

# HIDDEN AGENDAS?

## The risks of human trafficking legislation

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South Africa is a signatory to the United Nations Protocol on Trafficking in Persons, and is likely to draft legislation on the topic soon. But the extent of the problem in South Africa is unclear, and the offences involved in trafficking are punishable under current law. To avoid unintended consequences, care is needed in drafting a new law in this area.

While the practice has been a concern for some time, human trafficking emerged as a key issue for international law enforcement in the 1990s. This was partly a result of the dissolution of the former Soviet Union and the subsequent migration of Eastern European women into sex work in Western Europe. The movement and marketing of these women soon became controlled by organised crime syndicates, and predictable abuses followed.

This awakened the international community to similar practices elsewhere, and the United Nations and donor organisations launched a campaign against it. All signatories to the *United Nations Convention against Transnational Organised Crime* have also been asked to sign the attached *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children* ('the Protocol'), and money has been made available for work in this area.

South Africa has been quick to toe the line, ratifying the Protocol in February of this year. A Law Reform Commission project has been created to look into specialised legislation on the topic. Chapter 5 of the Criminal Law Amendment Bill, which will revise the Sexual Offences Act, is dedicated to criminalising trafficking in persons for sexual purposes. A Trafficking in Persons Inter-sectoral Task Team has been formed, including both government departments and NGOs. It is hoped that these efforts

will result in South Africa being moved from 'tier two' to 'tier one' in terms of our compliance with the United Nations human trafficking enforcement standards.

But aside from appearing to be good global citizens, what is driving the campaign to create specialised trafficking legislation? The scale of the problem of transnational trafficking in South Africa is unclear, and the offences involved could be prosecuted under existing law (see the next article in this issue). Is the interest in a new law purely symbolic, or are there other agendas at work?

### Defining human trafficking

'Human trafficking' calls to mind images of children being snatched from the streets into dark panel vans, stowed in the holds of cargo ships, and dumped in a foreign brothel or work camp far from their mothers' arms. It is difficult to imagine a more horrific crime, and no one would question the drive to halt such actions. But definitions of trafficking are broad, and much of the activity that has been labelled 'trafficking' falls far from this scenario.

According to the Protocol, 'trafficking' is comprised of three basic elements:

1. the recruitment, transportation, transfer, harbouring or receipt of persons...
2. 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...

3. for the purpose of exploitation.

Looking at element one, the movement of the victims is implied, but not essential. Most notably, transnational movement is not required, meaning that 'domestic trafficking' becomes a possibility. What this might mean is discussed further below.

Element two includes both direct application of force as well as trickery and the "abuse of vulnerability". The common thread is that there exists a differential in power, and if the victim is a child, this differential is assumed by the Protocol. If this element is satisfied, any apparent 'consent' of the trafficked person is deemed irrelevant.

The final element involves the loaded term "exploitation", but the Protocol explicitly states that this exploitation must rise to the level of:

- sexual exploitation or prostitution;
- forced labour or slavery; or
- organ removal.

This definition could conceivably encompass a wide range of activities, including child labour, organ theft during unrelated medical procedures, and adult prostitution. In South Africa, most of the existing research on trafficking, and consequent advocacy, has focused on the importation of adult women for sex work.

### **What do we know about foreign sex workers in SA?**

The Law Reform Commission Issue Paper, and just about every other document referring to human trafficking in South Africa, draws its ideas about the extent and nature of the local problem almost entirely from two pieces of primary research: the study published in 2000 by the organisation Molo Songololo; and the study published in 2003 by the International Organisation on Migration (IOM).<sup>1</sup> Both pieces of work profess to be preliminary investigations, but in the absence of other research they are being taken as authoritative. Both focused on trafficking for the purposes of sexual exploitation,

and most of the movement described was of foreign nationals into South Africa. They involved at least one common researcher,<sup>2</sup> and both suffer from similar methodological problems.

Most importantly, the number of foreign 'trafficked' victims interviewed in these two pieces of research was extremely limited. The Molo Songololo research<sup>3</sup> involved interviews with 10 foreign women working in prostitution in South Africa, some of whom were interviewed as a group to aid in translation. Despite this limited base of first-hand experience, the report discusses trafficking of women into South Africa from at least 24 countries.

The IOM report purports to cover all of Southern Africa (11 countries), but only 25 victims were interviewed, including: 13 refugee women from various countries who were living in the Cape Town area, two Basuto children, two Malawian women, two Mozambican women, and two Thai women. The authors also mention interviews with over 200 non-trafficked people about the issue, although these are not detailed in the footnotes.

The IOM report identified at least nine distinct trafficking patterns, but the evidence for some of these was slim. For example, the report claims to have discovered a pattern of Afrikaans-speaking men kidnapping street children in Maseru and sadistically abusing them across the border in the Eastern Cape. This analysis is based on interviews with two child victims, as well as 10 case studies provided by a social worker. While this sounds like a possible crime trend in which one or more serial offenders may be involved, it is difficult to see it as an established trafficking pattern, worthy of arrows on a continental map.

Setting the specific claims of the reports aside, it remains a fact that the two major pieces of primary research on which the drive for specialised legislation is based, are hinged on the direct experiences of less than 35 people. This key deficiency should ring alarm bells. If the size of the problem is large, why weren't more women and children interviewed about their experiences, particularly given the multiplicity of movement patterns and nationalities discussed?

## Why traffick into SA?

The first reason for questioning the extent of trafficking for the purposes of sexual exploitation into South Africa is a common sense economic one: where there exists a massive domestic work force, why go to the expense of importing prostitutes?

Clearly, there is a niche market for 'exotic' women, especially in well stocked, upper-end brothels. Thai women in particular have their own following, as South African men have experienced their services while on holiday, and may be willing to pay a premium for nostalgia value. The IOM sees Thai women as the largest trafficked group – at least of those they were willing to put a number on – and estimates that between 800 and 1,100 are imported each year, with some of the existing population returning home.

Brothels in South Africa also have a problem retaining white staff, as many, if not most, of the white women involved in sex work in this country have substance abuse problems, which makes them bad employees for the indoor trade.<sup>4</sup> Eastern European women may provide a solution, but once again, this is only affordable for up-market brothel owners. The IOM does not make an estimate as to the number of women trafficked from Eastern Europe annually.

The IOM also identifies a previously unrecognised trafficked group: the importation of Chinese women by the Triads crime syndicate to service Chinese clientele exclusively. None of these women were actually interviewed, so it is unclear to what extent their participation is voluntary. While this is a fascinating indication of Triad intent to create a foothold in South Africa, the number of women affected is constrained by their exclusive client base.

There are several possible advantages to importing women, aside from their niche interest, that might possibly offset some of the costs involved. These women may be more compliant than local sex workers, as language and distance issues increase their vulnerability, making them easier to exploit. There may also be cultural factors that could contribute to their being more submissive. In the

end, however, the scope for trafficking is limited by local demand and a highly competitive local market.

Another major deficiency of the existing research is the uncritical way the narratives of the women are accepted. When asked to explain their activity, sex workers can be expected to portray themselves as victims, and for foreign sex workers, this portrayal is likely to fit the broad definitions of trafficking. Particularly when encountering law enforcement, foreign sex workers will most likely choose to be repatriated as trafficked innocents, rather than opportunistic prostitutes.

In some countries, like the United States, women claiming to have been trafficked are given a special visa status and access to a wide range of services, including a 'soft landing' back home. Foreign sex workers who entered the country illegally on their own are simply deported. Given that sex workers tell people what they want to hear for a living, it is not surprising that increasing numbers of trafficked women are being discovered.

Looking at the victims interviewed by the IOM, the extent of their victimisation varies, even by their own account. As is often the case in other countries where foreign sex workers have been interviewed, some admitted to being prostitutes in their countries of origin and to travelling to South Africa for the purposes of sex work, but object to the exploitative conditions they encounter once arriving here. The abuses suffered vary, with some claiming brutalisation, and others simply excessive debt. Similar complaints are made by local, brothel-based sex workers.

## Is a new law needed?

All of the abuses claimed by the women interviewed in the research are punishable under existing law. Transporting illegal 'aliens' across South Africa's borders is a crime. Keeping a brothel, procuring, and making a living off the earnings of prostitution are all illegal acts. Transporting and keeping people against their will is kidnapping. Taking children from their parents for the purposes of sexual exploitation is statutory abduction. Threatening bodily harm to force compliance with

demands is extortion. Fulfilling these threats is assault. Having sex with a woman against her will is rape, and those who promote this victimisation are accessories to rape. Having sex with a minor is a serious crime regardless of any apparent consent, and prostituting a child is punishable under numerous provisions.

Why then the need for specialised trafficking legislation? On the one hand, it may assist under-trained prosecutors to have a single codified piece of legislation to refer to in handling these cases. Looking at the non-sexual provisions, there may be a need for more flexibility in prosecuting slavery or organ removal cases, though the prevalence of these problems is even less clear.

It is also possible that a new law could contain provisions for funding counter-trafficking interventions. Perhaps most importantly, the law would have symbolic value, showing that the South African government has taken cognisance of the issue and has expressed its intent to do something about it.

Of course, everyone is in favour of laws that protect children. Looking at domestic 'trafficking', it might help to have legislation that clarifies criminal responsibility in cases where parents or guardians sell children in their care for the purposes of marriage or prostitution. The guardians, the broker of the transaction, and the recipient should all be held liable, and the legal arguments around this might, at present, be complex. It is important to distinguish this crime from traditional practices, such as the paying of *lobola*.

But the bottom line is that virtually everything that is part of trafficking is already illegal, and simply generating more legislation is unlikely to revolutionise the situation. Further, there are very grave dangers in passing a new law if it is poorly drafted. There are some who would argue that all adult sex work is based on the exploitation of economic vulnerability. Thus, it is possible that all consensual domestic adult commercial sex work could be deemed 'trafficking in women'.

Just as is presently the case with the drug laws, moves to apply alternative approaches to the

'victimless crime' in South Africa could be thwarted because national legislators have the excuse of having acceded to an international instrument that ties their hands. By possibly locking the country into a law enforcement approach to the problem of adult prostitution, South Africa could lose its flexibility to deal more creatively with local problems.

The Americans, in what seems to be a national wave of moralistic conservatism, seem especially keen on keeping adult consensual sex work illegal internationally. US anti-trafficking funders will not give money to organisations that consider prostitution law reform. Using contingent funding to set local agendas is nothing new, but is particularly insidious when applied to something as intimate as domestic sexual behaviour.

For close on a decade, academics and human rights advocates in South Africa have championed a movement to see adult commercial sex work decriminalised or legally regulated. The consensus has been that criminalising prostitution only locks women deeper into sex work and exacerbates the abuses they suffer, while deterring no one. Laws that target brothel-keepers are no better, as working indoors has decided advantages over work on the street, and laws that limit the formal business of prostitution simply serve to push women into increasingly unregulated spaces.

Attempts to win constitutional protection for sex workers to practice their profession have failed, but the Sexual Offences Act is currently being revised, and the potential exists for creating a more humane and socially responsible approach. The campaign to ease the suffering of women working in brothels and on the streets could be derailed by poorly crafted anti-trafficking legislation.

#### **Time to take stock**

No policy decision should be taken in this area without further research. Until we can say with more precision how serious the issue is in this country, we cannot say how much of our scarce criminal justice resources should be dedicated to addressing it. This information must be more than anecdotal. We need to adjust our official record keeping mechanisms – which do not presently

distinguish trafficking cases from other kidnapping or sexual offences cases – to track the phenomenon over time.

Since we appear to be bound by our accession to the Protocol to come up with specialised legislation, it is important that this be tailored to local realities. We should not be pressured by international timetables or ranking lists into making hasty decisions in this area. South Africa needs to focus on this emotive issue in a calm and rational way.

Most importantly, the distinction between involuntary servitude and the unfortunate reality of consensual adult commercial sex work must be kept in mind at all times. The experts in this country are in agreement that while the former cannot be tolerated, the latter will not be helped by heavy-handed law enforcement. It is only with the cooperation of the victims that either of these issues can be addressed. Thus, while the Protocol does not take cognisance of consent, we must.

#### Endnotes

- 1 South African Law Reform Commission, *Trafficking in Persons*, Issue Paper 25, Project 131, Pretoria, 2004; JM Martens, B Pieczkowski and van Vuuren-Smyth, *Seduction, sale and slavery: Trafficking in women and children for sexual exploitation in Southern Africa*, Pretoria, International Organisation for Migration, 2003; Molo Songololo, *The trafficking of children for the purposes of sexual exploitation: South Africa*, Cape Town, Molo Songololo, 2000. These two NGOs are also the only two to be represented on the Inter-sectoral Task Team.
- 2 This researcher, Bernadette van Vuuren-Smyth, is also the author of the 2001 ECPAT International report, *The Commercial Sexual Exploitation of Children in Southern Africa*, though this report is attributed to the organisation, rather than the individual, in the Law Commission Issue Paper.
- 3 Molo Songololo also published a report on the trafficking of children at the same time, in which 19 young people were interviewed in the Western Cape, but all were South African and all but two were Afrikaans-speaking. It would be impossible to generalise nationally on the basis of this niche base.
- 4 See T Leggett, *Rainbow Vice: The drugs and sex industries in the new South Africa*, David Philip, Cape Town, 2001.