



REVIEW OF THE STANDARD OPERATING
PROCEDURES FOR THE IDENTIFICATION,
PROTECTION, AND REFERRAL OF VICTIMS OF
HUMAN TRAFFICKING



The Asia Foundation



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1. INTRODUCTION

1.1 Human trafficking in Sri Lanka

Human trafficking in Sri Lanka takes place both internally and in a cross border context. The objectives of such trafficking are primarily for forced labour and commercial sexual exploitation. The US Trafficking in Persons (TIP) report of 2019 (TIP report) documents the cross border trafficking of Sri Lankans to a range of countries for these purposes. These include several countries in the Middle East which have traditionally been the destinations of migrant labour for decades, but also countries such as Afghanistan, Bosnia and Herzegovina, Mauritius, Maldives and Pakistan. Sri Lankan men have reportedly been trafficked into forced labour in Sierra Leone, the Solomon Islands and Taiwan, often to work on boats. Conversely, Sri Lanka is a destination country for women being trafficked for sexual exploitation, and also reportedly, a transit country for labour migrants from Nepal en route to the Middle East and other destinations.¹

Foreign employment is the main reason for outbound migration from Sri Lanka and has been so since the 1970s. According to the Sri Lanka Bureau of Foreign Employment (SLBFE) a total of 212,162 persons (males 66%, females 34%) left for foreign employment in 2017. This amounted to a decrease of 12.6% from the previous year with female departures declining by 11.7 per cent to 72,891 and male departures by 13.1% to 139,271. The SLBFE reports that there has been a continuous decline in departures since 2014.² Nevertheless, given the large numbers involved it is not surprising that the majority of allegations of trafficking concerns this group. The International Organisation for Migration has noted that “Many outbound migrants are exposed to the risk of being trafficked as a result of deceptive recruitment practices and subjected to physical or sexual abuse, forced labor-like practices, movement restrictions, withholding of passports, and detention and deportation threats for immigration violations.”³

There is also a high prevalence of internal trafficking particularly of women and children. Children are used in forced labour in fisheries, tourism, small private estates, and domestic labour. Sexual exploitation of children also takes place, particularly of boys in tourism,⁴ and many of these children are trafficked. Children are also trafficked for illegal adoptions and for begging.

1.2 Background and objectives of the study

The Asia Foundation is implementing a project to ‘*Build an Effective Trafficking in Persons Data and Information Collection and Reporting System in Sri Lanka*’ (2017-2021) with support from the United States Department of State. The project feeds into the ongoing work of the National Anti Human Trafficking Task Force (NAHTTF) under the Ministry of Justice (MOJ) of the Government of Sri Lanka

¹ 2019 Trafficking in Persons Report: Sri Lanka, June 20, 2019 <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/sri-lanka/>; Counter Trafficking IOM Sri Lanka
<<http://srilanka.iom.int/iom/sites/default/files/CT%20Factsheet2.pdf>>

² Sri Lanka Bureau of Foreign Employment, Annual Statistical Report of Foreign Employment 2017 available at
<<http://www.slbfe.lk/file.php?FID=487>>.

³ <http://srilanka.iom.int/iom/?q=pbn/sri-lanka-sets-out-protect-victims-human-trafficking>

⁴ The National Policy on Elimination of Child Labour in Sri Lanka (September 2017) page 6.

(GoSL). The goal of building an effective trafficking-in-persons (TIP) data collection and reporting system is achieved through three objectives: 1) assess and develop or enhance an effective and efficient multi-sectoral TIP data collection and reporting system; 2) build the capacity of key stakeholders on the new or enhanced TIP data collection and reporting system; and 3) support dissemination of information from the new or enhanced data collection and reporting system to relevant stakeholders. To achieve the first objective of assessment The Asia Foundation (Foundation) will review existing formal reporting mechanisms used by the NAHTTF to share TIP data. Within this scope the Foundation will review the Sri Lanka Standard Operating Procedures (SOPs) on the Identification, Protection, and Referral of Victims of Human Trafficking, which sets out NAHTTF's plan for an as-yet operationalized formal data collection system. The review of the SOP will assist to understand the procedure for TIP recording and reporting at stages of identification and protection as well as the recommended referral procedures. The review will indicate to the Foundation whether to build a new data collection mechanism for Sri Lanka or enhance an existing mechanism. It will also help suggest system improvements to TIP data collection which may include developing mobile phone applications and/or computer-based databases, and an additional section on documentation and monitoring of SOPs, among others.

The SOP was launched in 2015 under the guidance of the NAHTTF and it reflects the initiatives of the government of Sri Lanka to combat human trafficking and to strengthen domestic laws in this regard. The SOP supports the identification and protection of victims of human trafficking, including both Sri Lankans who may become victims both within and outside Sri Lanka, and foreign nationals who may become victims within Sri Lanka. It sets out guidelines for a series of first responders to identify potential victims and refer them to services. Vulnerable groups include foreigners detained for visa overstays, women arrested for prostitution and related crimes, and Sri Lankans who work both legally and irregularly overseas.

It is now four years since the SOP was launched and this review is being undertaken to firstly, evaluate the role of the NAHTTF, and secondly, to assess the implementation of the SOP including the way it has been operationalized, to understand the challenges as well as the best practices in doing so, and to make appropriate recommendations, where necessary and appropriate, to enhance its effectiveness.

Further, in the four years since the SOP was launched the ground situation has changed somewhat. In 2015 Sri Lanka was identified as a source and destination country, but according to the TIP report it has now become a transit country as well. In addition, the Victim and Witness Protection Act No. 4 of 2015 also impacts on the issue of trafficking and it is necessary to explore this link further.

1.3 Methodology for the study

The methodology of the study was firstly, a review of laws and international standards on trafficking, various documents of state agencies working in the area of trafficking and previous studies on the subject. The analysis of the SOP was based to a large extent on interviews with relevant personnel involved in implementing it.

2. DEFINITIONS OF TRAFFICKING AND IDENTIFICATION OF VICTIMS

Before assessing the effectiveness of the National Anti Human Trafficking Task Force and the SOP it is necessary to have clarity as to the legal definition of trafficking and an understanding of the elements of the offence. It is important to do so as the interviews revealed that the implementing agencies of the SOP, civil society organisations and others, were often unclear as to what the offence entails.

In this section international documents and national legislation on trafficking will be considered in order to determine what the offence entails and the way that it has been understood by the current users of the SOP.

2.1 International documents on human trafficking

Trafficking in persons is defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000), commonly known as the Palermo Protocol. According to the Protocol

Trafficking in persons" shall mean 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.

The consent of the victim to any of the actions specified is irrelevant where any of the means set out have been used. Further, the Protocol specifies that "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article."

Sri Lanka has also signed the SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution (2005). This convention came into force on 15th November 2005. Trafficking is defined as "the 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." The scope of this Convention is limited to trafficking of women and children only, and only for the purposes of prostitution. The prostitution need not be forced prostitution as, according to the definition, the consent of the person is irrelevant to the offence.

2.2 National legislation on human trafficking

The offence of human trafficking was first introduced by the Penal Code (Amendment) Act No. 22 of 1995 to deal with illegal adoptions and related offences. The section was amended by the Penal Code

(Amendment) Act No. 16 of 2006 to bring it line with the Palermo Protocol. By this amending Act Section 360C of the principal Act was repealed and the following provision entitled “Trafficking” was substituted

(1) Whoever—

(a) buys, sells or barter or instigates another person to buy, sell or barter any person or does anything to facilitate or induce the buying, selling or bartering of any person for money or other consideration;

(b) recruits, transports, transfers, harbours or receives any person or does any act by the use of threat, force, fraud, deception or inducement or by exploiting the vulnerability of another for the purpose of securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation or any other act which constitutes an offence under any law.

(c) recruits, transports, transfers, harbours or receives a child or does any other act whether with or without the consent of such child for the purpose of securing forced or compulsory labour or services, slavery, servitude or the removal of organs, prostitution or other forms of sexual exploitation, or any other act which constitutes an offence under any law, shall be guilty of the offence of trafficking.

2.3 Related offences and statutes

(a) Procuration

The Penal Code Amendment Act No. 22 of 1995 introduced a new offence of procuration. Section 360A of the principal Act now makes it an offence to procure any person with or without the consent of such person for prostitution, illicit sexual intercourse or sexual abuse. A separate offence of procuring children for sexual activity, abuse or exploitation was introduced in a separate section, namely Section 360B of the principal Act.

(b) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act No. 30 of 2005

The purpose of this Act is to give effect to the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution of 2002. According to Section 2 of the Act any person who keeps, maintains, or manages, or finances or lets or rents a building or other place for the purpose of trafficking of women and children for prostitution or any matter connected thereto is guilty of an offence under the Act. Trafficking has been defined as “the 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 being subjected to trafficking.”

It must be noted that in both the offence of procuration and the offence of trafficking under the Act of 2005, the consent of the person is irrelevant.

(c) Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985

Section 62 of the SLBFE Act deals with offences where labour migrants are sent overseas in contravention of the Act. Section 62 is as follows:

- (1) Any person who, except in conformity with the provisions of this Act
 - (a) makes, or attempts to make, any agreement with any person purporting to assist that person or any other person to emigrate or depart from Sri Lanka for purposes of employment or demands or receives any money from such person;
 - (b) causes or assists, or attempts to cause or assist, any person to emigrate or depart or to attempt to emigrate or depart or to leave any place for the purposes of emigrating or departing from Sri Lanka for purposes of employment,

shall be guilty of an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not less than one thousand rupees and not exceeding one thousand five hundred rupees and to imprisonment of either description for a term not less than twelve months and not exceeding two years.

(2) Every person who carries on the business of a foreign employment agency without a licence in that behalf issued under this Act shall be guilty of all offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not less than twenty thousand rupees and not exceeding one hundred thousand rupees and an additional fine of one thousand rupees for each day on which such offence is continued after conviction.

(3) No prosecution under this section shall be instituted except with the sanction of the Secretary to the Ministry of the Minister

However, under this Section the offence with which a person may be charged will not necessarily be trafficking but rather violations of the conditions under which agencies operate.

2.4 Discussion

One of the most significant issues that surfaced in this study is the fact that the definition of trafficking has been misunderstood in many instances and the question of who a victim of trafficking is often difficult to determine. Trafficking has three elements, namely the activity, the means/methods and the purpose/objective. The following table contained in the SOP as well as in the Handbook of the SLBFE⁵ illustrates these elements.

⁵ Handbook for the Sri Lanka Bureau of Foreign Employment for the Identification, Protection and Referral of Victims of Human Trafficking available at <

Activities	Means/Methods	Purpose/ Objective
Recruitment	Threat	For the purpose of exploitation
Transportation	Force	Prostitution of others
Transfer	Other forms of coercion	Other forms of sexual exploitation
Harbouring	Abduction	Forced Labour or services
Receipt of persons	Fraud	Slavery or practices similar to slavery
	Deception	Servitude
	Abuse of power / Position of Vulnerability	Removal of organs
	Giving or receiving payments or benefits	
The 'consent' of a victim of trafficking shall be irrelevant where any of the means set forth above have been used. 'Consent' is irrelevant in case of children even if this does not involve any of the means set forth above.		

As the researcher learnt from several of the interviewees it is difficult to prove all the elements of trafficking in the process of investigation and prosecution, and consequently to identify either the victim or the offender. In the case of the offender it is also important to establish his/her intention or *mens rea* in regard to all the elements of the offence in order to prove the offence of trafficking. While trafficking is easier to identify in cases such as forced prostitution, forced marriage and organ removal, it can be more complex in cases of labour exploitation.

An example of inaccurate identification of trafficking is found in the TIP Report of 2019 where it is stated that

Some local government and security sector officials forced women who asked for information about their missing husbands, or widows who attempted to claim government benefits from their deceased husbands' military service, to perform commercial sex acts in exchange for information and/or government benefits.⁶

While this is an instance of abuse of power and sexual bribery, this does not meet the elements of trafficking.

Similarly, the Women and Media Collective in a study on trafficking⁷ had administered a questionnaire to CSOs to determine their understanding of trafficking. However, the

<http://srilanka.iom.int/iom/sites/default/files/HAND%20BOOK%20FOR%20THE%20SRI%20LANKA%20BUREAU%20OF%20FOREIGN%20EMPLOYMENT%20%28SLBFE%29%20ON%20HUMAN%20TRAFFICKING.pdf>.

⁶ Trafficking in Persons Report, June 2019, page 441.

⁷ Draft Report of the Survey on the existing systems of Trafficking-in- Persons Data and Information Collection by Civil Society Organizations in Sri Lanka, Submitted by Women and Media Collective to The Asia Foundation.

questionnaire in itself is not clear on all the elements of trafficking. The questions asked were as follows:

1. When a person reached his/her place of employment, his/her passport/travel documents were taken away
2. Worker not been paid the amount promised/stated in the contract
3. Worker does not have access to the bank account into which his/her salary is paid
4. Salary/wages withheld and not given regularly
5. Worker has to do work that was not mentioned in the contract or not explained by the employment agent
6. Worker subject to physical abuse and injuries by the employer/ family
7. Worker is not given enough food to eat
8. Worker is expected to work 10- 15 hours a day or more
9. Worker expected to work without a break/holiday/ vacation
10. Worker is not given leave or a break when he/she falls sick
11. Worker felt that he/she could not leave the place of work for any reason/confined to the workplace
12. The place of work/employment changed or worker is taken from place to place and asked to work
13. Worker is taken to another country to work
14. Worker is promised work in a house but has to work in a farm instead
15. Worker could not contact his/her family or friends

These are all instances of labour exploitation and breach of contract. However, the elements of trafficking may not necessarily be established in all of them, particularly the intent to exploit. Therefore, it may not be possible to identify the affected person as a victim of trafficking, and it also may not be possible to attribute all the elements of trafficking to an offender or offenders. It is important that the general public, CSOs and all those working in this field have an understanding of the offence.

According to the Ministry of Foreign Affairs (MoFA) only about 10% of alleged trafficking cases are actually proved to be so. It was suggested that these cases should be studied to improve the definition of human trafficking for the Sri Lankan context. However, since Sri Lankan law should be consistent with international standards amending definitions should be carefully considered.

Human trafficking must also be distinguished from human smuggling and from the offence procurement. There are often overlaps between the offences, one offence could transition into another. This must also be kept in mind when addressing of trafficking.

The Screening Tool to help identify a potential victim of Human Trafficking (Labour) (Annex 4 of the SOP) sets out the possible factual situations where trafficking could take place. The indicators of labour trafficking at the end of the Screening Tool sets out the main elements of trafficking and this would be a good guide in training stakeholders and State agencies in understanding the concept of trafficking.

The issue of accurate identification of trafficking will be discussed further in the course of this review.

3. THE NATIONAL ANTI HUMAN TRAFFICKING TASK FORCE

The National Anti Human Trafficking Task Force (NAHTTF) was established by the Ministry of Justice in 2010 and has been in operation for about nine years. It is composed of a wide range of state agencies and is currently chaired by the Additional Secretary (Legal) of the Ministry of Justice and Prison Reforms.

The researcher could not locate a website for the NAHTTF and notes that this is a significant omission. Information relating to the NAHTTF including its composition and work to date had to be found from other websites, documents and from interviews.

As at the most recent meeting held in July 2019 the list of members were as follows:

Attorney-General's department

1. Two Senior State Counsel/Deputy Solicitor General

Police Department

2. Direct Crimes Division
3. Director Criminal Investigation Division

Ministries

4. Secretary, Ministry of Defence (Law and Order Division) represented by Senior Assistant Secretary and Communications Advisor
5. Secretary, Ministry of Primary Industries and Social Empowerment represented by Director Planning
6. Secretary, Ministry of Telecommunications Foreign Employment and Sports represented by assistant director planning
7. Secretary, Ministry of Women and Child Affairs represented by Legal Officer
8. Ministry of Foreign Affairs - Assistant Legal Advisor
9. Ministry of Labour and Trade Union Relations - Commissioner of Labour (Children and Women)
10. Ministry of Tourism and Wildlife - Additional Secretary (Administration and Christian Affairs)

Other State Institutions

11. Controller General Department of Immigration and Emigration - represented by Chief Immigration Officer
12. Senior Probation Officer - Department of Probation and Childcare
13. Deputy General Manager - Sri Lanka Bureau of Foreign Employment
14. Chairperson - National Child Protection Authority - represented by Assistant Director Legal
15. Judicial Medical Officer- Head, Institute of Forensic Medicine and Toxicology
16. Chairperson - National Committee on Women
17. Director - Children and Women's Bureau

The researcher was subsequently informed that representatives of the International Organisation for Migration (IOM) and The Asia Foundation (the Foundation) are also invited to occasional meetings.

It was recommended to the researcher that the Department of Social Services should also be a part of the NHATTF as it has a role to play in protection of victims of trafficking.

There were conflicting reports on how often the NAHTTF met and the researcher was unable to determine this. It appears that the NAHTTF met in July 2019 after a lapse of a few months. However, it was also mentioned that although the entire NAHTTF may not meet regularly, a core group or sub-committee consisting of the Police, the SLBFE, the Ministry of Justice and the Ministry of Foreign Affairs meets more regularly in order to discuss complaints of trafficking.

As regards the role, functions and Terms of Reference of the NAHTTF, as mentioned earlier there is no website or document which provides this information which had to be obtained from those interviewed. The persons interviewed had mixed responses to this question.

Some institutions felt that they were not directly involved with the implementation of the SOP and could only act as advisory bodies. Several interviewees commented that the primary function of the NAHTTF was to contribute to the TIP report and that there were regular meetings while this process was ongoing. The agenda appears to be generally to discuss complaints received by the Police or the SLBFE. The achievements of the NAHTTF since its inception were cited as contributing to the TIP report, establishing a shelter, and formulating the SOP and the Strategic Action Plan to Monitor and Combat Human Trafficking 2015-2019. The agenda of the meeting held on 11th July 2019 was to discuss the 2019 TIP report and to discuss the proposed database and the Management Information System (mentioned below). Some interviewees were of the view that the NAHTTF was a good co-ordinating mechanism and facilitated inter-agency co-operation. However, it was agreed that its role and functions could be expanded, for instance in awareness raising and training.

A positive development is that the NAHTTF is now in the process of developing a database for data collection and reporting of TIP incidents and to track complaints of trafficking. This project is being undertaken by The Asia Foundation in partnership with Nielsen Company and Women and Media Collective.⁸ This project will enable the NAHTTF to both track complaints and follow up trafficking incidents. Further, it will enhance the cohesiveness of the NAHTTF and the co-ordination among its members. Nevertheless, there appeared to be lack of enthusiasm among those interviewed as to the effectiveness of the NAHTTF.

⁸ Assessment of Existing Trafficking in Persons Data Collection and Reporting Mechanisms to the Anti Human Trafficking Task force Final Report Submitted by Nielsen

4. OBJECTIVES, PROCEDURES AND STRUCTURE OF THE SOP

This section will examine the structure, objectives and procedures of the SOP as specified in the document, and consider their relevance and effectiveness.

4.1 Objectives

The stated objectives of the SOP are as follows:

- to ensure the effective identification and protection of victims including the establishment of a referral mechanism to provide appropriate assistance,
- to ensure expeditious and effective law enforcement including the conviction of offenders,
- to ensure the protection and non-revictimization of victims from the time of identification to reintegration; and
- to institutionalize specific steps for the provision of assistance and protection to victims of human trafficking.

It should be noted that law enforcement and the prosecution and conviction of offenders is not reflected in the title of the SOP which refers to the identification, protection and referral of victims only. The Message from the then Secretary to the Ministry of Justice, Ms. Kamalini de Silva states that “The main objective in developing the SOP is to respond to the call for a national mechanism to identify and protect victims of human trafficking. She goes on to say that “the SOP is of significance as it not only provides mechanisms to protect citizens of Sri Lanka who become victims of human trafficking within the territory of Sri Lanka and overseas but also protects non nationals who may become a victim within Sri Lanka.”

While prosecution of offenders is obviously a necessary function, it is not clear why it was included in the SOP which was intended to focus on protection of victims. There is, therefore a discrepancy between the title and the content of the SOP which may, in fact, diminish its effectiveness.

4.2 Procedures

The stated procedures of the SOP puts the victim at the centre of a response network comprised of both NAHTTF members and others. The procedures require the concerned agencies to ensure that the victim is not treated as an offender and is aware that she/he is the victim, that the victim is not re-victimised and that all services are provided on the basis of her/his informed consent and that her/his rights to privacy and confidentiality are respected.

Thus the procedures are victim centered and, as noted in the SOP adhere to the overarching principles reflected in the Palermo Protocol and the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015. In the context of human trafficking the latter law will provide assistance and protection to victims, enable them to obtain compensation from the offenders and provide for obtaining redress including restitution, compensation, reparation and rehabilitation.

4.3 Structure

The SOP is structured into five Phases as follows:

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
First information reporting/ complaints	Immediate response to urgent needs	Investigation by the Police (pre-trial)	Prosecution	Returns to and from Sri Lanka
Rescues	Medical care		Trial	
Initial screening / checklist	Age verification		Post-trial	
Preliminary information sharing	Shelter referral			
Identification of needs	Providing information after referral			
	Steps for victims (national/ non-national) willing or not to proceed with a complaint/ cooperate			
	Bail			

The SOP notes that it “provides a step-by-step guide to all agencies involved in the identification and provision of assistance and protection to victims of human trafficking,” and that it has been divided under the various phases for clarity and compliance with procedural norms.” However, it is not clear whether these steps are meant to be implemented successively or consecutively, or how they were assigned to the various phases. For example, it may be necessary to immediately respond to urgent needs and provide medical care immediately after rescue. Similarly, in cases of forced labour overseas, return to Sri Lanka may take place immediately after rescue. Therefore this needs to be clarified.

5. IMPLEMENTATION OF THE SOP

The implementation of the SOP by the current users and any other stage agency, if applicable, will be discussed in this section. Each Phase of the SOP will be analysed based on the interviews conducted with the users. As noted earlier, Phases 1, 2 and 5 relate to protection measures and are concerned with the welfare of victims, while Phases 3 and 4 relate to investigation of the offence and prosecution of offenders. For clarity, Phases 1, 2 and 5 will be discussed first and Phases 3 and 4 will be discussed next.

5.1 Phases 1, 2 and 5

This discussion will consider cross border trafficking and internal trafficking separately. It is in these Phases that initial complaints or information of trafficking, or suspicions regarding the possibility that trafficking is taking place, will arise, and response to needs and return to and from Sri Lanka will take place. The following discussion indicates how the users of the SOP address these situations. It should be noted that the users are also required to operate under the enabling law of their respective institutions in addition to adhering to the SOP.

(a) Cross border trafficking

In the case of cross border trafficking, intimations of possible trafficking would possibly arise at the airport or other entry/exit points to the country, and immigration screening as set out in the SOP would come into operation.⁹ The Dept. of Immigration and Emigration has a Human Trafficking Unit which was established after the adoption of the SOP and potentially plays an important role in the context of first information as labour migrants and possible victims of cross border trafficking will necessarily have to pass through their jurisdiction. However, the Department is constrained by the fact that its mandate is to deal with human smuggling and other violations of immigration and emigrations laws rather than human trafficking. It was also noted that no circulars have been issued to the Department as regards implementation of the SOP. Further, there is no data recording system to maintain an information base in this regard and at best only a log note is maintained. The Department also has internal constraints on implementing the SOP, including that the Controller Border who is the responsible officer to do so is in the transferable category of officers and is only in place for one or two years. This is a constraint on long term implementation of measures to curb trafficking.

It was pointed out that it is difficult to establish that a person passing through the airport is a possible victim of trafficking, and even though Immigration officials may have suspicions there are constraints in preventing such person from leaving the country. Many labour migrants leave the country on a visit visa to a transit country and travel from there to the country of work. However, they cannot be prevented from leaving the country if they possess valid travel documents including the visa and passport. Immigration officers can only apprehend a person if his/her travel documents are not in order. This position was also confirmed by the SLBFE and the Ministry of Foreign Employment. The SLBFE also noted that, as a result, it was not in a position to assist potential victims and could only assist those who

⁹ Section 4.3.2 and 4.3.3.

had actually been trafficked.

On the other hand, the SLBFE also pointed out that the mere fact that a person does not have valid travel documents and is attempting to illegally depart from the country would not in itself be proof of being trafficked since trafficking requires the element of exploitation which may or may not be established. Rather, it would be a violation of immigration and emigration laws. The problem that arises in such a situation is that, even a labour migrant who is in danger of being trafficked, would be considered an offender under immigration and emigration laws rather than a victim of trafficking. Further, the actual offender may not be apprehended. It must be noted that the SOP requires that such persons should not be considered as offenders under immigration laws,¹⁰ but the fact that they are victims rather than offenders will have to be established. However, to date there are no records of such instances and the question has not arisen.

Similar constraints apply as regards non-nationals who are trafficked into the country. If their visa is authentic they cannot be refused entry without justification, and action can only be taken against them if they overstay their visa or violate the visa conditions. While about 1200 foreign nationals were deported from the country within the last year for visa violations, the question as to whether they were victims of trafficking could not be verified.

As regards the report that Sri Lanka is a transit destination for trafficking, again it is difficult for the Department of Immigration and Emigration to address this issue. Transit passengers often remain in the transit area and do not come into contact with immigration officials. Therefore, it is difficult to verify the reports or take preventive action against this.

The Ministry of Foreign Affairs (MoFA) through its Embassies is a point of first information overseas for Sri Lankans who have been trafficked, and rescue and repatriation to Sri Lanka will also be handled by such Embassies. According to the MoFA Sri Lanka does not have a problem of trafficking for commercial sexual exploitation although the TIP report of 2019 does cite some instances. However, it appears that overseas missions have not had reports or complaints of such incidents.

The majority of people who appeal to the embassies for help, are labour migrants and most of the complaints relate to breach of employment contracts rather than trafficking and are resolved according to labour laws. Everyone who leaves the country to work abroad is not registered with the SLBFE.¹¹ Therefore these irregular migrants are often inhibited from appealing to the Embassies.

The Embassies are also constrained by lack of funds in the extent to which they can help labour migrants who face problems in the country of work. However, with the help of the receiving country they are sent back to Sri Lanka and assisted by the SLBFE. If the person had been sent by a licensed agent, such agent also pays for repatriation to Sri Lanka. It was also noted that the SLBFE Anti Trafficking Unit only has a mandate over the victims of cross border labour exploitation since the SLBFE Act covers only such

¹⁰ Section 4.2.14.

¹¹ The requirement of the family background report, training report, and requirement of a minimum age of the person are reasons for not registering.

issues. The SLBFE has its own screening tool and does not use the screening tool in the SOP.¹²

There are several shelters to provide services for trafficking victims and returning migrants including the Sahana Piyasa and the shelter operated by the Women's Bureau. However, these shelters are seldom used, as the persons concerned prefer to return to their families.

(b) Internal Trafficking

The SOP is also applicable to internal trafficking. Studies report that while labour migration contributes to the majority of trafficking cases, other types of trafficking including internally, are relatively less. Children are trafficked from the plantations into urban areas for child sex in the popular coastal tourist belts and for child labor in certain pockets of the country, and girls and women are trafficked into working in massage parlours and brothels operating under the guise of Tourist Board approved Ayurvedic Centres and spas.¹³

The welfare and protection of children falls under the mandates of the National Child Protection Authority (NCPA) and the Department of Probation and Child Care Services.

The NCPA is an advisory, monitoring and policy making body which works for the protection of children. However, one of its functions under the enabling law¹⁴ is "to take appropriate steps where necessary for securing the safety and protection of children involved in criminal investigations and criminal proceedings." The NCPA has its own procedures for this purpose, which it prefers to use rather than the SOP. It is also constrained by a lack of financial and human resources. However, it has launched a project called "*Jana Paula*" at grassroots level to enhance the protection of children.

The NCPA cited the following instances where trafficking of children occurs:

1. For use as beggars,
2. For child pornography
3. For labour and sexual exploitations at spas and "medical centres",
4. For use as domestic helpers,
5. Ordination of young children as monks.

The NCPA was of the view that trafficking of children generally takes place within the country and cross border trafficking is rare.¹⁵ It was also emphasised that child trafficking generally takes place with the connivance of the family and the NCPA was of the view that the SOP does not adequately take this into account. It was also felt that the SOP does not adequately deal with internal trafficking and is more focused on labour migration.

¹² The screening tool is contained in the Handbook for the Sri Lanka Bureau of Foreign Employment (SLBFE) on Identification, Protection and Referral of Victims of Human Trafficking.

¹³ <http://migrantinfo.lk/2019/07/human-trafficking-and-its-relevance-to-sri-lanka-andrew-samuel/>

¹⁴ National Child Protection Act No. 50 of 1998, Section 14 (j)

¹⁵ The TIP report, however, cites instances of children being trafficked overseas.

The Department of Probation and Child Care Services has the mandate to provide protection and care services to children in distress or a child in the custody of the Police. The role of the Department is to investigate the history and circumstances of the child and ensure his/her care, protection, and rehabilitation. It was observed that the mandate of the Department is to provide protection and care to all children in distress and not only to victims of trafficking. Consequently it has no experience in determining issues of human trafficking and is not concerned with the SOP. If a child is suspected of being a victim of trafficking for sexual or labour exploitation it is the function of the Police to investigate the issue and forward the matter for prosecution if there is sufficient evidence available.

There are 1000 Probation Officers at the district level and 800 Probation Officers at Provincial level who work in identifying children in need of care at grass-roots level. Once a child has come within the purview of the law the child in question will be sent to a shelter under court order. Further, even though other guidelines such as the referral form and screening tool are useful in identifying and protecting victims, the Department does not use them as they have their own system. While it considers the SOP as providing general guidance the staff prefer to work according to their own procedures.

(c) Trafficking into Sri Lanka

As regards instances of trafficking into Sri Lanka, there is only one recorded instance of an Uzbek national being rescued from sexual exploitation. She was given the necessary assistance and protection pending the case. However, the Victims and Witnesses Protection Authority did not play a significant role in this process and it was reported that their operations have not yet been established. Since then, another case has arisen and is being addressed.

5.2 Phases 3 and 4

Phase Three deals with the pre-trial Investigation by the police and Phase Four deals with Prosecution, Trial and the Post-trial period.

(a) Investigations

The pre-trial investigation is carried out by the Criminal Investigation Department (CID) and the Crimes Division.

The CID receives complaints/reports from the Embassies, the SLBFE and the families of alleged victims. After complaints are received a Facts Report is compiled after taking statements and recording details. The file is then forwarded to the Attorney General's Department for a determination as to whether the facts are consistent with the offence of trafficking and whether there is sufficient evidence for a prosecution. It was also noted that any person can make a direct complaint to the CID but most people are unaware of this.

More than 90% of complaints about trafficking are from foreign missions but it is difficult for the police to collect evidence from foreign countries as it is outside their jurisdiction. The CID asks for assistance from Interpol but does not always receive it. The Victims and Witness Protection Authority has a role to play in this regard as evidence can be recorded from remote locations under the Act. However, this facility is not yet fully operational.

The CID also noted that investigating trafficking is more difficult than other offences since proof of exploitation is required. They cannot establish this element since the alleged victims often do not cooperate. It was also emphasised that not all complaints are proved to amount to human trafficking. Many victims have left the country without following the procedures and consequently they are constrained in complaining of being trafficked or co-operating with an investigation.

Even when it is proved, some victims prefer to settle the case rather than to have it prosecuted. Victims prefer to settle the issue for various reasons, including that they want to return to the country of work or another country, they do not want to spend excessive time and money becoming involved in a court case, and they are also afraid or inhibited from doing so. Further, there is a lack of trust in the system. Many of the institutions interviewed confirmed this position. As a result recorded cases of human trafficking are rare.

It was also noted that the Police use their own screening measures to identify victims of trafficking and do not use the Screening tool contained in Annex 4 of the SOP.

(b) Prosecution

The Attorney General's department is responsible for following up on the cases forwarded to it by the CID and initiating prosecutions where it is possible. The SOP does not define the role of the Attorney General, other than to state that the Police must forward the case to the Department for instructions.

There are several constraints in prosecuting cases of human trafficking. It was noted that the Attorney General's Department does not refer to the SOP when determining whether a case falls within the definition of trafficking. Since the lawyers in the Department must prosecute under the law they refer to the relevant sections of the Penal Code. In order to interpret the meaning of "means" the prosecutor refers to the document entitled "Policy Guide on Identifying Victims of Trafficking Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process)."¹⁶

It was agreed that the definition of human trafficking under the SOP should remain as it is unchanged though it is broad and complex, since it has sufficient scope to cover every aspect of the offence, and Sri Lankan law should be in line with the Palermo Protocol. However, it was pointed out that on the basis of the information forwarded by the CID it is difficult to establish the mental element or *mens rea*, or in other words to prove the offender's knowledge that exploitation will take place.

In response to the negative reporting in the TIP report that the Attorney-General's Department was prosecuting offenders for procurement under Section 360A of the Penal Code rather than for trafficking under Section 360C, it was explained that this is done when it is not possible to establish the elements of Section 360C. When prosecuting under Section 360A, establishing the *actus reus* (or the fact that the act was committed) is sufficient and there is no necessity to prove anything further, particularly whether

¹⁶ Available at

<<https://www.baliprocess.net/UserFiles/baliprocess/File/Policy%20Guide%20on%20Identifying%20Victims%20of%20Trafficking.pdf>>

the victim consented or not. However, in establishing the offence of trafficking, several other elements also have to be proved. It is difficult to do so, particularly due to the non-co-operation of the victims who often settle the case with the agents or subagents. Often, such cases could be handled under labour laws.

It is noted that while it would be relatively easier to establish trafficking in cases of sexual exploitation, it is more difficult to prove all the elements of the offence in cases of labour. It can be said that the Attorney-General's Department is working within the constraints of the law to prosecute offenders to the fullest extent possible.

The TIP report has criticized the fact that courts have issued suspended sentences to convicted offenders. While this lapse is acknowledged, this is beyond the purview of the Attorney-General's Department and needs to be taken up at a different forum. Judicial training should be conducted to raise awareness of trafficking among judges.

It was also noted that the TIP report as well as media reports in countries such as India have cited Sri Lanka as transit destination in human trafficking. However, the Attorney-General's Department has not received reports of such instances. As noted earlier, the Department of Immigration and Emigration has also stated that they have also not discovered such instances as they have less interaction with transit passengers who remain in the transit lounge.

6. CONCLUSIONS AND RECOMMENDATIONS

This review highlighted several issues relating to combatting human trafficking and the contribution of the SOP including its formulation and operationalisation. Some salient points and recommendations are set out below.

6.1 Scope of the SOP

The SOP is intended for the identification, protection and referral of victims of human trafficking. There is no reason why such measures should be limited to victims of human trafficking only. Many people both within and outside Sri Lanka may find themselves in need of assistance from state and non-state entities even if they had not been trafficked. As noted in the Handbook of the SLBFE, trafficking in persons overlaps with other high risk situations for migrants including human smuggling and labour exploitation. Although there are legal distinctions between these offences they all have detrimental impacts on the victims who would all require rescue, protection and referral for necessary services. The Handbook notes that “The distinctions within these categories should not necessarily affect the level of assistance they are provided ...”.

It is suggested that the SOP should be reformulated to include the identification, protection and referral of victims in all situations which may require protection, and should not be confined to victims of trafficking only. As noted above, trafficking is a complex offence to establish and it is difficult to ascertain whether a person is a victim of this offence. The nature of the offence should not pre-determine whether a person qualifies for protection under the SOP.

It appears that in any case the current users of the SOP are assisting victims of labour exploitation even when the elements of trafficking cannot be proved. If the SOP is re-formulated to cover all these scenarios, it can be used more effectively in the case of victims of internal trafficking, including for forced prostitution, child labour and other situations. State authorities would also be compelled to consider the protection element in enforcing laws rather than merely prosecuting those considered to be offenders. For example, women within Sri Lanka are often arrested under the Vagrants Ordinance for prostitution, or apprehended in brothels. The SOP could make it mandatory for such women to be screened for possibly being trafficked rather than following the current practice of merely prosecuting them. While this may be possible under the current SOP, given its current emphasis on labour migrants such aspects are overlooked.

6.2 Title and content of the SOP

As noted earlier the title and content of the SOP appears inconsistent. Although the title indicates that its focus is on protection of victims, it also includes phases on investigation and prosecution of offenders.

It is recommended that the processes of investigation and prosecution of offenders should be contained in a separate document rather than being included in the current SOP. The separation of these two processes into distinct SOPs would ensure greater clarity and effectiveness in achieving protection for victims on the one hand and prosecution of offenders on the other.

6.3 Operationalisation and use of the SOP

The operationalisation and use of the SOP has had a mixed response. Many of the state agencies interviewed did not see the SOPs as being relevant to their functions and there appeared to be a reluctance among many departments to follow it. The Dept. of Immigration and Emigration was of the view that the definition of trafficking was not relevant to them and determining that question was one for the Police and the Attorney General's Department. This view was shared by other agencies such as the NCPA and the Department of Probation and Child Care Services.

Several users of the SOP indicated that they were following their own procedures and some indicated that the SOP could be a guideline that the relevant department could use to draft its own procedures. The SLBFE established an Anti-Trafficking unit in 2010 to implement the SOP with a mandate to protect labour migrants from trafficking. However, even the SLBFE has used the SOP to draft its own SOP on human trafficking.

Most users also appeared to be reluctant to go beyond the mandate of their own institution. Further, several interviewees said that the necessary circulars had not been issued to make the SOP operational in regard to their institution/department.

The Needs Assessment Matrix, the Screening Tool and the Referral Form were also not used to a great extent. In any case it was reported that victims and returnees from overseas did not want to use the shelters as they preferred to return to their families.

In view of the position described above, it is recommended that rather than have a generic SOP, each department be permitted to draft its own procedures in accordance with its mandate, duties and functions, and the services it provides. However, in order to ensure that there is cohesion and co-ordination in the operation of each department it will be necessary to ensure that each SOP is appropriately interlinked with each other. The role and function of each government agency should be clearly identified and services must be parallel and not consecutive. This should be ensured in a process of re-drafting.

Several agencies deal with distinct sections of the population. For example, the NCPA and the Department of Probation and Child Care Services deals with children only. These agencies may need specific and detailed procedures to carry out their functions in regard to children and would find it easier to formulate their own procedures.

6.4 Investigation and Prosecution

As noted above it is recommended that a separate SOP be drafted for investigation and prosecution. The primary function of the Police is to investigate crimes and it is not its mandate to consider the welfare of victims. This would be more effectively done by the institutions tasked with this function. However, as suggested above in the example of those arrested under the Vagrants Ordinance or for prostitution,

the Police procedures should establish a link with the necessary agencies who would handle the welfare of such women and children.

The Police have identified constraints in conducting investigations including interviewing victims who are outside their jurisdiction. The Victim and Witness Protection Authority has the mandate to obtain evidence from remote locations and it is necessary that this Authority is also drawn into the network of institutions dealing with trafficking. To date the Authority is not a member of the NAHTTF and this should be rectified.

The Attorney-General's Department faces certain constraints in prosecuting offenders for human trafficking. This is largely due to the legal interpretation of the offence of which all elements have to be proved. When it is unable to prosecute for trafficking the Department prosecutes offenders for the offence of procurement. While this has been cited as a negative point in the TIP report, the Department should not be faulted for doing so, as they can only function within the ambit of the law. The Department can also initiate prosecutions under Section 62 of the SLBFE Act. It is also suggested that the punishments for procurement could be enhanced to bring it in line with trafficking so that it becomes a deterrent.

The Department noted that it is also constrained by the fact that its lawyers are not permitted to have a pre-trial consultation with the victim. While this is a practice in criminal cases generally, if it can be overcome it would greatly facilitate proceedings in court.

The suspended sentences handed down by the courts is also a negative factor in combatting human trafficking. There must be training and sensitization of judges on this subject to raise awareness of the seriousness of the issue.

Both the Police and the Attorney-General's Department were concerned at the confusion that arises in the understanding of human trafficking with human smuggling and other offences. While it may not be possible to change the definition of trafficking as it has to conform to international standards it may be possible to bring in amendments to the law to make it easier to distinguish between these various offences and facilitate investigation and prosecution. The Attorney-General's Department also agreed that civil society organisations must be educated on the correct interpretation of trafficking.

6.5 Prevention and Partnership

The SOP does not contain sections on Prevention or Partnership and this is a significant omission. Given the title of the current SOP, it probably cannot be included in it. However, many agencies noted the critical need to address the issue of prevention, particularly through education and awareness raising, of both communities, and institutions working in the field. Many interviewees requested more sustained training for their personnel in this regard. Given the lack of understanding among the public even as regards the definition of trafficking, this is an important aspect of combatting human trafficking.

The National Strategic Plan to Monitor and Combat Human Trafficking 2015-2019 contains separate sections on Prevention, Protection, Prosecution and Partnership. The Executive Summary of the Action Plan notes that

Combatting trafficking requires a multi-pronged sustainable approach which insists on harmonized collaboration of a diverse spectrum of stakeholders, both state and non-state. Keeping in line with international best practices, the 4-Pillars (4-Ps) approach to address human trafficking concentrates on four core areas i.e. prevention, protection, prosecution and partnership, which provides a comprehensive blueprint for concerted action.

This approach can provide a sound basis on which to revise the SOP or draft separate institution-based procedures as noted above. Different institutions have the mandate to carry out specific and distinct functions and there would be more clarity and user friendliness if they were able to follow their specific procedures. However, the need for cohesion and co-ordination must be emphasized again.

A procedure on partnership would also help to bring state and non-state entities as well as communities together to address trafficking, particularly in the prevention stage. Potential victims and populations at risk should be identified in formulating procedures on both prevention and partnership. Stakeholders should map their needs, as well as their own duties and functions and formulate procedures accordingly.

6.6 The National Anti-Human Trafficking Task Force

Many of the interviewees were of the view that the NAHTTF can play a more effective role than at present. Its current activities appear to focus mainly on contributing to the TIP report every year. However, it has an important role to play in bringing together all the state institutions (and possibly non-state) together in a single forum to handle issue of trafficking. Many of those interviewed stated that training, awareness raising and education on the issue is of paramount importance and the NAHTTF can initiate and co-ordinate this. The CID observed that while its staff have gained a lot of experience of trafficking through working on these issues, a specialized training will be invaluable.

It is recommended that there should be common regular training provided to all stakeholders related to human trafficking, which will ensure that a multidisciplinary approach will be carried out in protecting victims. It was also suggested that the NAHTTF should produce a comprehensive training manual in this regard.

In the event that the various institutions formulate their own SOPs, the NAHTTF will have an important role to play in ensuring co-ordination of the SOPs at both the formulation and implementation stages.

The data collection and reporting mechanisms of trafficking being set up is an important development and must be implemented as soon as possible. Several interviewees agreed that there should be a database to have a bird's eye view of human trafficking in Sri Lanka which also links the stakeholders of the NAHTTF.

Several interviewees recommended that a fund should be established to assist victims of trafficking. While this is not within the purview of the NAHTTF itself, it could take steps to further this recommendation.

In addition, it is recommended that the NAHTTF also set up a website which will provide the general public with information and resources as to its functions and on trafficking issues.