since in the case of children many might not know or have forgotten their personal details such as names of parents and home towns, therefore repatriation and family reunification might become a problem. It is therefore important to have measures to deal with instances where reunification might not be possible, including providing for the long-term care of the child.

There is no requirement in the Bill to train or conduct sensitization programmes for public officials and others who deal with trafficked persons such as border guards, law enforcement officers and lawyers. The Bill also does not provide for education or awareness raising campaigns to educate the public about trafficking.

50 Ibid. Section 8.

51 Ibid. Section 14.

52 Ibid. Section 30.

53 Ibid. Section 15.

54 Ibid. Section 25.

Box 3.1 Chamoli

The case of Chamoli⁵⁵ represents the classical trafficking scenario, the nightmare that underlies the horrible reality and calls out for immediate attention and vigorous enforcement. Chamoli fell in love with a young man when she was 16. He promised to marry her so she ran away with him to India. After they crossed the border, he took her to Poona where there was an older Nepali lady who ran a home with many young girls. She watched the old lady pay her boyfriend and then he disappeared. She was told that she had been sold into prostitution.

She refused to accept her new trade and was beaten into submission and subject to torture. Knives were held to her neck and her genitalia. She was not given any food for days. Finally, hungry and exhausted she agreed to provide sexual services.

After a few weeks she was sold again to a woman from Bombay, she was given a cubicle that was the size of a narrow bed surrounded by a curtain. She served 10 to 20 clients a night even when she was menstruating and there was no day of rest. She was not allowed to leave the brothel without the male bouncer and was given some pocket money for clothes and other expenses.

Finally with the aid of a Nepali NGO Maiti Nepal, her brothel was raided and Chamoli was rescued. She was kept in an Indian Government home for seven months before being deported. She said the home was really a jail and the conditions were sometimes worse than the brothel. She had nothing to do from morning till evening. After seven months she was flown to Nepal and reunited with her family. By this time she began to have dizzy spells, diarrhea and vomiting. The Maiti Nepal doctors diagnosed her as having HIV/AIDS. She was in an advanced condition and had only a few more months to live.

Human Trafficking Control Act 1986

The Act, which has extra-territorial jurisdiction, was passed because existing laws were inadequate to deal with trafficking. The Preamble of the Act indicates that the Act does not approach the issue from a human rights perspective but rather from a moralistic, stance since it states that it was enacted to control the offence of trafficking in order to maintain the morality of the people.

Although the Act has extra-territorial jurisdiction Nepal does not have extradition treaties to enable and ensure prosecution of perpetrators in Nepal. Even the Nepal-India extradition treaty does not include trafficking as one of the offences for which extradition is allowed.⁵⁶

⁵⁵ Based on an interview conducted by the United Nations Special Rapporteur on Violence Against Women, November 2000. The name has been changed to protect the victim.

⁵⁶ ILO, Report on the Effectiveness of Existing Laws and Institutional Mechanism to Combat Trafficking in Women and Children in Nepal, p.45

Section 4 of the Act defines trafficking as any of the following acts:

- a. Cause human trafficking for any purpose;
- b. Take any person abroad for the purpose of human trafficking;
- c. Involve any women to engage in prostitution through allurement or any temptation or deception or intimidation or coercion or through any means; and
- d. Perform any act mentioned in the above parts, (to) make arrangements for fabrication, (to) assist in causing such act or (to) encourage any person to involve in such act or attempt to perform such act.

As with other Nepalese legislation, this Act suffers from conceptual confusion as to what constitutes trafficking. Even acts such as involving a woman in prostitution through deception, are viewed as trafficking. The provision therefore makes no distinction between the process, means and end products of trafficking. Although the provision is general, and therefore is applicable to males, females, adults and children; it does make specific mention of women in (c). Children however are not referred to even though in Nepal, girl children constitute a large number of those trafficked.

The Act also shifts the burden of proof to the accused when any woman is taken to a foreign country by a person not of her family or a relative and there is a complaint she is being taken with the intention of “trafficking to engage in prostitution”.⁵⁷ Considering that in many cases families send/traffic their daughters for the purpose of sex work, the exemption of guardians and close relatives from the purview of this section contravenes the purpose of

the provision. Further, this section makes no mention of children.

Even though section 5 states that “any person knowing that the act of human trafficking has been done or is about to be done may report to any police office”, investigation cannot begin until the police present the complaint to the relevant district court and the court finds there is reasonable grounds to take action and begin inquiry and investigation. This is an unnecessarily lengthy and complicated procedure which might also reduce the chances of the police locating a child who is being trafficked. However, according to government representatives, the purpose of this provision, as per the Evidence Act, is to allow the court to approve the statement of the victim. This is to enable the inclusion of the victim's statement during the trial (since the victim's statement was approved by the court) even if the victim is unavailable.⁵⁸

The penalty for trafficking is imprisonment for 10 to 20 years.⁵⁹ The penalty for involvement in taking people abroad with the purpose of human trafficking is less - five to 10 years.⁶⁰ In the case of human trafficking the amount paid by the buyer shall be rendered worthless and the seller apart from the punishment mentioned under Sub-section 1 shall be fined in addition an equal amount.

The Act does not contain provisions which allow in-camera proceedings to prevent the victim from being re-traumatized. It is also silent on issues such as repatriation, victim protection, reintegration of victims, setting up of shelters, ensuring victims are provided with shelter, health-care, and legal aid.

⁵⁷ Human Trafficking Control Act 1986, Section 7 (1).

⁵⁸ Comments expressed by government representative at the ILO Regional Workshop on Legal Frameworks and Law Enforcement Capacity in Combating Child Trafficking for Labour & Sexual Exploitation, Nov 22-23 2005.

⁵⁹ *Supra* n.54, Section 8 (1).

⁶⁰ *Ibid.* Section 8 (2).

Chapter on Sale of Human Beings in the National Code 1963

The Chapter on Sale of Human Beings was Nepal's only law on trafficking until the enactment of the Human Trafficking Control Act. The code contains a general provision, which is applicable to the sale of persons, and does not contain a specific provision on the sale of children. Section 11 of the National Code provides that “no person shall allure any other person outside the Kingdom of Nepal with intention to trafficking or sale”. The purchasing person if caught within the Kingdom of Nepal shall receive the same sentence as that given to the trafficker.⁶¹ Those convicted of the offence will be subject to a maximum of 10 years imprisonment if the defendant is apprehended before the sale of the person, and maximum of 20 years in the event the arrest is made after the sale.

The Chapter contains provisions that aim to protect the safety of the child. For example, section 11 (2) of the Chapter states “no person shall separate or entice any minor below the age of 16 from the legal guardian without consent”. Since in most cases the parents or guardians are complicit in the trafficking, often handing or selling their children to the trafficker, this provision is not applicable in many cases. Further, the maximum penalties of 3 years imprisonment and 500 rupees fine are too lenient to act as deterrents.

The end products of trafficking such as forced labour are also dealt with in the Chapter, which in section 11 (3) criminalizes acts such as forced labour, slavery or serfdom and gives discretion to the court to order the offender to pay compensation to the victim. Section 5 provides that in case of human trafficking, the amount paid by the buyer

shall be rendered worthless and the seller, in addition to the punishment mentioned under Sub-section 1, shall be fined an equal amount.

3.1.6 Laws that protect children from the end products of trafficking

Child prostitution

There are no specific laws that deal with child prostitution. Hence, persons have to be charged under other laws such as the Chapter on Rape of the Country Code 1963, which criminalizes sexual intercourse with a girl below the age of 16 (statutory rape). The penalty for statutory rape is five to 15 years imprisonment and half of the offender's property will be given to the victim as compensation.⁶² In this context the punishment is 10 to 15 years imprisonment if the girl child is below 10 years of age and seven to 10 years imprisonment provided the girl child is above 10 years of age but below 16 years of age.

However there are reports that tell of a different reality. According to these reports, girl children engaged in prostitution are charged under the Public (Offence and Punishment) Act for offences such as public nuisance and vagrancy, treating them as perpetrators of crimes instead of victims.⁶³ Once again legal loopholes enable perpetrators to escape from the law while child victims are re-victimized by a legal system that treats them as criminals.

Paedophilia

The Chapter on Rape also contains sections that criminalize paedophilia. Article no. 9 A of the Chapter defines paedophilia as unnatural sexual intercourse

61 Chapter on Sale of Human Beings in the National Code 1963, Section 11 (1).

62 Chapter on Rape of the Country Code of Nepal 1963, No 10.

63 Supra n.40, p. 19.

with a minor. The term “unnatural sexual intercourse” requires value judgments to be made about what is natural as opposed to unnatural and will most likely lead to confusion and misinterpretation. The definition should therefore have criminalized sexual intercourse with a child instead of using moralistic terms such as “unnatural”, which create ambiguity and lead to implementation difficulties.

The penalty for paedophilia includes compensation for the minor but here too lack of understanding of paedophilia and the harm it causes children is evident, as the law states compensation is dependent on the harm caused to the child. Since paedophilia itself is considered to be harmful to the child, to invite the court to determine compensation based on the level of harm caused might create the notion that only paedophilia of a certain “level”, in other words abuse the court determines serious enough to require compensation, is harmful.

Act to Provide for Safeguarding the Interests of Children 1992 (Children's Act)

The Children's Act was formulated to protect the rights of children. For this reason, it includes provisions which deal with the general needs of the child, such as health and education and also sections that protect the child from the end products of trafficking. The Act defines a child as a person below the age of 16 and also defines an abandoned child. The Act safeguards the child's right to a name, determination of the birth date of the child,⁶⁴ right to maintenance and upbringing, education and health care.⁶⁵ It clearly prohibits discrimination between male and

female children,⁶⁶ and between children born to married couples and those born out of wedlock.⁶⁷

Section 7 contains a prohibition on torture or cruel treatment of children but it states “the act of scolding and minor beating to the child by his father, mother, member of the family, guardian or teacher for the interests of the child himself shall not be deemed to violate the provisions of this section”. The act therefore appears to approve corporal punishment, which in some cases can turn to abuse. A positive development in this regard is the Mandamus of the Supreme Court of Nepal which has decreed the beating of a child illegal.⁶⁸

The employment of children in begging, one of the end products of trafficking, is also proscribed by the Act,⁶⁹ with certain exceptions. These include begging “following the religious or cultural traditions” which is presumably to allow novices and child recruits of different religious orders to engage in their respective practices which may, as in the Buddhist tradition involve asking for alms.

Paradoxically, the same provision also outlaws any measures that are taken “towards making a child Sanyasi, Bhikchhu or fakir” and states that “such measure even if taken, shall not be legally valid”.⁷⁰ So it can be deduced from these provisions that only children who join religious orders of their free will are exempt from this law. However, in practice it may be difficult to determine whether a child joined out of free will or was forced or induced by the parents or guardian. Further, since all international child rights and even national child rights laws are formulated on the basis that a child does not have the ability to give

64 Act to Provide for Safeguarding the Interests of Children 1992 (Children's Act), Section 3.

65 Ibid. Section 4.

66 Ibid. Section 5.

67 Ibid. Section 6.

68 Based on the report of the Country Consultant (Nepal) to the ILO Regional Review of Legal Frameworks.

69 Supra n.64, Section 13.

70 Ibid. Section 13 (2).

informed consent in many instances, this provision which assumes a child has the ability to make an informed choice to join a religious order appears unrealistic.

This Act also targets cultural practices that allow children to be offered to temples or priests in the name of gods. Section 14 explicitly states that no one may “offer or surrender his or anybody else’s child to any God or Goddess by buying such child, offering economic gain, under any kind of coercion or undue influence”.⁷¹ The person who sells a child is also penalized along with priests or other heads of such religious enshrinements who “incite the commission” of such an act. The Act prohibits them from even performing such rites when a person brings a child to the temple for such a purpose.⁷²

The provision states that if such an act takes place then “the father, mother or any member of the family shall take custody of the child and make arrangements for upbringing, education and health care of such child on equal footing with other members of the family as if such event never took place”.⁷³ The irony is that it is frequently the family that gives the child to the temple to pay a debt or for economic gain. In such an instance is it in the best interests of the child to send her or him back to the care of the family?

Since most often families resort to such acts due to poverty, the condition in the provision to provide for the education and health care of the child after the child is “rescued” seems unlikely to be fulfilled. Further, as it is almost always girl children who are subject to such practices, the requirement in the Act to treat the child like other members of the family is unlikely to result in the

improvement of the position of the girl child. It is far more likely that if returned to the family the girl child would be sold for the purpose of sexual exploitation.

Section 16 combines prohibitions on “immoral profession” and child pornography. Although this section outlaws the use of a child in an immoral profession, immoral profession is not defined. Even where pornography is concerned the act only prohibits the taking, distribution and exhibition of a photograph of a child “for the purpose of engaging a child in immoral profession”.⁷⁴ By restricting penalties to only one purpose for which photographs are taken, the act fails to penalize the massive and expanding child pornography industry. The Act also resorts to the use of moralistic terms in subsection 3 where it prohibits such photographs that “tarnish the character of such child”. Therefore, the Act instead of setting out the elements of the crime requires the judge to make value judgments.

Although the Act clearly states no criminal charge shall be brought against the child unless a legal practitioner is engaged to defend the child,⁷⁵ it should be ascertained whether in practice girls who are arrested for prostitution under the Public (Offence and Punishment) Act are provided with legal counsel.

Since in most cities abandoned, street children are the targets of traffickers the focus of this Act on the protection of the “abandoned child” is welcome. The Act provides for such children to be placed in a child welfare home⁷⁶ and requires they be involved in “vocational training or teaching and learning on the basis of their aptitude and knowledge”.⁷⁷ However, in case the child does not comply with the rules and conditions of the welfare home the

71 Ibid. Section 14 (2).

72 Ibid. Section 13 (3).

73 Ibid. Section 14 (4).

74 Ibid. Section 16 (2).

75 Ibid. Section 19 (1).

76 Ibid. Section 36.

77 Ibid. Section 37 (1).

Act allows for punishment including the deprivation of “facilities available in the Children’s Welfare Home not exceeding three days at one time”.⁷⁸

The fact that such deprivation is not defined in the Act is cause for worry since it is possible that such children who are in a vulnerable position could be exposed to further abuse. Therefore, in order to ensure there is no abuse it is imperative proper guidelines are provided to welfare homes regarding treatment of children. It is quite likely that excessive punishment may even cause such children to run away from welfare homes and be once again exposed to the risk of trafficking.

Section 42 relating to the “Establishment and operation of Children’s Rehabilitation Home” specifies the different children who may be inmates of such a home. This includes children who are imprisoned after being convicted of a crime,⁷⁹ those addicted to drugs,⁸⁰ children who “often run away from father, mother or family”⁸¹ and those who have “company with the persons involved in immoral or inexpedient activities of such persons or depends upon their earnings”.⁸² The fact children who are addicted to drugs and in need of treatment are placed in the same home as those who are convicted of crimes will adversely affect these children who have different problems and needs, and therefore need separate care. The list also includes children whose only “crime” is to run away from home, which illustrates the eagerness to institutionalize juveniles.

The Beijing Standard Minimum Rules for the Administration of Juvenile Justice clearly state “the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period”⁸³ since “juveniles...are vulnerable to negative influences”.⁸⁴ Instead in this case it appears institutionalization is the standard, preferred solution of the State.

The lenient penalties in the Act do not reflect the seriousness of the crimes and are therefore unlikely to have a deterrent effect. For example, the penalty for engaging a child in begging is either a fine or maximum imprisonment of three months⁸⁵ while the punishment for torture and cruel or inhuman treatment⁸⁶ and keeping a child in fetters, handcuffs or solitary confinement⁸⁷ is only a fine up to 5,000 rupees or imprisonment of up to one year or both.⁸⁸

Provision is made in the Act for the establishment of Juvenile Courts and Children’s Benches in each District Court.⁸⁹

Child labour

Nepali laws relating to child labour only target the formal sector while the informal sector which employs a large number of children is not within the purview of the law.

78 Ibid. Section 39 (1) (a).

79 Ibid. Section 42 (2) (b).

80 Ibid. Section 42 (2) (c).

81 Ibid. Section 42 (2) (d).

82 Ibid. Section 42 (2) (e).

83 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. res.40/33, annex, 40 U.N. GAOR Supp. (No.53) at 207, U.N.Doc. A/40/53 (1985), Commentary Rule 19 <available online at <http://www1.umn.edu/humanrts/instree/j3unsmr.htm>>.

84 Ibid.

85 Supra n.64, Section 53 (1)

86 Ibid. Section 7.

87 Ibid. Section 15.

88 Ibid. Section 53 (3).

89 Ibid. Section 55.

1. Labour Act 1991

The Labour Act is legislation that deals with the rights, interests and safety of employees in various sectors. Although it is a general act it is useful to study it as it contains a couple of provisions relating to children. It is also valuable for purpose of comparison with the Child Labour (Prohibition & Regulation) Act 2000.

The Act defines child as a person under 14 years old⁹⁰ and a minor as a person between the ages of 14 and 18.⁹¹ An adult is defined as a person who has attained 18 years of age.⁹² Further, child labour is prohibited by the Act,⁹³ which also stipulates that minors should not be engaged in employment between the hours of 6 p.m. to 6 a.m.⁹⁴

Box 3.2 Manisha

She smiles slowly with eyes full of tears. She has bruises all over her body. “What was my mistake?” she asks with innocence.

Manisha wished to go to school wearing a tie and carrying a tiffin box. She can still remember her mother committing suicide because of the cruelty and mistreatment of her alcoholic father. This memory frightens her from time to time.

The family survived on the homemade wine sold by her mother. Her father used her mother's earnings for alcohol. After her mother's death her father did not allow Manisha to go to school.

She then came to Kathmandu and started working as a domestic labourer in one of the houses of New Road, where she cleaned plates and pots, collected household dirt, washed clothes and cleaned toilets. Here she was subjected to abuse and torture by her employers. Manisha still cringes with fear when she remembers how she was stripped naked and beaten with iron wire. Sometimes she was beaten with a hanger, at other times she was hooked to a ceiling fan with both hands tied.

One day Manisha was found by the police near the Hanumandhokha area around 8:30 p.m. with a big packet of waste. She thought it best to tell the police that she was lost instead of telling the police about her employers. The police handed her over to a local NGO for rehabilitation.

At the NGO she received a full health check up and the NGO has taken responsibility for her care and has enrolled her in a school

90 Labour Act, Section 2 (h).

91 Ibid. Section (i).

92 Ibid. Section (j).

93 Ibid. Section 5 (1).

94 Ibid. Section 5 (2).

2. Child Labour (Prohibition and Regulation) Act 2000

The preamble of the Act states the purpose is to “prohibit engagement of a child in factory, mining and similar other riskful work and to make necessary provision for health, child's safety and services and facilities while engaging them in other work”. Hence, the purpose is not to prohibit but regulate the employment of children and prevent their engagement in hazardous work.

This Act repeals section 5 (1) of the Labour Act, which prohibits child labour⁹⁵ and the section containing the definition of a child.⁹⁶ The Child Labour Act also amends the definition of a child to a person who is less than 16 years⁹⁷ of age and the definition of a minor to a person between the ages of 16 and 18.⁹⁸ The increase of the age limit of a child from 14 to 16 is welcome.

It is evident section 5 (1) of the Labour Act was repealed to enable the employment of children who fall within the definition of a child or those under 16 years of age. Therefore, although the age of the child has been increased to 16, the minimum age of employment is 14. Even where employment of children under 14 years of age are concerned section 3 states that “nobody shall engage in work a child who has not completed 14 years of age as a labourer”. Rather than containing an explicit ban on employing children under 14 years old, the language of section 3 appears to only ban employing them as “labourers”. Is it then to be assumed the Act allows employment of children under 14 years as long as they are

not engaged in hazardous work or as labourers?

While the Child Labour Act contains prohibitions on the engagement of “a child in a risky occupation or work set forth in the Schedule”⁹⁹ (attached to Act) the section relating to hazardous work in the Children's Act, which was repealed by the Child Labour Act, contained broader and better language which stated that “no child shall be engaged in work that is likely to be harmful to the child's health or to be hazardous to the child's life”.¹⁰⁰ Forced labour is prohibited by the Child Labour Act¹⁰¹ which also requires employers who are engaged in a risky occupation or work set out in the schedule to the Act (work relating to weaving and dying carpet, bidi manufacturing and the like) to give notice to the Labour Office and to give details pertaining to their establishment and the work they undertake.¹⁰²

The Act further stipulates that any establishment engaging a child has to obtain the approval of the concerned Labour Office or Officer specified by the office and the parents or guardian of the child.¹⁰³ Considering that many children work in the informal sector and in small businesses, which maybe unaware of the Act or outside the purview of labour laws, the likelihood of this provision being implemented is slim. The Act also requires employers to medically assess the fitness of the child prior to employment¹⁰⁴ and submit particulars of the child along with a photograph to the Labour Office within 15 days of employing the child.¹⁰⁵ To fulfill the requirements set out by the Act and undertake the stipulated monitoring

95 Child Labour (Prohibition & Regulation) Act, Section 28 (1) (c).

96 Ibid. Section 28 (1) (a).

97 Ibid. Section 2 (a).

98 Ibid. Section 28 (1) (b).

99 Ibid. Section 3 (2).

100 Children's Act, Section 18.

101 Supra n.92, Section 4.

102 Ibid. Section 5.

103 Ibid. Section 6.

104 Ibid. Section 7.

105 Ibid. Section 8.

duties it is imperative the State provides for an efficient infrastructure with adequate human resources. The use of information technology could also help the monitoring activities, for example the use of databases could help keep track of employers engaging child labour.

If upon inspecting an establishment the inspector finds an employer has contravened the act by engaging a child in hazardous labour, the inspector “shall as soon as possible place such child to his father, mother or guardian’s custody”. Considering it is often parents who send their children to work, returning the child to his or her family will not prevent the further engagement of the child in hazardous labour.

The penalty for employing a child under 14 “as a labourer” in contravention of section 3, is only imprisonment of up to three months or a fine up to 10,000 rupees.¹⁰⁶ In the case of forced labour the person concerned is subject to imprisonment of up to one year or a maximum fine of 50,000 rupees.¹⁰⁷ A manager who does not medically assess the fitness of the child, give particulars of the child to the Labour office or engages a child in employment in contravention of the hours and period of work stipulated in the Act, will be subject to only up to two months imprisonment or 5,000 rupees fine or both.¹⁰⁸

3. Rules to (Prohibit and Regulate) Child Labour 2004

The Rules were formulated to provide for the implementation of the Child Labour Act. They set out

leave entitlements,¹⁰⁹ the action to be taken against a child remaining absent without taking leave,¹¹⁰ gratuity and provident fund entitlements¹¹¹ and health and safety standards at work.¹¹² In general the tone of the Rules and their approach to the issue leave a lot to be desired as they treat the child workers as quasi- adults. There is no concession made to the fact the workers are children with special needs. Instead, the Rules appear to formalize and institutionalize the system that exploits the labour of children. For example, the child is entitled to only one day home leave for “every work duration of 20 days”.¹¹³

In the case of leave, a particular provision states that if “any girl child for reason of circumstances beyond her control or under anyone’s coercion is to become caused pregnant such girl shall be entitled to 90 days special leave prior to and after delivery”.¹¹⁴ Hence, she will be given leave only if her pregnancy is due to some form of coercion and the employer is given the task of determining the circumstances in which the pregnancy occurred in order to provide leave.

The Rules also contain provisions that set out the constitution of the Child Labour Prevention Committee established by the Child Labour Act. The Committee is to function as an advisory and monitoring body, which is also called upon to “recommend a child, apart from the work mentioned in Schedule I, for appropriate employment according to the family status”.¹¹⁵ It is disturbing that the Committee created for the purpose of preventing child labour would actually recommend a child for employment rather than ensuring children have access to education and

¹⁰⁶ Ibid. Section 19 (1).

¹⁰⁷ Ibid. Section 19 (2).

¹⁰⁸ Ibid. Section 19 (3).

¹⁰⁹ Rules to (Prohibit & Regulate) Child Labour 2004, Section 7,8,9, 10, 11 & 12.

¹¹⁰ Ibid. Section 15.

¹¹¹ Ibid. Sections 16, 17 & 18.

¹¹² Ibid. Sections 25 & 26.

¹¹³ Ibid. Section 9 (1).

¹¹⁴ Ibid. Section 12 (4).

¹¹⁵ Ibid. Section 31 (i).

advocate for the provision of support to vulnerable families to enable them to give children the care they need for development. Further the phrase “according to the family status” entrenches existing class and caste prejudices and inequalities.

3.1.7 Laws on registration of births

As registration of birth is not mandatory many parents fail to register the birth of their children.¹¹⁶ Many children are unaware of their age which is an obstacle in the enforcement of laws relating to sexual and labour exploitation of children and prosecution of traffickers.

3.1.8 National Plan of Action Against Trafficking in Children and their Commercial Sexual Exploitation

The National Action Plan 2001 provides a national review of the 1998 National Plan of Action in order to ensure better implementation of the Plan's objectives. First, the Review identifies four central gaps in the implementation process: lack of effective coordination, lack of effective economic interventions, lack of effective regional interventions, and lack of reliable surveys and studies. Second, the Review identifies the need to incorporate strategies that address both sexual exploitation and labour exploitation of children. Third, the Review addresses the need for better coordination at the district level to ensure better implementation of the National Plan. Finally, the Review identifies new issues to be incorporated in the National Plan: encouraging trans-border, regional and international cooperation; improving monitoring and evaluation at both regional and national levels; and integrating four cross-cutting themes into the national plan: sustainability, gender, human-rights, and child participation.

Sustainability recognizes the need for government and civil society cooperation. Gender refers to the fact the girl child is at higher risk of being trafficked, and therefore, general steps to improve gender equality within society are important for the overall effectiveness of the Plan. A gender audit is proposed as part of the biannual review in order to measure the gender equality of the National Plan. The Plan takes a human-rights based approach which emphasizes the need to advocate a child's right to education, survival and development in anti-trafficking strategies. The Review also seeks to incorporate child participation in developing the Plan and its accompanying programmes.

The objectives of the Plan are divided into the following key areas: (1) policy, research and development; (2) legislation and enforcement; (3) awareness creation, advocacy, networking and social mobilization; (4) health and education; (5) income and employment; (6) rescue and reintegration; (7) cross-border, regional and international issues; and (8) monitoring and evaluation. Each of these sections is accompanied by a time frame, focal agency, set of implementing partners, and indicators of success and sustainability.

The policy, research and development strategies are to improve allocation of government resources in combating child trafficking, to maintain a research database, and to ensure a coordinating role through the Ministry of Women Children and Social Welfare of Nepal (MWCSW).

Legislation and enforcement strategies include promoting and asserting the entitlement of children's legal rights. In particular, the plan outlines the need to implement and enforce women's property rights, and the need to pass a new Anti-trafficking Act, which incorporates a human rights component that addresses juvenile delinquents. The plan also discusses the need to develop a witness protection

116 Supra n. 40, p.26.

plan. Enforcement measures as they relate specifically to children include creating standardized procedures for filing trafficking cases, establishing in-camera proceedings for hearings involving children, creating a special police investigation team for anti-trafficking in all districts, developing child-friendly training for law enforcement officials; and forming networks among the various concerned organizations. The plan would benefit from further attention being paid to compensation strategies and legal aid/assistance.

The awareness and advocacy strategies focus on developing programming on child trafficking for children in vulnerable areas; providing training for children to themselves become trainers and community leaders; designing educational curriculum; improving media awareness, and encouraging networking at the local, national, and international levels as well as community-based strategies.

The health strategies focus on developing workshops through the various District Health officers that increase awareness of reproductive health issues. Reproductive health education is to be incorporated into the public school and NFE curricula. For those girls and boys who have been rescued, free primary health care services are to be provided and mobile health camps and rehabilitation centres are to be established. Additionally, already existent institutions that provide health services to children are to be strengthened. The education strategies focus on enforcing free and compulsory primary education for all children, integrating social awareness into the education curriculum, developing special education programs for informal educational settings, and providing functional literacy classes and teacher/parent training workshops.

The income and employment strategies target children over the age of 14. Activities include organizing training on vocational skills and management, along with identifying and promoting the use of local resources and

skills for income generating activities. However, because labour exploitation is not restricted to children over the age of 14, the plan would benefit from including stronger life-skills training into the general education of all primary school children as well as providing awareness campaigns for communities.

The rescue and reintegration strategies focus both on cross-border and regional trafficking as well as internal trafficking from rural to urban areas. The plan acknowledges that the interests of the child need to take first priority in reintegration and rescue work. Rescue activities include establishing a registration and counselling system for girls and boys, strengthening enforcement mechanisms, developing databases to track missing children, coordinating networks of concerned agencies, and creating a referral system with NGOs and social welfare organizations to provide immediate attention to victims.

Reintegration strategies focus on providing the appropriate services for rehabilitation and reintegration. These services include establishing shelters houses and training centres for victims, counselling programs, non-formal education workshops and community-based programming, a monitoring system, and national standards for the services that are provided. The plan would benefit from greater attention being paid to gender issues in the rescue and reintegration processes by developing, for example, programmes specifically related to the peculiar stigmatization issues facing young girls, adolescent girls, and young married women.

The trans-border, regional and international strategies focus on strengthening coordination and collaborative networks. Activities include amending the extradition treaty to include trafficking, approving a SAARC Trafficking Bill, developing a regional court for legal action against child trafficking through SAARC, establishing a special rapporteur and drafting further

MOUs. As well, the need for greater cooperation at vulnerable border areas is also identified.

The monitoring and evaluation process of the NPA involves periodic reviews as well as more direct initiatives to monitor and evaluate specific strategies. Monitoring must be conducted at local, national, and regional levels. A gender audit is also to be incorporated into the evaluation process.

3.1.9 Recommendations

- Ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;
- Ensure there is conceptual clarity about the offence of trafficking and national legislation is in line with international conventions and standards;
- Enact an anti-trafficking law which is in line with international norms;
- Enact laws to provide compensation for child victims of trafficking and its end products;
- Strengthen existing legislation to ensure that children are not subjected to exploitation through traditional practices such as Deuki;
- Amend and harmonize all national laws and bring them in line with the international definition of child as a person under the age of 18;
- Draft laws to criminalize the various forms of exploitation that are end products of trafficking, such as pornography;
- Consult child labourers prior to drafting legislation regarding child labour to ensure the needs and concerns of the group most affected by legislation is taken into account and child sensitive laws are formulated;
- Extend the protection of the law to the informal sector which employs the majority of child workers;
- Legislate to extend protection of the law to child domestic workers;
- Make alternate arrangements and provision for child workers who are removed from employment;
- Strengthen implementing and monitoring mechanisms ;
- Provide child-sensitive training to judges, police officers, lawyers and others involved in any aspect of monitoring or implementing laws related to children;
- Ensure provision of health care, education, skills training and the like to child trafficking victims;
- Devise and implement public awareness campaigns on child trafficking;
- Develop guidelines for investigating child trafficking and other crimes related to children and child friendly procedures for prosecution of such crimes; and
- Institute more programs for the prevention of trafficking by addressing the factors that cause migration in the first place. Increasing the years of compulsory education or providing more job opportunities in rural areas themselves would prevent some of the children becoming prey to traffickers.

3.2 Pakistan

3.2.1 Introduction

Pakistan is a source, transit and destination country. While children are trafficked out of Pakistan, internal trafficking for the purpose of labour and sexual exploitation is also prevalent.¹¹⁷ Women from East Asia are trafficked through Pakistan to the Middle East, while Pakistani boys are trafficked to the Middle East to work as camel jockeys. Children are trafficked mainly for three purposes, camel jockeying, begging and sex work. According to a report by Caritas 15,000 children are working as sex workers in Lahore alone.¹¹⁸

86 Pakistani children were rescued and repatriated by the Pakistani embassy in the United Arab Emirates in 2003 and it is estimated on average 30 boys are sent every month to the Middle East.¹¹⁹ In 2003, 360 boys under 12 years old are estimated to have been trafficked to the Middle East alone. It has been reported that 200,000 Bangladeshi women were trafficked to Pakistan in the last 10 years.¹²⁰ The trafficking of Afghan girls from refugee camps has also been reported.¹²¹ Where internal trafficking is concerned, the sale of child brides in Southern Punjab and Sindh is stated to be on the increase.¹²² The most vulnerable children, those living on the streets and those abandoned by their parents, are most susceptible to traffickers and are estimated to constitute a large number of trafficked children.

In Pakistan, as in many other countries, authorities do not or are not able to distinguish between illegal

migration, human smuggling and trafficking. This is one reason for the paucity of data on the number of persons trafficked every year.¹²³ It has been reported that research and statistics regarding the problem of trafficking in Pakistan are dismal compared to neighbouring countries, such as India and Bangladesh.¹²⁴ Pakistan has been placed on “Tier 2”, as a country which does not fully comply with the minimum standards for the elimination of trafficking but is making significant efforts to do so, in the 2005 Trafficking in Persons Report of the United States Department of State. As part of its efforts the government has set up an anti-trafficking unit under the Federal Investigative Agency (FIA).

3.2.2 Ratification of international conventions

Pakistan has ratified The United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, the Convention on the Rights of the Child and ILO Convention 182 on Worst Forms of Forced Labour. It has also signed the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

3.2.3 The Constitution of Pakistan

The Constitution prohibits trafficking and certain end products of trafficking, such as slavery and bonded labour. Article 11 states “slavery is non-existent and forbidden and no law shall permit or facilitate its introduction into

117 U.S. Department of State, Trafficking in Persons Report 2005, <http://www.state.gov/g/tip/rls/tiprpt/2005/46612.htm>

118 Sustainable Development Policy Institute, Rapid Assessment on Trafficking of Children for Labour and Sexual Exploitation in Pakistan, ILO.

119 Ibid. p.17.

120 Ibid. p.16.

121 Supra n. 114.

122 Supra n.115, p.17.

123 Supra n.114.

124 Supra n. 115, p.17.

Pakistan in any form”¹²⁵ and prohibits “all forms of forced labour and traffic in human beings”.¹²⁶

3.2.4 Trafficking

Prevention and Control of Human Trafficking Ordinance 2002

The Ordinance defines a child as a person who has not attained the age of 18.¹²⁷ Coercion is “the use of force, violence, physical restraint, deception, fraud or acts or circumstances not necessarily including physical force but calculated to have the same effect, such as the credible threat of force or infliction of serious harm”.¹²⁸

Human trafficking is “obtaining, securing, selling, purchasing, recruiting, detaining, harbouring or receiving a person, not withstanding his implicit or explicit consent, by the use of coercion, kidnapping, abduction, or by giving or receiving any payment or benefit or sharing or receiving a share for such person's subsequent transportation out of or into Pakistan by any means whatsoever for any of the purposes mentioned in section 3”.¹²⁹

The definition falls short of the 2000 Protocol definition, as it fails to recognize the transfer and transportation of persons as important parts of the entire trafficking process. It also neglects to include trafficking through the abuse of power and use of vulnerability of the trafficked person as part of the definition. Moreover, the definition focuses only on transportation in and out of Pakistan and ignores trafficking within Pakistan, which, as stated in the introductory section, is on the increase.

Section 3 states human trafficking shall be punishable when “whoever knowingly plans or executes any such plan for human trafficking into or out of Pakistan for the purpose of attaining any benefit, or for the purpose of exploitative entertainment, slavery or forced labour or adoption in or out of Pakistan shall be punishable with imprisonment which may extend to seven years and shall also be liable for a fine”.¹³⁰

According to the Act exploitative entertainment means “all activities in connection with human sports or sexual practices or sex and related abusive practices”.¹³¹ The problem with the definitions is they do not recognize other end products of trafficking such as organ trade and forced marriage. A broader definition following the 2000 Protocol that clearly states the end product of trafficking as exploitation and provides examples of the different forms of exploitation would better serve the purpose of the legislation. It would then be broad enough to include all current and possible future forms of exploitation. Once again the focus is only on trafficking in and out of Pakistan.

A separate provision does mention child trafficking but does so in the same breath as women, with women and children combined in the same provision failing to recognize that women and children have different needs.¹³² This section, which prohibits trafficking of women and children in and out of Pakistan, is only concerned with trafficking for the purpose of exploitative entertainment. Hence, other end products of trafficking that are extremely common in trafficking cases in Pakistan, such as forced labour and adoption, which are mentioned in an earlier section of the

125 The Constitution of Pakistan, art. 11 (1).

126 Ibid, art. 11 (2).

127 Prevention and Control of Human Trafficking Ordinance 2002, art. 2 (b).

128 Ibid. Article 2 (d).

129 Ibid. Section 2 (h).

130 Ibid. Section 3 (i).

131 Ibid. Section 2 (f).

132 Ibid, Section 3 (iii).

Ordinance,¹³³ have not been included in this section.

The penalties prescribed in the act reflect the seriousness of the crimes. For example, trafficking incurs a penalty of up to seven years imprisonment and a fine. If kidnapping or abduction is committed in addition to the offence of trafficking, imprisonment may be extended to 10 years.¹³⁴

The Ordinance does not have separate provisions to safeguard the rights of survivors of trafficking. It merely states that the court should, “where appropriate direct Government to make arrangements for the shelter, food and medical treatment of victim being an unaccompanied child or destitute woman”.¹³⁵ Hence, it is not mandatory to provide for the needs of rescued victims.

According to the report of the ILO national consultant the Government to date has not made any financial allocation for the provision of such services to victims. This falls short of the requirements set out in the 2000 Protocol and the High Commissioner of Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking, which stress the importance of providing for the special needs of victims of trafficking, especially children. Since in many instances the children are re-trafficked when they are returned to their homes or are released from the welfare homes, the state should take measures to ensure the safety of rescued children.

The Ordinance is also silent on the issue of repatriation except to state that “the competent authorities of the

Government, at any stage of the trial to allow or extend the stay of the victim in Pakistan till such time, as the court deems necessary”.¹³⁶ This strictly law and order approach uses the victim for prosecution purposes and pays no attention to his or her needs.

Pakistan like most countries is reluctant to provide trafficked persons with permanent residence permits, and therefore the temporary permit is given only for the period of the trial, the trafficked adult or child has to return home to the same circumstance. Since in many cases of child trafficking it is the child's family that sells the child into servitude, returning the child to the same environment will not provide a long-term solution to the problem. The Ordinance also does not make provision for legal aid for the victims.

Prevention and Control of Human Trafficking Rules 2003

These Rules attempt to be more sensitive to the needs of the child survivor of trafficking, stating “if a victim is child or woman, the court may pass any order keeping in view the welfare of the victim regarding custody for the purpose of accommodation, food, medical treatment etc”.¹³⁷ Yet, the rules do not make it mandatory to provide these benefits, they merely give the court discretionary power to provide them if deemed necessary. It also provides for the temporary stay of the victim-survivor if the person is needed for the trial or if immediate repatriation is not possible.¹³⁸ However, scant regard is given to the requirements of the victim whose statement the court is requested to record “as soon as possible and pass an order for their repatriation if their

133 Ibid. Section 3 (i).

134 Ibid. Section 3 (i).

135 Ibid. Section 6 (iii).

136 Ibid. Section 6 (i).

137 Section 3 (ii), Prevention and Control of Human Trafficking Rules 2003

138 Ibid. Section 3 (iii).

presence is no more required for the trial”.¹³⁹

There is also provision made for the child to be handed over to institutions established for the purpose of providing care to such victims or to the “nearest blood relation” if any. As stated numerous times in the above sections it is important to ascertain the circumstances in which the child was trafficked before handing the child over to family or relatives since children are often sold by their families. For example, parents often take their children to the Persian Gulf for camel jockeying. A recent report states that although families were initially ashamed to admit they had sent their children to work as camel jockeys, the practice has now gained social acceptance due to increased monetary benefits.¹⁴⁰

Legal assistance has been provided to the victims and the participation of NGOs in providing such assistance is formally acknowledged in the Rules.¹⁴¹ Provision for the training of relevant officials, members of the judiciary and law enforcement officials is made in the ordinance along with public awareness campaigns. Section 10 of the 2002 Ordinance has been amended with provisions being made for the establishment of Special Courts to try offences under these Rules.¹⁴²

Prevention and Control of Human Trafficking Rules 2004

This set of Rules enables a victim who has been handed over to an NGO for the provision of shelter, medical attention or similar services, to apply to the court if he or she is not satisfied with the services provided by the NGO. Although this provision is welcome the drafters

do not appear to be aware that a trafficking victim in a shelter home would not have the means to apply to the court or to engage a lawyer to do so on his or her behalf. If the victim is a child his or her position will be worse. It is therefore important to stipulate that an officer of the court or of any other relevant organization or ministry is given the task of ascertaining whether trafficking victims handed over to NGOs and shelter homes are being given proper care.

The Government appears to have realized that the safety of child victims who are returned to their families is not guaranteed. Hence, this set of Rules contains a provision which states “the court may, for the welfare of the victim, hand over the custody to any of his blood relation after requiring a bond from the custodian for safe custody of the victim and his production before the court at the time and place mentioned in the bond...”¹⁴³ Although this will contribute towards ensuring the safety of child trafficking returnees, the disadvantage is that many families may not be able to afford to pay the required bond. Therefore, the court should ascertain the economic status of the family before determining the amount of the bond.

Penalties are prescribed for NGOs which fail to adequately provide for the needs of the victims of trafficking but are lenient and hardly likely to have a deterrent effect. The penalty is revocation of their notification.¹⁴⁴

There are no special provisions on children in the Rules.

¹³⁹ Ibid. Section 5.

¹⁴⁰ Supra n.115, p. 59

¹⁴¹ Supra n.134, section 4.

¹⁴² Ibid. Section 10.

¹⁴³ Prevention and Control of Human Trafficking Rules 2004, Section 3.

¹⁴⁴ Ibid. Section 5 (2).

Penal Code 1860

Section 366-B is concerned with importation of a girl into Pakistan and penalizes anyone who “imports into Pakistan from any country outside Pakistan any girl under the age of 21 years with intent that she may be, or knowing it to be likely that she will be forced or seduced to illicit intercourse with another person”. Although this provision could be used at times to prosecute traffickers as it criminalizes the transporting aspect of trafficking, its scope is narrow because it links the process to only one end product of trafficking, sexual exploitation. Further, it is only concerned with transporting a girl into Pakistan and is silent about transporting girls to other countries from Pakistan. It is unclear why the section has increased the age limit to 21 because if the intention is to protect girl children then the age limit should have been 18. The section is also gender specific and ignores the fact that male children are also trafficked for the purpose of sexual exploitation.

Several provisions address the issues of buying and dealing in slaves. According to section 369 importing, exporting, removing, buying, selling or disposing of any person as a slave or accepting, receiving or detaining “against his will any person as a slave” is an offence. Section 371 states that “whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves shall be punished with imprisonment for life...”. Although section 369 contains most of the elements of the offence of trafficking as defined in the 2000 Protocol it identifies slavery as an end product while not providing a definition of a slave. Rather than defining a state of being, such as “slavery”, stipulating the various purposes for which persons might be bought or sold would have been more conducive to identifying and prosecuting the offence.

Selling and buying a minor for the purpose of prostitution have been identified as separate offences in the Code.

Section 372 states that “whoever sells, lets to hire, or otherwise disposes of any person under the age of 18 with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful or immoral purpose, or knowing it is likely that such person will at any age be employed or used for any such purpose, shall be punished...”.

Once again even though the section contains certain elements that constitute trafficking the fact those elements are linked only to the end product of sexual exploitation narrows the scope of the provision. In addition, as one of the end products identified is “any unlawful and immoral purpose” there is room for moralistic and subjective interpretations of the offence. Section 373 criminalizes the buying of a minor for the purpose of prostitution, illicit intercourse or for “any unlawful and immoral purpose”.

3.2.5 Laws that criminalize end products of trafficking

Sexual exploitation

1. Penal Code 1860

Procurement of a minor girl, who is defined as a female under 18 years of age is criminalized by the Code. Procurement is considered inducing “to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person”.¹⁴⁵ This section could be used to prosecute both those who traffic for the purpose of sexual exploitation and those who employ girls as sex workers. The problem however lies in the fact the section specifies only “inducement” as a means through which a girl may be made to engage in sex work.

As inducement is hard to prove and allows the trafficker

¹⁴⁵ Penal Code of Pakistan, Section 366 A.

or person who employs her to plead she engaged in sex work of her own will and represented herself as over 18 years old, it might be more conducive to the prosecution of traffickers if other means such as fraud and coercion had also been included. The use of the term “illicit intercourse” is moralistic and unnecessary since it is enough to state that it is an offence to force a girl to have intercourse. It is obvious the existence of the Hudood and Zina Ordinances, which view sexual intercourse within marriage as the only form of “legal”, intercourse is the reason for the use of the term “illicit”. The section specifies a maximum penalty of 10 years.

Countries which do not have specific or adequate laws against trafficking often use laws that target the end products of trafficking, such as sexual exploitation, to prosecute traffickers for acts that may have been committed during the trafficking process or those who benefit from trafficking through the use of existing penal provisions on statutory rape, paedophilia and abduction among others. However, in Pakistan this is not possible since the Hudood Ordinances, which include the Zina Ordinance, which deals with extra-marital sex, adultery and fornication, and the Qazf Ordinance, result in the criminalization of the victim rather than the perpetrator.

The Zina Ordinance, which deals with crimes of rape and abduction was created to safeguard the reputation and chastity of women against false and defamatory charges but was later amended; an amendment which adversely affects women subject to violent sex crimes. There is no differentiation between rape and adultery, and rape requires four male witnesses to prove the offence.¹⁴⁶ Since a Zina crime punishes women for having sexual relations

outside marriage, in the case of rape if the crime is not proven the woman will be tried for adultery.¹⁴⁷ Abduction is also grounds for a Zina case, because if a woman has been abducted sexual relations are presumed to have taken place, which once more renders the victim liable for prosecution for adultery.¹⁴⁸ Hence, it is not possible to prosecute traffickers or those who benefit from the end products of trafficking by using existing legal provisions.

Kidnapping and abduction

1. Penal Code 1860

The Pakistani Penal Code criminalizes two kinds of kidnapping, kidnapping from Pakistan¹⁴⁹ and kidnapping from lawful guardianship.¹⁵⁰ Kidnapping from lawful guardianship is defined as taking or enticing “any minor under 14 years of age if a male, or under 16 years of age if female...out of the keeping of the lawful guardian of such minor...without the consent of such guardian”. Since both male and female children are kidnapped for the purpose of exploitation one of the shortcomings of this section is the provision of different minimum ages for males and females. In addition the age limits do not adhere to the international law definition of a child as a person under 18 years of age. Further, the restriction of the child specific section to only kidnapping from lawful guardianship does not extend the protection of this section to street children and those who do not have lawful guardians. The penalty for kidnapping is a maximum of seven years and a fine.¹⁵¹

The Penal Code also contains another section, which focuses on both the offence of kidnapping of a child under 14 years of age and the end product for which the

146 Khan N.S., *Women in Pakistan, Struggles and Strategies: Third World Perspectives*, Isis International, Rome, 1986, p.44.

147 Hina Jilani., ‘Whose laws? Human Rights & Violence Against Women in Pakistan’ in *Freedom from Violence: Women's Strategies from Around the World*, (ed) Schuler, OEF, London, 1992.

148 A.S. Zia., *Sex Crime in the Islamic Context*, ASR Publications, Lahore, 1994, p.26.

149 Penal Code , Section 360.

150 Ibid, Section 361.

151 Ibid, Section 363.

offence is committed. Section 364-A states that any person who “kidnaps or abducts any person under the age of 14 in order that such person may be murdered or subjected to grievous hurt or slavery or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt or slavery or to the lust of any person, shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to 14 years and shall not be less than seven years”.

Although this provision falls short of the definition in the Trafficking Protocol, since it does not criminalize the various acts that constitute trafficking and identifies only certain end products of trafficking, it is still a useful provision that could be utilized to prosecute traffickers. Ironically the fact it stipulates fewer elements of the crime might enable more successful prosecution.

Child labour

1. *Employment of Children Act 1991*

This Act defines a child as a person below the age of 14¹⁵² and an adolescent as a person between the ages of 14 and 18.¹⁵³ It is prohibited to employ a “child” or permit a “child” to be employed in certain occupations such as cinder picking, cleaning of an ash pit, performing certain work in a railway station, working in a port authority, bidi making and carpet weaving.¹⁵⁴ Hence, children are banned from working only in the occupations set forth in the Schedule, which creates ambiguity about the legality of employing of children under 14 in industries or work other than those

set out in the Schedule. The prohibition does not apply to a small family business or to schools established, assisted or recognized by the government. Although employing a “child” is prohibited by the Act in certain industries, the provisions in the act which regulate the employment of children over 14 years, or adolescents, use the term “child” and “adolescent” interchangeably which also creates confusion.

A National Committee on the rights of the Child is established by the Act to advise the Government “for the purpose of addition of occupations and processes to the Schedule”.¹⁵⁵ It is unclear why the function of the Committee is restricted to advising on addition of occupations and processes to the Schedule of the Act, since the committee consists of “experts of high moral standing and recognized competence” and is in a position to advise on all issues relating to child labour and the effective implementation of the Act.

Employers are required to send particulars of child employees to the inspector¹⁵⁶ and maintain a register containing details of the child available for inspection any time by the inspector.¹⁵⁷ Health and safety standards that employers have to adhere to are also prescribed by the Act.¹⁵⁸

Section 14 provides for penalties for “whoever employs any child or permits any child to work in contravention of the provisions of section 3”.¹⁵⁹ The penalty is lenient with such person being subject to imprisonment of maximum one year or fine of 20,000 rupees or both.¹⁶⁰ The penalty for repeat offenders is imprisonment of not less than six months, which may be extended to two years.¹⁶¹

152 Employment of Children Act 1991, Section 2 (iii).

153 Ibid. Section 3 (i).

154 Ibid. Schedule 1 & 2.

155 Ibid. Section 5.

156 Ibid. Section 9.

157 Ibid. Section 11.

158 Ibid. Section 13.

159 Ibid. Section 14.

160 Ibid.

161 Ibid. Section 14 (2)

Box 3.3 Najma

After the death of their mother Najma and her siblings were abandoned by their stepfather leaving them to pay off a debt of Rs. 25,000. Their uncle, Ibrahim Bengali decided to pay off the debt by selling his youngest niece, Najma, to one Suleman Bengali for Rs. 10,000. Najma was then forced to work in a sweatshop weaving carpets, where she was bound in chains to prevent her escape. Meanwhile, her 15-year-old brother tracked her down, went to the police station and registered a first information report (FIR). The police raided the house, rescued the six-year-old girl and arrested Suleman Bengali. The uncle who sold her was also arrested but his accomplice managed to escape. The accused were booked under s.370, 371, 366-A, and 344 of the Pakistan Penal Code. The case is still pending.

2. Bonded Labour System (Abolition) Act 1992

Bonded labour is an end product of trafficking. The National Plan for the Abolition of Bonded Labour acknowledges that no study or survey has been carried out on the issue. For this reason there are no statistics or means to ascertain the magnitude of the problem.

Bonded labour is “forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered into an agreement with the creditor to the effect that,

1. in consideration of an advance (peshgi) obtained by him or by any of the members of his family [whether or not such advance (peshgi) is evidenced by any document] and in consideration of the interest, if any, due on such advance (peshgi); or
2. in pursuance of any customary or social obligation; or
3. for any economic consideration received by him or by any of the members of his family;

s/he would:

1. render by himself, or through any member of his family, or any person dependent on him, labour or service to the creditor or for the benefit of the creditor, for a specified period or for an unspecified period without wages or for nominal wages; or
2. forfeit the freedom of employment or adopting other means of livelihood for a specified period or for an unspecified period; or
3. forfeit the right to move freely from place to place; or
4. forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his property of any person dependent on him

The Act abolishes bonded labour and decrees that every bonded labourer shall be free upon the commencement of the Act.¹⁶² Any form of bonded labour that is exercised due to tradition, custom or practice is prohibited by the Act,¹⁶³ which also extinguishes any outstanding debt owed by the bonded labourer to the creditor.¹⁶⁴ Property forcibly taken

¹⁶² Bonded Labour System (Abolition) Act 1992, Section 4.

¹⁶³ Ibid. Section 5.

¹⁶⁴ Ibid. Section 6.

from the bonded labourer is to be restored within a ninety day period.¹⁶⁵ If it is not returned within ninety days the labourer can apply to the relevant authority for restoration of property.¹⁶⁶

The penalty for keeping a person in bonded labour is imprisonment for not less than two years and not more than five years and a fine of not less than 50,000 rupees.¹⁶⁷ Failure to return property to the labourer incurs a maximum penalty of one year imprisonment or a fine of 1,000 rupees or both. The section further states if a fine is collected from the accused the bonded labourer will be paid 10 rupees for every day the property was withheld from him.¹⁶⁸ The fine seems excessively low and not likely to encourage restoration of property.

Vigilance Committees are to be set up at the District level consisting of representatives of Bar associations and District Administration among others.¹⁶⁹ The functions of the Committees include advising the District Administration on matters relating to the implementation of the law, and rehabilitation of former bonded labourers,¹⁷⁰ in other words to “keep an eye on the working of the law”¹⁷¹ and “provide the bonded labourers such assistance as may be necessary to achieve the objectives of the law”.¹⁷² In addition to the specified duties being too broad, the lack of specific powers to enforce the law is likely to make it difficult for the Committees to fulfill their broad mandate.

This Act does not contain special provisions regarding children.

¹⁶⁵ Ibid. Section 6 (4) & (6).

¹⁶⁶ Ibid. Section 6 (7).

¹⁶⁷ Ibid. Section 11.

¹⁶⁸ Ibid. Section 13.

¹⁶⁹ Ibid. Section 15.

¹⁷⁰ Ibid. Section 15 (2).

¹⁷¹ Ibid. Section 15 (2) (c).

¹⁷² Ibid. Section 15 (2) (d).

Box 3.4 Trafficking for camel jockeying

On 28th of June 2001 officials of the Federal Investigation Authority (FIA), arrested one Mst. Ayesha and recovered two children Muzaffar, 11 years old, and Sadam 8 years old, on their arrival from Dubai. The authorities suspected the children had been employed as camel jockeys in Dubai and referred them to the FIA station in Saddar for further investigation.

Mst. Ayesha revealed that she had purchased both children from Rahim Yar Khan two years ago with the help of a person named Sharif. She said the children's parents willingly sent them with her and knew the children were being sent to work as camel jockeys. Ayesha said she hailed from Bahawalpur and her husband lived in Dubai. She said that with the help of Sharif, she produced fake documents for the children and then travelled to Dubai via Iran.

The recovered children, Muzaffar and Sadam, said they belonged to Rahim Yar Khan and were siblings. They said their father willingly sent them to Dubai knowing they would be used for camel racing. In Dubai they were handed over to an Arab Sheikh. Saddam said he took part in and won many races. He said that every year the Sheikh sent money to their parents in Pakistan. The children also said that during their stay in Dubai, they were treated badly and were given only low fat vegetables to eat. They further said they first worked with camels and then later learnt how to ride camels. Muzaffar also said once he fell down from the camel but fortunately escaped unhurt. He further said that a few days ago he had spoken to his father on phone who had told him that he had purchased some land and asked him to return home.

The station house officer (SHO) of the FIA passport cell found out the children were smuggled to Dubai with the help of a large human trafficking network and they have registered a case under section 61-ACF of Passport Act 1974. He further said the children would be sent to their native village.

3. Bonded Labour System (Abolition) Rules 1995

These Rules were formulated to effect implementation of the Bonded Labour Abolition Act. Hence, they lay down a system to restore property to bonded labourers by making provision for the appointment of authorities

to deal with such cases¹⁷³ and stipulate a 30 day period within which the application has to be decided.¹⁷⁴ The functions of the Vigilance Committees are expanded upon whereby they are bound to establish complaint cells¹⁷⁵ and inform the District Magistrate when they have knowledge of the employment of bonded labour.¹⁷⁶

173 Bonded Labour System (Abolition) Rules, Sec 3 (1).

174 Ibid. Section 3.

175 Ibid. Section 7 (3).

176 Ibid. Section 7 (4).

Further, a fund is also created by the Rules to provide legal and financial assistance to bonded labourers and their families and for rehabilitation programmes.¹⁷⁷ The Rules do not specifically address child bonded labourers.

4. Penal Code 1860

Section 374 of the Code, which criminalizes compelling any person “to labour against the will of that person”, makes no specific reference to children.

3.2.6 National plans

Pakistan's National Policy and Plan of Action Against Sexual Abuse and Exploitation of Children in Pakistan has three components – prevention, protection, recovery and rehabilitation. The plan also develops the following themes: awareness raising; advocacy and social mobilization; capacity building; setting up and strengthening functional structures and systems; political commitment; and networking.

The prevention strategies focus predominantly on strengthening the role of the media in providing information of “the highest quality, reliability and ethical standards concerning all aspects of sexual exploitation of children”. The need to integrate children's rights and personal health and protection education into school curricula as well as the need to increase awareness among other sectors of society (public officials, law enforcement officials, communities, etc) are also advocated within this part of the NPA. The Ministry of Information and Media Development is listed as the lead agency.

The protective strategies focus on reviewing existing legislation and developing new laws; strengthening the

enforcement of child protection laws; standardizing a code of conduct for shelters; training law enforcement officials; publicizing laws pertaining to child sexual abuse and exploitation; conducting a situation analysis of child pornography; developing a policy framework for dealing with child pornography; and monitoring regional trafficking mafias and networks.

The recovery and rehabilitation strategies include training more officials in the area of psychosocial recovery and rehabilitation of victims of sexual abuse and exploitation; developing training packages for health care and social welfare providers; developing support services for victims through a pilot project in Rawalpindi, Islamabad (if successful, the project will be implemented in other urban centres); establishing a referral system to ensure that victims have access to services; and developing an information gathering centre on child sexual abuse and exploitation.

Pakistan's NAP lacks both a child-centred and child trafficking focus. Neither the preventive, protective, or recovery and rehabilitation strategies deal, for example, with issues of stigmatization. Nor does the plan effectively set out strategies to foster skills that empower children (given their different needs) to deal with child trafficking.

Labour exploitation

Issues of labour exploitation are dealt with through the National Policy to Combat Child Labour. The National Policy to Combat Child Labour addresses the following goals: awareness raising and advocacy; involvement of social partners and community in eliminating child labour in all employment sectors; expanding education

¹⁷⁷ Ibid. Section 9 (2).

opportunities by universalizing basic education; alleviating poverty by, for example, encouraging banks to create microcredit schemes to encourage family businesses; and reinforcing a social safety net through social security institutions, workers benefits, state life insurance corporations.

The plan is to be monitored by several actors, including law enforcement officials, monitoring bodies, and research bodies. The plan also outlines a strategy for rehabilitation and immediate withdrawal of children from hazardous and exploitative situations. Provincial labour departments, social welfare departments and home departments are responsible for determining when such emergency situations arise. Also, multi-purpose children's complexes will be established within each municipality where health and welfare services will be provided, including informal education, prevocational training, health services, recreational activities, and welfare activities targeted at child workers (five to 10 years of age), girl child workers, street children and those children who were withdrawn from hazardous and exploitive employment.

In addition, a national youth apprenticeship programme, will provide training in different trades along with informal and formal education. Children between 10 and 14 will receive prevocational training and informal education. Thereafter, children can go for a general education at the secondary level or a higher technical education in the regular system. For youth between 14 and 18, career planning and job training will be provided.

In order to effectively combat child trafficking, there is a need to have this plan reinforce the goals set out in the NAP on child sexual exploitation.

Box 3.5 TICSA Action Programme on Child Trafficking

This AP takes into account government actions in regards to child trafficking. The Government of Pakistan has formed an inter-ministerial committee of the relevant ministries on the issue and has also sought help in developing a Time Bound Program (TBP) to help them fulfil their international commitments under the ILO Convention 182. In response to this request, ILO/IPEC has developed a TBP with a view to eliminating Worst Forms of Child Labour in 10 to 15 years time. To this end, the Government is implementing a number of plans of action to promote child welfare.

Despite these moves by the Government, the Lawyers for Human Rights and Legal Aid (LHRLA), the implementing agency of this AP, feel that it is necessary to stimulate change in the realm of legislation in terms of child trafficking. So as to stimulate discussion among stakeholders for appropriate changes, LHRLA will conduct an action-oriented case study analysis by providing legal assistance to selected victims of trafficking. LHRLA will be working closely with the National Commission for Child Welfare and Development (NCCWD), Ministry of Social Welfare, Special Education and Women Development to identify some legislative barriers and law enforcement difficulties that inhibit the protection of victims of trafficking and appropriate action by Pakistani authorities. Further more LHRLA will review relevant international and sub-regional instruments concerning protection of child victims of trafficking for sexual labour and exploitation.

It is beneficial that the LHRLA is working with the Government, thereby strengthening the structures of governance while at the same time addressing the cases of about five to seven victims. However, the proposal seems to imply that since the LHRLA will work with a government agency, the National Commission for Child Welfare and Development (NCCWD), this alone makes it sustainable. There needs to be a more solid plan in place to fund this project. Although it is understood that the prosecution of child trafficking cases can take a longer time than the duration of this AP, there seems to be little information about long-term funding plans for the prosecutions, throwing into sharp relief the ultimate sustainability of this project. At least, the AP states, the LHRLA can provide initial support to the victims and set the prosecution in motion. This defeats the purpose of trying to see whether the legal system provides recourse to the victims of trafficking if all the remedies of the system are not exhausted.

Also, there is little information as to how the cases will be argued and what the merits of each case would be. It is not known whether the LHRLA plans to prosecute the employers of these children or argue that child labour in general is unconstitutional, or some other mode of prosecution. Hopefully, more of this information may be found in the work plan that the LHRLA will prepare and submit after the agreement is signed with the ILO/IPEC.

3.2.7 Recommendations

- Amend the Trafficking Ordinance to bring the definition of trafficking in line with international norms;
- Amend the Trafficking Ordinance to provide comprehensive protection to victims of trafficking, such as in-camera testimony and witness protection;
- Make the provision of basic assistance such as shelter, medical care and legal aid to victims of trafficking mandatory;
- Enact laws to provide compensation for child victims of trafficking and its end products;
- All national laws must be amended and harmonized and brought in line with the international definition of a child as a person under the age of 18;
- Draft laws to criminalize the various forms of exploitation that are end products of trafficking, such as pornography;
- Consult child labourers prior to drafting legislation regarding child labour to ensure the needs and concerns of the group most affected by legislation is taken into account and child sensitive laws are formulated;
- Legislate to extend protection of the law to child domestic workers;
- Make alternate arrangements/provision for child workers who are removed from employment;
- Strengthen implementing and monitoring mechanisms;
- Create juvenile benches;
- Provide child-sensitive training to judges, police officers, lawyers and others involved in any aspect of monitoring or implementing laws related to children;
- Devise and implement public awareness campaigns on child trafficking;
- Develop guidelines for investigating child trafficking and other crimes related to children and child friendly procedures for prosecution of such crimes; and
- Institute more programs for the prevention of trafficking by addressing the factors that cause migration in the first place. Increasing the years of compulsory education or providing more job opportunities in rural areas themselves would prevent some of the children becoming prey to traffickers.

3.3 Indonesia

3.3.1 Introduction

Indonesia is a source, transit and destination country which also experiences extensive internal trafficking for the purposes of labour and sexual exploitation. Internal trafficking is reported to be mainly for the purpose of sexual exploitation, but it is also common for children working as domestic help or helpers in small businesses to be tricked into sex work.¹⁷⁸ The city of Surabaya, known for its sex industry, purportedly functions as a regional trafficking hub.¹⁷⁹

Indonesia has been placed on “Tier 2” in the Trafficking in Persons Report of the United States Department of State, which claims that although the Government does not fully comply with the minimum standards for the elimination of trafficking it is making significant efforts to do so. In 2003, 67 trafficking prosecutions and 27 convictions were reported with the maximum sentence given being six years.¹⁸⁰

3.3.2 Ratification of international conventions

Indonesia has ratified the Convention on the Rights of the Child (CRC), ILO Convention 182 on Worst Forms of Child Labour and ILO Convention 138 on Minimum Age. Although the CRC was ratified by the Indonesian Government, the status of the ratification is a Presidential Decree which is lower than an Act. Hence, it is claimed the low legal status of the ratification has led to the CRC not being incorporated into domestic law with the result that it is given little importance by the judiciary and other state institutions.

3.3.3 The Constitution of Indonesia and The Human Rights Act 1999

The constitutional amendment in 2000 incorporated provisions protecting the rights of the child. Article 28 B states “every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination”. Although this is a general provision the fact the right of the child is enshrined in the Constitution is a major breakthrough in the struggle to protect the rights of the child.

The Human Rights Act contains many general provisions that protect the rights of children. The protection extends to children's right to health, education, to live, grow and develop among others. The Act also protects the child from commercial exploitation, which might endanger the health of the child, sexual exploitation and trafficking.¹⁸¹ It does not however provide a definition of trafficking.

3.3.4 Age of majority

The age of majority of a person is dependent on his or her marital status. A person under the age of 21 and unmarried is considered to be a minor. According to Act No.1 of 1974, if the person marries before attaining 21 years of age, then the age of marriage is considered the age of majority, for example, if a person marries at 16 the person then becomes an adult. Even if the marriage breaks up before the person turns 21 they continue to be a major. The age of 16 is the legal age of marriage for girls and 19 is the legal age for boys.

178 Antarini Arna & Mattias Bryneson., Report on Laws and Legal Procedures Concerning the Commercial Sexual Exploitation of Children in Pakistan, ECPAT, 2004, p. 8.

179 Ibid.

180 Trafficking of Persons Report 2005, U.S. Department of State <http://www.state.gov/g/tip/rls/tiprpt/2005/46612.htm>

181 Human Rights Act 1999, art. 65.

3.3.5 Trafficking

Anti-Trafficking Bill

The Anti-Trafficking Bill does not contain any special provisions that deal with the trafficking of children. It is a piece of legislation that focuses on general issues related to trafficking.

The Bill defines trafficking as “illegal acts of recruitment, transportation and transfer of persons for physical, sexual as well as labour exploitation purposes which will produce both material and immaterial benefits”.¹⁸² This fails to criminalize other acts, which are an integral part of trafficking such as harbouring and receiving persons.

The definition of exploitation is broad and structured to cover all possible forms of exploitation to which the victim might be subjected. It is defined as “an act whether committed with or without consent of a victim that includes but not limited to, prostitution, forced labour or services, slavery or practices similar to slavery, removal or transplantation of organs and or body tissues, or all acts that involve oppression, extortion and physical, sexual, labour and/or ability abuse against a person by another party arbitrarily in order to gain both material and non-material benefits”.¹⁸³

Like many other anti-trafficking laws in the region, this Bill does not make specific mention of internal trafficking within Indonesia except in article 4 which stipulates penalties for anyone “who deliberately brings persons into Indonesia with the intention

- a. to traffic them within the territory of the Republic of Indonesia; or
- b. to bring them again outside the Indonesian territory to be trafficked to the territories of other countries”¹⁸⁴

This section recognizes internal trafficking but only that of persons brought into Indonesia, whereby it fails to protect Indonesians who are trafficked within Indonesia. For instance, research indicates that extensive internal trafficking of girls takes place from Java to Batam and Medan in North Sumatra,¹⁸⁵ and girls are trafficked from all parts of Indonesia to cities like Jakarta and Surabaya. Indonesians benefit from the protection of the Bill only if they are trafficked “outside the territory of the Republic of Indonesia”.¹⁸⁶ Hence, it is imperative the Bill broaden its focus to include both internal and external trafficking.

Other crimes related to trafficking such as falsifying documents¹⁸⁷ and hiding and or abetting a person who has committed the act of trafficking are also within the purview of the Bill.¹⁸⁸ It seems the Bill is attempting to deal with the complicity of persons in power and authority such as government officials since it penalizes “any state administrator who abuses his/her power to force a person to commit, not commit or allow something that results in the crime of trafficking in persons”. However, the Bill by combining and linking the “abuse of power by the government official” with the act of “forcing another person to do or allow something that results in trafficking”, fails to take into account any act committed by the official, for example the act of abetment committed by the official himself. Government officials can be prosecuted under general provisions, such as Article 56 in Book I of the Penal Code.

182 Anti-Trafficking Bill, art. 1 (1).

183 Ibid. art. 1 (6).

184 Ibid. art. 4.

185 Supra n.175, p. 8

186 Supra n.179, art. 5.

187 Ibid. art. 11.

188 Ibid. art. 13.

Article 23 penalizes perpetrators who do not pay restitution to the victims while article 24 states that all proceeds of the crime will be confiscated by the State but there is no connection made between both sections to explicitly decree that such funds will be utilized by the State to provide compensation to the victims.

Where victim protection is concerned the Bill enables testimony to be given in-camera¹⁸⁹ and creates special units in police stations to examine victims and witnesses.¹⁹⁰ It however does not clearly exempt victims from prosecution for violation of immigration laws and other offences that may have been committed during the process of trafficking.

Provision is also made for the protection of victims and their families if threats are made against their life and/or properties. Even though this is satisfactory the fact protection is provided only if threats are made is a cause for concern, since many trafficking victims who are rescued are in constant fear for their lives and have even been subjected to violence.

Further, according to section 19 attacking a witness is an offence liable to a maximum penalty of 15 years but curiously enough no mention is made of attacking the trafficked person. Any law that aims to prevent trafficking and secure the conviction of traffickers has to pay attention to the security needs of the trafficked person. Hence, the security and safety of the trafficked person must be ensured as a matter of course according to the 2000 Protocol, which calls upon each State to “provide for the physical safety of victims of trafficking

in persons while they are within its territory”.¹⁹¹

Where the protection of the identity of the trafficked person is concerned the Bill appears to protect only informants¹⁹² and witnesses¹⁹³ and there is no provision, which prevents the identity of the trafficked person being made public or the name being used in proceedings. The trafficked person referred to as the “victim-witness” is entitled to legal representation and to receive information on the case.¹⁹⁴

Although there is provision for the victim-witness to request the absence of the defendant from the courtroom it has to be kept in mind the trafficked person, especially a child who has been subject to violence and intimidation would not even consider making such a request, particularly in the formal set-up of a courtroom. The Bill should therefore require the judge to ask the trafficked person, particularly if it is a child whether s/he would like to provide testimony in-camera.

In the event the victim is ill or traumatized and requires “immediate assistance” the State “no later than 7 days will provide temporary assistance in order to recover the victim's health”.¹⁹⁵ The fact that immediate assistance is to be provided within 7 days is unsatisfactory and falls short of standards in the 2000 Protocol and the United Nations High Commissioner's Principles and Guidelines on Human Rights and Human Trafficking (hereinafter referred to as the Guidelines).

189 Ibid. art. 32.

190 Ibid. art. 36.

191 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime 2000, art. 6 (5).

192 Supra n.179, art. 31.

193 Ibid. art. 37.

194 Ibid. art. 33 (2)

195 Ibid. art. 40 (3)

The plight of non-Indonesian victims of trafficking is even worse since the Bill only requires the State to “try to provide protection while they are in Indonesia or help their repatriation to their country of origin”.¹⁹⁶ It is not mandatory to provide assistance to such victims, in contravention of the Guidelines, which require the safe return of such persons and exploration of the option of providing the person with permanent residency to prevent re-trafficking.

The Bill is silent on the issue of repatriation except to state that Indonesians who have been trafficked abroad¹⁹⁷ will be repatriated through the representatives of Indonesia abroad and the State will “help” the repatriation of trafficked foreign persons in Indonesia.¹⁹⁸ There is also no explicit provision which makes a mandatory requirement upon the State to provide basics such as housing or counseling to trafficked persons or to inform the victims of their rights and the available means of redress.

Certain offences do not incur a minimum penalty such as harbouring or abetting a trafficker,¹⁹⁹ giving false testimony²⁰⁰ and obstructing an inquiry or thwarting court proceedings.²⁰¹ The Bill also does not provide for additional penalty in instances of abuse of power and authority, such as in cases when government officials abet trafficking.

The standards set by the Guidelines require anti-trafficking legislation to make provision for awareness campaigns, training of law enforcement, immigration and other officials to ensure they deal with trafficked

persons, especially children, in a sensitive manner that takes into account their needs. Although the Bill does contain a general provision which states “the government and local governments shall develop policies and programs to implement the prevention of the crime of trafficking in persons”,²⁰² there is no specific mention of training of law enforcement officials. Article 27 requires the Government to develop and implement programs in “economic, cultural, educational, legal sectors”, and carry out “socialization and facilities for accessing information” it does not provide any minimum standards, examples or guidelines to officials involved about the contours of such programs.

196 Ibid. art. 43

197 Ibid. art. 43 (1)

198 Ibid. art. 34 (2)

199 Ibid. art. 13

200 Ibid. art. 19

201 Ibid. art. 20

202 Ibid. art. 26.

Box 3.6 Case study: Exploitation for commercial sex

TAS, a 14 year old girl who had just finished elementary school in Pagedongan, Banjarnegara, Central Java, was recruited by Ms. Parwati a neighbor and taken to Batam island (close to Singapore) for commercial sexual exploitation. She was brought to Parwati by another neighbour and was enticed by an offer to work as a waitress at a cafe in Batam with a monthly salary of Rp 5 million. However, in fact, she was sold as a commercial sex worker to MK Karaoke Bar in Kampung Pelita for IDR 1.5 million (US\$ 150.00).

As TAS left for Batam on June 7, 2004 without the consent of her parents with only the clothes she was wearing at the time, her family thought she had gone missing. Her identity was falsified prior to her departure and her name changed to Fatmawati on the plane ticket. At the MK karaoke and massage parlour bar she used the name of Indah Fitriani Dewi and claimed she was 19.

At the bar customers pay IDR 280,000.00 for the booking and TAS gets paid only a voucher worth IDR 100,000.00. She was told cash to the value of the voucher would be given to her only upon completion of her contract, in other words she would be paid only when her contract ended.

On July 31, 2004, a social worker of a local non-governmental organization managed to sneak her out of the parlour by booking her and then taking her to a near by police station in Bareleng. TAS later flew to Yogyakarta on August 12. From there, she returned home to Banjarnegara to meet her family, accompanied by an NGO activist. Her case was then reported on August 20, 2004 with three NGOs jointly filing the case to the district police. The district police detained Ms. Parwati who was charged under Law No: 23/2002- Child Protection Law, and was imprisoned for four years and fined IDR 60 million (subsidiary for six months). The sentence is slightly less than requested by the district attorney who demanded six years imprisonment.

During the legal process NGOs accompanied the victim and assisted in reporting the case to the local police. During the trial process the family of the defendant attempted to threaten the victim and the NGO activists by mobilising local people to terrorise the victims by flattening the tyre of their car with sharp devices.

While this case illustrates the important role played by NGOs it also shows the reintegration process cannot always be done smoothly as the family could be threatened by the defendant or his family or be subject to stigmatization by the community.

Child Protection Act 23 of 2002

This Act, which defines a child as a person under 18 years of age, contains a general section which protects children against violence and discrimination.²⁰³ The Act enshrines the principle that any decision or policy made in relation to children must have the best interests of the child at heart. Article 91 provides that laws in conflict with the Children's Act are rendered void. One of the positive aspects of the Act is that it requires the government to provide a minimum of nine years basic education.

The Act contains a general provision on the protection of children from exploitation of an economic or sexual nature, neglect, harsh treatment, violence, abuse or other forms of exploitation.²⁰⁴ Section 17 states that a child “who is a victim or perpetrator of sexual abuse or who finds himself having dealings with the law shall be entitled to have his identity kept confidential”. The shortcoming of this section lies in the fact that children who have suffered abuse and exploitation other than sexual abuse are ignored and protection is extended only to children who have suffered from sexual abuse and exploitation. There are also provisions which make the Government accountable “for putting in place infrastructure and facilities designed to provide protection for children”.²⁰⁵ The Act also focuses on the responsibility of parents in caring for, maintaining and ensuring the well-being and development of children.²⁰⁶

Chapter VIII of the Act deals with issues relating to fostering and adoption and makes provision for the fostering of children whose parents are unable to

“guarantee their proper physical, mental, spiritual and social development”.²⁰⁷ The Act rightly identifies the best interests of the child as the primary concern in adoptions and goes on to stipulate various conditions to ensure the physical, emotional and spiritual well-being of the child.²⁰⁸

There is no comprehensive provision on trafficking but the Act does contain a section which penalizes anyone who traffics, kidnaps, sells or trades in children.²⁰⁹ However, no definition is provided for the term trafficking. The penalty is minimum imprisonment of three years, maximum 15 years and minimum fine of IDR 60 million.²¹⁰ Section 78 can also be used to prosecute traffickers as it states that any person who “knowingly or deliberately allows ‘children to be traded’”, or “children to become the victims of kidnapping, sale and trading” is subject to a term of imprisonment of not more than five (5) years and/or a maximum fine of IDR 100 million.²¹¹ The terms “sale and traffic”, are not defined but “exploitation” is described as “an act of manipulating, using or forcing a child to obtain profit in the interests of a particular party, the family or a group”.²¹² Since selling and kidnapping are only a couple of acts that constitute the process of trafficking, the use of these terms along with the term “trafficking” illustrates lack of conceptual clarity with regard to the concept of trafficking.

Paradoxically, the National Consultant in her report states “the lack of definition enables the justice agencies to interpret the definition to their discretion. While it is true that this might cause an abuse of power, well-intentioned law officers would be able to put this provision to good use

203 Child Protection Act 23 of 2002, art. 3.

204 Ibid. Section 13

205 Ibid. Section 22

206 Ibid. Section 26

207 Ibid. Section 37 (1)

208 Ibid. Section 39

209 Ibid. Section 83

210 Ibid. Section 83

211 Ibid. Section 78

212 Ibid. Section 13 (1) (b)

for investigating and prosecuting child trafficking cases. The more elaborate the definition, in other words the more elements it has, the more work has to be done by the law officers in order to deal with such cases”.²¹³ Although this might be true and in some instances may allow law enforcement officers, lawyers or other officials to prosecute traffickers, it is dangerous to give such broad discretion to public law officers in countries where corruption is rampant and law officers act in tandem with traffickers.

A few end products of trafficking are also criminalized. For example, it is illegal to conduct an operation involving “an organ or body tissue of a child in the interests of a third party for his own gain or the gain of some other person”.²¹⁴ Forcing, threatening or tricking a child to have sexual intercourse with another person²¹⁵ and economically or sexually exploiting a child for “his own gain or the gain of some third party” are also crimes.

The Act requires parents to protect children from labour and sexual exploitation, violence, abuse and similar acts. In addition it states that if anyone who is responsible for the care of a child “subjects a child to one of the forms of mistreatment referred to in Section (1) above, he shall be subject to legal sanction”.²¹⁶ Similarly, parents are given the responsibility of protecting children against transplanting activities that take place in the interest of third parties.²¹⁷

The Act has a separate section which contains measures that need to be taken to protect and provide support

to victims of trafficking and sexual exploitation. For example, the State is required to provide special protection to child victims of sexual or economic exploitation and “kidnapping, sale and trading”.²¹⁸ These children are also to be provided with “counselors, special infrastructure and facilities, ensured of protection of their identity”²¹⁹ and have their physical, mental and social safety guaranteed. Article 68 explicitly states the protection afforded to children who are victims of kidnapping, sale and trading shall include “supervision, protection, prevention, care and rehabilitation”.²²⁰ The same section makes “permitting, undertaking, ordering to be undertaken or participating in the kidnapping, sale or trading in children” illegal.

Penal Code

The Penal Code does not have a definition of trafficking but criminalizes many acts that form a part of the trafficking process or are the end products of trafficking, such as kidnapping and sexual exploitation. Article 324 states that anyone who “runs a slavery trade, or intentionally and directly or indirectly participates in any of such acts ...is liable to a maximum penalty of 12 years”.²²¹ Article 297 deals with the “trafficking in females and trafficking in underage males”²²² which carries a penalty of six years. Although the section specifically identifies underage males it makes no mention of underage girls. The penal code also uses the term “woman” even when referring to young girls below the age of 18.

Another shortcoming of this provision is that it

213 Report of the National Consultant (Indonesia) to the ILO-IPEC Regional Review of Legal Frameworks on Combating Child Trafficking for Labour and Sexual Exploitation- on file with authors

214 Supra n.200, Section 84

215 Ibid. Section 82 (3)

216 Ibid. Section 13

217 Ibid. Section 17

218 Ibid. Section 59

219 Ibid. Section 64 (2)

220 Ibid. Section 68 (1)

221 Penal Code, art. 324.

222 Ibid. art. 297

criminalizes only trafficking for sexual exploitation which is only one end product of trafficking. The deprivation of a person's freedom is also a crime which is liable to a maximum imprisonment of eight years.²²³ The problem with prosecuting traffickers under the penal code is that since there is no one crime of trafficking for which they can be charged, one would assume that charges be have to be made under the various sections on sexual exploitation, abduction or similar acts.

There is therefore no requirement to provide services to trafficked persons such as housing or medical treatment. There is also no criminalization of those who abuse their authority and power, such as government officials, who abet traffickers. However, Book I of the Penal code on General Issues of Crime does contain provisions which could be used to prosecute those who assist traffickers.

Abduction, which sometimes forms a part of the trafficking process, is penalized in the Code. The abduction of an underage woman with or without her consent²²⁴ and the removal of an underage person from his/her legal guardian²²⁵ are subject to penalties. The penalty is increased if the abducted child is below 12 years of age. Confinement of an underage person is also illegal with increased penalties if the person is below 12 years of age.²²⁶

The Code also provides for revoking guardianship “as a consequence of his or her crime the right of guardianship of the perpetrator of child trafficking can be revoked”.²²⁷

3.3.6 Laws that penalize end products of trafficking

Sexual exploitation

1. Penal Code

The age of consent is 15 years of age and the penalty for statutory rape is a maximum of nine years.²²⁸ A person who, through violence or threats, forces a person to commit or “allows someone else to commit an act of obscenity is liable to a penalty of nine years”.²²⁹ The shortcoming of this article is that no definition of “obscenity” is given. Despite the fact that offences committed against children often incur harsher penalties, the penalty for committing such an obscene act with a person under the age of 15 incurs a lesser penalty of seven years.²³⁰ Anyone who through the abuse of authority, deception or enticement causes an underage person to “perform or to permit an act of obscenity to be committed to him or her” is liable to a maximum penalty of five years.²³¹ Parents or guardians who may cause or facilitate such obscene acts are also subject to criminal charges.²³²

Penalties in the Code do not reflect the gravity of crimes against children and young persons and will not have a deterrent effect. In some cases the law also adversely affects children such as Article 509 of the Bill of Revised Penal Code. This provision, which states that anyone “who wanders and roams around the streets or public places with the purpose of prostituting himself/herself is liable to a... fine”, could be used to fine street children who are

223 Ibid. art. 333 (1)

224 Ibid. art. 332

225 Ibid. art. 330 (1)

226 Ibid. art. 331

227 Ibid. art. 298

228 Ibid. art. 287

229 Ibid. art. 289

230 Ibid. art. 290 (2)

231 Ibid. art. 293

232 Ibid. art. 295 (1) (1)

employed in sex work. If pimps do not pay the fine the children will languish in jails or protection homes.

Child labour

1. Manpower Act 2003

This Act deals with one of the end products of trafficking, labour exploitation of the child. In the explanatory notes it is stated that the aim of the Act is to “overcome problems associated with children who work outside of employment relations and intended to ensure that no child works outside of employment relations or to reduce the number of children who work outside of employment relations”.

A child is defined as a person below 18 years of age.²³³ Although the Act prohibits the employment of children²³⁴ it makes exception for the employment of children between 13 and 15 the age of light work “as the job does not stunt or disrupt their physical, mental and social developments”.²³⁵ Employers who engage such children are required to fulfill certain requirements such as have the written permission of the parents.²³⁶ Children 14 years of age are allowed to do piece work at a school or a place of training.²³⁷ There is express prohibition against engaging children in worst forms of child labour which include:

- a. slavery or practices similar to slavery;
- b. job(s) that make use of, procure, or offer children for prostitution, the production of pornography, pornographic performances, or gambling;
- c. All kinds of job(s) that make use of, procure, or involve children for the production and trade of alcoholic beverages, narcotics, psychotropic

substances, and other addictive substances; and/or
d. All kinds of job(s) harmful to the health, safety and moral(s) of the child.²³⁸

The penalty for engaging a child in one of the identified worst forms of labour is imprisonment for a minimum of two years and a maximum of five years and/or a fine of IDR 200 million and maximum of IDR 500 million.²³⁹

3.3.7 Other laws related to trafficking and end products of trafficking

Money Laundering

Law no. 15 of 2002 on money laundering decrees that proceeds of trafficking will be considered to be assets from a criminal activity and punished.

Extradition laws

At present Indonesia has signed extradition treaties with Malaysia, Thailand, Australia, Philippines and Hong Kong. Indonesian Extradition Law No .1. of 1979 includes the crime of trafficking, slavery and abduction as extraditable offences.

Laws related to using children for begging

Using children for the purpose of begging and hazardous work is recognized as an offence by the Code but an age limit is stipulated for the criminalization of such an act. Article 301 criminalizes “anyone who gives or surrenders to another person, a child under his/her legal

²³³ Manpower Act 2003, art. 26.

²³⁴ Ibid. art. 68.

²³⁵ Ibid. art. 69 (1)

²³⁶ Ibid. art. 69 (2) (a)

²³⁷ Ibid. art. 70

²³⁸ Ibid. art. 74 (2) (a) (d)

²³⁹ Ibid. art. 183

guardianship who is under 12 years of age and whereas it is recognized that the child is to be mobilized for begging or for hazardous work, or for work that may harm his/her health...”.

3.3.8 National Plan of Action on Trafficking of Women and Children

Indonesia's National Action Plan is to be reviewed every five years and is implemented through the National Task Force. The Plan operates at three levels, the national, provincial, and sub-national levels. It is further divided into four working areas, legal norms and empowering law enforcers, social reintegration, preventing all forms of trafficking, and establishing cooperation and coordination in elimination of trafficking in women and children at the local, national, and international levels.

National level

Establishing legal norms and empowering law enforcers against traffickers includes harmonizing international law standards with national laws; enacting laws on witness and victim protection as well as on the elimination of trafficking in women and children; improving the capacity of law enforcers and justice system inspectors; improving general awareness; and encouraging judicial watch groups to monitor law enforcement processes.

Rehabilitation and social reintegration strategies include improving the number and quality of rehabilitation and social reintegration crisis service centres for victims; enacting laws on the minimum age of employment; monitoring practices of child labour; developing alternative education curricula; standardizing rehabilitation and reintegration procedures; developing a system of compensation for victims; and building community awareness.

Preventing all forms of trafficking includes developing a national database on trafficking information at national and international levels; making MOUs pertaining to the elimination of trafficking within ASEAN and Asia-Pacific countries; developing models and mechanisms for child labour protection in order to have national strategies match international commitments; and providing educational equipment to improve the skills of children in order to meet their needs.

Cooperation and coordination at the national and international levels requires establishing bilateral or multilateral MOUs with relevant countries and developing a national tracking system, which makes use of various organizations including religious institutions, communities and families.

Provincial level

Establishing legal norms and empowering law enforcers against traffickers at the provincial level includes enacting various regional regulations on the trafficking of women and children; increasing the efficiency of the justice system; and improving public monitoring of the judicial process.

The strategies associated with providing rehabilitation and reintegration at the provincial level are similar to those outlined at the national level.

Preventing all forms of trafficking at this level includes developing alternative education models for women and children; ensuring stricter enforcement of labour recruitment standards; establishing integrated service standards for victims of trafficking; and encouraging educational facilities and structures to meet the individual needs of children. Strategies for cooperation and coordination are similar to those outlined at the national level.

City and regency level

Strategies for developing legal norms and empowering law enforcers against traffickers are similar to those at the provincial level. In addition, the following goals are also outlined: the clearing of locations that are vulnerable to sexual exploitation activities; prohibiting and preventing children from entering such vulnerable places; ensuring representation for victims of trafficking in litigious and non-litigious cases.

In addition to the work done at the provincial level, providing rehabilitation and social reintegration for victims of trafficking at the local level includes providing cheap and accessible health care; expanding programs associated with children's health; and conducting awareness campaigns.

The strategies pursued at the local level for preventing all forms of trafficking as well as for establishing coordination and cooperation are similar to those at the provincial level.

While the plan addresses the need to have strategies at the various levels (national, regional, city), each of these levels provides unique opportunities for combating child trafficking that are not fully explored in this plan. The plan does not sufficiently account for the diverse experiences of children (girl children, refugee children, and disabled children). While Indonesia has a NPA to address labour exploitation, greater coordination is needed between that plan and this NPA, which specifically targets child trafficking.

3.3.9 National Plan for the Elimination of Worst Forms of Child Labour

There are three phases to this NPA. The first phase is to last five years, followed by the second phase at 10 years, and the last phase at 20 years.

The first phase activities include: improving research and documentation; advocacy campaigns; developing appropriate models for addressing child labour issues; harmonization of laws and regulations; and strengthening the institutional capacity among government agencies, employment organizations, workers/labourer organizations, and NGOs to deal with child labour issues.

The second and third phase activities will depend upon the outcomes reached during the first phase.

The various stakeholders are assigned particular roles and responsibilities in ensuring the effectiveness of the NPA. These stakeholders are found in the areas of education, labour, health, legal enforcement, and media.

3.3.10 Recommendations

- Ensure there is conceptual clarity about the offence of trafficking and national legislation is in line with international conventions and standards;
- Enact an anti-trafficking law which is in line with international norms;
- Enact laws to provide compensation for child victims of trafficking and its end products;
- Draft laws to criminalize the various forms of exploitation that are end products of trafficking, such as pornography;
- Consult child labourers prior to drafting legislation regarding child labour to ensure the needs and concerns of the group most affected by legislation is taken into account and child sensitive laws are formulated;
- Legislate to extend protection of the law to child domestic workers;
- Make alternate arrangements and provision for child workers who are removed from employment
- Strengthen implementing and monitoring mechanisms;

- Create juvenile benches;
- Provide child'sensitive training to judges, police officers, lawyers and others involved in any aspect of monitoring or implementing laws related to children;
- Ensure provision of basic needs such as health care, education and skills training to children trafficking victims;
- Devise and implement public awareness campaigns on child trafficking;
- Develop guidelines for investigating child trafficking and other crimes related to children and child friendly procedures for prosecution of such crimes; and
- Institute more programs for the prevention of trafficking by addressing the factors that cause migration in the first place. Increasing the years of compulsory education or providing more job opportunities in rural areas themselves would prevent some of the children becoming prey to traffickers.

3.4 Bangladesh

3.4.1 Introduction

As in other South Asian countries, child trafficking for labour and sexual exploitation is prevalent in Bangladesh. Bangladesh is a country of origin and transit for trafficked persons. Internal and external migration is taking place at a rapid rate with urban growth of 5.6 per cent.²⁴⁰ The urban population is estimated to reach 67 million by 2025.²⁴¹ This trend has also increased the vulnerability of children whose families move to urban areas only to face unemployment and therefore may feel pressure to subject their children to exploitative situations. It is reported that some child rural-urban migrants are separated from their parents while others make the move to urban areas on their own to find a better life for themselves. Without a supportive and protective family structure these children are extremely vulnerable to trafficking.²⁴²

The porous borders of Bangladesh, which are shared with India and Myanmar, are also conducive to external trafficking. A particularly well known land route used to traffic women and girls to India is the Benapole border crossing which is well-connected with Kolkata, and its renowned sex industry.²⁴³ Despite this Bangladesh has no MOUs or treaties with India to prevent trafficking or to protect the rights of trafficked persons.

The children said to be trafficked from Dhaka, consist mainly of street children and children migrating to Dhaka from rural areas such as Chittagong and Jessore.²⁴⁴ As in

other countries the end products of trafficking, include sexual exploitation, domestic labour and bonded labour. Children are also trafficked from Bangladesh to the Middle East to work as camel jockeys. As the National Consultant states in her report, many of the children rescued from camel jockeying²⁴⁵ are “recovered and rehabilitated”, a process which is complicated by many factors. For example, many children are trafficked when they are very young and may not remember their personal details, such as their name or village. As the National Consultant has pointed out many children cannot even speak their own language, do not have any education or marketable skills and are misfits in their own homes and villages.²⁴⁶

The National Consultant further notes that enforcement of laws is rendered more complicated by the difficulty in determining the age of children since births are not often registered and malnutrition is common. Other laws and customs also provide legal loopholes to traffickers. For example, a Bangladeshi man does not have to include the name of his wife in his passport and thereby is in a position to take many women out of Bangladesh any number of times.²⁴⁷

According to the United States Department of State, the Government prosecuted 70 cases resulting in 42 convictions.²⁴⁸ The report of the Bangladeshi Ministry of Home Affairs for the period 15 June 2004 to 15 March 2005 states that of 72 cases, 47 cases resulted in convictions and 25 in acquittal, with 60 persons being given life sentences. In total 85 persons have been

240 Bangladesh Counter Trafficking Framework p. 21

241 Ibid.

242 Ibid.

243 Ibid. p.22

244 Ibid. p.23

246 Report of the National Consultant (Bangladesh) to the ILO-IPEC Regional Review of Legal Frameworks on Combating Child Trafficking for Labour and Sexual Exploitation-on file with authors.

247 Ibid.

248 Ibid.

convicted and 120 acquitted. As part of its anti-trafficking measures the Government created a fast-track court to prosecute trafficking offences but no convictions have been made to date.²⁴⁹ The United States Department of State has placed Bangladesh on “Tier 2” in its 2005 Trafficking in Persons Report. “Tier 2” countries are those whose Governments do not fully comply with minimal standards but are making significant efforts to combat trafficking. In the past year it prosecuted an increasing number of traffickers and rescued 161 boys from servitude in the fishing industry.²⁵⁰ It has also created a national anti-trafficking police monitoring unit with offices in 64 districts.

3.4.2 Ratification of international conventions

Bangladesh has ratified the Convention on the Rights of the Child (CRC), the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, ILO Convention 182 on Worst Forms of Child Labour, 1949 Convention on the Suppression of Traffic of Persons and the 1956 Slavery Convention.

3.4.3 Trafficking

Women and Children Repression Prevention Act 2000

The Act deals with offences such as trafficking, kidnapping, crippling a child for beggary and prostitution, with harsh penalties that include the death sentence for certain crimes. Offences under this Act are non-bailable.²⁵¹ Before this Act was passed traffickers were charged under the Passport Act for immigration offences. It

has been alleged that corrupt government officials who were abetting traffickers were responsible for this since immigration offences are subject to only small fines. One of the reasons cited for the lack of convictions under this Act is the reluctance of judges to convict due to the harsher penalties provided by the Act.

The section which deals with child trafficking states that “any person (who) brings in from abroad or sends out of the country or traffics or sends or buys or sells any child for any immoral or illegal purpose or takes possession of, keeps in his/her custody with the said purpose, s/he shall be liable for the punishment of death sentence or rigorous imprisonment for life and cash fine in addition”.²⁵² A child is defined as a person under the age of 16.²⁵³

The provision is not specifically structured to deal with the offence of child trafficking although the title of the section states “Punishment for Child Trafficking”. This is because there is no clear, comprehensive definition of trafficking. The section criminalizes certain acts (not all) which constitute the offence of trafficking but instead of linking the acts to the purpose of exploitation it links the offences to “immoral or illegal” purposes. Immoral and illegal purposes, are not defined in the Act. Further, the use of value laden moral terms, such as “immoral”, attach stigma to survivors of trafficking. Although the provision on trafficking does not mention the various end products of trafficking there are sections which deal with some end products such as sexual exploitation.

“Sexual torment” defined as the act of unlawfully touching a child's sexual organ or any other organ of the body by any organ of the body in order to fulfill one's sexual urge/

249 Ibid.

250 Ibid.

251 Women & Children Repression Prevention Act 2000, Section 19 (2).

252 Ibid. Section 6 (1)

253 Ibid. Section 2 (1) as amended in 2003

desire is criminalized by section 10 of the Act. It is curious the term “sexual torment” is used rather than sexual exploitation or abuse. One of the shortcomings of this provision is that it criminalizes the “unlawful” touching of a child's sexual organ or any other organ, which begs the question what is lawful touching? Although the drafters may have used “unlawful” to exempt those who perform religious ceremonies, such as circumcision, the term should be defined in the interest of clarity and in order to ensure children are afforded every protection from sexual exploitation.

The most problematic feature of this provision is that it links abuse, defined as unlawful touching, to the sexual desire of the offender. First, sex crimes are never about sexual desire but concern issues of power, violence and discrimination which the Act needs to recognize. Secondly, the linkage will also make it harder to prove the offence, because it may be impossible to prove the act was done to fulfill sexual desire as opposed to inflict pain upon the child. Further, the section is applicable only to males, as only males are identified as would-be offenders under this section.

Kidnapping of children with intent to commit any of the offences stipulated in Section 5 is also criminalized by the Act.²⁵⁴

Begging, one of the end products of trafficking, is given some consideration in the Act.²⁵⁵ Section 12 penalizes anyone who “damages the hand, leg, eyes or any other organ of a child for the purpose of beggary or for selling them or otherwise cripples or disfigures the child”. The limitation of the section is that it does not criminalize trafficking or procuring and using a child for begging.

The Act enables the establishment of Special Tribunals in every district to fast-track the prosecution of offences under the Act. According to the paper presented by a Bangladesh government representative at the ILO “Regional Workshop on Legal Frameworks and Law Enforcement Capacity in Combating Child Trafficking for Labour and Sexual Exploitation”, 42 such special tribunals have been set up. The Act also provides for the setting up of safe houses for trafficked persons.

Despite its shortcomings, the Act contains some provisions which are concerned with victim protection. For example, section 14 states that in any case where a child is a victim, information relating to the offence, legal proceedings and the like should be published without disclosing the identity of the child. The Penalty for trafficking is imprisonment for a maximum of two years or a fine not more one 100,000 Taka. Though the Act allows the tribunal to use the fine collected from the offender as compensation for the victim “if it considers it necessary”,²⁵⁶ it does not make compensation for victims mandatory. The following provision which deals with procedures for the realization of the fine appears to be drafted on the assumption compensation is mandatory, as it states the tribunal “shall arrange paying such money to the person affected because of the offence committed”.²⁵⁷ Therefore, the position with regard to compensation for victims is ambiguous.

The investigation of offences under the Act are dealt with in detail in section 18 which gives specific time limits within which investigations have to be completed. Similarly Section 20 sets out guidelines for the trial process and as per the amendment to the Act in 2003 provides for trials to be held in-camera.

254 Ibid. Section 7

255 Ibid. Section 26

256 Ibid. Section 15

257 Ibid. Section 16

Section 31 deals with the issue of safe custody and gives discretion to the Tribunal to place a child into safe custody (not in a prison) if it feels it is necessary at any point during the trial process. First, the use of the term safe “custody” rather than phrases such as “protection of child shall be ensured” or “tribunal shall ensure the safety and security of child”, indicates a non-child-sensitive, law and order approach to the issue. The weakness of the section is its failure to recognize that children might need protection as soon as they are rescued as offenders often attempt to intimidate them. The Act also does not make it mandatory to establish shelters for trafficked children or provide such children with basic needs such as health-care or legal aid.

Since this is not an anti-trafficking act there are no provisions which deal with issues of repatriation of victims of trafficking or programmes to support their re-integration.

Suppression of Immoral Traffic Act 1933

This Act though still in effect is rarely applied and has not been amended since enactment. The intent of the Act is prohibiting prostitution and hence the focus is more on establishing and operating brothels rather than on the protection of girls under 18 years of age, who are not mentioned in the Act except for the definition provision. The Act deals broadly with brothels including the process by which complaints may be lodged against brothel owners and penalties levied against them.

A brothel is defined as a place or house “in which two or more females carry on prostitution or in which any girl under the age of 18 years is kept with intent that she

shall at any age be employed or used for any immoral purpose”.²⁵⁸ According to the Act it is an offence to keep or manage a brothel and knowingly allow the premises to be used as a brothel.²⁵⁹ The definition of prostitution is “promiscuous sexual intercourse for hire whether in money or kind”.²⁶⁰ Although moralistic terms such as “promiscuous sexual intercourse” and “immoral purpose” are used they are not defined. The moralistic terms used also attach stigma to the trafficking survivors and re-victimize the victim. The protection provided by this Act to girls being subject to sexual exploitation is minimal.

Penal Code 1860

The Penal Code does not contain provisions which specifically address trafficking but does criminalize other offences such as kidnapping and abduction.

Two types of kidnapping are recognized by the Code – taking without consent from legal guardianship males under the age of 14 and girls under 17 years of age and conveying a person out of Bangladesh without the consent of the legal guardian.²⁶¹ The prescription of different minimum ages for males and females is unnecessary and discriminatory and does not follow the international definition of a child as a person under the age of 18. Kidnapping a child under the age of 10 with the intent or likelihood the child will be enslaved or subject to the lust of another person is recognized as an aggravated offence in the Penal Code.²⁶²

258 Suppression of Immoral Traffic Act 1933, Section 3 (1).

259 Ibid. Section 4

260 Ibid. Section 3 (4)

261 Penal Code, Section 359

262 Ibid. Section 364A

3.4.4 Laws that deal with the end products of trafficking

Children's Act 1974

The preamble states the aim of the Act is to “consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders”. It is therefore a general act but does contain provisions relating to violent crimes against children.

A child is defined as a person under 16 years of age. The Act also contains definitions of one of the activities for which trafficked children are used – begging. The majority of sections in the Act focus on juvenile justice and issues concerning institutional protection of children, the powers of protection officers and the setting up of homes for destitute children. One section of the Act deals with “Special Offences in Respect of Children” and criminalizes several end products of trafficking, such as using children for begging.²⁶³ Penalties are also prescribed for permitting a child to be in a brothel. However, the manner in which the provision is framed appears to indicate the Act is more concerned with protecting the morals of the child rather than protecting the child from sexual exploitation since it penalizes “whoever allows or permits a child over the age of 4 years to reside in or frequently go to a brothel”.²⁶⁴

Section 42 penalizes a guardian or anyone who having control of a girl under 16 years of age “causes or encourages the seduction or prostitution of that girl or causes or encourages any person other than her husband to have sexual intercourse with her shall be punishable”.²⁶⁵ Leaving aside the use of the word “seduction”, on the face of it the provision appears to protect a girl under 16 from being

pushed into prostitution, the explanation following the section disabuses one of these notions as it clearly states that causing or encouraging shall include knowingly allowing “the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character”.

Exploitation of child employees, which includes economic as well as sexual exploitation, is dealt with in section 44. The Act defines sexual exploitation narrowly as “seduction, sodomy, prostitution or other immoral conditions” but provides no definition of economic exploitation.

The provisions relating to sexual exploitation of children and young persons criminalize offences against female children ignoring the fact that male children are also subject to sexual exploitation.

Sexual exploitation

1. Penal Code 1860

The Penal Code contains provisions that deal with engaging underage girls in prostitution. The procurement of a minor girl is prohibited by section 366 and “inducing a girl under 18 years of age to go from any place or to do any act with the intent that she will be forced or seduced into having illicit intercourse” and “importing a girl under 21 years of age into Bangladesh with the intent that she will be forced or seduced into have illicit intercourse”. The use of moralistic terms such as “illicit intercourse” and a legally ambiguous term such as “seduced” will only lead to further victimization of women when interpreted by a judiciary which subscribes to myths and stereotypes about women and is not gender sensitive.

²⁶³ Children's Act 1974, Section 35.

²⁶⁴ Ibid. Section 41

²⁶⁵ Ibid. Section 42

The “selling, letting to hire, or otherwise disposing of a person under 18 years of age with the intent that the person will be used for the purpose of prostitution or any unlawful or immoral purpose” is prohibited by section 372. The “buying, hiring or otherwise obtaining possession of any person under 18 years of age for the same purpose with the same intent” is also proscribed by section 373. Since these provisions do not criminalize the various and numerous acts that constitute trafficking their effectiveness in curbing trafficking is questionable. Moreover, none of these provisions deal with the sexual exploitation of boys.

Although there are no laws which specifically deal with child pornography there are general provisions which could be used to prosecute those who deal in child pornography. Possession, sale, distribution, circulation of obscene pamphlets, books, drawings, papers and the like is prohibited by section 292. Selling such obscene materials to those under the age of 21 is an aggravated offence under the Code.²⁶⁶ Obscenity has been interpreted in case law as “publishing or exhibiting such matter or object which has the tendency to corrupt the minds of those who are open to immoral influence by exciting in them sexuality and carnal desire”.²⁶⁷

The highly moralistic interpretation makes it difficult to make an objective determination as one person's opinion of what would “corrupt the minds of those who are open to immoral influence” might be vastly different to another's interpretation and is likely to create confusion. The interpretation which views sexuality negatively also illustrates fear and suspicion about sexuality and sexual expression. Rather than couching the definition in moral terms it would be better to follow the definition in the Optional Protocol which defines child pornography as “any representation,

by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”.

Child labour

1. *Employment of Children Act 1938*

This Act does not provide a definition of a child although it states that children under 15 years shall not be “employed or permitted to work in any occupation

- a. connected with transport of passengers, goods or mails by railway; or
- b. involving the handling of goods within the limits of any port”.²⁶⁸

The Act also makes it illegal to employ children between 15 and 17 years of age in the above mentioned work, unless their period of work is fixed and they are given a rest period of 12 consecutive hours and do not work during the night.²⁶⁹ Despite the above-mentioned prohibitions, the fact that no minimum age for employment is stipulated creates confusion about the ambit of the Act. For example, children under 15 are banned only from working in certain occupations, which creates confusion as to whether they are allowed to work in industries or occupations other than those prohibited.

Since the Act decrees that a child under 12 years of age should not be employed in any workshop where certain types of work, such as tanning, carpet weaving and bidi making (as set out in the Schedule) are carried out,²⁷⁰ it is unclear whether the employment of children under 12 years of age is prohibited only in the industries mentioned or

²⁶⁶ Penal Code, Section 293.

²⁶⁷ Salma Ali, Report on Laws and Legal Procedures Concerning the Commercial Sexual Exploitation

²⁶⁸ Employment of Children Act 1938, Section 3 (1).

²⁶⁹ Ibid. Section 3 (2)

²⁷⁰ Ibid. Section 3 (3)

whether it is a blanket ban. What is the position of children between 12 and 15 years of age? Are they allowed to work in industries other than those set out in the Schedule?

The lack of a definition of a child coupled with the Act's reference to several age groups, children under 12 years old, those under 15 years old and children between 15 and 17 years old, create ambiguity about the ambit of the Act. This is further compounded by section 3 C, which states that any dispute as to whether the child is 12 years of age or 15 years of age should be resolved through medical determination of age. This implies that 12 and 15 years are the age limits for employment in different kinds of industries.

Any employer carrying out any work set out in the schedule is required to supply details of his business to the Inspector,²⁷¹ while every employer has to maintain a register of children employed in occupations mentioned in section 3 (2).²⁷² The penalty for contravening section 3 of the Act (which contains the prohibitions), or failing to give details if carrying out work set out in the schedule²⁷³ or not maintaining a register²⁷⁴ are only subject to a maximum fine of 500 Taka. Due to the ambiguity of its provisions and lack of comprehensive measures to ensure the welfare of such child workers it is doubtful whether the Act has been effective in preventing child labour, especially in hazardous work, and protect the rights of children engaged in employment.

2. *Child (Pledging of Labour) Act of 1933*

The pledging of children under the age of 15 for labour is prohibited by this Act, which defines it as “an agreement to pledge the labour of a child” which according to the Act is

“an agreement written or oral, express or implied, whereby the parent or guardian of a child, in return for any payment or benefit received or to be received by him undertakes to cause or allow the services of the child to be utilized in any employment”.²⁷⁵ The Act exempts from its purview any “agreement made without detriment to a child, and not made in consideration of any benefit other than reasonable wages to be paid for the child's services, and terminable of not more than a week's notice”.²⁷⁶

Upon analysis it becomes evident that the definition of the prohibition and that of the exemption are not very different. Neither definition speaks of exploitation, yet both speak of economic gain. In the case of an “acceptable” agreement for employing the child, the economic gain takes the form of “reasonable wages” while in the “pledging agreement” it is “payment or benefit”. Instead, the Act should have provided a better definition of a “pledging agreement” to differentiate it from an “acceptable” agreement. Such a definition should have explicitly stated that pledging is labour for an unspecified period of time in order to pay off a debt or an initial lump sum payment. The penalties in the Act are lenient and reflect the period in which the Act was drafted, a guardian or parent is subject to a maximum penalty of 50 taka²⁷⁷ while the person who employs the child is subject to a maximum penalty of 200 taka.²⁷⁸

Other laws related to trafficking

Extradition Act 1974

Extradition from treaty countries for offences of trafficking, procuring young persons, kidnapping, abduction and

271 Ibid. Section 3B

272 Ibid. Section 3 D

273 Ibid. Section 4 (b)

274 Ibid. Section 4 (c)

275 Children (Pledging of Labour) Act 1933, Section 2.

276 Ibid

277 Ibid. Section 4

278 Ibid. Section 5

dealing in slaves are allowed under the Act. Reports indicate the Extradition Act has not been used often for numerous reasons including non-renewal of existing treaties.²⁷⁹

3.4.5 National Plan of Action Against the Sexual Abuse and Exploitation of Children Including Trafficking 2001-2006

Bangladesh's National Plan of Action against the Sexual Abuse and Exploitation of Children Including Trafficking seeks to incorporate the view of children both in the substance of the NPA and in its implementation and monitoring. The NPA is divided into seven themes: prevention; protection; recovery and reintegration; perpetrators; child participation; HIV/AIDS, sexually transmitted infections (STIs) and substance abuse; and coordination and monitoring. The latter four are cross-cutting themes. Accordingly, separate strategies in addition to strategies of prevention, protection, recovery and reintegration are advocated.

In the area of prevention, awareness and advocacy activities are targeted specifically at children as well as members of society more generally. In both cases, education/training is identified as a key component of prevention. The NPA highlights the need to develop different approaches to reach different groups of children, including, for example, refugee children and disabled children. The specific needs of the girl child are addressed in strategies endorsing both a "girl friendly environment" within schools as well as the rights of adolescent women after they are married.

In the area of education, the NPA also mentions the need for social and religious leaders to participate in developing an environment conducive to reproductive health education. The need to ensure that all children receive a basic education

with a strong life skills component in either formal or non-formal settings is also listed as a key strategy. Additionally, for children in rural communities, there is a need to provide alternative or non-agricultural skills training and to encourage the formation of children's associations. Complementing these strategies focused on education, there is a need for legal reform and for better implementation of laws and policies concerning children's rights, especially in the area of eliminating child marriages. Relevant laws and policies must be reviewed, where necessary new laws must be created, and law enforcement officials (judges, lawyers, police officers) must be trained in children's rights awareness.

In the area of protection, strategies include: reactivating the birth registration system and standardizing practices for the reporting of cases and for the handling of complaints and investigations. Establishing an independent body, whose purpose is to deal specifically with complaints related to sexual abuse and child exploitation, is central to standardization strategies. Through training and education, children are to be equipped with those life skills that are essential to their self-protection. Additionally, shelters and day centres must be created. As with the preventive strategy, legal reform and the strengthening of enforcement mechanisms, including monitoring the operations of police officials, are outlined as protective strategies.

The NPA acknowledges the need to have both punitive and non-punitive measures to deter child trafficking. One strategy includes setting up an incentive regime to reward officers and individual units who protect or rescue children from sexual abuse, exploitation or trafficking. The NPA also identifies vulnerable groups, such as child refugees of natural disasters, as requiring special assistance. Finally, the stigmatization of children is addressed by standardizing the procedures for dealing with child trafficking; providing appropriate training for enforcement units involved in the

279 Salma Ali, Report on Laws and Legal Procedures Concerning the Commercial Sexual Exploitation of Children in Bangladesh, ECPAT International, Bangkok, October 2004, p. 25

protection of children's rights; and setting-up separate child-friendly centres both within police stations as well as within medio-legal centres. Legal aid and assistance to enable children to pursue their claims is also outlined as a strategy.

In the area of recovery and reintegration, the NPA identifies the need to engage children who are victims of trafficking so that they can play a role in their own recovery. Strategies for doing this include developing their skills, incorporating their own views into recovery strategies, and providing opportunities for children to work with their peers to develop appropriate programming. These strategies are left primarily to the NGO and INGO sectors to develop. Additionally, the NPA acknowledges the need for the government as well as other NGOs and civil society networks to provide child-friendly support services, including psychological, medical, educational, legal, recreational and creative services. In order to avoid stigmatization, the media in various forms (for example mass, cultural groups, theatre groups) is relied upon. Finally, the need for bilateral and multilateral coordination to facilitate reintegration is also identified as a goal.

Dealing specifically with the perpetrators, or the demand side of child trafficking, the NPA outlines community-based, judicial and non-judicial approaches. One of the strategies is to gather recorded data on trafficking in order to better understand the socio-psychological and economic profiles of the perpetrators. Media and other awareness campaigns are to be used to target existing and potential perpetrators. Also, the NPA identifies NGOs and community groups as key actors in preventing the marriage of the victim to the perpetrator as a solution to the problem of stigmatization.

Child participation is reflected in the implementation and monitoring of the NPA. Children are to be consulted in the creation of a National Children's Task Force (NCTF), which is to be composed entirely of children. Children are

also to be informed of their rights through their education in formal schools, non-formal learning centres, and children's organizations and clubs. There is a need to make the adult community aware of the value and significance of the perspectives of children through awareness building for individuals who feature prominently in the lives of children such as teachers, parents and community leaders.

Space for children to engage in decision-making processes on policy are to be created. Again, the NPA also identifies the need to have different strategies to encourage child participation for children with different needs, including, for example, children with disabilities, adolescent girls, and child refugees. The two strategies proposed are encouraging children to join organizations and clubs that address these concerns and establishing networks of children's organizations. NGOs and INGOs are responsible for monitoring the participation of children in the implementation and monitoring processes.

Coordination and monitoring strategies emphasize the need to establish appropriate structures to ensure coordination at the local, national and international level. The NCTF is to work in partnership with national bodies. The NPA also identifies the need to develop indicators so as to determine the effectiveness of the various strategies that are outlined in the plan.

The plan could be improved with more strategies targeted towards child trafficking and labour exploitation.

3.4.6 Recommendations

- Enact laws that prohibit commercial sexual exploitation of children;
- Enact a comprehensive anti-trafficking law in line with international norms ;
- Ensure there is conceptual clarity about the offence of trafficking and national legislation is in line with international conventions and standards;

- Ensure legislation is drafted in gender and child sensitive language;
- Enact laws on child pornography which take into account technological advances and the emergence of cyber porn;
- Make registration of birth mandatory;
- Enact laws to provide compensation for child victims of trafficking and its end products;
- All national laws must be amended and harmonized and brought in line with the international definition of child as a person under the age of 18;
- Draft laws to criminalize the various forms of exploitation that are end products of trafficking, such as pornography;
- Consult child labourers prior to drafting legislation regarding child labour to ensure the needs and concerns of the group most affected by legislation is taken into account and child sensitive laws are formulated;
- Legislate to extend protection of the law to child domestic workers;
- Make alternate arrangements/provision for child workers who are removed from employment;
- Strengthen implementing and monitoring mechanisms;
- Create juvenile benches and a fast track process for crimes involving children;
- Provide child-sensitive training to judges, police officers, lawyers and others involved in any aspect of monitoring or implementing laws related to children;
- Ensure provision of health care, education, skills training, legal aid etc to children trafficking victims
- Ensure victim and witness protection programmes to ensure the physical safety of victims, witnesses and their families;
- Establish shelter homes for children against whom crimes have been committed and ensure child victims are separated from adults and child offenders;
- Ensure child victims are not sent to jails or detention centres but to shelters or protection homes set up specifically to cater to the needs of child victims;
- Devise and implement public awareness campaigns on child trafficking;
- Develop guidelines for investigating child trafficking and other crimes related to children and child friendly procedures for prosecution of such crimes;
- Develop standards of care for social services providers and others who provide services to child victims of trafficking offences;
- Make compensation for victims mandatory; and
- Institute more programs for the prevention of trafficking by addressing the factors that cause migration in the first place. Increasing the years of compulsory education or providing more job opportunities in rural areas themselves would prevent some of the children becoming prey to traffickers.

3.5 Sri Lanka

3.5.1 Introduction

In Sri Lanka children are trafficked from rural to urban and tourist areas mainly for domestic labour and sexual exploitation. Estimates indicate the number of children trafficked in this manner range from 10,000 to 12,000.²⁸⁰

Where the end products of trafficking are concerned, the Child Activity Survey conducted by the Department of Census and Statistics states that 5.3 per cent of children under the age of 18 are involved in economic activity, while child labour projections by the ILO in 2000 place the number at 35,000. The conflict and tsunami, which orphaned thousands of children, have also created easy prey for traffickers with many children being trafficked from refugee camps and temporary shelters. In response to the tsunami the government enacted the Tsunami (Special Provisions) Act 2005 which in Part II sets out a protective regime for affected children which also seeks to protect children from trafficking. The trafficking of children to be used as combatants by the Liberation Tigers of Tamil Eelam (LTTE) is also common. A UNICEF estimate of under-age recruitment by the LTTE as of 31st January 2005 puts the number at 4,811.

Sexual abuse of the child,²⁸¹ becomes commercial sexual exploitation when the child is forced into prostitution, used for the production of pornography or other such activities. According to Professor nearly 10 per cent of abused boys and 20 per cent of abused girls know their abuse from school or homes.²⁸² The growth of the tourist industry in Sri Lanka coupled with the phenomenal growth of the global sex tourism industry has led to the creation of suppliers of

children, especially young boys to the growing paedophile market. ILO and UNICEF statistics estimate that around, 40,000 children are being used as prostitutes, while 5,000 to 30,000 boys are used by Western paedophiles.²⁸³ In most of these cases, no ground studies have been conducted, and statistics are either not available or are merely estimates based on smaller pilot studies. These studies indicate that in many cases children are either forced into prostitution or enter with the connivance or encouragement of their parents.²⁸⁴ It has also been found that mostly boy children are in the profession, because the stigma attached to girl children taking up prostitution is not present in the case of boys.

Reports indicate that children involved in the prostitution industry are often also used in the production of pornography.²⁸⁵ Sri Lanka has been advertised as an ideal destination for paedophiles on websites. This along with photographs and pornographic films that involve the sexual abuse of children uncovered in police raids, attest to the dangers faced by Sri Lanka's trafficking victims.

Where child labour, one of the end products of trafficking, is concerned according to statistics of the International Organisation for Migration (IOM) children are trafficked from rural areas, especially plantations, to urban areas to be employed as domestics.²⁸⁶ The Child Activity Survey conducted by the Department of Census and Statistics in 1999 also arrived at the same conclusion. Results of a recent ILO study are evidence of the nexus between the local and global market for services previously performed solely for the family, such as domestic labour and migration and trafficking.

The ILO study found a similarity between the local and global explosion of the market for domestic labour. In

280 Report on Worst Forms of Child Labour Compiled by the Global March Against Child Labour, <http://www.globalmarch.org/resourcecentre/world/sri%20lanka.pdf>

281 Camena Gunaratne, 'Child Abuse', Women in Focus: Working Paper No.13, Centre for Women's Research, 2000, pp 74-75.

282 Damitha Hemachandra, "Many Children still Abused and Neglected in Sri Lanka", Daily Mirror, 8 October 2003.

283 Ibid.

284 Supra n. 279 p. 76.

285 Ibid

286 http://www.iom.int/DOCUMENTS/PUBLICATION/EN/tm_23.pdf

both cases those employing domestic labour are two career households with 92 per cent of female partners of the households surveyed engaged in full-time employment. In the case of Sri Lanka increased female migration, particularly to the countries of the Persian Gulf, led to a shortage of female domestic labour which, resulting in increased employment of children as domestics.

A Rapid Assessment by the ILO showed that many children entered the domestic labour market to earn extra income, with 40 per cent of the children surveyed having sought employment voluntarily. 80 per cent of those surveyed said they kept the income they earned.²⁸⁷ This illustrates that in many cases children seek employment and view it as a means to obtain a better education and life.

It is therefore important while enacting laws to keep in mind the reality faced by child labourers and instead of depriving them of a means of earning income, provide safeguards such as minimum wage laws and means for the child to continue his or her education. At the same time the exploitation and in many cases violence child domestics experience are also realities that have to be addressed. Many children stated they performed tasks that required them to work with fire, sharp objects and lift heavy objects, all clearly hazardous tasks. The children surveyed in the study were overworked, with some waking up at 5 a.m. and going to bed at 10 p.m. They also reported being verbally abused and being subject to sexual harassment and abuse. One of the disturbing facts to emerge from the study is that many children were not even addressed by their own names, and thereby were even denied their identity.

Using children for begging, another end product of

trafficking is a common phenomenon in Sri Lanka. Despite its prevalence there are no definitive studies which provide statistics on the number of children so employed. The International Organisation for Migration (IOM) has however identified begging as one of the forms of exploitative labour for which children are internally trafficked in Sri Lanka.²⁸⁸

In Sri Lanka children are also trafficked to function as cadre of the Liberation Tigers of Tamil Eelam (LTTE). Upon the signing the Memorandum of Understanding with the Government of Sri Lanka (GOSL), the Liberation Tigers of Tamil Eelam (LTTE) agreed it would halt its recruitment of child soldiers. Despite the agreement the LTTE continues to recruit and train children. UNICEF reported that as of October 31, 2004 it had received reports of 3,516 new cases of child recruitment by the LTTE²⁸⁹ and voiced concern that many cases may have been unreported.²⁹⁰ The average age of a recruit is said to be 15. Although the LTTE claims children are recruited voluntarily, according to Harendra de Silva, only one in 19 children is voluntarily recruited.²⁹¹ The defection of the Karuna faction from the LTTE has led to an increased recruitment drive by the Wannu faction which targeted 1,800 child recruits previously released by Karuna. Although the LTTE formally released 1,206 child recruits during this period, as of November 2004 of cases reported to UNICEF 1395 were outstanding. Though there have been reports of recruitment from welfare centres, as of April 2005 UNICEF has received reports of only nine such cases.²⁹²

287 Nayomi Kannangara, Harendra de Silva, Nilakshi Parndigamage, "Sri Lanka Child Domestic Labour: A Rapid Assessment" ILO, Geneva, 2003

288 Supra n. 283

289 Scott McDonald, "Sri Lanka Rebels Recruit 709 Child Soldiers" UNICEF, ReliefWeb, 22 Jan 2004.

290 Human Rights Watch, *Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka*, at <http://hrw.org/reports/2004/srilanka104/>

291 Report of the Human Rights Commission on the Eastern Province, p.12

292 Ibid. p.15

3.5.2 Ratification of international conventions

Sri Lanka ratified the Convention on the Rights of the Child without reservations in 1991 and the Optional Protocol on Children in Armed Conflict in 2002. As a party to the Convention, Sri Lanka has a duty to ensure the rights set forth in the Convention. Sri Lanka is also party to the ILO Convention on Minimum Age for Admission to Employment, which requires State parties to abolish child labour and “raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons”.²⁹³ Further, the Convention decrees that the minimum age should not be less than the age of completion of compulsory schooling, which in any case should not be less than 15 years.²⁹⁴ States “whose economy and educational facilities are insufficiently developed may, after consultation with the organizations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years”.²⁹⁵ The protection of children under 18 from work that may jeopardize their health, safety or morals is also one of the concerns of the Convention. Sri Lanka's ratification in the year 2000 imposes a duty upon the State to ensure the rights enshrined in the Convention are not violated.

As a State party to the Convention on the Worst Forms of Child Labour, Sri Lanka is bound to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”.²⁹⁶ As in the CRC and the ILO Convention on Minimum Age for Admission to Employment, in this Convention a child is also defined as all persons under

the age of 18.²⁹⁷ Worst forms of labour include slavery, sale and trafficking of children, debt bondage, forced or compulsory labour and use of children for prostitution and pornography. The Convention also requires States to “establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention”.²⁹⁸

Sri Lanka has also signed the SAARC Convention on Preventing and Combating Trafficking in Women and Children.

3.5.3 The Constitution of Sri Lanka

The Constitution does not contain specific provisions on children except for article 12 (4), which allows for affirmative action for the advancement of women, children and disabled persons. Section 27 (3) of the Directive Principles of State Policy, which are meant to act as guiding principles, state that “the State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination”.

3.5.4 Trafficking

Penal Code (Amendment) Act No.22 of 1995

Although the Penal Code of Sri Lanka recognized crimes such as abduction, kidnapping and slavery, the crime of trafficking was introduced for the first time by the 1995 amendments to the Penal Code.

²⁹³ ILO Convention No.138 on Minimum Age for Admission to Employment 1973, Article 1.

²⁹⁴ Ibid. article 2 (3).

²⁹⁵ Ibid. article 2 (4).

²⁹⁶ ILO Convention on No.182 on Worst Forms of Child Labour, Article 1.

²⁹⁷ Ibid. Article 2.

²⁹⁸ Ibid. Article 5.

Section 360C of the Penal Code states that whoever:

- a. “engages in the act of buying or selling or bartering of any person for money or for any other consideration;
- b. for the purpose of promoting, facilitating or inducing the buying or selling or bartering or the placement in adoption of any person for money or for any other consideration;
 - (i). arranges for, or assists, a child to travel to a foreign country without the consent of his parent or lawful guardian;
 - (ii). obtains an affidavit of consent from a pregnant woman, for money or for any other consideration, for the adoption of the unborn child of such woman;
 - (iii). recruits women or couples to bear children;
 - (iv). being a person concerned with the registration of births, knowingly permits the falsification of any birth record or register;
 - (v). engages in procuring children from hospitals, shelters for women, clinics, nurseries, day care centres, or other child care institutions or welfare centres, for money or other consideration or procures a child for adoption from any institution or centre by intimidation of the mother or any other person; and
 - (vi). impersonates the mother or assists in such impersonation.

Commits the offence of trafficking.

The penalty is imprisonment for not less than two years and not more than twenty years and a discretionary fine. The term child is defined as persons under 18 years of age.

This provision contains two subsections. One is a general provision which criminalizes the acts of buying, selling and bartering humans. The other focuses on certain acts which, if committed for the “purpose of promoting, facilitating or inducing” the buying, selling and bartering or placement in adoption of a person attract penal sanctions. Though the provision criminalizes buying, selling and bartering, it fails to criminalize the various other acts that constitute trafficking such as transporting and harbouring. It does however criminalize assisting a child to travel to a foreign country without the consent of the parent or guardian. The weakness of this sub-section is that in many cases the parent may consent to the child being taken out of the country and in many cases are the person who sold the child to the trafficker. Hence, rather than focus on consent it might be more effective to criminalize assisting anyone to take a child to a foreign country for the purpose of exploitation. Reports claim that although the provision is general, many practitioners favour limiting it to trafficking for adoption.²⁹⁹

The shortcomings of this article are now being reconsidered and a new amendment in line with the Optional Protocol on trafficking is being considered.

Penal Code (Amendment) Bill 2005

Sri Lanka, having signed the Convention on Transnational Crime is now seeking to introduce legislation in line with the Optional protocol on Trafficking. The Bill of 2005 seeks to repeal section 360C of the 1995 amendment and introduce a new section in its place. Trafficking is defined in the proposed section as

299 Centre for Policy Alternatives, National Legislation on Trafficking in Children, Centre for Policy Alternatives, April 2002, p.8

- a. Buying, selling, bartering or instigating another person to buy, sell or barter any person or doing anything to promote, facilitate or induce the buying, selling or bartering of such person for money or other consideration.
- b. Recruiting, transporting, transferring, harbouring or receiving any person or doing any other act by the use of threat, force, fraud, deception or inducement with or without the consent of the said person for the purpose of securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation.
- c. Recruiting, transporting, transferring, harbouring or receiving a child or doing any other act with or without the consent of the child for the purpose of securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation.

The provision is in line with the international definition on trafficking under the Protocol which only requires recruitment, transportation, transfer, harbouring or receipt to be considered trafficking of children even in cases which do not involve any of the means set forth in the Protocol, such as force or the abuse of vulnerability. By the use of the words “or any other act” in subsection (b) the Bill covers a wider range of offensive conduct. The Bill includes some but not all the means set out in the Protocol. Means such as “abduction” which are predicate offences in themselves and are recognized as such in the penal code have not been included. The Sri Lankan provision differs from the Protocol which has an open ended definition of exploitation, and instead only identifies certain types of exploitation. Given the link to migration, the end products of exploitation have to be open ended

since we do not know where and when markets for exploitation will be set up. Sri Lankan boys for example may be sent to the Middle East for camel jockeying, or there may be mail order brides to rural China. This makes it impossible to anticipate what form future markets may take. It was for this reason that the term exploitation was left open ended in the Protocol leaving the decisions to be made on a case by case basis.

The penalty for the offence is imprisonment for not less than two years and not more than 20 years. The minimum penalty appears to be too lenient for such a grave crime, which results in unimaginable abuse of the trafficked person.

Offences related to adoption, which constituted the previous section on trafficking, have been separated in the Bill and introduced as section 360D. The elements of the offence are the same as the previous section 360C with the penalty also remaining unchanged.

One of the limitations of the Penal Code is that it does not have any specific provision which exempts the trafficked child from criminal liability. There are also no special legislative requirements that make it mandatory to provide child survivors of trafficking with assistance and protection, including appropriate housing, education, health care and legal aid. There is also no provision which binds the Government to take measures to protect children from re-victimization.³⁰⁰ The Sri Lankan law is also silent on the Protocol requirement to sensitize and train immigration and other relevant officials on the needs of children.

300 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women & Children, Supplementing the United Nations Convention Against Transnational Organised Crime 2000, art. 9 (1) (b).

3.5.5 Laws that protect children from the end products of trafficking

Child soldiers

The proposed amendment to the Penal Code introduced in August 2005 contains a new section (358A), which criminalizes recruiting a child forcibly or compulsorily for use in armed conflict, which is also an end product of trafficking. Any person found guilty of an offence under this section is liable to imprisonment not exceeding 20 years and a fine. Given the reality of child soldiers in Sri Lanka, it is understandable that a separate provision dealing with recruitment of child soldiers was adopted and is an important provision in the context of steady recruitment of children by the LTTE. However, why does the provision only criminalize “forced or compulsory” recruitment of children? Merely recruiting a child for use in armed conflict should attract penal sanctions. Further, if the section on trafficking of the present amendment is structured broadly along the lines of the Trafficking Protocol, in other words if it recognizes the end product of trafficking to be exploitation, recruitment for armed conflict could be included in the section on trafficking.

Sexual exploitation and prostitution

Sri Lanka as party to the Convention on the Rights of the Child is bound by article 36 of the CRC. Article 36 requires States to “protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare”, article 34 obliges State parties to protect children from all forms of sexual exploitation and sexual abuse and taken national and bilateral measures to prevent:

- a. The inducement or coercion of a child to engage in any unlawful sexual activity;
- b. The exploitative use of children in prostitution or other unlawful sexual practices; and
- c. The exploitative use of children in pornographic performances and materials.

1. *Children and Young Persons Ordinance*

The Children and Young Persons Ordinance states that it is an offence for any person having custody, charge or care of a child or young person to allow the child or young person to “reside in...a brothel”.³⁰¹ This particular provision could be used to prosecute persons who force children into sex work. Penalties however are minimal; a fine not exceeding 250 rupees or imprisonment not exceeding six months or both. There is no mandatory minimum penalty.

2. *Penal Code Provisions*

The Penal Code amendment of 1995 introduced the crime of sexual exploitation of children whereby it is an offence for any person to “knowingly” allow a child to be on any premises for the purpose of “causing such child to be sexually abused or to participate in any form of sexual activity or in any indecent exhibition or show”.³⁰² Although this section could be utilised to prosecute brothel owners, child rights groups claim that brothel owners are often prosecuted under the Brothels Ordinance, which contains lighter penalties.³⁰³ They therefore call for the inclusion of section 360B in the Brothels Ordinance.

The act of procuring a child for any form of sexual abuse

301 Children and Young Persons Ordinance, Section 73

302 Penal Code (Amendment) Act No. 22 of 1995, Section 360B (1) (a).

303 Child Abuse and the Law: A Review of the Law & Legal Processes, Lawyers for Human Rights and Development, 2000, p. 76

or intercourse,³⁰⁴ inducing a person through print or other media or any other form of advertisement to be a client of a child for such purpose, taking advantage of such person's influence or relationship to a child to procure a child for such purpose,³⁰⁵ subjecting a child to threats or violence to procure³⁰⁶ a child for such purpose³⁰⁷ or give material benefits or monetary consideration to a child or his or her parents to procure a child for such purpose³⁰⁸ are all offences as per the 1995 amendment. The penalty is imprisonment not less than five years and not more than 20 years. Once again prescribing the same penalty for all offences does not recognize that certain offences, such as abusing one's relationship or power over the child and using violence against a child, are far more serious.

The Penal Code amendment of 1998 taking into account the reality of the child prostitution industry, especially in the coastal areas introduced a new section, (288A), which makes it an offence for any person to knowingly hire, employ, persuade, use, induce or coerce a child to “procure any person for illicit sexual intercourse”. The penalty is imprisonment of not less than two years and not more than five years upon conviction. Although this provision is welcome, since often children who grow up in the industry become pimps and recruit other children, there is no justification for the lesser penalty of five years imprisonment as compared to section 360B –the offence of procuring a child. If at all the offence of using a child to procure a prostitute should invite a stricter penalty.

Section 360E of the 2005 Penal Code Amendment Bill creates the offence of soliciting a child. The section makes it an offence to solicit a person under the age of 18 “for the purpose of sexual abuse”. The penalty is imprisonment of not more than 10 years or a fine or both.

3. Brothels Ordinance

This Ordinance criminalizes keeping, managing, acting or assisting in the management of a brothel,³⁰⁹ or being a tenant or occupier of any premises knowingly allow any part of the premises to be used as a brothel,³¹⁰ or being the landlord let the premises with the knowledge it will be or is being used as a brothel.³¹¹ The penalty is not more than 500 rupees or imprisonment for not more than six months or both.³¹² In the case of a second or subsequent conviction the penalty is a fine not more than 1,000 rupees or imprisonment for a period not more than one year or both.³¹³

Since the Ordinance has not been amended in decades the penalties are inadequate and hardly likely to act as a deterrent. Where implementation is concerned, as has been pointed out by some child rights groups, it is possible for the police when charging the brothel keeper under the Brothels Ordinance to charge a girl found at the premises for assisting the brothel keeper instead of charging the brothel keeper under the Penal Code for sexual exploitation or procurement.³¹⁴

304 Supra n.301, Section 360B (1) (b) .

305 Ibid. Section 360B (1) (c).

306 Ibid. Section 360B (1) (d).

307 Ibid. Section 360B (1) (e).

308 Ibid. Section 360B (1) (f).

309 Brothels Ordinance, Section 2 (a)

310 Ibid. Section 2 (c) .

311 Ibid. Section 2 (i).

312 Ibid. Section 2 (ii).

313 Supra n. 302, p. 29.

314 Ibid. Section 2 (b).

4. *Vagrants Ordinance*

This ordinance decrees persons behaving in a certain manner, which includes “common prostitutes found wandering in the streets and behaving in a riotous or indecent manner and persons in any public place accosting any person against his will and to his annoyance”,³¹⁵ as idle and disorderly. Such person upon first conviction will be subject to imprisonment without hard labour not exceeding 14 days or a fine not exceeding 10 rupees.³¹⁶ Since child sex workers and children engaged in begging who are arrested under this Ordinance are, in practically every instance, subject to the control of a brothel owner or pimp, the likelihood of paying even 10 rupees as a fine is slim. It is most likely they will be sentenced to 14 days of prison and be re-traumatised. A person convicted of such offence a second time will be deemed to be a “rogue” and “vagabond” and liable to imprisonment with or without hard labour not exceeding one month or to a fine not exceeding 20 rupees.³¹⁷ Persons so convicted a third time are deemed to be “incorrigible rogues”.³¹⁸ The terms “rogue” and “incorrigible rogue” are not defined in the Act.

Section 9 states that a person who either lives on earnings gained from prostitution or “systematically procures persons for the purpose of illicit or unnatural intercourse”³¹⁹ will also be deemed to be an incorrigible rogue and upon conviction be liable to a fine not exceeding 100 rupees or imprisonment not exceeding six months or both.³²⁰ Soliciting in public for the purpose of

illicit sexual intercourse or indecency is also considered an offence.³²¹ The use of the word “indecency” takes a moral tone and implies meaning. Interpretation can therefore be subjective.

In the case of the girl child the Ordinance states that if a person having custody or care of a girl (defined as girl under 16 years of age), “causes or encourages the seduction or prostitution or unlawful carnal knowledge” of the girl she or he will be subject upon conviction to a fine not exceeding 100 rupees or imprisonment not exceeding six months or both. It cannot be denied the penalty mocks the seriousness of the crime.³²² This offence constitutes sexual exploitation of the girl child and should therefore be subject to stricter penalties and specific minimum mandatory fine and imprisonment. Section 12 goes further and makes parents execute a bond for the exercise of care or supervision of the girl, if it is proven the parents or guardian had knowledge the girl was at risk of seduction, being unlawfully carnally known or engaged in prostitution. Although making the parents responsible for the safety and well-being of the child is one way of protecting the child, considering it is in many cases parents who force children into sex work, the penalty appears to be minimal and once again does not reflect the seriousness of the crime. Further, the Act does not define “at risk of seduction” and “being unlawfully carnally known”, terms and phrases which in any case have no relevance in today's society.

315 Vagrants Ordinance, Section 3.

316 Ibid.

317 Ibid. Section 4.

318 Ibid. Section 5.

319 Ibid. Section 9 (1) (b).

320 Ibid. Section (1) (b) (i).

321 Ibid. Section 7.

322 Ibid. Section 11.

Other sexual offences against children

The Penal Code also contains many other provisions that criminalize sexual offences against children and young persons.

Section 365A of the Penal Code relating to the offence of gross indecency between persons, in other words sexual intercourse between persons of the same sex, states that “any person who, in public or private, commits or is a

party to the commission of ...any act of gross indecency with another person shall be guilty of an offence”. The section goes on to impose stricter penalties where the offence is committed by a person over 18 years of age in respect of any person under 16 years of age, implying that persons under 16 years will not be held to be a party to the offence but a victim. However, some child rights groups claim there is lack of clarity in the section, which has often resulted in police charging the child victim or producing him in court along with the accused (paedophile) as a

Pornography

Box 3.7 Case study: Exploitation for pornography

A Sri Lankan male placed an advertisement in a Sri Lankan gay web site looking for an investor who could invest in making a teen gay video indicating that he has a team of actors aged between 14 to 16 years old.

The National Child Protection Authority (hereinafter NCPA) detected this message and decided to investigate. It appointed a decoy who posed as a white male working in Sri Lanka as a diplomat. He contacted the video producer and made inquiries about the age and sex of the actors, the number of performers, type of sex, their experiences, duration of the video, and rate. The video producer quoted his prices and the NCPA decoy bargained until prices were agreed upon. Further, the decoy agreed to provide the director and camera crew. The NCPA investigation team was trained in shooting a film especially for this case. The producer was supposed to supply the actors and arrange a safe location for shooting.

The decoy then asked to see photographs of the young actors and the video maker sent photographs of seven minor boys. The decoy selected the actors.

On the agreed day at a location close to Negombo the NCPA investigation team commenced shooting the pornographic film under the guidance of the producer. Seven minors were ready to perform in this video along with the producer who was the only adult performer. The NCPA police investigation team arrested the video maker who was sexually abusing two minors for the camera.

The producer was charged for sexually abusing minors but not for the “offence” of trafficking of children for exploitative employment. The victims were between 14 and 16 years of age.

suspect.³²³ In some cases defense counsels have attempted to prevent the child from giving evidence claiming the child was a co-accused and party to the offence.³²⁴

A new section introduced in the Penal Code Amendment Bill in August 2005 makes it mandatory for a person who has the charge, care, control or possession of any premises and has knowledge the premises is being used for the abuse of a child to inform the nearest police station of the matter.³²⁵ Failure to inform is subject to imprisonment of not more than two years or a fine, or both. This provision could be used to prosecute those who may be in connivance with an abuser or paedophile and provide or rent their premises to the abuser with full knowledge of the illegal activities taking place.

1. Penal Code

Section 286 of the Penal Code deems it an offence if anyone has in his possession “any such obscene book or other thing as is mentioned (in a previous section) for the purpose of sale, distribution, or public exhibition”. The punishment is imprisonment for up to three months or fine or both. The term “obscene” is not defined and is therefore open to interpretation.

2. Obscene Publications Ordinance No. 4 of 1927 and Obscene Publications (Amendment) Act No. 22 of 1983

This Act criminalizes the production, possession,³²⁶ import or export³²⁷ of obscene publications for the purpose of

trade, distribution and public exhibition. Accordingly, it is illegal to engage in business in any way and distribute, exhibit or lend such obscene publications.³²⁸ Abetment is also a crime. The Act makes it punishable for a person in Sri Lanka to abet the commission of similar crimes in another country that are punishable under corresponding laws.³²⁹ “Obscene publication” is not defined and could be challenged on the grounds that it violates free speech. It should be noted the Act does not contain anything specific to obscene publications concerning children. Due to the fact it is outdated there is also no reference to recent technologies for distribution such as cyber porn. As in other legislation the punishment is inadequate and there is no minimum mandatory sentence or fine “not exceeding 1,000 rupees” or imprisonment not exceeding three months.

The Ordinance was amended in 1983 by the Obscene Publications (Amendment) Act No. 22 of 1983, which increased the penalties for offences under the Ordinance. Despite the amendment there are no minimum mandatory sentences and penalties are still low and unlikely to deter offenders. If it is the first offence, the penalty is a fine not exceeding 2,000 rupees or imprisonment not exceeding six months or both.³³⁰ In the case of a subsequent offence committed after the conviction for first offence, the sentence is prison not exceeding six months and a fine not exceeding 5,000 rupees.³³¹ The Act also does not contain provision for confiscation of equipment used to produce such obscene material.

323 Supra n.302, p. 12

324 Ibid.

325 Penal Code (Amendment) Act 22 of 2005, Section 286C.

326 Obscene Publications Ordinance No.4 of 1927, Section 2 (a).

327 Ibid. Section 2 (b)

328 Ibid. Section 2 (c)

329 Ibid. Section 3 (2)

330 Amendment Section 2 (1)

331 Obscene Publications (Amendment) Act, No.22 of 1983, Section 2 (2).

3. *Children and Young Persons (Harmful Publications) Act No. 48 of 1956*

The Act defines a child as a person below 14 years of age and a young person as one who is 14 but below 16. It is concerned with ensuring that publications which consist of stories told mainly in pictures that depict “the commission of any crime”, “any act of violence or cruelty”, or “any incident of a repulsive or horrible nature” which would corrupt a child or young person do not “fall into the hands of any child or young person”.³³² It is an offence for a person to print, publish, sell, hire or have in his or her possession for the purpose of selling any such publication. The penalty is a fine not exceeding 1,000 rupees or imprisonment not exceeding 6 months or both.³³³

As defence a person can claim he was not aware of the contents of the publication as he had not previously examined it and had no reasonable cause to think it was such an obscene publication. Once again “obscene publication”³³⁴ is not defined. Although the Act applies only to such publications which contain violent or cruel acts (amongst others) that “would tend to corrupt” a child or young person no guidelines are provided in the Act as to how a determination is to be made that a particular publication with depiction of a particular violent act will corrupt a child or young person.

The definition of a child is not in line with international standards, which define a child as a person under the age of 18.

4. *Penal Code (Amendment) Act No. 22 of 1995*

This Act amends section 286 of the Penal Code by adding a section which recognises as an offence hiring, employing, assisting, persuading, using, inducing or coercing any child to “appear or perform in any obscene or indecent exhibition or show or to pose or model for, or to appear in, any obscene or indecent photographs or film or who sells or distributes or publishes or has in his possession any such photograph or film”.³³⁵ A parent or guardian who allows a child to be “employed or participate, in any obscene or indecent exhibition or show or pose or model for, or to appear in any such photograph or film” is subject to imprisonment of not less than two years and not more than 10 years.³³⁶

Taking or assisting in taking of any indecent photograph of a child,³³⁷ distributing or showing any such photograph or publication,³³⁸ having in one's possession for the purpose of distribution or showing³³⁹ and publishing or causing any such photograph or an advertisement to be published which gives the message that the advertiser or person named in the advertisement distributes or shows such photographs³⁴⁰ are all offences subject to the penalty mentioned above. The stipulation of the same penalty for all offences gives the impression the law views all the offences as the same whereas some offences, for example a parent or guardian subjecting or allowing the child to participate in such exhibition or publication should be subject to stricter penalties, since the parent has a duty of care which has been breached. The minimum penalty is too lenient since the act of subjecting a child to take part in such publication or exhibition often involves or leads to other offences, such as child sexual

332 Children and Young Persons (Harmful Publications) Act No.48 of 1956, Section 2.

333 Ibid. Section 3

334 Ibid.

335 Penal Code (Amendment) Act No.22 of 1995, Section 286A.

336 Ibid. Section 286A (1) (b)

337 Ibid. Section 286A (1) (c) (i)

338 Ibid. Section 286A (1) (c) (ii)

339 Ibid. Section 286A (1) (c) (iii)

340 Ibid. Section 286A (1) (c) (iv)

abuses. Child rights groups have called for broadening this section to criminalize showing pornography, obscene videos and the like to children. Child is defined as persons under 18 years old.

5. Penal Code (Amendment) Act, No. 29 of 1998

The amendment inserts new subsections to section 286A which make it mandatory for any developer of films or photographs who discovers that any photograph or film contains an “indecent or obscene photograph or a film of a child” to report the matter to the office in charge of the nearest police station. Any developer who contravenes the provision is subject to imprisonment of up to two years or fine or both.

6. Penal Code (Amendment) Bill 2005

The Bill places a duty upon a person providing computer services to take all necessary measures to prevent such computers being used for the commission of an act constituting sexual abuse of a child.³⁴¹ The penalty is imprisonment not more than two years or a fine or both. This is a particularly important provision since cyber porn, especially cyber porn for paedophiles, is a growing industry, which is largely unregulated.

Other criminal offences

Kidnapping, Abduction Slavery

The provisions on kidnapping recognize two types of kidnapping -kidnapping from Sri Lanka and kidnapping from lawful guardianship.³⁴² The Penal Code states that any person who “entices any male minor under 14 years or female minor under 16 years...out of the keeping of the lawful guardianship...without the consent of such guardian” is said to have kidnapped the minor from lawful guardianship.³⁴³ No explanation is given as to why the cut off ages are 14 and 16 and not 18 as per the international definition of a child, or for the different minimum ages for males and females. The penalty is imprisonment of up to seven years and a fine.³⁴⁴ This provision will be rendered useless in cases of kidnapping of street children. The use of the provision in prosecuting traffickers is also limited since it only criminalizes the person who “entices” or takes the child away and not others involved in the process.

Section 358 of the Penal Code criminalizes kidnapping in order to subject that person to grievous hurt or slavery or “to the unnatural lust of any person”.³⁴⁵ The penalty is imprisonment of up to 10 years and a fine.³⁴⁶

Prostitution

Procuring, attempting to procure, removing or attempting to remove any girl under 21 years old to leave Sri Lanka “with a view to illicit intercourse with any person outside Sri Lanka”,³⁴⁷ or doing the same “with the intent she may become the inmate of...a brothel elsewhere”,³⁴⁸ or bringing

341 Ibid. Section 286B

342 Penal Code, Section 350.

343 Ibid. Section 351

344 Ibid. Section 354

345 Ibid. Section 358

346 Ibid. Section 358

347 Penal Code (Amendment) Act No.22 of 1995, Section 360A (1).

348 Ibid. Section 360A (2)

into Sri Lanka a girl under 21 years of age “with a view to illicit sexual intercourse with any person”³⁴⁹ or procuring or attempting to procure any girl to “become, within or without Sri Lanka, a common prostitute”,³⁵⁰ procuring or attempting to procure any girl to leave her “usual place of abode” so that she may for “the purposes of prostitution become the inmate of, or frequent a brothel within or outside Sri Lanka”³⁵¹ are offences under the Penal Code.

All offences have the same penalty of imprisonment for not more than two years and in the case of a male offender whipping in addition to imprisonment.³⁵² Extending the age limit to 21 contributes to the confusion regarding the definition of a child, further complicating determining whether 18 is the age of majority. There is no rationalization as to why the age limit was extended beyond 18 in this case, whereas in certain other cases of far graver crimes for example, statutory rape, the age limit is either 14 or 16. The inclusion of women above the age of 18 in this clause indicates an extremely protective stance of the State, which becomes restrictive and robs the woman of choice and agency. Another limitation of the section is that subsection (3), which deals with procuring a person to become an inmate of a brothel, does not stipulate an age limit. The section also contains words such as common prostitute, which are derogatory to women. Further, the section prescribed the outdated not to mention cruel and unusual punishment of whipping.

Recognizing the current reality where both male and female children are forced into sex work, the Penal Code amendment of 1995 revised the section on kidnapping

and abduction by making it applicable to both sexes by the incorporation of terms such as “any person whether male or female”. Terms such as “common” prostitute were removed, as was the punishment of whipping. The section on procuring or removing a person from Sri Lanka with a view to illicit sexual intercourse with a person outside Sri Lanka was amended to reduce the age limit from 21 to 16.³⁵³ Although 21 years exceeds the age of majority it is unclear why the age was reduced to 16 and not 18, the age at which a person attains majority and is considered an adult.

The following sub-section states that age is irrelevant in instances where a person is procured to leave Sri Lanka to “become an inmate of, or frequent a brothel” or is removed or attempts are made to remove the person from Sri Lanka for the said purpose.³⁵⁴ The age limit for bringing a person into Sri Lanka for the purpose of illicit sexual intercourse is also 16.³⁵⁵ Once again there appears to be no logical reason for reducing the age from 21 to 16. As the Penal Code, the 1995 amendment too provides the same penalty for all offences, imprisonment of not less than two years and not more than 10 years. The 1998 amendment to the Penal Code further revised the above sections on kidnapping to include abduction for the purposes of sexual abuse.³⁵⁶

Child domestic labour

1. *Employment of children regulations: under sections 14 and 31 of the Employment of Women, Young Persons and Children Act No. 47 of 1956*

The regulation clearly states that no person under the age

349 Ibid. Section 360A (3)

350 Ibid. Section 360A (4)

351 Ibid. Section 360 A (5) as amendment by Penal Code (Amendment) Act No.29 of 1998

352 Ibid, Section 360A, Penal Code (Amendment) Act No.22 of 1995

353 Ibid. Section 360 A (2)

354 Ibid. Section 360 A (3)

355 Ibid. Section 360 A (4)

356 Penal Code Amendment Act No. 29 of 1998, Section 5

of 12 shall be employed in any occupation.³⁵⁷ Employing a child as a domestic servant in a way that prevents the child from having four hours of leisure between 6 a.m. and 8 p.m. on any day, and additional three hours of leisure following consecutively between 6 a.m. and 8 p.m. on any one day of the week is prohibited. According to the regulation a child employed as a domestic servant should also be allowed 10 consecutive hours' rest from 8 p.m. to 6 a.m. in addition to the leisure time stipulated above.³⁵⁸ Such children are required to have seven consecutive days rest every three months.

Although section 17 of the principal enactment states children should not be employed in a manner that prevents them from attending school, there is no provision that ensures or makes provision for the education or fair pay of the child. Further, there is no provision which clearly states persons employing children as domestics need to ensure the child is provided with decent and adequate food and clothing and that his or her health needs are met. Most importantly there are no mechanisms either in the Act or in the regulation to monitor whether the regulations are being followed, receive complaints about contravention, investigate such complaints or provide remedy to the affected child. Child is defined as a person under 14 years of age.

2. 2000 Amendment to the Employment of Children Regulation made under sections 14 and 31 of the Employment of Women, Young Persons and Children Act No. 47 of 1956

Prior to the amendment in 2000, children above 12 could obtain employment in “undertakings other than industrial undertakings”. The amendment to the regulation expressly prohibits children, defined as those under the

age of 14, being employed in any occupation and repeals regulations 3 (relating to prohibition of employing a child in specified occupations), 4, 5, 6, 7 (relating to employing a child as a domestic servant), and 8. These regulations were repealed since they were not required after the prohibition on employing children. However, they could instead have been amended to regulate employing young persons, defined as those between the ages of 14 and 18, as domestics.

3. Children and Young Persons Ordinance

The Ordinance has a section relating to the prevention of cruelty to children, which could be used as an additional ground to prosecute offenders in cases of abusive child labour. According to the Ordinance it is an offence for any person over the age of 16 having custody or care of a child or young person, to subject him to a variety of ill-treatment including assault, neglect, abandonment, or expose him to suffering or injury.³⁵⁹ Not providing adequate food, clothing, medical aid and lodging for a child can be construed to be neglect.

Other forms of child labour

It should be noted that there is no definition of hazardous work in any legal provision relating to the employment of children, although certain regulations prohibit employing children in certain industries, which could be construed to be hazardous work.

1. Employment of Children Regulations made under sections 14 and 31 of the Employment of Women, Young Persons and Children Act No. 47 of 1956

This Regulation prohibits the employment of children in

³⁵⁷ Employment of Children Regulations made under sections 14 and 31 of the Employment of Women, Young Persons and Children Act No. 47 of 1956, Regulation 2.

³⁵⁸ Ibid, Regulation 6.

³⁵⁹ Ibid, Regulation 6.

professions stipulated in the schedule³⁶⁰ which include, scavenging, driving mechanically propelled vehicles, blasting operations, work in night clubs, any work involving use of tractors, bulldozers and work connected with hunting or training wild animals.

2. *Employment of Women, Young Persons and Children Act of 1956*

The Act, which defines a child as a person under 18 years of age and a young person as a person who is between 14 and 18, prohibits employing persons under 18 years old any time during the night at an industrial undertaking. The definition of an industrial undertaking in the context of employment of persons under the age of 18 for night work includes working in mines, manufacturing activities, demolition, shipbuilding, construction, transporting of passengers or goods.³⁶¹ The penalty for contravention of this section is a fine not exceeding 1,000 rupees or imprisonment not exceeding six months or both.³⁶² The Act does allow women and young persons to work between 7 p.m. and 11 p.m. The Act contains a provision which enables the Minister to “exempt from the application of the provisions of this Part (of the Act) relating to persons under the age of 18 years the employment of such persons on work which is not deemed by the Minister to be harmful, prejudicial, or dangerous to them in a family undertaking wherein only parents and their children or wards are employed”.³⁶³ This section appears to allow the employment of persons under 18 years old in occupations that are clearly hazardous

and unsuitable for children if they are employed in a family undertaking and working only with their parents. Although this might be required due to economic necessity it places the safety and well-being of the child in jeopardy.

The Act requires any person who employs persons under 18 years of age to keep a register with the name, date of birth and hours of work of such employees.³⁶⁴ Failure to maintain such a register will upon conviction incur a fine not exceeding fifty rupees or in the case of a second or subsequent offence not exceeding 200 rupees. Not only are the fines inadequate but the fact that the person who breaches the provision will be subject to a fine only upon conviction and not upon the inspecting officer finding that the employer does not maintain such register, robs the section of its strength. These sections do not make a distinction between children and young persons but contain a general reference to persons under 18 years of age. Although the Act requires employers to display relevant provisions of the Act along with translations³⁶⁵ the chances of the provision being implemented are slim.

The Act prohibits employing children in public or private industrial undertakings.³⁶⁶ Once again industrial undertakings in which only family members are employed are exempt from this prohibition.³⁶⁷ The penalty for contravention of the provision is a fine not exceeding 1,000 rupees or imprisonment not exceeding six months or both upon conviction.³⁶⁸ The Act also bans employing children under 15 in a ship or vessel but the prohibition does

360 Children and Young Persons Ordinance, Section 71.

361 Employment of Children Regulations made under sections 14 and 31 of the Employment of Women, Young Persons and Children Act No. 47 of 1956, Regulation 3.

362 Ibid. Section 2

363 Ibid. Section 3(7)

364 Ibid. Section 5 (1)

365 Ibid. Section 6 (1)

366 Ibid. Section 7 (1)

367 Ibid. Section 7 (2) (a)

368 Ibid. Section 7 (3)

not apply to a vessel on which only family members are employed.³⁶⁹ It also allows persons who are 14 but not yet 15 to be employed on a ship if the designated authority is satisfied such employment will be beneficial to the person. The Act does not set out the factors the authority has to take into account in arriving at such a decision, in other words no guidelines or standards are provided.

Employing children before close of school hours, any time between 8 p.m. and 6 p.m., more than two hours on any Sunday, to lift, carry or move anything that is heavy enough to cause injury and in any occupation likely to be “injurious to his life, limb, health, or education” are prohibited by the Act.³⁷⁰ Contravention of the provision is liable to fine not exceeding 1,000 rupees or imprisonment not exceeding six months or both.³⁷¹

The Act also contains provision for exceptions to be made to allow employment of children depending on age, circumstances or occupations among other factors. This includes employment of children by parents or guardians in light agricultural work, or in schools imparting technical education.³⁷² The legislation also provides for the formulation of regulations that prohibit the employment of children in any specified occupation, the setting of a minimum age of employment, hours of work, rest and meal times.³⁷³ Penalty for contravention is a fine not exceeding 1,000 rupees or imprisonment not exceeding six months or both upon conviction.³⁷⁴ Employing a child in a manner that prevents the child from attending school is an offence subject to the same penalty as above.³⁷⁵ Employers,

parents and guardians if requested by an authorised officer have to provide information regarding the employment of such child. Providing false information is an offence, once again liable to the same fine as stated above.³⁷⁶ The Act gives power to authorized officers to enter any building or place where an industrial undertaking is taking place to determine whether anyone is employed at such a place in contravention of the Act.³⁷⁷ Obstructing an officer from carrying out such inspection is an offence subject to the same penalty mentioned above.³⁷⁸

Once again the penalties are inadequate and the stipulation of the same penalty for all offences regardless of the gravity of the offences gives no indication of the level of seriousness of each offence. There is also no minimum mandatory fine, which creates the impression that the offences in the Act are not serious enough to warrant strict penalties. Although the Act prohibits employment of children (defined as persons below 14 years of age) it contains provisions that set out regulations relating to the employment of children. Hence, the Act does not appear to contain an absolute prohibition of employment of children under 14 years of age.

Section 19 prohibits a person under the age of 16 taking part in any public performance which may endanger his life or limbs. Any person who allows him to do so will be liable to a fine not exceeding 1,000 rupees or imprisonment not exceeding six months. Section 20 prohibits a child being trained to take part in performances of a dangerous nature. However, those who are under 16 years but have attained the age of 14 can be so trained if a

369 Ibid. Section 9 (2) (a)

370 Ibid. Section 13 (1)

371 Ibid. Section 13 (3)

372 Ibid. Section 14

373 Ibid. Section 14 (b)

374 Ibid. Section 14 (3)

375 Ibid. Section 17

376 Ibid. Section 22

377 Ibid. Section 25

378 Ibid. Section 25 (3)

licence is granted under section 20 (2) of the Act. It should be noted that the Act does not provide a definition of what constitutes performances of a dangerous nature. Despite allowing the training of a child upon the issuance of a licence no guidelines are provided to the authorized office as to which aspects need to be taken into account when issuing such licences.

The section states that before granting the licence the officer may require the applicant to produce a health certificate as to whether the health of the person to be trained will be affected, or may request the police to investigate and report whether any reasons exist to prevent the granting of the licence.³⁷⁹ Hence, the fulfilment of the requirement is discretionary, not mandatory. Although section 20 (6) states the licence shall specify the places where the training shall take place and “shall embody such conditions as are, in the opinion of the authorized officer, necessary for the protection of that person” there are no objective standards the trainer is required to abide by, in other words there are no standard rules or safeguards in place to ensure the safety of the child on account of whom a licence has been granted to be trained to take part in performances of a dangerous nature. For example, no provision for check-up visits by the authorized officer, no demands made of the employer to maintain certain safety standards or the like.

Although the Act prohibits employing children in certain industries, it also provides many exceptions. In addition, there is no recognition and prohibition and therefore definition of worst forms of child labour.

3. Employment of Young Persons at Sea Regulation 1957 made under sections 9 (3) and 31 of the Employment of Women, Young Persons and Children Act No. 47 of 1956

The regulation states the Commissioner of Labour, if

satisfied, may allow persons who have attained the age of 14 years, but below 15 years and are physically fit for employment on a sea-going vessel to be so employed if he is satisfied that such employment is “likely to be of immediate or ultimate benefit to such person”. Approval may be withdrawn if the Commissioner is of the opinion the person so authorized to work on a sea-going vessel has ceased to be physically fit or if he is of the opinion “that the likelihood of immediate or ultimate benefit has ceased to exist”. The flaw in the regulations lies in the fact the decision rests entirely on the (subjective) opinion of the Commissioner who is required to make decisions about the physical fitness and well-being of the child without recourse to expert medical opinion.

4. Employment of Young Persons at Night in Industrial Undertaking Regulations made under sections 3 (7) and 31 of Employment of Women, Young Persons and Children Act No. 47 of 1956

The provisions of Part I (prohibitions and terms of employment) of the Act are said not to apply to the employment of young persons in the undertakings specified in the attached schedule, if such undertakings are family undertakings, in other words where only parents and children are employed. The Schedule sets out various forms of work including manufacture of furniture, manufacture of bricks and tiles, manufacture of cigars and beedies. Hence, this regulation removed existing safeguards for children working in family undertakings. Since the list of manufacturing activities include making bidies and manufacturing tiles and bricks, work that could be hazardous to the health and well-being of the child, removing family enterprises from the purview of the Act adversely affects attempts to protect the child from hazardous labour.

³⁷⁹ Ibid. Section 20 (5)

5. *Employment of Women, Young Persons and Children, The Factories and The Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Act No. 32 of 1984*

The regulation contains prohibition on employing persons under the age of 18 in an industrial undertaking during night-time.³⁸⁰ Further, it states that those under 16 years of age should not be employed for more than 12 hours in any day and should not begin work earlier than 6 a.m. or finish work later than 6 p.m.³⁸¹ Persons between 16 and 18 years of age should not be employed later than 8 p.m. and on not less than one day a week at 1 p.m.³⁸² It is unclear why the regulation makes provision to allow older persons to finish work earlier at 1 p.m. on not less than one day a week and effectively have at least one half day of work.

6. *Employment of Women, Young Persons and Children (Amendment) Act, No. 8 of 2003*

This amendment introduced stricter penalties for all offences set out in the Employment of Women, Young Persons and Children Act of 1956. For example, the penalty for employing a person under 18 years old at night in an industrial undertaking was increased from a fine not exceeding 1,000 rupees or imprisonment of not more than six months or both, to a fine not exceeding 10,000 rupees or imprisonment of a period not more than 12 months or both. The positive factor is that the employer is also required to pay compensation to the person so employed in contravention of the Act.³⁸³ The penalty for not maintaining a register with details of employees who are under 18 years has also been increased from a fine of not more fifty rupees or in the case of a second

offence a fine of not more than 200 rupees to a fine not exceeding 5,000 rupees or in the case of a second offence a fine not exceeding 10,000 rupees.³⁸⁴

Another new section requires not only the employer of a young person employed in any industrial undertaking but also the parents to provide an authorized officer with information regarding the employment of the young person.³⁸⁵ This rectifies the problem created by the Regulation on Employment of Young Persons at Night in Industrial Undertakings and provides protection to young persons employed in family undertakings. Contravention of this provision or giving false information is subject to a fine not exceeding 10,000 rupees or imprisonment for not more than 12 months or both.

This Act also repeals section 13 of the principal enactment. The new section 13 states that anyone employing a child in contravention of the provisions of this part of the Act shall be liable to a fine of not more than 10,000 rupees or imprisonment of not more than 12 months or both upon conviction. The person shall also be ordered to pay compensation to the child in question. The new section 14 sets out the exceptions to the prohibition on employing a child. Exceptions are employment of a child by his parents or guardian in light agricultural work or similar work carried out by members of the same family before or after school hours, and “employment in any school or institution supervised by a public authority and imparting technical education or other training for the purpose of trade or occupation”.³⁸⁶

The amendment to section 20 increases the age limit of children prohibited from taking part in dangerous performances from 14 to 16 years of age. The section which

380 Employment of Women, Young Persons and Children, The Factories and The Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Act No. 32 of 1984, Section 2 (1).

381 Ibid. Section 5

382 Ibid. Section 5

383 Employment of Women, Young Persons and Children (Amendment) Act, No.8 of 2003, Section 2.

384 Ibid. Section 5

385 Ibid. Section 8A

386 Ibid. Section 14

authorizes an officer to grant a licence for a dangerous performance has also been amended with the licence to be granted only to those who have attained the age of 16 instead of 14. The amendment however does not contain any objective standards by which the trainer is required to abide, in other words no provision for check-up visits by an authorized officer, no demands made of the employer to maintain certain safety standards or similar measures.

The definition of authorized officer has been expanded to include Medical Officer, Chief Factory Inspecting Engineer, any Factory Inspecting Engineer, any Labour Officer or any Statistical Officer or any Statistician attached to the Department of Labour,³⁸⁷ which will greatly enable the detection of illegal employment and labour exploitation of children. It is important to keep in mind that merely empowering various officers as “authorised officers” will not lead to more effective implementation of the Act. What is important is to provide training on the provisions of the Act for the officers designated as authorized officers so they possess the knowledge and skills to implement the provisions of the Act.

Begging

1. Children and Young Persons Ordinance

The Children and Young Persons Ordinance makes it an offence to cause or procure a child or young person to be in a street or place for the purpose of begging.³⁸⁸ An exception is made in case of the father or mother of the child or young person. The fine for contravention is an amount not exceeding 500 rupees or imprisonment not exceeding one year. It has to be pointed out the penalty for this offence is stricter than the penalty for cruelty against a child.

2. Penal Code (Amendment) Act, No. 29 of 1998

The amendment added a new section 288, which makes it an offence to cause or procure “a child to be in any street, premises or place for the purposes of begging or receiving alms, or of inducing the giving of alms”. The penalty upon conviction is imprisonment of not more than five years and a discretionary fine. Child is defined as a person under 18 years old. Unlike the provision in the Children and Young Persons Ordinance, this provision makes no distinction between children begging with parents and children forced to beg, whereby the parents of a child could be imprisoned leaving the disadvantaged child completely destitute and at the mercy of traffickers.

Other offences

1. Penal Code (Amendment) Act, No. 29 of 1998

Using children to traffic restricted articles, in other words using children as carriers of restricted articles is prohibited by the new section 288B. The penalty is imprisonment of not less than five years and not more than seven years upon conviction and a discretionary fine. The definition of a restricted article is the same as in the Poisons, Opium and Dangerous Drugs Ordinance and the act of trafficking includes selling, giving, procuring, storing, administering, transporting, sending, delivering or distributing. Limiting the definition of a restricted article to that in the Poisons, Opium and Dangerous Drugs Ordinance ignores the use of children to smuggle liquor and even small arms.

³⁸⁷ Ibid. Section 27

³⁸⁸ Children and Young Persons Ordinance, Section 74 (1).

3.5.6 Juvenile justice

In Sri Lanka the minimum age of criminal responsibility is eight years old.³⁸⁹ Juvenile courts exist in Sri Lanka but they mainly try offences committed by children. There are no special courts that hear cases relating to offences committed against children. Children against whom offences have been committed and are in need of care are sent to remand homes along with those who are suspected of committing crimes and those who were arrested and awaiting trial. In the year 2002 several under-age children whose employment conditions were in contravention of laws or regulations were placed in remand homes 18 in Pannipitiya, 11 in Anuradhapura, and 17 in Rammutugala.

There is provision in the Children and Young Persons Ordinance in relation to children in need of care. The Ordinance provides for the Minister to establish remand homes and appoint persons as visitors to any remand home.³⁹⁰ The Minister may also approve schools for the education, training or detention of children and young persons and if at any time the Minister is unsatisfied with the condition or management of the school he or she can withdraw approval of the school.³⁹¹ The problem with the provision is that it makes no distinction between homes for the care or education of children and homes for the detention of children who may have committed crimes.

A child is defined as a person under 14 years of age and a young person as a person between 14 and 18 years of age. A child in need of care or protection includes those who are “falling into bad associations, or exposed

to moral danger, or beyond control”,³⁹² a child against whom particular offences (in the Penal Code) have been committed³⁹³ or a child found wandering the streets or begging.³⁹⁴ The Ordinance contains a section which allows a police officer of rank not below sub-inspector or “any person authorised by any court” to take a child or young person against who any of the stated offences have been or are believed to have been committed or is about to be brought before a Juvenile Court,³⁹⁵ to a place of safety until she or he is produced before a Juvenile Court. Place of safety is defined as “any remand home or hospital, or the residence of any person nominated by the Minister under section 14 (3)”.³⁹⁶ Many rights groups working with children find this provision problematic as it allows a police officer or “authorised officer” to take a child without a court order to a “place of safety”. There is no time limit stated within which the child or young person has to be produced before the court, making it more problematic as a police officer could place the child in a “place of safety” and the child could be forgotten for months.

Table 1 below gives the number of remand, detention homes and similar facilities and Table 2 sets out the number of children in these facilities along with the reason for their detention.

389 Penal Code, Section 75.

390 Supra n. 387, Section 48

391 Ibid. Section 50 (2)

392 Ibid. Section 34

393 Ibid. Section 34 (1) (b)

394 Ibid. Section 34 (1) (c)

395 Ibid. Section 37 (1)

396 Ibid. Section 88

Table 3.1 Number of homes and number of children admitted during 2002

	Number of Homes	Number of Children
Remand homes	4	1161
Certified schools	4	242
Receiving homes	8	326
Detention home	1	183
Approved school	1	3
National training centre	1	24
Voluntary remand homes	3	71
Voluntary homes	201	9485
Total	223	11,495

Source: The Department of Probation and Child Care Services

Table 3.2 Admissions to certified schools by offence during 2002

Offence	Makola	Kappitipola	Hikkaduwa	Rammutugala	Total
Thefts, Burglaries	36	18	13	—	67
Disobedience to parent	15	5	3	21	44
Sale and use of alcohol	6	1	—	—	7
In need of care and protection	12	11	33	18	74
Other	19	—	11	20	50
Total	88	35	60	59	242

Source: The Department of Probation and Child Care Services

The table clearly illustrates that children in need of care and protection are placed in detention homes with those convicted or awaiting trial for thefts and burglaries, and in some cases even murder. Although detailed statistics are not available for the year 2003, based on the available statistics there is no reason to believe that the situation has improved. As admitted by the Provincial Commissioner of the Department for Probation and Child Care Services, the number of homes to house victims of abuse, those awaiting trial, and offenders is inadequate. Lack of qualified staff is also a contributing factor to the ineffective functioning of the juvenile justice system.³⁹⁷

Many problems have been identified in the existing institutional correctional method. As mentioned earlier there is a shortage of institutions in Sri Lanka. In Ranmuthugala 95 girls were housed in 2003³⁹⁸ although the capacity of the facility is 60.³⁹⁹ This has often resulted in victims of abuse and other crimes being housed with those accused of serious crimes. In addition, there is a lack of qualified and trained staff able to identify and deal with the needs and concerns of the children. Upon their release from the institution children do not join their families due to various reasons, such as parents are separated and unwilling to take back the child, children have no families or financial instability of the family. In such cases the Department helps children find employment and supervises them until they attain the age of majority.⁴⁰⁰ Due to financial constraints this is often hard to achieve and children may go back to crime or become street children.

Houses of Detention Ordinance No. 26 of 1955

The Minister is to provide houses of detention for the reception of vagrants.⁴⁰¹ A vagrant defined as “any person found asking for alms” and “any person not being physically able to earn, or being unwilling to work for, his own livelihood and having no visible means of subsistence”.⁴⁰² Although children in need of care and custody are also sent to detention homes the Ordinance deals only with vagrants. No structure exists to ensure such detention homes are child friendly and do not re-traumatize a child victim.

Vagrants Ordinance

The Ordinance allows a peace officer upon the complaint of a probation officer to remove a person against whom an offence under section 11 has been committed to a place of safety selected by the probation officer. A peace officer is defined to include police officers, grama niladhari (village officers) appointed by a government agent in writing to perform police duties.⁴⁰³ A place of safety is defined as “any hospital, institute, house, home or other suitable place, the occupier of which is in the opinion of the probation officer after due inquiry a person of respectable character, and is willing to receive the girl temporarily”.⁴⁰⁴

To remove a girl child without a court order to a location, which the probation officer in his opinion finds suitable, is detrimental to the safety and well-being of the child and provides room for further abuse of the girl-child. The place of safety is not even one so designated by the court

397 Sunethra Gunerwardena, Operational Issues In Institutional Treatment and Community-Based Treatment Methods for Juvenile Offenders in Sri Lanka at [http://www.unafei.or.jp/english/pdf/](http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch13.pdf)

PDF_rms/no59/ch13.pdf

398 Courtesy- Department of Probation and Child Care Services.

399 Supra n. 394.

400 Ibid.

401 Houses of Detention Ordinance No.26 of 1955, Section 3 (1).

402 Ibid, Section 2

403 Vagrants Ordinance, Section 25.

404 Ibid.

or the Ministry but only a place which the probation officer believes to be suitable after due inquiry. The section does not specify which factors have to be satisfied in order for the person to be deemed suitable to receive the child. The girl so detained should be brought before a magistrate for a maximum of seven days and may continue to be detained at the place of safety until the magistrate makes an order in relation to the case.⁴⁰⁵

If the magistrate believes an offence has been committed against the girl he may order the care and detention of the girl until a charge is made against a person for the offence.⁴⁰⁶ If a charge is made against a person the order for the care of the girl may be extended until the conviction or discharge of the person.⁴⁰⁷

Although the Ordinance states that if the person charged is convicted then the order may be extended for a period not exceeding 21 days, it is silent about what should be done after 21 days.⁴⁰⁸ Further, the Ordinance also states that notwithstanding any person claiming the custody of the girl, orders issued under the Ordinance for the detention and care of the girl will be carried out. Considering the lack of care homes in Sri Lanka and the fact it is beneficial to children to be with their families in a familiar environment it is unclear why the Ordinance does not make provision to ascertain whether the person seeking custody is a suitable and rightful guardian who had no role in the abuse of the child and place or return the child to his or her custody.

3.5.7 Protection for the victim

Penal Code (Amendment) Act No. 22 of 1995

A new section was introduced in the 1995 amendment to the Penal Code, which provides some protection to victims of certain offences such as the procurement and sexual exploitation of children. The new section 365C prohibits the publication of the name or any matter that exposes the identity of a person against whom one of specified offences “is alleged or found to have been committed”. The penalty is imprisonment of up to two years or fine or both. The amount of the fine is not specified. Police officers in charge of the police station or in charge of investigation may order such publication if she or he acts in good faith for the purposes of the investigation. This is problematic since most officers are not sensitive to the repercussions of such publication and not being child or gender sensitive cannot be given the power to decide if the identity of the victim should be made known. Anyone who publishes any matter in relation to proceedings in court in respect of offences referred to in the section without the permission of the court will be subject to imprisonment of up to two years or fine or both.

Evidence (Special Provisions) Act, No. 32 of 1999

Several new sections were added to make court proceedings more child-friendly. Section 2 of the Act allows the child to give evidence without taking an oath where the court is satisfied the child is capable and competent to give evidence but does not understand the nature of the oath. Evidence so obtained will be admissible. A section added on to the Evidence Ordinance as section 163A enables the court in cases of child abuse to

405 Ibid, Vagrants, Section 13 (2)

406 Ibid, Section 13 (3) (a)

407 Ibid, Section 13 (3) (b)

408 Ibid. Section 13 (3) (a) (i)

use video recording of a preliminary interview of a child witness as evidence, which can be treated as if given by the child in direct oral testimony. The court may prohibit submitting such videos if the child is not available for cross-examining or where “any rules of court requiring the disclosure of the circumstances in which the video recording was made have not been complied with to the satisfaction of the court”.

The provision allows the child not to be examined in chief on any matter which has been dealt with in his recorded testimony. If the child during direct oral testimony before the court contradicts any statement (expressly or by implication) made in the video, the judge may “if he considers it safe and just in all the circumstances of the case, to act upon such previous statement as disclosed by the video recording, if such previous statement is corroborated in material particulars by evidence from an independent source. Since in many cases of child abuse, exploitation and trafficking the abusers and traffickers gain access to witnesses, especially child witnesses, and through intimidation and violence force them to change their testimony, this provision will enable the court to minimize the erosion of the State’s case against the abusers and traffickers.

One drawback is that for the purpose of the said provision an offence relating to child abuse includes only certain offences and not all offences related to exploitation and abuse of children. Although the section does provide some protection to the child witness its failure to include specific child-friendly provisions to prevent subjecting the child to intimidating, aggressive or improper lines of questioning during cross-examination (such as the rape shield laws) leaves the child open to re-victimization. Further, if the child dies after his or her evidence is recorded the tape

recording cannot be introduced as evidence, undermining the purpose of this provision.

3.5.8 Institution to protect the rights of children

National Child Protection Authority established by Act No. 50 of 1998

In 1998 the government, in recognition of the need for an institution to spear head the protection and promotion of the rights of children, established the National Child Protection Authority by an act of Parliament. The membership of the Authority is to include psychiatrists, paediatricians, medical practitioners, senior psychologists, a senior officer of the Attorney-General’s Department, a senior officer of the Department of Police and other members with wide experience in law, child welfare, education or any other related field⁴⁰⁹ and ex-officio members consisting of the Commissioner of Probation and Child Care, the Commissioner of Labour and the Chairperson of the Committee established by Article 40 of the Charter on the Rights of the Child.⁴¹⁰

Section 14 of the NCPA Act, sets out the following functions of the NCPA:⁴¹¹

- Advising government on national policy and measures regarding prevention and treatment of child abuse as well as protection of children
- Creating awareness of the rights of the child to be protected from abuse;
- Consulting and co-ordinating with relevant ministries, local authorities, public and private sector organizations and recommending measures

409 National Child Protection Authority Act No.50 of 1998, Section 3(a).

410 Ibid. Section 3(b)

411 <http://www.childprotection.gov.lk/index.htm>

for the prevention of child abuse and protection of victims;

- Recommending legal, administrative and other reforms for the effective implementation of national policy;
- Monitoring implementation of the law, the progress of all investigations, and criminal proceedings in cases of child abuse;
- Recommending measures in relation to protection, rehabilitation and reintegration into society of children affected by armed conflict;
- Taking appropriate steps for the safety and protection of children in conflict with the law;
- Receiving complaints from the public relating to child abuse and taking action on these;
- Advising and assisting local bodies and NGOs to co-ordinate campaigns against child abuse;
- Promoting, co-ordinating and supporting conduct of research on child abuse;
- Organizing and facilitating workshops, seminars, and other events. to develop skills and knowledge;
- Co-ordinating with and assisting the tourist industry to prevent child abuse related to commercial sex networks;
- Co-ordinating; and
- Preparing and maintaining a national database on child abuse. This includes monitoring organizations which provide care for children.

Box 3.8 Case study: Enforcement of anti-exploitation laws

R (offender) advertised on a bill board in one of the gay web sites requesting children for companionship.

The NCPA arranged a decoy to correspond with R to find out his intentions. The decoy wrote to R posing as a child and contact was established. When R came to Sri Lanka in 2002 the decoy met R in the suburbs of Colombo. R's intention was clear but there was not enough evidence. R returned home.

The decoy was in touch with R through E-mail and learnt R was planning to visit Sri Lanka again in 2004. His profile appeared in many gay web site billboards indicating his intention to visit Sri Lanka shortly and seeking Sri Lankan boys as companions. Since around this time R stopped corresponding with the decoy the NCPA deployed a second decoy. R said he enjoyed the companionship of the 2nd decoy and continued to write lengthy E-mails to him grooming him for sexual activities.

After R's arrival in Sri Lanka the 2nd decoy withdraws from the operation and the 1st decoy takes over. R requests the 1st decoy to accompany him on sight seeing tours. The 1st decoy agrees and accompanies him on some of the trips. During these trips he gathered more corroborative evidence regarding boy victims, their names addresses, and financial support received from R.

Upon their return to Colombo, R wanted to compensate the 1st decoy and offered some pornographic pictures of children to him. He also requested the decoy to visit him at the Hotel where he was staying. Hidden cameras were set up and a team disguised as people loitering in the area was deployed to follow the 1st Decoy when he went into the hotel to receive the pornographic material offered by R. Although an offence was committed he was not arrested at the scene.

The facts were reported to Colombo Magistrates Courts and a search and arrest were obtained.

In the meantime R went to stay with two boy victims whom the 1st Decoy had identified and met during the tour in a hill city. Since the investigation team followed R and the building which R was occupying was under constant surveillance sufficient evidence was obtained.

R was in the company of children when he was arrested by the NCPA Police team. The two minors who were subjected to sexual abuse by R were introduced to R by their maternal uncle. The parents were financially looked after by R, and were not even prepared to believe that R could sexually abuse their children. It is not clear how the trafficker was compensated by R for the "kind deed" of supplying companions. At present two cases are pending in the High Court against R on charges of Child Pornography and Sexual Exploitation of Children. The offence was immediately informed to R's country of origin and his passport was revoked as the NCPA has been in touch with the law enforcement authorities in that country.

The NCPA conducts training programmes on issues such as the legal proceedings with regard to victims and perpetrators of sexual abuse, the gathering of information and reporting cases of child abuse, legal proceedings with regard to child labour, for police officers, Samurdhi officers, labour and probation officers. Workshops on interviewing and working with perpetrators and victims of maltreatment, indicators of sexual abuse in children, profiling of offenders, abuse prevention and victim awareness have also been conducted.

The NCPA has also produced a manual entitled “A Guide to Interviewing Children: Video Interviewing Manual”.

Campaigns

Poster campaigns on children's rights, child labour and child abuse are amongst the campaigns undertaken by NCPA. The posters, which are printed in all three languages are distributed to schools, governmental and non-governmental organizations and displayed in public places. Mobile exhibitions are also held particularly on days such as the International Children's Day.

District and divisional protection committees

Based on section 15 (e) of the National Child Protection Authority Act, the NCPA has established child protection committees in 13 districts. The District Secretary acts as the focal point and engages in the planning and implementation of activities. The purpose of the Committee is to act as a coordinating body between probation and child-care workers, local law enforcement authorities, the judiciary and health workers at the local level. Under the same section, the NCPA has also established divisional committees with the mandate to amongst other duties receive complaints about child abuse and refer them to the NCPA, conduct awareness programmes and conduct surveys to identify problems faced in preventing abuse of children. Although these Committees aim to prevent abuse along with promoting

and protecting the rights of children their number may prevent proper co-ordination and result in duplication of effort. This has been pointed out by the CRC Committee in its Concluding Observations, which has recommended the establishment of a national body to co-ordinate “all activities regarding the implementation of the Convention”.

3.5.9 National plan of action

The national plan has four priority areas of intervention: legal reform and law enforcement; institutional strengthening and research; prevention; and rescue, rehabilitation and reintegration.

In the area of legal reform and law enforcement, the NAP outlines the following goals: ratifying relevant international instruments; revising laws to ensure they are in conformity with international standards; ensuring the effective enforcement of laws and policies; ensuring that the relevant persons/agencies are sensitized to the issues surrounding child trafficking; endorsing a justice system that focuses on the best interests of the child, including establishing juvenile courts in critically vulnerable areas and revising “child hostile” procedures; and incorporating children's rights as fundamental rights within the present constitution.

In the area of institutional development, strategies include assessing the institutional capacities of relevant national organizations, government ministries, and those organizations that are capable of combating child trafficking. The objectives are to ensure that within these institutions priority is given to child rescue efforts and that there is a standardization of institutional procedures. The plan outlines specific goals for the ministry of education, the ministry of social services, the police department, the ministry of labour, the Attorney General's Department, and the National Child Protection Authority. Additionally, there is a need to improve the coordination

of all institutions involved in child trafficking through the NCPA.

In the area of prevention, activities are divided into areas that promote social awareness of labour exploitation of children through, for example, incorporating children's rights into the formal school curriculum. Other strategies focus on preserving the integrity of the nuclear family by promoting practices that minimize disruption of family life. Providing health care support to vulnerable families is considered to fall under this particular category of prevention. Additional categories include promoting community-based approaches to alleviating poverty by providing opportunities for skills development for parents and children, extending public NGO micro-credit programmes, and expanding gender sensitization programs. Those strategies targeted specifically at children include compulsory education for children up to the age of 16 years of age in formal and non-formal settings, providing means for alternative employment for children from 14 to 18 years of age, preventing the recruitment of child soldiers, and encouraging child participation in decision-making processes.

The rescue, rehabilitation, and reintegration strategies include instituting a tracking and reporting system that will allow communities to make early interventions; ensuring that all shelters follow established protocol guidelines; ensuring that an individual needs-based approach is integrated into all programming; encouraging and organizing community and family involvement in the rehabilitation process; and eliminating the re-victimization of rescued children (boys and girls) by ensuring confidentiality, protective measures for the family, a flexible approach for the relocation of the child, and easy monitoring through databases.

3.5.10 Recommendations

- Enact a comprehensive anti-trafficking law in line with international norms;
- Ensure there is conceptual clarity about the offence of trafficking and national legislation is in line with international conventions and standards;
- Repeal the Vagrants Ordinance;
- Ensure legislation is drafted in gender and child sensitive language;
- Enact laws to provide compensation for child victims of trafficking and its end products;
- All national laws must be amended and harmonized and brought in line with the international definition of child as a person under the age of 18;
- Consult child labourers prior to drafting legislation regarding child labour to ensure the needs and concerns of the group most affected by legislation is taken into account and child sensitive laws are formulated;
- Ban the employment of children at sea;
- Formulate a definition of worst and hazardous forms of labour;
- Legislate to extend protection of the law to child domestic workers;
- Make alternate arrangements/provision for child workers who are removed from employment;
- Strengthen implementing and monitoring mechanisms;
- Create a fast track process for crimes involving children;
- Provide child-sensitive training to judges, police officers, lawyers and others involved in any aspect of monitoring or implementing laws related to children;
- Ensure provision of health care, education, skills training, legal aid and the like to child trafficking victims; and
- Establish victim and witness protection programmes to ensure the physical safety of victims, witnesses and their families.

- Establish shelter homes for children against whom crimes have been committed and ensure child victims are separated from adult and child offenders
- Ensure child victims are not sent to jails or detention centres but to shelters or protection homes set up specifically to cater to the needs of child victims
- Devise and implement public awareness campaigns on child trafficking
- Develop guidelines for investigating child trafficking and other crimes related to children and child friendly procedures for prosecution of such crimes
- Develop standard of care for social services and those who provide services to child victims of trafficking offences
- Institute more programs for the prevention of trafficking by addressing the factors that cause migration in the first place. Increasing the years of compulsory education or providing more job opportunities in rural areas themselves would prevent some of the children becoming prey to traffickers

3.6 Thailand

3.6.1 Introduction

Thailand is a source, transit and destination country, where persons are frequently trafficked for the purposes of sexual exploitation and forced labour. As a source country, Thai women and girls are often trafficked to Australia, Bahrain, Japan, Malaysia, Singapore, South Africa, Taiwan Republic of China, Europe, and North America for commercial sexual exploitation.⁴¹² A significant number of children trafficked from Myanmar, the People's Democratic Republic of Laos, Cambodia, and the People's Republic of China (P.R.C.), the province of Yunnan in particular, are economic migrants who wind up in forced labour and commercial sexual exploitation in Thailand.⁴¹³

Regional economic disparities fuel significant illegal migration into Thailand, presenting traffickers opportunities to move victims into labour or sexual exploitation.⁴¹⁴ Women and girls are trafficked from the highly impoverished North and Northeastern regions of the country for the above purposes. Those trafficked are often the rural poor and are from ethnic minorities.⁴¹⁵

The State Department of the United States of America's Trafficking in Persons Report places Thailand on its Tier 2 Watch list, and states that although Thailand “does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so”.⁴¹⁶ The Government of Thailand has made significant efforts in addressing the

issue of human trafficking through various measures. At the National Conference on Human Trafficking held on August 6, 2004, the Prime Minister proclaimed the fight against human trafficking to be the priority of the national agenda.⁴¹⁷ However, any progress made due to legal reform is marred by the tacit support granted by the Government to the commercial sex industry which generates revenues for the government through tourism.

3.6.2 Ratification of international conventions

The Thai Government has signed the United Nations Convention on the Rights of the Child, the World Declaration of the Survival, Protection and Development of Children and Plan of Action and the Protocol to Prevent, Suppress and Punish Trafficking in Persons. The Government of Thailand has also ratified ILO Conventions relevant to child labour, namely the Forced Labour Convention, 1920, ILO Convention 182, Elimination of Worst Forms of Child Labor and the Minimum Age (Underground Work) Convention, 1965.

3.6.3 The Constitution of the Kingdom of Thailand

The Constitution of 1997, although not addressing the problem of trafficking directly, does grant the child certain rights. Section 53 of the Constitution states that:

“Children, youth and family members shall have the right to be protected by the State against violence and unfair treatment. Children and youth with no guardian shall

412 Trafficking in Persons Report 2004, U.S. Department of State
<http://www.state.gov/g/tip/rls/tiprpt/2005/46616.htm>

413 Ibid

414 Thailand Report, <http://www.humantrafficking.org/countries/eap/Thailand/>

415 Ibid

416 Supra n.409.

417 Thailand's Country Paper on “Policy Mainstreaming: The Labour and Employment Perspective in Taking Action against Human Trafficking” ILO, <http://www.ilo.org/public/english/region/asro/bangkok/child/trafficking/downloads/thaicountrypaper-eng.pdf>

have the right to receive care and education from the State, as provided by law”.⁴¹⁸

The Constitution also addresses the right to education of all children. Under Section 43 of the Constitution, education is to be provided for 12 years without charge,⁴¹⁹ but only nine of those 12 years are compulsory.⁴²⁰ This requires that children remain in school until the age of 15 or 16, as the required enrollment ages for Thai children is between six and seven years of age.⁴²¹ If the proposed 12 year compulsory education scheme is endorsed, it is expected that child labour will become practically non-existent. While the careers that are customarily pursued by children themselves would remain, older workers would enter into these fields in place of children thereby reducing risk factors.⁴²²

The Constitution protects against potential end products of trafficking. For example, Section 51 states that “Forced labour shall not be imposed except by virtue of the law specifically enacted for the purpose of averting imminent public calamity or by virtue of the law which provides for its imposition during the time when the country is in a state of war or armed conflict, or when a state of emergency or martial law is declared”.⁴²³

However, due to the fact that the Constitution and its protections are only limited to those with citizenship, those trafficked from other countries cannot appeal to the same fundamental rights as Thai citizens. The lack of citizenship also acts as a risk factor for internal trafficking

of the approximately a half a million non-Thai hill tribe people living in northern Thailand.⁴²⁴

3.6.4 Trafficking

Measures in Prevention and Suppression of Trafficking in Women and Children Act of 1997

This act replaces the Trafficking in Women and Girls Act of 1928. The former statute specifically exempted trafficking victims in Thailand from imprisonment or fine, however they had to be sent to a state reform institution for at least thirty days, portraying those that were trafficked as women or girls in need of “moral rehabilitation”.⁴²⁵ The new act does not include similar labeling of the victims and has been designed more to deal with the various forms of present-day trafficking, whereby officials were given wider authority to search and inspect establishments.

The Act criminalizes the acts of “trafficking, the buying or selling, vending, bringing from or sending to, receiving, detaining, or confining any woman or child or arranging for any woman or child to act or receive any act, for sexual gratification of the third person, for an indecent sexual purpose, or for gaining any illegal benefit for him/herself or another person, with or without the consent of the woman or girl”.⁴²⁶ Although the acts which incur liability, such as buying and selling are recognized, the Act links them to only one end product of trafficking, sexual exploitation. “Sexual gratification” and “indecent sexual purpose” are the end products recognized by the

418 THE CONSTITUTION OF THE KINGDOM OF THAILAND, 1997, Section 53 http://www.kpi.ac.th/en/con_th3.asp

419 Ibid, Section 43

420 The Effective Abolition of Child Labour, ILO, pg.362

421 Comparative Study of the Legal Provisions of the Six Countries in the Mekong Sub-Region with Respect to Trafficking in Women and Children, Research Findings and Recommendations, Save the Children, pg. 16

422 Nawarat Phlaimoi, Child Domestic Workers: A Rapid Assessment, ILO, pg.29

423 Supra n.415, Section 51

424 Supra n.411.

425 Thai Legal Context, Human Rights Watch, <http://www.hrw.org/about/projects/womrep/General-12.htm>

426 Measures in Prevention and Suppression of Trafficking in Women and Children Act of 1997, Section 5

Act which fails to criminalize the other end products such as bonded labour. Further the Act states that committing any one of these acts for the purpose of “gaining any illegal benefit for him/herself or another person” is also identified as an end purpose. This provision will actually make prosecution harder as proof of benefit would have to be presented. Rather, if the Act had merely stipulated the commission of certain acts as attracting penal sanctions there would be no need to prove the offender obtained benefit, only that the acts took place.

As a result, in cases where the end result is not prostitution, traffickers are not prosecuted for trafficking and the related human rights abuses inflicted on the workers, but are prosecuted instead under the Immigration Act, for harbouring illegal migrants or the Labour Act, for hiring illegal labour or child labour.⁴²⁷ This has a significant effect on the treatment by authorities of trafficked children. For example, in the case of several Burmese women and girls trafficked to a garment factory, the staff of a Thai NGO, the Foundation for Women (FFW) reported that, “The problem was the definition of ‘trafficking’. The police and the prosecutor did not think that these women and girls had the right to be ‘complainants’ against the employer. They were not seen as trafficked persons. These women and girls rescued from the factory were seen as illegal workers because they illegally entered Thailand to work in the garment factory and they were not forced or lured to come with the agent. But they were forced to work every day for many hours, they were beaten if their work was not satisfactory and they were locked in the building and unable to go out”.⁴²⁸ The treating of the trafficking victims as illegal immigrants, even being charged with illegal entry or having fake passports, is a significant flaw in the Act.

Section 10 allows an official, defined in the Act as “a government official not lower than the third level, or the superior administrative or police official appointed by the Minister for the execution of this Act”, to detain a child for the “benefit of prevention and suppression of the offence” or for “rescuing a child who may be a victim of such offence” for not more than half an hour. If the official feels longer detention is necessary the Act requires him to record the detention in an official report, inform the Director-General of the Police Department or the provincial governor of the jurisdiction and detain the child for not more than 24 hours. The definition of a government official is wide, giving the power to detain a child without a court order to a large number of officials. Since in many cases trafficking occurs with the complicity of government officials, this provides space for abuse of power and corruption.

The fact that the Act even allows detention for more than 24 hours, but not exceeding 10 days, with the permission of the Director-General of the Police Department of the Provincial Governor, without any judicial oversight is cause for concern. The last paragraph of the section seems to indicate the true intention of the detention which is to obtain the testimony of the child. Scant regard is paid to the interests and needs of the child.

There are also several provisions in the Act to provide assistance to the victims of trafficking. Section 11 mentions a primary shelter for the victims and also mentions repatriation of the victim.⁴²⁹ However, under the section on repatriation, little mention is given to the consideration of the consent of the victims to repatriation, raising the spectre of coercion.

427 Human traffic, Human rights: Redefining Victim Protection, Thailand <http://www.antislavery.org/homepage/resources/humantrafficking/thailand.pdf>

428 Ibid.

429 Ibid. Section 11

Despite the fact that the new Act is a vast improvement on the previously existing legislation, there still are a few problems. Although the new law has been expanded to include all children, defined as “person(s) whose age is not over 18 years”, some sections seem to apply only to women and girls, such as section 10. Also, Section 5 discusses indecent sexual acts with or without the consent of the woman or girl, excluding boys entirely, which seems to revert to the earlier act on the prevention of the trafficking of females.⁴³⁰

There is also a great deal of discretion granted to officials in this process, relating to the inspection of sites, making arrests and determining the level of assistance given to the victims. For example, section 11 allows the official concerned to “use his/her judgment in giving appropriate assistance to the ...child...in providing food, shelter and repatriation to her/his original country or residence”. Since most often officials are not particularly sensitized to deal with the issue in a way that takes the rights, needs and interests of the child into account, the Act should not allow important matters such as provision of assistance and repatriation to be at the discretion of the official. Regardless of the fact that numerous NGOs have cited the corruption of officials as the prime reason behind the prevalence of the trafficking problem this Act continues to grant substantial power to the officials with no regard for oversight. It is therefore imperative there are checks and balances in place to ensure that power is not abused and there is no discrimination in the application of the Act.

Additionally, the support granted to the victims of trafficking appears very minimal. Repatriation is not an option that is appealing to many, in light of the push factors such as the lack of employment, abuse or poverty that make these children prey to traffickers. There needs

to be more programs for long-term care of the victims and emphasis must be placed on rehabilitation for these children as well as training in trades that make them more saleable in the job market, thus decreasing the risk of re-trafficking.

Prevention and Suppression of Human Trafficking Bill of 2003

The Bill seeks to amend the earlier 1997 Act which as stated above focused solely on trafficking for sexual purposes while ignoring trafficking for other purposes and charged the victims of human trafficking themselves with criminal offenses, such as illegal entry and or fake passports. This Bill was approved by the cabinet on June 14, 2005 and is now under the consideration of the Council of State.⁴³¹

Under this Bill, human trafficking has been broadened to refer to “the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. The consent of a victim of trafficking in children and women to the intended exploitation shall be irrelevant where any of the means aforementioned have been used”,⁴³² thereby including other purposes for trafficking in addition to sexual activity.

In addition, the Bill will allow Thailand to prosecute every offender of human trafficking no matter where the offence is committed, in other words it gives extra-territorial jurisdiction. There is also more provision for victim care,

430 Ibid. Section 5

431 Supra n.414.

432 Ibid

with limitations introduced on the disclosure of the names of the victims and witnesses to protect their safety and reputations. As well as having remedies in the criminal courts, victims may claim compensation from the offender for any damages caused by human trafficking. Victims will also be provided with longer term care in terms of physical, psycho-social, legal, educational, and health care assistance.⁴³³

Finally, the Bill establishes a fund to support suppression and prevention of human trafficking, and welfare protection of trafficked victims. The fund will be established through annual budgetary contributions by the Government, funding from intergovernmental and international organizations, donations from the private sector and confiscated assets of trafficking offenders.⁴³⁴

Though this draft is more progressive than the existing Act, there needs to be more attention paid to the training and the sensitization of the officials implementing these regulations. Without properly screened and trained individuals addressing the needs of the children, children run the risk of being re-victimized by the system. As the officials are granted a great deal of discretion by the legislation standardized practices have to be established to ensure unbiased treatment of the children and transparency in the process.

Penal Code Amendment Act of 1997 and Penal Code

The Thai Penal Code was amended in 1997 to include violations related to trafficking and set the penalties proportionate to these offences. The Code prescribes that procuring, luring, or trafficking any person, especially

a child even with his or her consent for an indecent sexual act with another person is a crime.⁴³⁵ Receiving, selling, procuring, luring, trafficking a person for illegal benefit is also a crime under Thai law.⁴³⁶ Additionally, Thai law provides that taking or sending a person out of the Kingdom by use of fraudulent or deceitful means, threat, violence, unjust influence or compulsion as well as bringing in or sending a person out of the Kingdom or buying or selling a person in order to enslave such person are criminal offences.⁴³⁷ The problem with this provision, which recognizes receiving as an offence separate to trafficking, is that it conflates trafficking with procuring and luring for “sexual gratification of another person”, in other words sexual exploitation. It appears to confuse the offences of procuring or luring a person into prostitution with trafficking.

In 2004, under the Penal Code and the accompanying Act for the Prevention and Suppression of Trafficking in Women and Children of 1997 discussed above, the Government had reported 307 trafficking-related arrests, 66 prosecutions, and 12 convictions, an increase in arrests over the previous year. Sentences handed down for trafficking cases remained light, with an average sentence of three years' imprisonment. However, a number of sentences in trafficking cases were severe, with imprisonment of up to 50 years. In early March 2005, a Thai court convicted a Cambodian woman for trafficking eight Cambodian girls to Thailand and Malaysia; the trafficker was sentenced to 85 years' imprisonment.⁴³⁸

However, there is a disconnect between this Act and other legislation dealing with children such as the Child Protection Act of 1997, as there is a different penalty for

433 Ibid

434 Supra n.424

435 Penal Code Amendment Act of 1997, Section 282.

436 Ibid. 283

437 Ibid. Sections 283-284

438 Supra n.409

those under 15 and those from 15 to 18, in spite of the fact that the Thai Government itself considers children to be persons under the age of 18. There is a consideration of the “maturity” of the child which seems to render the act less heinous, but this goes against both Thai Law and Thailand’s international obligations.

3.6.5 Procedures in cases involving human trafficking

The Criminal Procedure Amendment Act of 1999 and the Criminal Procedure Code

The provisions of the Criminal Procedure Code have been amended to include procedures that would help in the combat of trafficking as well as protect the victims. The Code provides that:

- The statement of trafficked women and children shall be promptly taken upon rescue
- The victims shall be sent to a primary shelter after the statements are taken
- If the victims are foreign women or children, the police inquiry official shall make a proposal to the immigration officials to grant leniency to the woman or child
- The trafficked victims may be detained for factual clarification for a maximum of half an hour. If necessary, the detention may be extended to 10 days provided that the permission of the Director General of the Police Department is obtained
- During the initial inquiry, investigation and trial, the police inquiry official shall inform the Public Welfare Department or a non-governmental organization to provide or arrange to have an official experienced in working with women and

children such as a social worker or psychologist participate in such proceedings

- In addition, the use of an interpreter is permitted, if they cannot speak the national language
- The Trial can also be conducted behind closed doors if it is “in the interest of public order or good morals”⁴³⁹

In terms of children in particular, the law prescribes that the statement of the child be taken in privacy in a suitable place for the child and a psychologist or social worker, a person who the child has requested to be present, and a public prosecutor shall participate in such an inquiry. The child may also reject such a person upon which such person shall be replaced. To avoid the child having to appear in court, provision is made for video and audio recording of the statement which may be later used as evidence.⁴⁴⁰

The Code and its amendments also provide that before an accused is prosecuted, when there is reasonable ground to believe that a witness will travel out of the country, has no fixed residence or resides a distance from the court or will be tampered with or there is any other reason arising from necessity which will cause difficulty in bringing the witness to testify in the future, the public prosecutor may file an application to the court requesting an order to examine such witness forthwith. When the court receives such application, it may immediately examine the witness, and the accused counsel may cross examine the witness. If the accused cannot cross examine the witness, the court will cross examine the witness on its behalf. The testimony of such witness will be admitted as evidence if the accused is later prosecuted.⁴⁴¹ Though this provision will assist in prosecuting traffickers it does raise questions regarding the rights of the accused.

439 Criminal Procedure Code and Section 5-10 Criminal Procedure Amendment Act of 1999, Section 13.

440 Criminal Procedure Amendment Act of 1999, Sections 5-6.

441 Ibid, Section 10.

Often, cases of trafficking are published in the newspaper and open to the public, thereby offering no consideration to the victims. This will render it difficult for the victims, especially children, to reintegrate into society as they may be discriminated against and placed at a disadvantage. Therefore, there needs to be closed door trials and publication of personal details of victims should be banned.

3.6.6 Other laws related to trafficking

Immigration Act of 1979

This Act considers any foreigner without a legal document in Thailand to be an illegal immigrant, which is a legal offense punishable with two-years' imprisonment and a fine. As mentioned above, trafficked people have often been charged under this act and have been treated the same as illegal immigrants.⁴⁴² Therefore, they may have to pay a fine or stay in prison, after which they are detained in an immigration detention centre and then sent home. When treated like illegal immigrants, little attention is paid to the trauma that many of these children have undergone due to being trafficked.⁴⁴³

Thailand, however, has recently passed a Regulation allowing illegal immigrants from Myanmar, The People's Democratic Republic of Laos and Cambodia to register and apply for work permits as of August 2001, thereby allowing trafficked persons to stay and work and avoid problems of repatriation. Citizenship by naturalization in Thailand requires that one must have been there for 5 years, and there are heavy penalties for falsifications.

3.6.7 Memorandums of understanding

The Memorandum of Understanding on Common Guidelines of Practices Among Concerned Agencies for Operation in Case Women and Children are Victims of Human Trafficking B.E. of 1999

The Memorandum of Understanding (MOU) is a non-binding agreement signed between the Prime Minister's Office, police, Ministry of Public Welfare and NGOs. It recommends measures for co-operation between police and public welfare officials regarding the treatment of trafficked persons, both Thai nationals and nationals of other countries, and to improve chances of successfully prosecuting traffickers. In defining trafficking, the MOU adds elements of slavery-like labour practices, forced begging and "other inhumane acts".⁴⁴⁴

The MOU states that foreign women and children who have been trafficked into Thailand should not be treated as illegal migrants and therefore stipulates that after a statement from a victim is taken, the official is to submit information to the Immigration Service to grant leniency under the Immigration Act and give assistance as provided for in Section 11 of the Trafficking Act. In accordance with the MOU, the Deputy Minister of Labour announced in February 2000 that Thailand would start hosting the trafficked women and children in the Department of Welfare shelters, instead of treating them like illegal immigrants.⁴⁴⁵

Women and children trafficked to Thailand who agree to testify against traffickers are permitted under the MOU to stay in Thailand for the duration of the trial and are expected to be housed in a shelter and are entitled to food,

442 Supra n.424.

443 Ibid.

444 Ibid.

445 Ibid.

clothing, medical care and counseling. Information then will be collected from the trafficked person by public welfare officials who will then pass it on to the police in the event that it can be used as evidence to prosecute the trafficker.⁴⁴⁶ Linking the provision of temporary residence permits to willingness to testify and repatriating the trafficked person after the testimony or trial is callous and takes a law and order approach rather than a human rights approach to the issue.

Since the Memorandum of Understanding was drafted in conjunction with NGOs and other civil society groups that have practical experience on the ground in addressing the needs of those trafficked, it lends a degree of legitimacy to the MOU. The NGOs play an important oversight role to the actions of the police officials. Acting in tandem, the Government and civil society can hope to effectively combat trafficking.⁴⁴⁷

Memorandum of Understanding Between The Government of The Kingdom of Thailand and The Government of The Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking of 2003

This quasi-legal agreement which addresses women and children that have been trafficked as well as the prevention of trafficking considers as the end result, including and not limited to “prostitution, forced or exploitative domestic labour, bonded labour and other forms of hazardous, dangerous and exploitative labour, servile marriage, false adoption, sex tourism and entertainment, pornography, begging and slavery by the use of drugs on children and women”.⁴⁴⁸ Although some crimes, such as the harvesting

of organs, are not included in this list, it is nonetheless quite expansive.

There are provisions on both ends for care and rehabilitation of the victims. In addition, there are legal provisions to ensure that the victims have access to justice. In terms of repatriation, the consideration is that children and women who have been identified as victims are not deported but instead repatriation will be arranged and conducted in “their best interest”.⁴⁴⁹ There is limited elaboration on what this exactly means, although it appears that there is a process involved in these decisions. Hopefully, the victim's consent is a necessity for the repatriation process to occur. However, because the MOU states that if the victim consents to repatriation, there is no necessity to undergo procedures, it does not seem that consent is necessary. There are also provisions for reintegration into society within this MOU.

This agreement, recognizing the need for nations to cooperate with one another in order to stop the problem of child trafficking, is an important step in addressing the situation of trafficking in Thailand due to the flow of migrants from Cambodia to Thailand. The statements in the MOU are very broad; however, they can act as a useful framework which can build into more specific practices.

The Memorandum of Understanding on Operations Between State Agencies and Non-Governmental Organizations (NGOs) Engaged in Addressing Trafficking in Children and Women 2003

The Memorandum of Understanding (MOU) is a non-binding legal agreement signed between many NGOs, International NGOs (INGOs) and government

446 Supra n.414.

447 Ibid

448 Memorandum of Understanding Between The Government of The Kingdom of Thailand and The Government of The Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking of 2003, Article 2

449 Ibid. Article 16

agencies such as the Ministry of Foreign Affairs and the Department of Public Health Labour Protection and Welfare. It recommends the continuation of co-operation between state agencies and NGOs and establishes a subcommittee of these actors to lay down guidelines and focus on coordinating and monitoring operational work, which has the potential to effect great changes on the treatment of victims of trafficking and the prevention of trafficking in general.⁴⁵⁰ Taking advantage of the expertise of the NGOs and INGOs, the Government can hope to be more effective in its endeavors against trafficking. The MOU however is non-binding; therefore, it is questionable whether the benefits that could be achieved with this committee and this level of co-operation are actually realized.

The Police continue to be given a great deal of discretion in “deciding if the children or women are injured persons in a case”.⁴⁵¹ The criteria for the basis of this decision is not noted in the MOU although it is important to note that the definition of a trafficked person has been broadened significantly under the MOU to include “children or women who are procured; traded; bought; sold; brought from or sent to wherever; harboured/received, confined, detained or hidden by means of deception, intimidation, violence, abuse of authority, or other forms of coercion by individuals, groups of individuals or organizations”.⁴⁵² This definition is wider than other definitions of the victims of trafficking in Thai law. It is hoped that the police therefore have a suitably widened criteria for determining who are the “injured” and how this injury is perceived.

The Memorandum of Understanding on Common Operational Guidelines for Government Agencies Engaged in Addressing Trafficking in Children and Women 2003

This Memorandum of Understanding replaced the earlier MOU that was written in 1997 pertaining to common guidelines. The reason for the replacement as stated in the MOU was that “problems had arisen in the implementation of the MOU”.⁴⁵³ Although it was stated that problems had arisen, it was not established what these problems were. Without this information it then becomes difficult to assess whether or not this new agreement effectively addresses these issues. However, if the problem is with implementation, it may be that there is little political will to enforce these MOUs. Therefore, due to the fact that there are no provisions regarding the enforcement of the MOU, this new MOU may not be effective either.

The MOU is unique in that it categorizes the victims of trafficking according to their citizenship status. It distinguishes between four categories,

1. Thai children and women who are victimized by trafficking
2. Foreign children and women who illegally enter the country and become trafficked victims
3. Foreign children and women who enter Thailand legally but later become trafficked victims
4. Non Thai children and women who live in Thailand and are victimized by trafficking⁴⁵⁴

It is important to note the distinction between the legal

450 The Memorandum of Understanding on Operations between State Agencies and Non-Governmental Organizations (NGOs) Engaged in Addressing Trafficking in Children and Women of 2003, Section 2.3

451 Ibid. Section 3:1:1

452 Ibid. Section 1

453 Ibid. Section 3:1:1

454 Memorandum of Understanding on Common Operational Guidelines for Government Agencies Engaged in Addressing Trafficking in Children and Women of 2003, Section 1.

454 Ibid

and the illegal immigrants because this could then lead to the forcible repatriation of those that have entered Thailand illegally. Care should be taken against this forcible repatriation to prevent re-trafficking.

The MOU also continues to encourage the participation of NGOs and other agencies in the government investigation. However, it is not useful to state that “their requests to have the concerned officials or representatives to participate in the investigation shall be met”, when the victims may not be aware of these rights. The victim should be made aware of their ability to have a representative of an NGO or similar organization, present in order to make use of their important oversight role.

3.6.8 Laws relating to the prevention of trafficking

Job Placement Agencies and Job Seekers Protection Act of 1985

Job placement agencies are often used as fronts for traffickers to recruit children who are seeking jobs away from their home countries. Thailand prescribes punishments against job placement agencies and those who violate legal provisions concerning recruitment for overseas work. Under Thai law, job placement agencies are liable to arrange for job seekers to return to Thailand, and to pay for transportation, accommodation and food until job seekers arrive in Thailand, in the event that job seekers do not receive the job stipulated in the job placement agreement. Failure to comply with such provision shall subject the job placement agency to two years imprisonment or a maximum fine of 40,000 baht.⁴⁵⁵ This

law, however, is difficult to police as the victims are often in other countries and where there is no cooperation with the country that the victim has been trafficked to. For this reason prosecution of traffickers that use these agencies as fronts will be next to impossible.

Child Adoption Act of 1979 and Ministerial Regulation No. 9 Issued under the Child Adoption Act of 1979

Children are often “adopted” under false pretenses and later trafficked to other countries. Under the Act and the Ministerial Regulation which elucidates many of the provisions in the Act, a probationary period is imposed as a precondition to the adoption of a child in Thailand.⁴⁵⁶

All adoptive parents require extensive documentation, especially in the event the adoptive parents are foreign.⁴⁵⁷

However, there is relatively little procedure when transferring the child to a blood relative, although there is still a risk of the child being ill-treated or even trafficked.⁴⁵⁸ This is a practice that must be changed to make the adoption laws more effective. Also, there needs to be background checks into the adoptive parents and in particular, checks into their criminal record.

Anti-Money Laundering Act of 1999 (AMLO)

The Act is an attempt to crack down on traffickers by making the activities that they use to launder money illegal. The trafficking industry in Thailand is underground, so all earnings must be laundered in order to escape detection by the state. This law will prevent laundered money being used to finance trafficking

455 Job Placement Agencies and Job Seekers Protection Act of 1985, arts 30, 50, 82 as quoted in Comparative Study of the Legal Provisions of the Six Countries in the Mekong Sub-Region with Respect to Trafficking in Women and Children, Research Findings and Recommendations

456 Ministerial Regulation No. 9 Issued under the Child Adoption Act of 1979, Chapter 4.

457 Ibid. Chapter 2, Clause 17

458 Child Adoption Act of 1979, Section 19.

operations. All parties, even aliens if not extradited, can be charged under this act.⁴⁵⁹ Assets made through committing a predicate offence, one of which is trafficking, are illegal.⁴⁶⁰

Although trafficking is included in this act, it seems to primarily be spoken of in reference to “sexual offenses pertaining to procuring, seducing, or taking or enticing an indecent act on women or children in order to gratify the sexual desire of another person”.⁴⁶¹ It goes on to discuss offenses of “procuring, seducing, enticing or kidnapping a person for the purpose of the prostitution trade, or offenses relating to being an owner of a prostitution business, or an operator, or a manager of place of prostitution business, or supervising persons who commit prostitution for trade in business”.⁴⁶² There is no explicit mention of activities such as child labour or begging, which may lead the enforcement officials to ignore these types of businesses when addressing money laundering.

3.6.9 Laws that protect children from the end products of trafficking

Prostitution

Prostitution Prevention and Suppression Act of 1996

This act replaced the earlier Suppression of Prostitution Act of 1960, under which prostitution was criminalized and prostitutes, and to a certain extent, those that procured and benefited from their exploitation were penalized while their clients escaped penalties. It also continued to punish those

that had been forced into prostitution and was in conflict with the 1956 Penal Code which assigned higher penalties for the same offenses.⁴⁶³

Under the current Act, procurement of prostitutes is established as an offence. Such offence includes procuring, enticing, luring other persons to engage in prostitution or sheltering prostitutes, with or without the victim's consent. Offences against children are treated as aggravated offences.⁴⁶⁴ For example, the offences of procuring a child between the age of 15 and 18 or a person under 15 years of age incur penalties of five to 15 years imprisonment and 10 to 20 years imprisonment respectively.⁴⁶⁵ Clients are also penalized by section 8 which has higher penalties for sexual intercourse with a child in a prostitution establishment. The shortcoming of this section is that it only appears to apply to having sex with a child in a prostitution establishment whereas many children may be employed as street walkers or engaged in sex work through other means.

If the offender detains, confines, assaults or uses physical force to force a person to perform an act of prostitution, the minimum sentence is 10 to 20 years, increased to life imprisonment if the offence causes serious bodily injury and to life imprisonment or death if the offence causes a fatality.⁴⁶⁶ Parents who have knowledge and connive in the commission of offences prescribed in section 9, for example through coercion or pushing into prostitution in any way, against their child who is less than 18 years old and “under their parental control” is liable to imprisonment of four to 20 years and a fine of 80,000 to 400,000 baht. Since many parents force their children into prostitution this provision is a step in the right direction.

459 Anti-Money Laundering Act of 1999, Section 6.

460 Ibid. Section 3

461 Ibid

462 Ibid 463 Supra n.422.

463 supra n.422

464 Prostitution Prevention and Suppression Act of 1996, Section 6.

465 Ibid. Section 9-12

466 Ibid. Section 12

Although this Act does not contain any specific provision which decriminalizes children engaged in prostitution, there are certain sections which in practice would ensure the child is not penalized. For example if the accused is under 18 years old and has committed no other crime, the offender can be placed in vocational training or a primary shelter.⁴⁶⁷ Section 34 allows the court to take into account factors such as the child's former life, conduct, health and mental condition and decide that punishment is not appropriate for the child.⁴⁶⁸ The court can instead make protection and occupational development available to the child. These provisions are necessary to promote the reintegration of child commercial sex workers and trafficked children into society.

Although the Act does provide for the setting up of Primary Admittance and Protection and Occupational Development Centres there are no specific standards stipulated for the functioning of these Centres. However, the Act does allow for the revocation of the licence granted to such a centre if it does not abide by the Rules and Regulations prescribed by the Government.

Rape

Penal Code

Statutory rape of a female child under 13 years of age is seven to 20 years, a fine of 14,000 to 40,000 baht or the death penalty. If the victim is under 15, the penalty is decreased slightly; imprisonment of four to 20 years, or a fine of 8,000 to 40,000 baht.⁴⁶⁹ Grievous bodily harm or use of weapons in the crime is punishable by life imprisonment or an increase in the prison term.

In Thailand, the crime of statutory rape can only be committed against female children and there is no similar law to afford male children the same form of remedy.

Another highly problematic section of the Penal Code on statutory rape states that “if the offence is committed to a girl of 13 to 15 years of age, and the court later allows the offender to marry the victim (with parental consent), the offender is not punished”. This is a heinous breach of the rights of the girl child.⁴⁷⁰ After she has been raped, she is then made to live with the offender who has raped her and the offender avoids any penalty. The implicit assumption is that the offender has now made the victim, who has been sullied by his actions, an “honest woman”, and is now living with his crimes; therefore, all is well. If statutory rape is considered a crime by society due to the fact that consent cannot be given by an underage child, then why, in the event that the judge considers it prudent, should the victim have to marry someone who has committed a criminal act?

Begging

The Penal Code provides that using a child as a tool for begging or committing an act that promotes begging shall subject the offender to imprisonment “not exceeding one month or a fine not exceeding 1,000 baht or both”, thereby criminalizing begging as an end product of trafficking.⁴⁷¹ However, as the Department of Public Welfare, the Department that is responsible for decreasing the number of child beggars, has joined hands with the police to arrest homeless children and beggars, penalties for foreign gangs forcing migrant children to beg have become much harsher.⁴⁷²

467 *ibid.* Section 33

468 *Ibid.* Section 34

469 *Ibid.*

470 *Ibid.* Section 277

471 Thailand Announcement of the National Executive Council No. 294 re Child Welfare Protection (1972), Clause 20.

472 *Supra* n. 409

However, arresting these homeless children, criminalizing what are often survival strategies, is not the most effective way to resolve the begging problem. These children, after being taken out of the situation of trafficking under which they may have been coerced to be beggars, need to be given counseling, thus granting them an opportunity to discuss their experiences, and education and vocational training to prevent them from being re-trafficking.

Coercion

Coercion is often an aspect of trafficking. The Penal Code criminalizes coercion with the penalty being a maximum of three years imprisonment and/or a fine of 6,000 baht for compelling a person to do or not to do any act or to suffer anything by putting him or her in threat of injury to life, body, reputation, property or by committing a violent act.⁴⁷³ Most importantly, Thai law exempts the offender from liability if an offence is committed under coercion,⁴⁷⁴ which can be used to prevent the victims of trafficking from being charged with “crimes”, such as prostitution or begging, that are committed under the coercion of their traffickers.

Child labour

Labour Protection Act of 1998

Under this Act, an employer must not employ a child under 15 years of age; however, in the case of the employment of a child under 18 years of age, the employer must notify a labour inspector.⁴⁷⁵ Therefore, child labour in Thailand is technically legal. As noted in the introduction, this has the

potential to either empower or harm the child, depending on the labour practices involved in the particular position the child is employed in.

However, for dangerous work, section 49 of the Labour Protection Act sets the minimum age for engaging in dangerous work at 18 years of age. Dangerous work is classified into the following types of work: “(1) work involving harmful levels of heat, cold, vibration and noise; (2) work involving hazardous chemicals, poisonous substances or inflammable material; (3) work involving toxic micro-organisms which may be virus, bacteria, fungi or other germs; (4) driving or manipulating hoists or cranes operated by an engine or electricity, regardless of the methods for driving or manipulating them; and (5) any kind of work involving radioactivity”.⁴⁷⁶

Under Section 50 of the Act, an employer must not require a child employee under the age of 18 to work in certain places, “such as a slaughterhouse, a gambling place, a place for dancing, or a place for selling serving food, liquor, tea or other drinks, where there is a person for serving customers,⁴⁷⁷ a place for relaxing, or massage services for customers”. In addition, the Ministerial Regulation No. 6 of the Ministry of Labour and Social Welfare prohibits a young worker under 18 years of age from performing dangerous work.⁴⁷⁸ These provisions, therefore, prohibit children from working in many locations where they are potentially at risk.

There are also provisions within the Act that address the working hours of a minor. A minor employee must be provided with at least one hour break if he or she has

473 Penal Code, Section 309.

474 Ibid. Section 67

475 The Effective Abolition of Child Labour, Thailand, ILO, pg 362

476 Ibid

477 Ibid

478 Ibid

worked continuously for four hours.⁴⁷⁹ Within the four hour periods, a minor employee can have breaks as specified by the employer. Employers are prohibited to hire minors under the age of 18 to work from 10.p.m. to 6.am. Also, the child workers are protected from the exploitation of others as employers are prohibited from giving a minor's wage to others and employers are prohibited from collecting deposits from minor employees, although there is little assurance that the child will not be forced to hand the money over to another person in any case.⁴⁸⁰

The implementation of the Act occurs through labour inspection, ad hoc inspections as a result of a submission of a grievance, and reporting in those cases. In the case of establishments where child labour, employment of persons who are under 15 years of age, is found, those who are responsible are prosecuted. The maximum penalty for a convicted employer is a fine of 10,000 baht.

The Act is highly problematic because the scope of the application of the Act does not extend to certain sectors and industries, such as agricultural work, domestic labour and work by self-employed persons.⁴⁸¹ Also, the provisions of the Act concerning general labour, female labour, child labour, wage and overtime, welfare, safety and severance pay do not apply to employers who hire employees for work relating to housework which does not involve the operation of business.⁴⁸²

Child domestic workers are particularly vulnerable to the worst forms of exploitation because their work is hidden and house owners have full legal right not to grant permission to

individuals to enter and inspect their households. Children from rural areas are pushed into the urban labour market despite their age and lack of preparedness.⁴⁸³ The situation of child domestic workers is likely to encompass aspects of the Worst Forms of Child Labour as defined in the ILO Worst Forms of Child Labour Convention 1999. Since there is a scarcity of Thai child domestic workers due to the successful expansion in education in remote areas, many of these workers are trafficked from Myanmar and Lao PDR for domestic work.⁴⁸⁴ Therefore there needs to be regulation of domestic labour as well as agricultural work in order to fully protect the rights of the child and combat trafficking.

General child protection legislation

Child Protection Act of 2003

This Act serves to create institutions that will be in charge of the protection of children and grant more responsibilities and specify duties to pre-existing institutions. In the Act, a “child” is concretely defined as a person below 18 years of age, but does not include “those who have attained majority through marriage”.⁴⁸⁵ The Act also forbids some of the end products of trafficking more generally, as elucidated below:

“Regardless of a child's consent, a person is forbidden to act as follows:

- Commit or omit acts which result in torturing a child's body or mind;
- Force threaten, induce, encourage or allow a child to adopt behaviours and manners which

479 Comparative Study of the Legal Provisions of the Six Countries in the Mekong Sub-Region with Respect to Trafficking in Women and Children, Research Findings and Recommendations, Save the Children pg 29-33

480 Children pg 29-33

481 Ibid.

482 Ibid

483 Nawarat Phlanoi, “Child Domestic Workers: A Rapid Assessment”, ILO, pg.15 Geneva

484 Ibid. pg. 16-17

485 Child Protection Act of 2003, Article 4.

are inappropriate or likely to be the cause of wrongdoing;

- Force, threaten, induce, encourage, consent to, or act in any other way that results in a child becoming a beggar, living on the street, or use a child as an instrument for begging or committing crimes, or act in any way that results in the exploitation of a child;
- Use, employ or ask a child to work or act in such a way that might physically or mentally harm the child, affect the child's growth or hinder the child's development;
- Use or allow a child to gamble in any form or enter into a gambling place, brothel or other place where children are not allowed; and
- Sell, exchange, or give away liquor or cigarettes to a child, other than for medical purposes”⁴⁸⁶

There are also provisions for social welfare in this Act, which determine that the children warranting welfare assistance are as follows:

“Street children or orphans, children who have been unlawfully brought up, exploited, abused, or subjected to any other conditions which are likely to cause them to behave in an immoral manner or suffer physical or mental harm”⁴⁸⁷.

There are also provisions for longer term care, such as support to the family, adoption, foster homes, remand homes, mental rehabilitation and welfare centres.⁴⁸⁸

Children in need of physical protection, specifically related to the children that are trafficked, are defined as “tortured children, children vulnerable to wrongdoing”. A child

at risk of “wrongdoing”⁴⁸⁹ means a child who behaves “inappropriately, who is engaged in occupational activities, or in the company of persons, that appear likely to induce such child into committing unlawful or immoral acts; or a child who is in the environment detrimental to such child, as stipulated in the ministerial regulations”⁴⁹⁰. This definition is problematic as it uses value laden terms for which definitions are not provided. Inappropriate behaviour might have different meanings to different people depending on a variety of factors such as their value systems or socio-economic situation. Further, to allow judicial officers who might not be child-sensitive to interpret these terms is not conducive to protecting the rights of the child.

The Child Protection Committee, created by the Act, will act to implement, monitor and evaluate welfare, safety, protection and rehabilitation measures. They will also issue regulations on the safety of the Child.⁴⁹¹ The Act also establishes a Bangkok Metropolis Child Protection Committee, which has additional authority and is explicitly devoted to Bangkok.⁴⁹² Therefore, the emphasis appears to be on Bangkok and not on the rural regions. Even though it is true that children trafficked are trafficked to Bangkok and the majority of job-seeking migrants also head to Bangkok making it a particular site of vulnerability, rural areas should not be ignored as they are the sites of origin. The fact the emphasis of the Act is on protection rather than prevention, might explain the emphasis on Bangkok rather than on rural regions.

486 Ibid. Article 26

487 Ibid. Article 32

488 Ibid. Article 33

489 Ibid. Article 40

490 Ibid. Article 4

491 Ibid. Article 7

492 Ibid. Article 16

3.6.10 Recommendations

- Enact the Draft Anti-Human Trafficking Act and implement its provisions as soon as possible;
- Institute more programs for the prevention of trafficking by addressing the factors that cause migration in the first place. Increasing the years of compulsory education or providing more job opportunities in rural areas themselves would prevent some of the children becoming prey to traffickers;
- Engage other countries in the combat of trafficking by signing more bilateral agreements, firstly with neighbouring countries that are the source of trafficked children such as the People's Democratic Republic of Laos and China in order to aid in the prevention of trafficking and secondly, with countries that act as destinations for Thai children that have been trafficked such as Australia and Singapore to ensure the proper treatment of these children;
- Continued and increased emphasis on rehabilitation and support to trafficked children in the form of shelter, provisions, counselling, legal aid, health care, education and vocational training;
- Train officials to be sensitized to the issues of the trafficked children and ensure that end products of trafficking other than prostitution, such as begging and child labour, are recognized as issues of child trafficking and recognize boys as being victims of trafficking as well;
- Oversight commissions must be created to ensure checks and balances in the system to prevent the corruption that is detrimental to the implementation of the laws against trafficking;
- Ensure that those trafficked are not treated as illegal immigrants and not charged as such, therefore, making repatriation consensual;
- Amend the Labour Act of 1998 to ensure that it applies to all industries, including domestic labour, agricultural work and home work and institute mechanisms to monitor these industries;
- Amend the Suppression of Prostitution Act of 1996 to classify engaging in sexual activities with a person under the age of 18 even with a “prostitute” as statutory rape;
- Amend the Penal Code Sections on Statutory Rape to include boys and remove the provision that allows the offender to be excused from punishment if the offender marries the victim;
- Amend the Criminal Procedures Code to ensure that names of trafficked children are not published in the media and have closed door trials where necessary; and
- Amend the Adoption Act to ensure that even blood relatives have to undergo a probationary period before being able to adopt a child
- Continue to cooperate with civil society to combat trafficking in all its forms.

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