

South Africa
**CRIMINAL LAW (SEXUAL OFFENCES AND RELATED
MATTERS)**
AMENDMENT ACT 32 OF 2007

[ASSENTED TO 13 DECEMBER 2007] [DATE OF COMMENCEMENT: 16 DECEMBER
2007]

CHAPTER 7

GENERAL PROVISIONS (ss 54-72)

Part 6

Transitional provisions relating to trafficking in persons for sexual purposes (ss 70-72)

70 Application and interpretation

(1) Pending the adoption of legislation in compliance with the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Trans-National Organized Crime* (signed on 14 December 2000) and the repeal of this Part, the transitional provisions in this Part relating to the trafficking in persons for sexual purposes are provisionally provided for in partial compliance of our international obligations and to deal with this rapidly growing phenomena globally.

(2) For purposes of this Part-

(a) '**commercial carrier**' includes a company, or the owner, operator or master of a means of transport, that engages in the transportation of goods or people for commercial gain; and

(b) '**trafficking**' includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of-

(i) a threat of harm;

(ii) the threat or use of force, intimidation or other forms of coercion;

(iii) abduction;

(iv) fraud;

(v) deception or false pretences;

(vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or

(vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage, for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and '**trafficks**' and '**trafficked**' have a corresponding meaning.

71 Trafficking in persons for sexual purposes

(1) A person ('A') who trafficks any person ('B'), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.

(2) A person who-

(a) orders, commands, organises, supervises, controls or directs trafficking;

(b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or

(c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking, is guilty of an offence of involvement in trafficking in persons for sexual purposes.

(3) For the purpose of subsection (1), '**consent**' means voluntary or uncoerced agreement.

(4) Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following-

(a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (i) to (vii) of the definition of trafficking having been used or being present; or

(b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act-

(i) asleep;

(ii) unconscious;

(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;

(iv) a child below the age of 12 years; or

(v) a person who is mentally disabled.

(5) A person who has been trafficked is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked.

(6) (a) A commercial carrier commits an offence if the carrier brings a person into or removes a person from the Republic and, upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into or departure from the Republic.

(b) A commercial carrier is not guilty of an offence under paragraph (a) if-

(i) the carrier had reasonable grounds to believe that the documents that the person has are the travel documents required for lawful entry into or departure from the Republic by that person;

(ii) the person possessed the travel documents required for lawful entry into or departure from the Republic when that person boarded, or last boarded, the means of transport to travel to or from the Republic; or (iii) entry into the Republic occurred only because of illness of or injury to a child or adult on board, stress of weather or other circumstances beyond the control of the commercial carrier.

(c) A commercial carrier is, in addition to any offence under this section, liable to pay the costs of the trafficked person's care and safekeeping and return from, the Republic.

(d) A court must, when convicting a commercial carrier of an offence under this section, in addition order the commercial carrier concerned to pay the costs contemplated in paragraph (c).

South Africa
Child Protection Act 2005
(English text signed by the President.)
(Assented to 8 June 2006.)

CHAPTER 18
TRAFFICKING IN CHILDREN

Purposes of Chapter

281. The purposes of this Chapter are-

- (a) to give effect to the UN Protocol to Prevent Trafficking in Persons; and **5**
- (b) generally to combat trafficking in children.

UN Protocol to Prevent Trafficking in Persons to have force of law

282. The UN Protocol to Prevent Trafficking in Persons is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act.

International co-operation 10

283. (1) The President may on such conditions as he or she deems fit-

- (a) enter into an agreement with a foreign State that is not a State Party to the UN Protocol to Prevent Trafficking in Persons in respect of any matter pertaining to trafficking in children; and
- (b) enter into an agreement with a foreign State that is a State Party to the UN 15 Protocol to Prevent Trafficking in Persons in respect of any matter pertaining to trafficking in children for the purpose of supplementing the provisions of the Protocol or to facilitate the application of the principles contained therein.

(2) **An** agreement contemplated in subsection (1) may not be in conflict with the provisions of the UN Protocol to Prevent Trafficking in Persons.

(3) The President may agree to any amendment or revocation of an agreement contemplated in subsection (1).

(4) **An** agreement contemplated in subsection (1) or any amendment to or revocation thereof, shall not be of any force or effect until such agreement, amendment or revocation has been approved by Parliament.

Trafficking in children prohibited

284. (1) No person, natural or juristic, or a partnership may traffic a child or allow a

(2) It is no defence to a charge of contravening subsection (1) that a child to be trafficked.

(a) a child who is a victim of trafficking or a person having control over that child 30 has consented to-

- (i) the intended exploitation; or
- (ii) the adoption of the child facilitated or secured through illegal means; or

- (b) the intended exploitation or adoption of a child referred to in paragraph (a) did not occur.
- (3) In order to establish the liability, in terms of subsection (1), of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting-
- (a) within the scope of his or her employment;
 - (b) within the scope of his or her actual or apparent authority; or
 - (c) with the express or implied consent of a director, member or partner of the employer or principal.
- (4) A finding by a court that an employer or principal has contravened subsection (1) serves as a ground for revoking the licence or registration of the employer or principal to operate.

Behaviour facilitating trafficking in children prohibited

- 285.** (1) No person, natural or juristic, or a partnership, may-
- (a) knowingly lease or sublease or allow any room, house, building or establishment to be used for the purpose of harbouring a child who is a victim of trafficking; and
 - (b) advertise, publish, print, broadcast, distribute or cause the advertisement, publication, printing, broadcast or distribution of information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology.
- (2) Every Internet service provider operating in the Republic must report to the South 10 African Police Service any site on its server that contains information in contravention of subsection (1).

Assistance to child who is victim of trafficking

- 286.** (1) With due regard to the safety of a child and without delay-
- (a) the Director-General: Foreign Affairs must facilitate the return to the Republic of a child who is a citizen or permanent resident of the Republic and who is a victim of trafficking; and
 - (b) the Director-General: Home Affairs must-
 - (i) facilitate and accept the return of a child contemplated in paragraph (a);
 - (ii) issue such travel documents or other authorisations as may be necessary to enable such a child to travel to and enter the Republic;
 - (iii) at the request of another state that is a party to the UN Protocol to Prevent Trafficking in Persons or to an agreement relating to trafficking in children, verify that the child who is a victim of trafficking is a citizen or permanent resident of the Republic; and
 - (iv) upon the child's entry into the Republic refer the child to a designated social worker for investigation in terms of section 155(2).
- (2) (a) If it is essential in the best interests of a child who has been trafficked, the Director-General must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.
- (b) The Director-General may not act in terms of paragraph (a) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

287. If a court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child or allowed the child to be trafficked, the court may-

- (a) suspend all parental responsibilities and rights of that parent, guardian, or other person; and
- (b) place that child in temporary safe care, pending an inquiry by a children's court.

Reporting of child who is victim of trafficking

288. An immigration official, police official, social worker, social service professional, medical practitioner or registered nurse who comes into contact with a child who is a victim of trafficking in the Republic must refer that child to a designated social worker for investigation in terms of section 289(1).

Child who is victim of trafficking found in Republic

289. (1) A child who is a victim of trafficking- **50**

- (a) must be referred to a designated social worker for investigation in terms of section 155(2); and
 - (b) may, pending such investigation, be placed in temporary safe care.
- (2) If, after an investigation contemplated in subsection (1), an illegal foreign child is brought before the children's court, the court may order that the child be assisted in applying for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998).
- (3) A finding in terms of section **156** that an illegal foreign child who is a victim of trafficking is a child in need of care and protection serves as authorisation for allowing the child to remain in the Republic for the duration of the children's court order.

Repatriation of child who is victim of trafficking

290. (1) The Director-General may not return a child contemplated in section (2) to his or her country of origin or the country from where the child has been trafficked without giving due consideration to-

- (a) the availability of care arrangements in the country to which the child is to be returned;
 - (b) the safety of the child in the country to which the child is to be returned; and
 - (c) the possibility that the child might be trafficked again, harmed or killed.
- (2) (a) If it is essential in the best interests of a child who has been tracked, the Director-General must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.
- (b) The Director-General may not act in terms of paragraph (a) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

Extra-territorial jurisdiction

291. A citizen or permanent resident of the Republic, a juristic person or a partnership registered in terms of any law in the Republic that commits an act outside the Republic which would have

constituted an offence in terms of this Chapter had it been committed inside the Republic, is guilty of that offence as if the offence had been committed in the Republic and is liable on conviction to the penalty prescribed for that offence.