18 August 2010

Advocate Ngoako Ramathlodi (MP)

Chairperson

Portfolio Committee on Justice and Constitutional Development

Parliament

P O Box 15

Cape Town

Dear Sir

Re: Submission by Embrace Dignity on Prevention and Combating of Trafficking in Persons Bill B7 – 2010

INTRODUCTION

Embrace Dignity is a South African NGO established to advocate for laws that affirm the democratic values of human dignity, equality and freedom of women and that protect their rights in the Bill of Rights. In particular it is established to protect women from trafficking and sexual exploitation. Embrace Dignity is affiliated to the Coalition Against Trafficking in Women – International.
It is our view that the proposed bill has much to offer when it comes to combating the harms of trafficking, including how trafficking is defined. We are very pleased to note that debt bondage has been stipulated as a means of trafficking and that consent is not a defence where the prohibited means of trafficking have been used.

We further welcome the opportunity to make comments on certain aspects of this Bill.

PREAMBLE:

In addition to ‘push’ factors such as poor socio economic conditions (article 9.4)\(^1\), the Palermo Protocol identifies the demand (article 9.5)\(^2\) as one of the root causes of trafficking in persons. In order to better reflect this it is suggested that the first paragraph be adjusted to:

“Recognising the search for improved socioeconomic circumstances and the demand for trafficked persons for all forms of exploitation, especially for sexual exploitation, are contributing factors making persons vulnerable to becoming victims of trafficking.”

While we are aware of the Constitutional aspiration to equality, we are also cognisant of the continuing discrimination against women. In this context we note that the equality and anti-discrimination provisions of the Constitution appear to have been omitted from the Preamble. In order to better foreground these imperatives, (i.e. equality and anti-discrimination) which are behind any law on trafficking, it is suggested that:

The right to equality be included in the fourth paragraph beginning "AND SINCE" so that it reads as:

“….enshrines the right to human dignity, equality, the right to freedom...”

\(^1\)Article 9.4: States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of opportunity.

\(^2\)Article 9.5: States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including the bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.
Further, it is proposed that **CEDAW** be included in the fifth paragraph beginning with "MINDFUL", after the reference to the Palermo Protocol.

**DEFINITIONS**

"Abuse of vulnerability"  

The terms “physical or psychological” have been included to qualify the "abuse, which leads a person to believe that he or she has no reasonable alternative but to submit to the exploitation ..." and which do not appear in the transitional definition in section 70(b)(vi) of the Sexual offences Act.³ It is suggested that the Protocol intended "abuse of (a position of) vulnerability"⁴ to refer to the taking advantage of a situation of hardship, a refugee being one example of this, where a victim feels impelled to submit to the exploitation, as opposed to the more direct forms of abuse as described in (a) threat of harm or (b) threat or use of force, intimidation or other forms of coercion⁵.

It is suggested therefore that the qualifying terms "physical or psychological” be removed.

It is also suggested that the term "abuse of vulnerability" in "Definitions" be altered to "abuse of a position of vulnerability" in line with the Protocol. Likewise it is suggested that (c) of the definition of trafficking be altered to "the abuse of a position of vulnerability".

³Section 70(b)(vi) Sexual offences Amendment Act 2007:"the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indication his or her unwillingness or resistance to being trafficking, or unwillingness to participate in such an act;"
⁴Relevant portion of article 3(a) of Palermo Protocol reads as follows:" abuse of power or of a position of vulnerability,..."
⁵In the Council of Europe Convention on Action against Trafficking in Human Beings, Explanatory Report, abuse of vulnerability was explained as follows at 83 as:” By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce."
Furthermore, it is suggested that 1(e) should also include a reference to "being a woman". Similarly, "whether the victim was a woman" should be inserted under factors to be considered at sentencing in Chapter 3, section 11.

“Sexual exploitation”

The definition is confusing and will be difficult to implement. It isn't clear what elements the State would have to prove in order to secure a conviction. It is suggested that it be altered as follows:

"sexual exploitation" means the commission of any sexual offences in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any offence of a sexual nature in any other law against a victim of trafficking, or the inducement of such a person through the means of trafficking into the production of pornographic material or the performance of any other act of a sexual nature"

"Trafficking"

It is suggested that (g) include a reference to traditional practices such as "ukuthwala", and be altered to:

"(g) abduction. This includes the traditional practice of "ukuthwala" and other similar practices"

CHAPTER 4

IDENTIFICATION AND PROTECTION OF VICTIMS OF TRAFFICKING:

Reporting and referral of adult victims of trafficking

Section 13 (1)(b)

It is not clear why the social service and medical service providers should be barred from reporting suspected trafficking matters to a police official unless written permission has been obtained from the victim - apart from the exceptional circumstances contained in (i) and (iii).
There are many circumstances where obtaining a written statement from a victim might not be possible. The victim might be unable to speak any of the official languages or be illiterate. Or might be accompanied by the controllers/traffickers and not be able to say or sign anything. He/she might simply be too intimidated, or afraid, or not able to trust the service provider sufficiently that the statement would not be passed on to the traffickers. These provisions will simply place obstacles in the way of those able to assist and potentially allow the continuation of the abuse of the victims while there was a possibility of rendering assistance and arresting the traffickers.

Victims of trafficking suffer immense harm. Due to the involvement of organised criminal networks and inability of victims to come forward, incidents of trafficking are very difficult to detect and prosecute. It is suggested that any concerns about the disclosure of personal information by service providers are overridden by the public interest in combating and preventing this horrific crime. It is suggested therefore that the distinction between service providers in 13(1)(a) and (b) fall away and that the same obligation to report without obtaining written consent be placed on all service providers mentioned in 13(1)(a).

Submitted by

Nozizwe Madlala- Routledge

Embrace Dignity