

TRAFFICKING IN NEPAL: POLICY ANALYSIS

An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal

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Executive Summary

This study assesses Nepal's policies and laws that address the trafficking of women and children in terms of effectiveness, human rights, international obligations, and the relationship between trafficking and HIV. Through both formal and informal methods utilizing primary and secondary data, the study reviewed policies and laws related to trafficking, HIV/AIDS, labor and foreign employment, foreign travel and migration, gender, and children's issues. The study evaluates the strengths and weaknesses of the Nepal's policies and laws and offers recommendations for improving them.

Assessment of Laws and Policies

The following laws and policies are assessed independently and as they relate to Nepal's international obligations and HIV/AIDS policy:

1. *The National Policy, Action Plan, and Institutional Mechanism to Combat Against Trafficking in Women and Children for Commercial Sexual Exploitation (2000)*: Ministry of Women, Children, and Social Welfare (MOWCSW). This document outlines the government's National Policy on Trafficking, the Action Plan proposed to implement it, and the specific Institutional Mechanisms that are to be set up to sustain the Action Plan.
2. Domestic Laws
 - a) Nepal Constitution (specific provisions dealing with trafficking)
 - b) *Traffic in Human (Control) Act, 1986* (currently governs the issue of trafficking in Nepal)
 - c) *The Foreign Employment Act, 1985*
3. Law Reform Proposals to amend the *Traffic in Human (Control) Act, 1986*:
 - a) *The Human Trafficking Activities Eradication Act (1999)* proposed by the Centre for Legal Research and Resource Development (CeLLRd).
 - b) *A Bill Made to Provide for the Elimination of the Offences of Traffic in Persons* prepared by the Nepal Police and submitted for consideration on August 9, 1999.
 - c) *The Traffic in Human Beings (Offences and Penalties) Act, 1999*. This MOWCSW law reform proposal is based on the other two proposals. The MOWCSW draft will be put before Parliament to be enacted into law.

Major Conclusions and Recommendations

1. Trafficking and Prostitution

Current laws and policies in Nepal focus on the portion of trafficking that is for the purpose of prostitution. By emphasizing the endpoint, the violence and abuse of human rights that occur during the process of trafficking (and for any purpose other than prostitution) are not addressed. The MOWCSW reform bill would effectively criminalize prostitution for the first time in Nepal, whether or not it results from trafficking. This would result in denial of redress to victims of trafficking for the purpose of prostitution because, in such cases, the “victim” risks impugning herself of committing a crime in the course of filing a complaint against a trafficker. This undermines the intent of the bill, which is to prosecute traffickers and protect victims of trafficking.

Recommendation: No specific laws should be enacted to criminalize prostitution. Protecting and ensuring the legal and constitutional rights of socially and sexually stigmatized communities is an essential step in countering their social stigmatization and marginalization and creating viable ways to exit sex work. Criminalization of prostitution and withholding protection to stigmatized communities from harassment by law enforcers and exploiters in the sex industry will only further disempower these women, their families, and communities.

2. Migration and Trafficking

Several recent laws and orders in Nepal specifically limit the international migration of women. Controlling migration and hindering women’s right to migration will not curb or prevent trafficking and will simply drive it underground.

Recommendation: Policy and legislative interventions should make clear distinctions between migration and trafficking. The open-door agreement between Nepal and India should not be altered. Stricter border controls, such as instituting a passport system or more stringent border surveillance, will not stop trafficking or migration.

3. Women’s Rights

Nepal’s constitution ensures gender equality under the law. The National Policy on Combating Trafficking (MOWCSW 2000) includes commitments by the government to remove laws that discriminate against women, take all necessary measures to protect the rights of women, and take steps to alleviate poverty and provide employment opportunities to women. In addition, the National Plan of Action proposes training programs for behavior and attitude change on gender issues and trafficking. However, several laws still discriminate against women, especially in the areas of property, inheritance, and migration. A legal environment that limits options and redress for women in difficult marital and financial situations may force them to migrate, legally or illegally, and increase their vulnerability to trafficking.

Recommendation: His Majesty’s Government of Nepal (HMG/N) should fulfill its commitment to repeal all laws that discriminate against women.

4. Consent

Current and proposed policies and legislation do not address the issue of consent. Many national laws and policies include the phrase “with or without consent” in their texts. While this may have legitimate bearing in the case of children, consent must be included as a rights issue in the case of adults. An adult woman’s right to make her own decisions must be recognized, even if this includes, for example, a decision to migrate for work in the sex trade. Disregarding the will, wishes and choice of an adult and confining her to forcible protection or “rescue” is a violation of human rights.

Recommendation: Policies and interventions should clearly distinguish between the issues of trafficking and its control for adults and children.

5. Other Human Rights Issues

There are several human rights concerns raised by the MOWCSW reform bill. The bill shifts the burden of proof onto the defendant for certain offenses. In addition, the MOWCSW bill grants the State power to search without a warrant, denies housing for all sex workers and former sex workers, and blocks free speech through the prohibition of the production and distribution of “vulgar” materials without defining the term.

The MOWCSW bill takes a moralistic approach to trafficking and uses this platform to address issues of rape, child sexual abuse, pornography, kidnapping, trafficking, and prostitution, by defining them all as “trafficking.” Each of these issues raises distinct and separate concerns and requires clear and precise definitions and rules of procedure and practice.

Recommendation: Consistent with its international commitments, HMG/N should ensure that anti-trafficking interventions do not subject trafficked persons to discriminatory treatment in law or practice. Current laws and policies under discussion do not actively follow the principle of non-discrimination and include punitive measures for women who work in the sex industry either consensually or non-consensually. Rather than one catch-all bill, separate pieces of legislation should be drafted for each non-trafficking issue, as is the case in many other countries.

6. Focus on Rescue and Rehabilitation

Most of the policies and bills emphasize rescue and rehabilitation operations and income generation schemes, although both approaches have been criticized for their ineffectiveness and paternalistic approach to trafficked persons and those vulnerable to trafficking.

Recommendation: There is a need to move from a paradigm of rescue, repatriation, and rehabilitation to an approach that protects and promotes trafficking victims’ human rights and creates sustainable incomes. State benefits, including legal rights that are available to other families should be made available to mothers and their children, regardless of their work. The State should provide soft loans, infrastructural support, and educational scholarships to women, including women who have been or are engaged in prostitution.

7. Interface with HIV/AIDS Policy

The National Policy on AIDS and STD Control and the Strategic Plan for HIV and AIDS in Nepal are based on a human rights framework and address the factors that render persons more vulnerable to HIV/AIDS. Although the Strategic Plan makes no specific recommendations for legal reform, it does specify that legal reform should be based on non-discrimination, in order to produce an “enabling” environment. Many of the features of the anti-trafficking laws and policies are in direct conflict with the HIV/AIDS policy in Nepal. This is most striking in the areas of migration and prostitution. The Strategic Plan for HIV/AIDS calls for interventions that effectively address the spread of the epidemic and are consistent with the right to freedom of movement and the right to seek a better standard of living. This is in direct contrast to anti-trafficking laws and policies that call for restricting women’s migration and limiting and/or criminalizing prostitution.

Recommendation: Any legal or policy proposals on anti-trafficking formulated by the government, or recommended by non-governmental stakeholders or donors, should embrace a human rights approach like the approach used in the National Strategic Plan on HIV/AIDS in Nepal.

8. Other Recommendations

Rigorous methodologies with qualitative and quantitative indicators, including impact-assessment indicators, should be developed to address the lack of research and data on trafficking in Nepal.

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Glossary

CBO	Community-Based Organization
CEDAW	Convention for the Elimination of All Forms of Discrimination Against Women
CeLLRd	Centre for Legal Research and Resource Development
CRC	Child Rights Convention
DDC	District Development Committee
GO	Governmental Organization
HMG/N	His Majesty's Government of Nepal
ICCPR	International Convention on Civil and Political Rights
ILO	International Labor Organization
INGO	International Non-Governmental Organization
IOM	International Organization for Migration
IPEC	International Program on the Elimination of Child Labor
MOWCSW	Ministry of Women, Children, and Social Welfare
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
PCRW	Production Credit for Rural Women
SAARC	South Asian Association for Regional Cooperation
SFDP	Small Farmers' Development Project
UNDP	United Nations Development Program
USAID	United States Agency for International Development
VDC	Village Development Committee
WOREC	Women's Rehabilitation Center
WDD	Women Development Division

An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal

1. Introduction

Trafficking in women and girls has been recognized as a global problem in recent years. Reportedly, millions of women have been trafficked across borders and within countries. Some estimates claim that the profits from this trafficking eclipse the profits from the underground trade in arms and narcotics (Widgren 1994).¹ Trafficking in women has become part of transnational organized crime and has been referred to as the “dark side of globalization” (Ministerial Conference Communiqué 1999).

Over the last decade, the South Asian region has attracted attention for its growing trafficking problem. Within the South Asian region, Nepal and Bangladesh have been designated as “sending” countries or countries of origin in the regional web of trafficking. India and Pakistan are usually referred to as countries of “transit” or “destination.” Activists and governments are increasingly acknowledging that the trafficking of women and girls occurs both within the borders of a country and across regions and continents beyond South Asia.

The problem is particularly acute in Nepal. Nepal is one of the least developed countries of the world, lacking in sufficient economic capital, infrastructure, and developed human resources to forge an independent path of development. Overwhelmingly agrarian in nature, 90 percent of its 21 million inhabitants rely on subsistence agriculture. Adult literacy is as low as 23 percent for females and 57 percent for males; infant and maternal mortality rates are the highest in South Asia. The historically high level of out migration of people searching for sustainable livelihood options is escalating. In certain districts in the country the out migration of men and women of prime productive and reproductive age is particularly high (Sanghera 1999). Trafficking is an important offshoot of migration in Nepal, and one of its most abusive forms.

1.1 Context of Trafficking in Nepal

Anti-trafficking discourse and activities in Nepal intensified after a multi-party democracy was established in 1990 (Bhandari and Sharma 2000).² This political development allowed NGOs and community-based organizations (CBOs) to expand their various social, cultural, and economic programs. The donor community increased funding for many social issues that had been relegated to the background, including issues related to women, children, bonded labor, and human rights.

At this time, trafficking in women and girls was identified as a priority issue.³ Anti-trafficking activities and interventions grew and within five years, several NGOs and

¹ The profits accruing from the international trade of trafficking in persons are estimated to range between US \$5-7 billion annually (Widgren 1994).

² In 1990, the Panchayat system was converted into a multi-party democracy in Nepal. The new Constitution of the Kingdom of Nepal respects popular will and accords various fundamental rights to the people.

³ In 1991, significant media coverage appeared on trafficking, and one of the first major conferences on trafficking as a national issue was held in the first half of 1991 under the sponsorship of ABC-Nepal.

CBOs began to address and combat the problem. Support for these activities from the UN system, bilateral and multilateral donors grew. The Ministry of Women, Children, and Social Welfare (MOWCSW) was established and began to formulate national policies and plans on women and children and to integrate them into the national development process. The problem of trafficking of women and girls became a priority issue for the MOWCSW.

A watershed event occurred in February 1996 when the Indian government tried to forcibly repatriate 200 Nepali women from brothels in Mumbai (Sanghera 1999). The government of Nepal initially refused to repatriate these “rescued” women when many were declared HIV positive after involuntary testing. This emergency was diffused somewhat when several NGOs based in Nepal came forward to assist the repatriated women with shelter, care, and reintegration. This event publicized the growing problem of trafficking in the region.

In 1997, a National Task Force on Trafficking was formed by the MOWCSW and supported by UNICEF and the International Labor Organization (ILO). District Task Forces were established under this initiative in 26 districts, and a National Policy and Plan of Action to Combat Trafficking was formulated. In 1998, an interagency UN Task Force on Trafficking was set up under the coordination of UNDP in Nepal. In March 1999, the Office of the High Commissioner for Human Rights (OHCHR) Trafficking Program was set up and identified Nepal as one of the key countries for intervention. Two workshops were organized under the OHCHR program in Nepal in 1999, and pilot projects have been initiated in cooperation with the UN Task Force. The High Commissioner is also examining the South Asian Association for Regional Co-operation (SAARC) Draft Convention on Trafficking from the standpoint of human rights. At the same time, the UN Special Rapporteur on Violence against Women has selected Nepal as a one of the focus countries for her report on trafficking submitted to the Human Rights Commission in April 2000.

1.2 Dimensions of the Problem in Nepal

The reasons for trafficking of women and girls are myriad, ranging from poverty and the search for viable means of livelihood to the endemic social disadvantages suffered by women as a gender (Acharya 1998; ASMITA 1998). Other reasons may include individual compulsions and needs that fuel the desire to move, especially for young people, who may suffer abuse at home or merely wish to explore the world. These reasons are many of the same reasons that people migrate from the countryside to the cities, and from one country to another.

Trafficking is a complex development issue. It is an economic problem, as the vast majority of women seeking to escape poverty are lured into trafficking by the false promise of economic gain. Trafficking is a health problem, as trafficked women and children are most at risk for HIV infection. It is a gender problem, as unequal power relations reinforce women's secondary status in society. Lastly, it is a legal problem, as its victims are stripped of their human rights and lack any access to redress the crimes committed against them.
(USAID, 1999)

All players in the anti-trafficking movement recognize that trafficking of women and girls within and from all South Asian countries, including Nepal, occurs for a diverse range of purposes. The most common ones include domestic work, agricultural work, construction labor, carpet and garment industries, organized begging, forced marriage and prostitution.

1.2.1 The Number Game

Evidence-based information grounded in research and data collection on the magnitude of trafficking in Nepal remains a major and striking gap. Assumptions and anecdotal observations are the basis for deeply held beliefs among various anti-trafficking players. These beliefs include: (i) the number of victims of trafficking within South Asia and from Nepal has escalated manifold,⁴ (ii) an overwhelming majority of women and girls are trafficked into the sex industry, and (iii) increasingly younger girls are falling prey to criminals who are transporting them for sale to brothels. The existing statistics on the number of women and girls trafficked into sex centers of India are based upon questionable evidence. It is commonly believed that 5000-7000 Nepali girls are trafficked across the border to India each year, and that currently 150,000-200,000 women and girls are trapped and bonded in brothels in various Indian cities. These numbers were first disseminated in an article published in 1986 and have remained unaltered over the past 15 years.⁵ Several authors who cite these figures admit that these numbers are only “intelligent speculations” due to the clandestine and underground nature of trafficking (Sangraula 2000). This number is still cited, unchanged for over a decade, while at the same time, widespread claims are being made about the rapidly escalating crime of trafficking in Nepali women and girls.

1.3 The Nexus of Vulnerability – Trafficking and HIV/AIDS

The most frequently highlighted association between trafficking and HIV is the increased likelihood of HIV infection in women and children trafficked for prostitution. Rates of HIV infection among sex workers in urban areas have been reported to be as high as 21 percent in urban areas in Nepal (UNAIDS 2000) to 72 percent in Mumbai, India (Salunke et al. 1998). Although no data are available on rates of HIV among trafficked women and children, it is reasonable to conclude that those trafficked for prostitution would assume the same prevalence of HIV as the sex workers in the area in which they are held, depending on their length of stay. In addition, their rate of HIV may be even higher since they are less likely to protect themselves with condoms. They are less likely to be beneficiaries of sex worker interventions and empowerment movements due to their forced working conditions and debt bondage.

Even those women and children who are not trafficked into prostitution are subject to sexual abuse and are therefore at increased risk of contracting HIV. Trafficked women and children are not able to control even the most basic aspects of their lives, least of all

⁴ This view is widely held in Nepal by almost all stakeholders. It is typified in the words of Mr. G. P. Thapa, the Deputy Inspector General, Police, Kathmandu, who said that despite all efforts to create greater awareness on the issue and a variety of programs to curb the problem, trafficking in women and girls in Nepal had not decreased (personal discussion, September 22, 2000).

⁵ It makes little sense to quote articles and reports supporting these figures because almost every article on the issue of trafficking of women and girls in Nepal cites these numbers, with minor variations. The article that first reported these statistics was written by Dr. I. S. Gilada of the Indian Health Association in Mumbai, India, and presented in a workshop in 1986. Subsequently, a version of this article was published in the Times of India, January 2, 1989.

to negotiate safe sexual relations. Since they are displaced from their usual family and community support systems and may also face language barriers, their vulnerability and subsequent risk of HIV infection are increased (UNDP 1999). In addition, those who are trafficked internationally are classified as illegal immigrants in their country of destination and are further marginalized with less access to education, services, and protection. If they seek help, they may be subject to prosecution for the crime of illegal immigration, rather than assisted as a victim of trafficking.

Highlighting the link between trafficking and increased HIV risk may not be in the best interest of returned trafficked persons since it may result in increased stigma for returnees. In the past, women who left sex work could reintegrate into their communities with relatively few problems, especially if they returned with some wealth. However, the current panic associated with the AIDS epidemic in Nepal is such that women returning from a big city in India are stigmatized as carriers of HIV, regardless of whether they have been engaged in sex work. In many districts, the common perception is that “a returnee from Mumbai is a carrier of AIDS” (Rajbhandari 2000).⁶

The increased risk of HIV infection as a result of trafficking should certainly be minimized at the field level. In addition, there should be research on the HIV/AIDS experience in order to improve the trafficking control movement. HIV/AIDS and trafficking have similar determinants, present similar processes, and require similar rights-based responses. Both affect vulnerable and disempowered populations often associated with poverty and gender discrimination. Both are associated with migration and with sex work. Finally, both involve stigma and discrimination against affected and infected persons.

2. Policy Assessment Background

This policy assessment is part of a larger study, “Intervention Needs for the Prevention of Trafficking and the Care and Support of Trafficked Persons in the Context of an Emerging HIV/AIDS Epidemic in Nepal.” The three interrelated components of the larger study include:

1. Policy analysis
2. Documentation of current intervention models
3. Community-based study of the nature and determinants of girls and women trafficking

This policy and legal analysis is a stand-alone document that builds upon an earlier draft document prepared by Pro Public⁷ with the support of The Asia Foundation (Bhandari and Sharma 2000). An Executive Summary of the Pro-Public document appears in Annex 1.

⁶ Subsequently this perception was confirmed by other persons interviewed.

⁷ Pro-Public is an NGO based in Kathmandu, Nepal, consisting mainly of lawyers engaged in legal interventions.

2.1 Objectives and Methodology

The principal objectives of this study were to assess policies and laws that deal with the issue of trafficking of persons in Nepal, identify gaps, and recommend ways to address these gaps. This document analyzes the context and the laws, policies and interventions for the prevention trafficking and providing care and support for trafficked persons.

2.1.1 Primary Questions

1. What is the legal and policy context in which trafficking occurs? This query addresses the growing prevalence of HIV/AIDS in Nepal and the links between trafficked women and girls and HIV/AIDS.
2. What are the existing legal and policy interventions that address trafficking?
3. What are the underlying assumptions on which these policies and legislation are based?
4. How feasible, acceptable, and effective are the policy and legal interventions?
5. How do these policies and laws stand up to a human rights analysis? How do they address the rights of the most vulnerable?
6. How do these interventions relate to the control of HIV/AIDS in Nepal?
7. What recommendations could improve the policies and laws and improve anti-trafficking interventions?

2.1.2 Methodology

This study used both formal and informal methods to gather primary and secondary data. This document is based on an extensive review of policy and legislation on: trafficking; HIV/AIDS; labor and foreign employment; foreign travel and migration; National Plans, Policies and Plans of Action on trafficking, gender, children and other related issues; and the Constitution of Nepal. Secondary materials include reports, proceedings of workshops and conferences, micro studies, and more general writings.

In addition, discussions were held with a variety of key players in the governmental, NGO, CBO and INGO sectors (see Acknowledgments). These discussions provided a valuable historical and political context for the analysis. All of these discussions were held in an informal unstructured format.

2.2. Framework of Analysis

2.2.1 Definition of Trafficking

Many definitions of trafficking are currently used, depending on the ideological stance or the particular focus of an organization. A detailed discussion of the various conceptual issues associated with the definition of trafficking appears in Section 3.2. For discussion and analysis, this document uses the definition offered by the UN Special Rapporteur in her recent report:

Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harboring, or receipt of persons:

by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of:

placing or holding such person, whether for pay or not, in forced labor or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described (Coomaraswamy 2000).

2.2.2 Focus and Approach

In Nepal, migration, movement and trafficking of men, women and children takes place even though men are rarely mentioned. However, this document focuses primarily on the trafficking of women and girls, and the associated human rights violations. Due to the different issues involved, trafficking in children requires a distinct analysis from that of adults.

Nepal's anti-trafficking policies and laws are assessed both independently and as they relate to Nepal's HIV/AIDS policy to determine how much these interventions promote, protect, and center the rights of those who are most vulnerable. This study analyzes trafficking policy and legislative issues through the lens of human rights.

Any critique of policies, laws or practice in this study is offered in the spirit of constructive engagement with full and due acknowledgment of the commitment of those working to prevent the trafficking of women and girls in Nepal.

3. Confused Issues of Trafficking, Migration and Prostitution

3.1 The Search for a Definition

The international community widely acknowledges that trafficking in persons is a gross violation of human rights and believes it to be a growing global phenomenon. However, the lack of a common definition of "human trafficking" has led to confusion. The issue of trafficking women and girls is considered the same as their sale and forced consignment to brothels in the sex industry, as well as with consensual migration. This is not the case. The tendency to consider trafficking in persons with various manifestations of migration and mobility as the same issue as prostitution and sex work lies at the core of the confusion that underpins the contemporary discourse on trafficking of women and girls.

Nepal is not spared this tendency towards conflation and confusion. Many writings, interventions, and strategies on the part of various stakeholders equate trafficking of women and girls with migration and prostitution. Even when awareness of the confusion and need to make appropriate distinctions are expressed on paper, this awareness is often not translated into practice at the operational level.

Part of the reason for this confusion lies in the absence of an internationally recognized definition of trafficking. Various stakeholders use the term "trafficking" to describe a vast array of activities including voluntary migration, facilitated migration, forced prostitution, consensual sex work, and forced non-sexual labor. However, the international community is gradually recognizing that trafficking is a dynamic concept that encapsulates a process – recruitment (with coercion or deception), transport, and exploitative labor conditions – rather than a static end-point or purpose.

Most definitions share a basic understanding of trafficking that incorporates abuse, coercion, deception, exploitation, use and threat of authority, forced labor and/or slavery-like practices.

“At the core of any trafficking definition must be the recognition that trafficking is never consensual. It is the non-consensual nature of trafficking that distinguishes trafficking from other forms of migrations. The lack of informed consent must not be confused with the illegality of certain forms of migration. While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from collapsing the concepts of trafficking and illegal migration.”

Report on Trafficking submitted by the UN Special Rapporteur on Violence Against Women, to the Human Rights Commission, Geneva, April 2000.

3.2 Implications of Lack of Clarity

Curbing migration to prevent trafficking: Equating trafficking with migration leads to simplistic and unrealistic solutions. To prevent trafficking, people who are deemed vulnerable are often intentionally or inadvertently stopped from migrating in an effort to protect them from harm. This tendency has been observed repeatedly in several anti-trafficking interventions in Nepal. Even when curbing migration is not a stated programmatic focus, many women and girls are dissuaded from moving in the name of protecting them from harm.

As discussed in detail later in this report, conflating trafficking with migration in a simplistic manner results in further gender discrimination through the enactment of laws that limit women’s right to movement or right to earn a living in the manner they choose. In addition, border-based interventions have prevented women and girls from crossing the border of Nepal in a bid to protect them from the harm of trafficking despite their vehement protestations that they are traveling of their own free will.

Trafficking in persons must be viewed within the context of increasing trans-border and in-country movements and migrations. People migrate for a wide variety of reasons: the reconfiguration of economies and states as a result of globalization, displacement and dispossession of marginalized populations, the search for sustainable livelihoods, armed conflict, the transformation of political boundaries, the search for more challenging and fulfilling futures, a desire to explore the world, and many others.

Women move and are moved, with or without their consent, for a variety of reasons. Trafficking in women must be understood within the continuum of women’s migrations. All persons, including women, have a fundamental right to freedom of movement and mobility, and this right must not be compromised. Trafficking in women, however, is a coercive form of movement that must be prohibited since it involves the use of force, abuse, violence, deception, and exploitation. These abuses are not inherent to the migration process. Trafficking is a crime because of the elements of abuse and the violations that are committed against women not because of the movement or mobility per se.

Trafficked women are vulnerable to several harms, including persecution from the state if they have migrated illegally or lack citizenship rights, abuse at work, poor living conditions, and health risks. Through this nexus of vulnerability, trafficked women and

girls are at a greater risk of contracting HIV because they may not be in a position to control their sexual relations and their sexual health.

However, it must be recognized that trafficking is not the only form of violation that women and girls experience when migrating. Depending on the extent of their marginalized status, women face harassment due to their gender and socio-economic disadvantage. Because women and girls are discriminated against simply because they claim their right to migrate, it is vital to recognize, promote and protect their fundamental human rights. In seeking to migrate, women are simply asserting their rights to development, livelihood, and self-determination.

Curbing migration will not stop trafficking. Some stakeholders have demanded greater border control and surveillance on the Indo-Nepal border. Introducing passports or other measures will merely drive trafficking further underground, and render it more invisible. This result has been seen in other states that implemented increasingly stringent immigration controls as a response to trafficking (Altink 1995, Azize-Vargas 1996, Barry 1995, Johnston and Khan 1998).

The number of victims of trafficking is equal to the number of migrants: When researchers erroneously equate migration with trafficking, all women and girls who migrate are considered trafficking victims. This practice has resulted in inaccurate statistics on the magnitude of trafficking in “risk-prone” and “affected districts” in Nepal. Well-meaning CBOs and researchers have conducted household surveys to count the number of women and girls who are absent from their villages. Some of these persons may have migrated voluntarily or under deception, but there are no methodological variables to gather this information. Absent women or girls are routinely considered “missing persons” or trafficked.⁸

Trafficking is equal to prostitution: Many anti-trafficking stakeholders continue to conflate trafficking with prostitution, thereby shifting attention from the abuse and violence inherent in trafficking to the site of work and form of labor. Furthermore, trafficking for all other purposes is largely ignored, and targeting trafficking for prostitution becomes the principal agenda of anti-trafficking interventions, policies, and laws. By confining the definition of trafficking to trafficking for prostitution, a vast number of women are excluded from protection. As pointed out elsewhere in this document, trafficking occurs for a variety of purposes, including but not limited to prostitution, labor in the informal and formal sectors of the economy, and marriage.

To provide protection and redress to women and girls who are trafficked, a clear distinction needs to be made between the abuse and human rights violations committed during the entire process of recruitment, transport, and confinement on the one hand and the form of employment on the other. When women and girls are trafficked for the purpose of domestic work, forced marriage or work in carpet factories, anti-trafficking interventions should target the abuse, forced labor and violation of rights that are endured by these victims of trafficking. The anti-trafficking objective is not to eradicate marriage as an institution or domestic work and the carpet industry as sectors of employment. Similarly, attempting to eradicate the sex industry in a bid to protect women and girls from trafficking is an unrealistic approach that is doomed to failure.

⁸ Based on interviews carried out during background research for this report.

3.3 Towards a New Definition

Trafficking becomes an offense and a violation of human rights when the movement is non-consensual or deceptive and the person is confined to exploitative or servile work and life. It does not become an offense because of the purpose for which a person moves. Trafficking is not the movement or the site of work per se, but it is the combination of brokering, lack of consent and exploitative conditions of work. The definition formulated by the UN Special Rapporteur on Violence Against Women (see Section 2.2.1) captures the continuum of trafficking without these confusions. The key features of this definition are:

- Trafficking is not merely limited to the trans-border movement of the trafficked person. Trafficking takes place both within and outside the country.
- It acknowledges that trafficked women and girls have been moved to an unfamiliar environment within or outside their country, and are therefore disconnected from their usual support network and community physically, emotionally and by language or other barriers.
- It recognizes a trafficking chain: those at the beginning of the chain who provide or sell the trafficked person, and those at the end of the chain, who receive or purchase the person, hold her in forced labor or abusive conditions and profit from that labor.
- Although numerous abuses may happen in the process of migration, the definition recognizes that complete chain process – from coerced transport to the coerced end-practice – that makes trafficking a distinct violation.

4. Assessment of Policies and Laws

This section lists and evaluates the legal and policy initiatives taken by the Government of Nepal to control trafficking and evaluates these initiatives against the definition of trafficking provided by the U.N. Special Rapporteur on Violence Against Women.

4.1 Responses to Trafficking

Governments of the South Asian region have acknowledged the problem of trafficking of women and girls under combined pressure from international organizations and civil society groups, and have demonstrated varying degrees of commitment at national and regional levels to combat the problem. Countries of origin, such as Nepal and Bangladesh, have exhibited greater proactive initiative to address the issue as compared to their neighbors in the region.

Mounting concerns over the trafficking of women and girls in Nepal have spurred considerable activity to address the problem. His Majesty's Government of Nepal (HMG/N), the civil society, the media, and the donor community are vastly mobilized and several anti-trafficking interventions are underway in the country. In 1998, the Ministry of Women, Children, and Social Welfare (MOWCSW) with support from the International Program on the Elimination of Child Labor and the International Labor Organization (ILO-IPEC) program in Nepal developed a comprehensive, thirteen-point strategy for the prevention of trafficking. The government has also initiated steps to address the problem of gender discrimination, violation of child rights, and increased

out-migration. MOWCSW has hosted several consultative workshops on trafficking, and actively provided a forum for NGOs, GOs, CBOs, policy-makers, women's groups, INGOs, and members of the civil society. Similarly, UNICEF and USAID have provided support to several organizations, including the Department of Police, to intensify their anti-trafficking initiatives. In addition, HMG/N has ratified several UN Conventions that deal both directly or indirectly with the issue of trafficking.

Recently, rising concern about the trafficking of Nepali women and children has included a critique of national and local level political apathy on the issue, and the chronic lack of law enforcement and political will to address this problem.⁹ While the government has expressed a commitment to gender and child rights issues, most of these programs are conducted in isolation (UN Task Force 1999). The marginalization of women's and children's issues limits participation and contributes to further exclusion. The present decentralization process in Nepal through the tiered structure of DDCs (District Development Committees) and VDCs (Village Development Committees) provides a positive base to incorporate women's and youth programs and to elicit maximum participation.

Innovative credit and economic empowerment programs (as distinct from income generation) have been successful in Nepal, especially with rural women. The Production Credit for Rural Women (PCRW) initiated by the Women Development Division (WDD) in the Ministry of Local Development, and the Women in Development component in the Small Farmers Development Project (WID/SFDP) under the Ministry of Agriculture are two successful initiatives. These programs have made considerable gains in promoting women as credit clients, generating savings, and increasing household incomes. If properly guided, these interventions may contribute towards effective prevention strategies for the trafficking of women and girls in Nepal.

The government of Nepal has begun several concrete activities that address trafficking. However, most of the initiatives are either still in the planning stage or awaiting financial commitments from various donors.

The pace of new anti-trafficking interventions on the part of the INGOs, NGOs, and CBOs has been almost frenetic. The limited scope of this study addresses only the policies and initiatives of the government and does not list the many responses and initiatives undertaken by the various stakeholders to combat trafficking in Nepal.

4.2 Anti-Trafficking Initiatives

The following HMG/N initiatives are discussed and evaluated to determine their consistency with the human rights of vulnerable persons:

⁹ In the recent past, this critique has been voiced in numerous reports and proceedings. See also Sanghera 1999.

1. *The National Policy, Action Plan, and Institutional Mechanism to Combat Against Trafficking in Women and Children for Commercial Sexual Exploitation (2000)*: Ministry of Women, Children, and Social Welfare. This document outlines the government's National Policy on trafficking; the Action Plan proposed to implement its policy; and the specific Institutional Mechanisms that are to be set up to sustain the Action Plan.
2. *Domestic Laws*
 - a) Nepal Constitution (specific provisions dealing with trafficking)
 - b) *Traffic in Human (Control) Act, 1986*. This Act currently governs the issue of trafficking in Nepal.
 - c) *The Foreign Employment Act, 1985*
3. *Law Reform Proposals*
 Three law reform proposals have been put forward to amend the *Traffic in Human (Control) Act, 1986*:
 - a) *The Human Trafficking Activities Eradication Act (1999)* proposed by the Centre for Legal Research and Resource Development (CeLLRd).
 - b) *A Bill Made to Provide for the Elimination of the Offences of Traffic in Persons* prepared by the Nepal Police and submitted for consideration on August 9, 1999 (referred to as the Police Bill).
 - c) *The Traffic in Human Beings (Offences and Penalties) Act, 1999*. This proposed Ministry of Women, Children, and Social Welfare (MOWCSW) law reform is based on the other two proposals. The MOWCSW draft will be put before Parliament to be enacted into law.

5. Detailed Analysis

5.1 The National Policy, Action Plan and Institutional Mechanisms to Combat Against Trafficking in Women and Children for Commercial Sexual Exploitation (2000) by the Ministry of Women, Children and Social Welfare

The National Policy, Action Plan, and Institutional Mechanisms (see Annex 2) are examined separately in the following three sections.

5.1.1 National Policy

The National Policy against trafficking remains confined to trafficking for commercial sexual exploitation. This stance replicates the confusion and conflation discussed earlier in this document. The policy seeks to address the trafficking of “thousands of children and women” to brothels in major Indian cities and elsewhere through forceful abduction or false promises. The policy also seeks to address several more general human rights and anti-discrimination concerns that are collapsed with the concerns around trafficking.

The main features of the policy around trafficking are:

- Designating the MOWCSW as the focal point for carrying out measures against girl trafficking.

- Mobilizing the private sector NGOs and INGOs in the battle against trafficking in women and children and establishing coordination committees at the national, district and village levels to control trafficking.
- Seeking the assistance and cooperation of donors to combat the problems of trafficking.
- Imposing heavy fines on traffickers and exploiters of women and children.
- Conducting public awareness campaigns on trafficking.
- Taking steps to control the spread of sexually transmitted diseases and HIV “as they are associated with trafficking and commercial sexual exploitation of women and children.”
- Setting up rehabilitation programs for rescued girls and women with the collaboration of NGOs.

Some of the human rights concerns woven into the policy document include commitments by HMG/N to:

- Remove laws that discriminate against women.
- Take all necessary measures to protect human rights and the human rights of women.
- Take steps to alleviate poverty and provide employment opportunities to women.

An important major feature of this policy is the commitment to “*remove legislation that discriminates against women.*” The Government of Nepal ratified the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1991 without reservation. It is committed to repealing or amending any domestic law that is inconsistent with CEDAW or prevents compliance with the Government’s obligations under the convention. Unfortunately, a number of domestic laws still exist that discriminate against Nepali women. Some of the gender discriminatory property and inheritance laws in Nepal include the following:

- A daughter can only inherit paternal property if she is unmarried and over 35 years of age, and she cannot inherit tenancy rights.
- A wife can inherit her husband’s property only if she is over 35 and has completed 15 years of marriage. If she obtains her partition share before his death and lives separately, he is allowed to take a second wife without divorcing the first wife.
- A divorced woman can claim neither a share in her husband’s property nor her paternal property.
- A widow must return her share of her husband’s property if she remarries. This discourages widow remarriage.
- A widow living with her in-laws is not entitled to a share of property as long as the in-laws provide her with food, clothing and religious expenses until she is 30 years old.
- Contrary to constitutional guarantees, a woman effectively must get permission from her father or adult son before disposing of her immovable property (e.g., selling land or a house).
- While a man is legally bound to look after his sons and wife, the maintenance of daughters is not legally addressed (Mahbub ul Haq Human Development Centre 2000).

A Nepali woman can only claim a right to support for up to five years after divorce or until she remarries, whichever is the shorter period, and only if the divorce is the fault of the husband and she has no other source of income. She also loses her right to child support if she remarries.

If a woman is unable to leave a violent marriage for reasons of economic dependency, she does not have any recourse available to her through the criminal law. Nepal does not have any legal provision for domestic violence. According to recent statistics, 77 percent of Nepali women have experienced domestic violence, and at least 44 percent experience domestic violence on a daily basis (Mahbub ul Haq Human Development Centre 2000).

Further research is needed to investigate how these deficiencies in support, maintenance and property laws contribute to the migration of women. A woman who is widowed or who leaves an untenable marriage may be forced to find means to support herself plus her children. With limited economic opportunity available in rural villages, women may seek better economic opportunities through migration, legal or illegal, to urban centers.

In summary, the overall focus of the National Policy is to target the problem of women and children who are trafficked into commercial sex work without addressing the problem of people who are trafficked for purposes other than sex work. The policy does not specify what laws are to be repealed or amended to end the formal discrimination against Nepali women.¹⁰

5.1.2 National Plan of Action

The Ministry of Women, Children, and Social Welfare prepared the National Plan of Action Against Trafficking in Children and their Commercial Sexual Exploitation, in coordination with the International Program on the Elimination of Child Labor and the International Labor Organization (ILO-IPEC) in April 1998. The Cabinet formally approved the National Plan in July 1999.

The plan is divided into six intervention areas including:

- Policy, research and institutional development
- Legislation and enforcement
- Awareness creation, advocacy networking and social mobilization
- Health and education
- Income and employment generation
- Rescue and reintegration

¹⁰ The Ninth Plan (1997-2002) prepared by the National Planning Commission, also adopts a policy of eliminating gender inequality. It states as follows:

- Review of laws and regulations which discriminate between men and women and which are obstructive to ensuring equal rights for women will be carried out to make egalitarian laws.
- Existing economic, social and other forms of discrimination will be gradually reduced with the adoption of positive policies and programs, which give special priority for women for gender equality and rights
- In view of the national policies relating to the elimination of gender inequality governmental and non-governmental organizations as well as local bodies will be mobilized with co-ordination and integration to control all kinds of crimes and violence against women through preventive, rehabilitative and other kinds of measures. Subsequently, women's human rights will be protected.

Many of the intervention areas mentioned in the section on policy, research and institutional development focus specifically on the trafficking of children including:

- Organizing workshops and seminars on the national policy and programs against trafficking in children
- Preparing surveys of policies on trafficking in children and making recommendations on how to improve the policies
- Preparing a bibliography of competent organizations that could combat trafficking in children
- Organizing training programs to enhance the capabilities of the implementing agencies for combating the trafficking in children.¹¹

There are several proposed legal interventions, some of which are once again focusing on children including: organizing legal awareness programs in every sector to help implement the Children's Act,¹² and developing bilateral, regional and international coordination and cooperation mechanisms including conventions "to deal with the problems of trafficking and sexual exploitation of children." Rights-based activities include: preparing a document on the legal provisions for compensating and rehabilitating victims, and developing schemes for delivering legal rights.

The section on creating awareness, advocacy networking and social mobilization focuses heavily on trafficking in children, but does include an important proposal to organize training programs for behavior/attitude change on gender issues and trafficking.

The section dealing with health and education focuses on providing education and health care to HIV/AIDS and STD patients and promoting awareness programs and training to those affected by trafficking or those who are vulnerable to trafficking. The broad nature of the proposals have not addressed the potential conflict between protecting the rights of those vulnerable to discrimination, such as persons with HIV, and instituting mechanisms that may perpetuate this discrimination, such as establishing a campus to intercept victims and organizing regular health camps for victims.

Independent sections are devoted to rescue, reintegration, income generation, and employment. This emphasis fails to consider the problems associated with both approaches. Rescue and rehabilitation programs have been shown to break up families, especially if the police are empowered to "rescue" children from mothers who are in prostitution. Rehabilitation homes in other countries are often used to remove women from the public view and render them invisible. The focus is on the public interest rather than the human rights of these women (Ramanathan 1996). Such programs do not

¹¹ The Plan is largely derived from the consultative workshop organized by the MOWCSW and ILO-IPEC in April 1998 that focused exclusively on the trafficking in children and their commercial sexual exploitation. See the *Proceedings of the Consultative Workshop on the Development of a National Plan of Action Against Trafficking in Children and Their Commercial Sexual Exploitation, 22-24, April 1998*.

¹² The Children's Act (1992) applies to children below the age of 16. It protects the rights and interests of children, such as their rights to a name, maintenance, education, and health care. It condemns torture or cruel treatment of children. It also eliminates discrimination in treatment between children born within and outside of marriage, and between those who are adopted and natural children. It contains a specific prohibition against involving children in an "immoral profession" (Section 16). Nor shall a child be involved in the sale, distribution and trafficking of alcohol or drugs. The act does not define "immoral profession."

address the stigma experienced by women who have been in the sex industry, or subject to commercial exploitation, or have HIV/AIDS. Stigma hinders access to and eligibility for other jobs, education, health care, and other state benefits.

People travel in search of better economic opportunities even when income generation programs are available. Furthermore, income-generating programs, unless tailored very carefully to the needs of the specific community, may not always lead to economic empowerment but often end up reinforcing gender stereotypes. As in all other programs, any successful income-generating program must be grounded in the social, economic, and cultural reality of the women's community.¹³

5.1.3 Institutional Mechanisms

The following groups will implement the Action Plan:

- A national level coordination committee (established under the leadership of the MOWCSW)
- A national task force (consisting of secretaries and joint secretaries from various ministries and representatives from donor agencies)
- A district level task force
- A Village Development Committee/municipal level task force.

Overall, the plan will be implemented by bureaucrats, without the active involvement and participation of the community. There are a few community representatives on the district and Village Development Committee (VDC) level task forces. For example, a representative of a women's group and the principal of a girls' high school are included on the district level task force. Representatives from the Nepal Red Cross Society, a children's organization, and a local bank, as well as a local health teacher and a women's health worker are included at the Village Development Committee/municipal level. However, these local participants account for a small minority of task force members.

5.2 Domestic Law and Law Reform Proposals

5.2.1 Constitutional Provisions

The 1990 Constitution of Nepal guarantees the fundamental rights of its citizens. Several of these are relevant to the discussion on trafficking, including the right to be free from exploitation, the right to equality, the right to choose a profession, the right to privacy and the right to mobility. Article 20(1) states that "traffic in human beings, slavery, serfdom or forced labor in any form is prohibited." Article 20(2) states that minors cannot work in factories, mines, or other hazardous occupations.

¹³ A variety of development literature focusing on gender has critiqued the tendency of income generating schemes for women to reinforce gender stereotypes by providing training in sewing, knitting, cooking, preserve-making, and other activities that are considered to be "womanly" chores. Some of the well known writings are Bruce, J, and D. Dwyer, 1989, **A Home Divided: Women and Income in the Third World**, Stanford University Press; Kabeer, N., 1995, **Reversed Realities: Gender Hierarchies in Development Thought**, Verso, London, Rogers, B, 1980, **The Domestication of Women**, Zed, London; Tinker, I. (ed.); 1990, **Persistent Inequalities: Women and World Development**, Oxford University press, New York.

Under Article 11(3), the government can enact special provisions for the benefit of women (and children). This provision enables the government to enact affirmative action measures in favor of women. It is integral to the right to equality, and not an exception to equality. In addition, Article 26(9) requires the State to take special measures to promote the education and social security of women.

The Constitution also guarantees its citizens the right to freedom of movement throughout the Kingdom of Nepal and to reside in any part of the country as well as the freedom to practice any profession, or to carry on any occupation, industry, or trade. The government can enact laws to impose certain “reasonable restrictions” on this right for several reasons, including when an act may be contrary to “decent public behavior or morality.” Thus, the right to work in a chosen profession is permitted. Article 22 of the Constitution also provides every citizen with a fundamental right to privacy.

Nepal’s legal initiatives are evaluated against these constitutional commitments.

5.2.2 Traffic in Human (Control) Act, 1986

The *Traffic in Human (Control) Act, 1986* (see Annex 3) was enacted on November 28, 1986 to stop “human trafficking.” This extra-territorial Act appeared well before HIV/AIDS became a serious issue in Nepal. The Act attempted to provide specific redress to persons who were trafficked. The Act built upon existing provisions of the New Muluki Ain (Code of Law of the Land), 1964, which is a uniform criminal code that defines criminal offenses and provides punishments for the offenses. The 1964 Code outlaws taking persons across the Nepal border for the purpose of selling them. It provides a ten-year imprisonment for this offense if the seller is apprehended before the sale of the human being and twenty years imprisonment if the sale has already taken place. The Code also outlaws slavery and bonded labor with punishments that range from 3 to 10 years imprisonment. No information was available regarding the effectiveness and limitations of these provisions. It is not entirely clear how the 1986 Act improves upon the provisions in the 1964 Code.

As defined in Article 4 of the 1986 Act, human trafficking includes:

- To sell a person for any purpose.
- To take a person abroad with an intention of selling her/him.
- To have a woman engage in prostitution by persuasion or enticement or deception and fraud or pressure, or to encourage anyone to be engaged in such acts.
- To make attempt to commit any acts mentioned above, or to render assistance to commit such acts or to encourage anyone to be engaged in such acts.

Article 5(1) of the 1986 Act deals with filing complaints. Any person who receives information about anyone who has engaged in an act of trafficking in human beings or is planning to do so, must file a complaint at any police station. Once a complaint is made, it will be lodged with the nearest district court. If the court finds a reasonable ground to take action in relation to the complaint, then the police shall conduct the necessary investigations into the complaint.

Under Article 6(1), if the person who files a complaint under Article 5 is the person who is being sold or trafficked into prostitution, her statement is to be authenticated. First,

her statement will be recorded in the presence of a government attorney. She will then be taken to the nearest district court to have her statement attested by a judge within 24 hours.

Section 7(1) provides that in the case of a woman being taken outside of Nepal by any person other than a close relative (not defined) or guardian, and any person who files a complaint (under Article 5) alleging that she is being taken away to be sold or with the intent of having her engage in prostitution, the accused will have to prove that he or she is not transporting the woman for such purposes.

The penalties imposed on traffickers range from ten to twenty years' imprisonment (Section 8(1)). If a person takes a human being out of the country with the intention of selling that person, the punishment is five to ten years. Compelling, enticing, deceiving or intimidating any woman to prostitution is punishable by ten to fifteen years of imprisonment.

The 1986 Act has been criticized for its ineffectiveness. This law is widely considered insufficient to deal with the problem of trafficking and the rights of vulnerable persons.¹⁴ The procedural requirements for filing a complaint are too complex, prolonged and largely impractical. It is unclear why filing a complaint by a person who has been trafficked requires an elaborate process of authentication.

The provisions in Article 7(1) address scenarios that are highly unlikely to occur for a person who is being forced/deceived to cross a border. A person may cross a border willingly in anticipation of better work or economic opportunities though s/he is unaware that the promises made are false or fall short of his/her expectations. A "close relative" is not defined anywhere in the Act, and it is unclear who falls within this category. There is also an implicit assumption that close relatives are unlikely to be traffickers, contrary to what some reports suggest (Frederick 1998). It is also unclear if a person who is merely an associate, a fiancé, or intimate friend would be suspect under this provision. Shifting the burden on the accused is also unduly harsh and can lead to undue harassment and abuse of the person accused.

Under the Nepali judicial system, the government can withdraw charges without the consent of the victim and even if she disagrees. In the past, as many as 500 criminal cases have been withdrawn without notifying the victims. Many of these cases were trafficking-related (CeLLRd 2000).

The Human Trafficking Control Act 1986 is considered one of the most poorly enforced acts. Only 150 cases were investigated by the enforcement agency in the fiscal year of 1994-95. An additional 133 cases were investigated in 1995-96, and 107 cases in 1996-97 (CeLLRd 2000).

5.3 Proposals to Amend the 1986 Act

¹⁴ Based on interviews with key informants carried out as background research for this report.

5.3.1 The Human Trafficking Activities Eradication Act, (CeLLRd proposal, published in July 1999)

This bill, prepared by the Centre for Legal Research and Resource Development (CeLLRd), recommends significant amendments to the 1986 Act. This proposal adopts many of the procedural clauses of the 1986 Act. Some of the proposed changes include the following:

- The definition of human trafficking is expanded to include “selling humans for any purpose, using humans in flesh trade and separating them from their guardians with the purpose of trafficking and causing them physical and mental harm by means of sexual exploitation” (Section 3 (b)).
- Prostitution is defined as “the sexual flesh trade carried out in a commercial and vocational manner”(Clause 3(c)).
- An expanded range of acts that are considered to be human trafficking are set out in Section 5. These acts include:
 - a) to sell or buy a person for any purpose.
 - b) to take abroad any person with the purpose of having him/her engaged in prostitution by persuasion, enticement, or deception or under threat or pressure or by bringing under control or by kidnapping or performing such act inside the country or elsewhere.
 - c) to take anyone away for any purpose of trafficking, separating from his/her guardians’ protection.
 - d) to engage oneself and have others engaged in prostitution in the country or abroad.
 - e) to take anyone abroad with the purpose of prostitution.
 - f) to buy or consume the sex of any person who has been made to be engaged in prostitution in the country or abroad.
 - g) to marry or adopt any woman with the purpose of trafficking.
 - h) if a person performs or gets [sic] performed prostitution at his/her own will.
- Anyone who is an accomplice or abets in the above acts is also included in the definition of human trafficking.

Other new provisions include increased penalties for those convicted of trafficking (Section 12) and expanded procedures for lodging a complaint by placing an obligation on local officials to act (Section 6).

Analysis of the CeLLRd Bill

The CeLLRd proposed bill focuses primarily on the issue of prostitution rather than on addressing the harms and abuses that occur to victims during transport and recruitment by agents. The bill defines prostitution as the “sexual flesh trade carried out in commercial or vocational manner.” By this definition, anyone who engages in prostitution is deemed to have engaged in human trafficking (Section 5(d)). The bill therefore outlaws prostitution by bringing it under the rubric of human trafficking. The definition of human trafficking in this new bill is vague and susceptible to a range of interpretations. It fails to recognize that people do want to migrate and not every act of mobility constitutes trafficking. There is no attempt to identify the harms or protect the rights of those who may be subjected to force, fraud, coercion, and exploitation in the course of recruitment or transport.

The proposed bill criminalizes anyone engaged in prostitution. It punishes women engaged in prostitution out of their own free will to imprisonment for up to three years, without considering her economic and social condition (Section 12 (7)). Clients will also be punished with up to three years imprisonment. Furthermore, if a person “consents” to being “trafficked,” which presumably means consenting to being transported or engaging in prostitution, then s/he can also be prosecuted and imprisoned (Section 12(9)).

5.3.2 A Bill Made to Provide for the Elimination of the Offences of Traffic in Persons (Crime and Punishment) Act, August 9, 1999.¹⁵

The Nepal Police prepared this bill. Although the Police bill incorporates several of the new features set out in the CeLLRd draft, and it also offers several variations or wholly new provisions. The activities considered offenses in traffic in persons have been expanded to include offenses related to bonded labor, sex tourism, sexual abuse of children, using prostitutes, forced contraception and sterilization, kidnapping and hostage-taking (Section 4). The period of detention during investigation is increased to 90 days.

Some of the Police Bill’s major proposed alterations to the 1986 Act include:

- Strict prohibition on operating a brothel (Section 5).
- Provisions that shift the burden of proof entirely onto a defendant (Section 6 read with Section 13).
- Provisions that permit the exercise of powers of entry, search, seizure and arrest without a warrant (Section 10).
- Detention during the course of a trial (Section 11).
- Additional penalties against men trafficking in female family members (Section 15), recidivist offenders (Section 16) and public officials (Section 29).
- Compulsory medical examination of victims of trafficking (Section 19).
- Compulsory and indefinite detention of victims of trafficking found to have certain diseases (Section 20).
- Prohibition on the supply of pornography (Section 24).
- Reward to informants and the reduction of penalties of co-accused informants (Section 24).
- Establishment of rehabilitation centers (Section 21).

The legislation also forbids the sexual exploitation of male children, protects victims from damaging publicity, and exempts victims from punishment for actions of self-defense, even if the trafficker is killed or seriously injured from the action.

Analysis of the Police Bill

The police proposal compounds the limitations and serious implications of the 1986 Act without addressing the issue of trafficking and the violence experienced in the course of trafficking. At the individual level, a number of fundamental human rights will be threatened if not entirely undermined by these proposals, including the right to due process. The “victim” that the legislation intends to protect is vulnerable to further

¹⁵ Derived from Note by Chris Muryagurd entitled, *Note on the Ministry of Women and Social Welfare*, sponsored by UNICEF Nepal (undated).

harassment and abuse under the provisions of this bill. If a trafficked woman is HIV positive or carries any other sexually transmittable disease, she is unlikely to seek the assistance of authorities, particularly with the mandatory health check and detention provisions.

The bill covers areas that do not belong in a trafficking bill, such as the prohibition on pornography. Pornography is entirely irrelevant when addressing the human rights of those who are harmed during the course of trafficking. Anti-trafficking stakeholders have not raised concerns about pornography in Nepal. A major concern is that pornography is not defined anywhere in the act. In fact, providing safe sex education, which is stipulated in the MOWCSW Action Plan, will require explicit information. Visual teaching media on safe sexual practices may also be very explicit. The right to convey sexual information will need to be protected. Vague provisions prohibiting pornography can easily hamper sexual speech and expression essential to address the issues of safe sex or reproductive health information. This information is essential to combat the spread of HIV.

Several of the Police Bill's punitive provisions primarily target women in sex work, victims with HIV or other STDs, and pornography. This suggests that the primary objective of this legislation is moralistic and will merely reinforce discrimination against sexually stigmatized groups and HIV-infected persons. The bill also limits the rights to free speech and expression. The provisions are based on a moral agenda, rather than on a human rights standard directed towards addressing the problems of violence, abuse and coercion that trafficking victims experience. The bill does not display any of the compassion advocated in the Strategic Plan on HIV/AIDS in Nepal (see Section 8.2 in this document).

Many of the Police Bill's provisions are unlikely to survive a constitutional rights challenge. Some particularly egregious features of this bill include the compulsory medical examination of trafficked persons and their compulsory detention if found to have "certain diseases." These recommendations do not respect the rights to life and liberty, protected under the Constitution of Nepal, which also includes the right to bodily integrity. Other constitutionally questionable proposals include the power to search, seize, and arrest without warrant. Such power in the hands of law enforcement officers is highly susceptible to abuse. Another provision provides a special exemption for a trafficked woman who kills a "trafficker" while trying to escape. Self-defense is already a general defense for murder. It is unclear why this defense has been incorporated into the bill and in a broad language that moves well beyond the well-established grounds for self-defense in the criminal law.

5.3.3 The Traffic in Human Beings (Offences and Penalties) Act, 1999

The Ministry of Women, Children and Social Welfare (MOWCSW) prepared the most recent legislation, Traffic in Human Beings bill (see Annex 4). This bill adopts most of the procedural clauses of the existing 1986 Act with some slight adaptations, as well as several provisions in the Police draft and the CeLLRd draft bill. This bill has effectively replaced the previous two reform proposals and is the version that will be considered in the forthcoming session of the parliament of Nepal.

Article 4 prohibits persons from engaging in offenses relating to the Traffic in Human Beings. These offenses include:

- Buying and selling human beings with any motive.
- Enslaving anyone, or keeping him or her as bonded labor.
- Engaging or instigating others to engage in prostitution.
- Separating a minor or insane person from his/her guardian without the guardian's consent.
- Sexually abusing a minor or instigating anyone to abuse a minor.
- Having sexual intercourse with prostitutes.
- Forcing any woman to become pregnant or render her incapable of becoming pregnant against her will, or through inducements.
- Kidnapping a person as a hostage.
- Being an accomplice in any of the above acts.

The MOWCSW bill also outlaws operating a brothel. The bill also states that no one who has knowledge that another person has committed one of the offenses stated in Article 4 or has instigated the commission of any of the offenses set out in Article 4 shall rent out or offer his/her house, land or vehicle to that person for economic benefit or a fee.

The draft reproduces the following Police draft bill provisions verbatim:

- Prohibiting operation of a brothel (Section 5).
- Prohibiting the supply of pornography (Section 7).
- Search and seizure without a warrant (Section 12).
- Detention during the period of trial (Section 13).
- Reversal of the burden of proof in certain specific offenses.
- Immunity for offenses committed by trafficked persons trying to escape from their perpetrators.

The MOWCSW draft did not adopt the Police draft provisions for the compulsory and indefinite detention of trafficked persons found to have certain diseases.

The MOWCSW draft also reverses the burden of proof in relation to specific offenses. These include compelling a woman to sit in a brothel in return for economic benefit, intimidation, pressure or other forms of coercion; or taking a person outside of Nepal through allurements and enticements or threats; or intimidation or having sex with a minor (Article 9 and Section 15).

If a person who is trafficked within the definition of the Act makes a complaint, and that person is a woman or minor, then the complaint must be authenticated by a Government Advocate and subsequently before a district court (Article 10(1)).

Analysis of the MOWCSW Bill

The primary objective of the MOWCSW draft is to stop the traffic in human beings by improving the limitations of the 1986 Act. Unfortunately, the draft undermines this objective by trying to address a vast array of issues in one general law and using the force of the criminal law without adhering to a minimum human rights standard. The proposed legislation deals with issues of rape, child sexual abuse, pornography, trafficking, and prostitution simultaneously. Each of these issues raises distinct and

separate concerns that require clear, precise and elaborate definitions, rules of procedure and practice covered by separate pieces of legislation.¹⁶ Legislation in other countries has generally dealt with these broad issues separately.

The bill's preamble states that the control of the sale and abuse of the human body is necessary to "safeguard the interest of the general public and maintain good conduct." From this moralistic approach, the maintenance of "good conduct" rather than the protection and promotion of the human rights of the trafficked persons becomes the priority of this bill. In addition, the overly broad definitions contained in the law and criminal law provisions are repressive and can threaten even normal, healthy sexual contact between Nepali citizens.

Criminalization of Prostitution: The bill explicitly criminalizes prostitution, which has not been criminalized before in Nepal. Nearly all sexual activity both within and outside of Nepal (if a Nepali citizen is involved) is criminalized. The definition of prostitution set out in Section 3(a) includes the use of the human body to "engage in sexual acts in return for anything." This overbroad definition using the term "anything" would include sex within marriage, which clearly cannot be the concern of the legislature. And any "house, room or place" used for such activity, including a bedroom in a normal domestic household would fall within the definition of a brothel as set out under the bill (Section 3(b)).

It is well documented that the criminalization of prostitution only forces the issue underground (Lap-Chew and Wijers 1997). The proposal does not conform to the current global trend to end exploitation in prostitution rather than eliminate prostitution itself. The bill also does not conform to the objectives of the Strategic National Plan on HIV/AIDS (discussed in Section 8.2 of this document).

At the 1998 consultative workshop for developing a National Plan of Action Against Trafficking in Children and Their Commercial Sexual Exploitation, statistics were presented about commercial sex work in Nepal from a report commissioned by UNICEF (Tuladhar 1998). According to these statistics, people of all castes are involved in sex work. Based on a sample group, 66.3 percent of the commercial sex workers were involved in sex work out of their choice, 37.8 percent were influenced by female friends, 9.2 percent influenced by other natal family members, 6.1 percent by pimps, 4.1 percent by brothel owners and 3.6 percent influenced by mothers. Although these statistics are not based on a sustained and coordinated research program on sex work in Nepal, they belie many of the broad assumptions about women in sex work and need to be further investigated.

Addressing the issue of trafficking, even for prostitution, through the force of the criminal law will not protect the rights of either the trafficked women or sex workers. Once a sex worker is cast as a criminal by virtue of her work, she will not assist the state by testifying against her abusers, pimps, clients or others since she has been deemed a criminal and risks punishment. This will probably prevent her from seeking redress

¹⁶ The lack of precision and clarity in this law is addressed in detail by Chris Muryagurd in his analysis of this bill that was sponsored by UNICEF Nepal. Muryagurd also points out that there are no rules or regulations currently in place to ensure that the provisions of the bill can be carried out, that the limits of those exercising powers under the act, which is mainly the police, are clearly defined, and that the rights of all those affected by the exercise of such powers are safeguarded. See in particular, section 3.5.2.

from the state for the abuse and violence she may be suffering as a woman trafficked into sex work. Under the current draft, she risks impugning herself if she makes a complaint.

Without basic human rights, a sex worker cannot fight the exploitation or violence she experiences in her work, nor leaves to seek other work. Ensuring basic human rights is the first step for any legal strategy to empower or assist any disadvantaged group. The MOWCSW proposal does not comply with this prerequisite for guaranteeing human rights. Hence, the bill ensures that women in prostitution, whether trafficked or not, will be in an even more vulnerable position once the bill is enacted. The related issues of violence, abuse, exploitation, HIV and STDs will be pushed further underground.

Focusing attention and directing the force of the criminal law on the purpose of the work, whether it is for sex work, domestic work or other work is misdirected. The legislation should target the violence, or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion that take place in the course recruitment and/or transport of a person within or across national borders for work (Lap-Chew and Wijers 1997).

Denial of Human Rights: The MOWCSW bill criminalizes any person for renting or hiring property to anyone s/he knows has committed an offense in relation to trafficking (Section 6). This provision ensures that sex workers and former sex workers, whether trafficked or not, will be denied the right to housing since many sex workers use the same rented premises for work and residence.

Section 7 prohibits the production and distribution of “vulgar” materials with the intention of indulging in or instigating others to indulge in “sexual abuses.” The terms “vulgar” and “sexual abuses” are not defined in the bill. It is unclear why these provisions regulating sexual material are included in a law on trafficking.

The very broad power to search without a warrant is an important human rights concern. The MOWCSW bill places no limits on the exercise of this power, the way these searches should be conducted, or the degree of force police may use to enter a place.

Section 16 deals with penalties and punishments that specifically target women in prostitution. A woman can be imprisoned for a term of up to one year if she has engaged in prostitution out of choice, and three to ten years if she has been running a brothel and instigated others to commit the “offense of prostitution.” These women are deemed criminals due to the nature their work, and they are denied all of their human rights. The question of choice is troubling and very difficult to assess. A woman may have been coerced into prostitution, but continues in the work because she has no other economic opportunities. Or she may be forced to continue in sex work because of the stigma that impedes access to her other rights as well as state benefits.

However, the bill does include provision for supporting the victims of trafficking with provision of free legal aid, *in camera* legal proceedings, and granting 50 percent of all collected fines to the victim.

Rescue and Rehabilitation: The MOWCSW proposal emphasizes the establishment of rehabilitation centers for victims of trafficking (Section 30). The bill focuses on

rehabilitating “helpless” women who have been saved from trafficking or have been rescued from a brothel. No provision is made for persons who have been rescued from trafficking for other purposes.

Women who are placed in rehabilitation centers remain invisible. The bill does not clearly state any procedures for her care during her “stay”, nor the length of time she will remain at the rehabilitation center.

On the other hand, the need to establish rehabilitation and reintegration programs with shelters and homes for women and girls affected by trafficking cannot be undermined. Care and support of these persons is crucial to any anti-trafficking agenda. However, a review of rescue and rehabilitation interventions reveals that in many instances these shelters do not always function in the manner they were intended. Many rehabilitation programs function more as detention centers under the pretext of protection. Rescued women and girls are not allowed to leave the facilities and are therefore, virtually incarcerated. The human rights of these trafficked women and girls must be protected.

5.4 The Foreign Employment Act, 1985

The Foreign Employment Act that deals with women migrants and foreign employment in an attempt to control the abuse of women and trafficking is also troubling. The government enacted the *Foreign Employment Act* in 1985 because of the large numbers of Nepali citizens who were migrating in search of employment abroad. The act requires that employment agencies that recruit workers for foreign jobs must be licensed. The act also lists which countries may recruit Nepali workers. The government can cancel the licenses of these employment agencies. In 1998, Section 12 of the Act was amended to prohibit foreign employment of women and minors without the permission of the government and his/her guardians.

A Foreign Employment Order¹⁷ issued by the Ministry of Labor further limits the overseas travel of single women, women under 35 years of age, and minors unless they are accompanied by a relative or can show proof of consent from their guardian.

Despite the Open Border Agreement of 1950 that effectively allows citizens of India and Nepal to travel freely between the two countries without displaying passports or visas, the passport provisions under the Passport Order also curtail the trans-border migration of women by requiring they provide permission letters from their fathers or husbands. This order is not legally stipulated but is widely implemented by immigration authorities especially in the case of young women, single women or women from disadvantaged social groups.

Once again, the government’s legal initiatives tend to negate rather than promote the human rights of its citizens who are mobile and crossing borders for the sake of work or better economic opportunities. These laws also undermine the government’s commitment to women’s equality under the Constitution since they preferentially target the migration and employment of women.

¹⁷ An order is a government directive and is less binding than a law.

6. International Obligations

A number of provisions in the MOWCSW bill and some of the existing legal provisions do not comply with Nepal's international obligations. Nepal has ratified several international conventions, including the following:

- *The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (ratified 1995)*. This Convention imposes on Contracting Parties the obligation to punish a number of acts pertaining to the exploitation of prostitution and the traffic in persons. It does not call on States to outlaw or abolish prostitution.
- *The 1957 Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery (accession 1963)*. This Convention makes the act of enslaving another person a criminal offense under the laws of the Contracting Parties and offenders must be prosecuted and punished.
- *The 1989 UN Convention on the Rights of the Child (ratified 1990)*. This Convention sets out a number of provisions for the protection of the human rights of children. Each State can determine what measures to adopt to protect children within their territory and jurisdiction.
- *The 1979 Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) (ratified 1991)*. This Convention stresses the elimination of discrimination against women to achieve equality between men and women as well as setting out the means for realizing that equality.
- *The 1996 International Convention on Civil and Political Rights (ICCPR) (acceded 1991)*. This Convention focuses on five individual rights: protection of the individual's physical integrity (which includes arbitrary deprivation of life); procedural fairness when government deprives an individual of liberty; equal protection norms; freedoms of belief, speech, and association; and the right to political participation.

The Conventions for the Suppression of the Traffic in Persons and the Elimination of All Forms of Discrimination Against Women require that State signatories take steps to suppress the trafficking in women and exploitation of prostitution of women. It does not empower the State to eliminate prostitution. As discussed previously, anti-trafficking initiatives proposed by different stakeholders in Nepal continue to conflate the issues of trafficking, prostitution, and migration. Nepal's commitments under the International Convention on Civil and Political Rights, require the State to protect a person's "right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." The anti-trafficking law reform proposals and Section 12 of the Foreign Employment Act undermine this right.

Other important international obligations that appear compromised by Nepal's legal interventions, include Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) that states that anyone "charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law." The MOWCSW proposal to shift the burden of proof onto the defendant in the context of certain offenses appears to abrogate Nepal's international obligation under the ICCPR.

7. Regional Initiative: SAARC Draft Convention on Trafficking

To be successful, anti-trafficking policy and legal interventions must be promoted at the regional and international levels. Although Nepal's international obligations are important, regional initiatives tend to have a more immediate and direct impact on South Asian governments and their national legislation. The Nepali government is working with other governments in South Asia to draft a convention to counter inter- and intra-country trafficking. At the Ninth Summit of SAARC held in May 1997, the member states agreed that the formulation of a regional convention to combat the crime of trafficking of women and children for the "purpose of prostitution" should be explored. A draft of this convention was prepared, and was focused more on the purpose of trafficking, rather than on the harms that arise during the course of trafficking. However, in subsequent discussions, the term "for the purpose of prostitution" was deleted. Prior to the Tenth Summit of SAARC held in July 1998, the Foreign Ministers of SAARC adopted a draft *SAARC Convention for Preventing and Combating Trafficking in Women and Children* (see Annex 6). This draft significantly improves the earlier draft (no reference to prostitution).

Approval of this Convention was expected at the Eleventh SAARC Summit scheduled to take place in Kathmandu in November 1999. However, the summit was postponed due to tensions in the region, especially between India and Pakistan. The attached draft of the Convention includes amendments and deletions that have been made to the document. The document will probably undergo further changes and amendments before it is presented for adoption at the next Summit (date not set).

The current draft of the SAARC Convention on Trafficking recreates some of the problems that have already identified with some of the domestic law and policy proposals under consideration in Nepal and does not improve on existing domestic laws. The Convention emphasizes criminal law and punitive provisions to address the problem of trafficking. However, it also recognizes that the State parties must repeal or amend domestic policies, programs, and legislation that discriminate against women and children. Overall, the Convention gives some, albeit limited, attention to the human rights of persons who are trafficked or who are vulnerable to trafficking.

Trafficking: The draft Convention is aimed specifically at criminalizing the activities of persons engaged in "moving, selling, buying, kidnapping or fraudulent marriage of women and children within or outside a country for monetary or other considerations with or without the consent of such person" (Article 1(2)). This definition would include a woman who has moved outside her country, with her consent, on payment of some kind of consideration. Although it is not presumably the intention of the draftsman, this definition would include a woman who purchases an air ticket to travel outside of her country. In contrast however, Article 1(5) defines "persons subjected to trafficking" as "women and children forced into trafficking by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means." A comparison of these two provisions indicates some ambiguity as to whether consent is relevant or irrelevant. Clarification of the SAARC governments' positions on this issue is needed to evaluate the full implications of this Convention. However, given the history of this Convention, participating governments apparently consider consent irrelevant to the issue of trafficking.

The Convention directs States to use criminal law to deal with the problem of trafficking. Article III (1) requires State parties to take effective measures to ensure that trafficking in any form is an offense under their criminal law, and that such offenses are punishable by penalties appropriate to the grave nature of the offense. When the act of trafficking is committed by a person who is in a custodial situation or educational institution, the offense should be considered as an aggravated offense and a more stringent penalty should be imposed. The Convention also requires States to punish any person who keeps, maintains, manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking and knowingly lets or rents a building or other place for the purpose of trafficking (Article III (2)). The emphasis on the use of the criminal law treats trafficking as a crime against the State and a law and order problem.

It is unclear what situation the Convention addresses in Article III (2). If a person is kept against his or her will in any place, this can constitute abduction and/or kidnapping. Laws against such forceful detainment already exist in the criminal/penal codes of all SAARC countries. If a place is used as a transit point while a person is being moved, then the issue of consent becomes extremely relevant. If a person remains in a hotel room or another rented place with her/his consent, then no crime is ostensibly committed. If they are abused or harmed during the period of their stay, or if they have been bought or sold, then it is unclear why the person letting the place or renting the room should be punished, unless s/he knows the abuse/sales is occurring. By way of comparison, if a landlord lets a place to a family and sexual abuse or domestic violence happens in that family, the landlord cannot be held guilty of committing a crime by letting his/her place to such a family. If he/she knows that such abuse is taking place and fails to report it, then there *may* be grounds for prosecution under certain provisions in the existing domestic penal codes.

State parties are required to provide wide mutual legal assistance for investigations, inquiries, trials and other proceedings, including evidence, information, search and seizure, and service of documents. Offenses in connection with the Convention will be extraditable offenses (Article VI (1) and (2)).

States are also obliged to provide training and assistance to their respective authorities to enable them to conduct inquiries, investigations and prosecute offenses effectively, and to sensitize their law enforcement agencies and judiciary about the Convention. Bilateral mechanisms to implement the Convention are encouraged. States parties are obliged to regularly exchange information about agencies, institutions and individuals who are involved in trafficking in the region, including the methods and routes that they employ (Article VII (3)).

The current draft ignores the issue of consent, or at least considers consent irrelevant. Excluding consent in the definition of the offense of trafficking can result in a serious violation of the rights of persons who are willing to be transported across borders and pay for such assistance.

Infantilizing Women: The SAARC Convention does not differentiate the very different issues that affect adult women and children (see Article 1(5) of the SAARC draft). Children are vulnerable and demand society's protection. Children's labor issues are

usually addressed separately from adult's issues. The same distinctions should apply to issues of trafficking, migration, and sex.

Some women may have been forced to move as a child. A woman should be entitled to a legal remedy for any harm she has endured as a child, whether it is in the form of child sexual abuse, slave labor, or coerced work while still a minor. Providing such remedies is different from setting up a legal regime that treats all women like children.

The issue of consent for children is irrelevant in most SAARC countries until s/he reaches the age of majority. In all SAARC countries, children's rights should be addressed independently from adults. Once a child reaches the age of consent then an entirely different set of rules and legal provisions must govern her. The primary tools she requires to defend herself are rights. Rights are the only legitimate means by which to resist any further violence, coercion or harm she may experience whether it is in the family, in exploitative labor or in the workplace.

Treating women like children, or according to the same norms/standards that govern children, infantilizes women, is patronizing, and does not recognize their ability to make decisions.

Rescue and Rehabilitation: The SAARC draft recommends that States set up safe houses for persons who are released from trafficking. Safe houses are to be provided for "the care and rehabilitation of persons subjected to trafficking" (Article IX (3)). Voluntary organizations will establish these safe houses and provide suitable care and maintenance to the persons who have been trafficked. This provision recognizes the lack of suitable arrangements for persons who have been placed into "protective homes." However, the draft Convention does not specify that a stay in a safe house should be voluntary and not compulsory.

The draft Convention states that adequate legal advice and health care facilities should be provided to persons who have been released from trafficking and are awaiting the voluntary return to their home countries (Article IX (2)). There is no indication that anyone other than the person who has been released will bear the costs of such facilities. At the same time, it is important to highlight the fact that States recognize that persons require legal protection even after they have been released from trafficking.

Human Rights: The draft contains two important provisions recognizing the need to support the human rights of those vulnerable to trafficking. Article VIII (8) provides that the parties shall introduce "effective legislation and policies in line with international and constitutional standards including those in CEDAW and CRC to prevent trafficking in areas which are known to be source areas." States are thus obliged to take more initiative in preventing vulnerability to trafficking through laws and policies that conform to the human rights standards set out in CEDAW and the Child Rights Convention. Once again, separate measures may be necessary for children and for women. Women's issues may be more appropriately addressed through affirmative action policies, while children may require the protection of the criminal law and law enforcement agencies.

A second significant proposal states that "State parties shall take steps to eliminate economic, social and political causes which contribute to the trafficking in women and

children” (Article VIII (10)). This amounts to an official recognition that trafficking is partly the result of discriminatory State practices, policies, and laws against women that undermine human rights necessary to resist exploitation, force, coercion, and fraud.

One provision in the draft encourages States to supervise employment agencies to prevent trafficking in women under the guise of recruitment (Article VIII (7)). The provision could be used to either facilitate or to restrict women’s rights, as witnessed in the application of the Nepali Foreign Employment Act.

8. Legal and Policy Interventions on HIV/AIDS in Nepal

This section assesses Nepal’s legal and policy approaches to HIV/AIDS prevention and treatment and their consistency with anti-trafficking concerns. Any anti-trafficking initiatives must protect and promote the human rights of HIV-positive people and communities who may be more susceptible to the illness because of their social, economic and/or gender status.

8.1 Background

Nepal’s HIV/AIDS policy is based on the fact that Asia and Nepal are currently facing an epidemic. The first AIDS case in Nepal was diagnosed in the late 1980s, and the number of cases has continued to rise since then. The number of reported infections in Nepal is still relatively low but the number of undetected infections is probably much higher due to inadequate testing and health facilities (Gurbacharya 2000).

Those who are vulnerable to HIV/AIDS are difficult to identify given the limited surveillance and statistical data available on this issue in Nepal. However, reported HIV prevalence in urban male sexually transmitted infection patients ranges from 0-10 percent. HIV rates ranging from 9-21 percent have been reported in urban sex workers (UNAIDS 2000).

8.2 Policy

The National Policy on AIDS/STD Control, 1997-2001¹⁸ sets out the Government of Nepal’s current policy towards HIV/AIDS. Some of the major features of this policy are to:

- Give HIV/AIDS and STD prevention high priority.
- Implement prevention activities through a decentralized program in both governmental and non-governmental sectors.
- Promote safe sexual behavior.

¹⁸ The policy was adopted on the grounds of the following assumptions:

- According to the National Centre for AIDS and STD Control, the total number of HIV/AIDS infected persons in Nepal increased from just four in 1988 to 1,411 in 1999.
- There is a concern that sex workers from India and other AIDS affected countries are a major source of introduction of HIV into Nepal.
- That the even larger numbers of men who migrate within and outside of the country are also sources of the virus.

These assumptions are once again not based on sustained and coordinated research on the issue of HIV/AIDS.

- Provide counseling and other services to people with HIV/AIDS.
- Ensure that people with HIV/AIDS will not be discriminated against.
- Ensure confidentiality.

The Ministry of Health, Department of Health Services, National Center for AIDS and STD Control, Kathmandu has issued a Strategic Plan for HIV and AIDS in Nepal, 1997-2001 (see Annex 5). This clear and precise document serves as an excellent pro-rights framework that addresses the factors that render persons more vulnerable to HIV/AIDS and the problem of trafficking.

The Overview of the Strategic Plan sets out the ways in which HIV is transmitted (see Annex 5). The plan describes the systemic forces that facilitate the transmission of the disease, including social, economic and gender factors. The plan emphasizes that the breakdown of communities encourages the transmission of the disease. Isolation is a form of protection, and the breakdown of isolation can end this protection, particularly for rural populations in Nepal.

The plan states that the population's high mobility creates conditions for the spread of HIV. At the same time, it recognizes that mobility and the structure of the labor market are central factors for the process of national development planning. Better economic opportunities available in Kathmandu, and in neighboring countries, such as India, invite and encourage people to move in search of a better standard of living and work. Interventions must maintain people's right to freedom of movement, to seek better employment opportunities and standard of living, but also reduce their vulnerability to the HIV virus. At no point does it suggest limiting options for migration. Possible interventions include:

- Reaching people who are migrants both within the country as well as outside.
- Improving living conditions, including education and primary health care, that may reduce the desire to migrate, "including the recruitment of young women as CSWs (commercial sex workers), and thus reduce the spread of HIV infection."

Given that the South Asia region has the fastest growing number of new HIV infections in the world since 1996, the plan also recognizes that people who are already affected by the epidemic need assistance. These provisions include the protection of their rights in areas such as access to health care and continuing employment. The plan recognizes that resource constraints, poverty, high levels of illiteracy, inadequacy of health services and the remoteness of the rural populations, limit the ability of the government and other institutions to respond to HIV effectively. However, there is also a crucial recognition that these limitations are "compounded in some cases by practices which unnecessarily worsen the situation such as attitudes in many hospitals and other facilities which deny HIV infected persons from [sic] access to care, and evidence of discrimination in employment. These are matters which are not resource determined but reflect social attitudes and practice which are amenable to public policy and which can be changed at little cost." HIV/AIDS is not simply a health problem. A multi-sectoral response to the problem is essential.

The plan points out that the current efforts at addressing the problem are highly centralized and badly coordinated with other institutions, both functionally and geographically. This lack of coordination and absence of a comprehensive approach is

partially because many of these activities are funded by external donors, frequently unrelated to national need, and are not sustainable. The monitoring system for these programs is quite weak. The plan recommends a new role for the National Centre for AIDS and STD Control, which “needs to relinquish operational and implementation functions” and focus on developing policy frameworks, providing information on HIV/AIDS prevention strategies and mobilizing resources to respond effectively to the illness. The plan stresses the need for coordination as well as compassion.

The plan details the methods for dealing with the virus. These include:

- Increasing the understanding of the epidemic.
- Developing a multi-sectoral approach.
- Decentralizing program activities.
- Strengthening collaboration between the NGO sector and government.
- Integrating HIV/AIDS and STD prevention activities with other programs both in governmental and non-governmental sectors.
- Following up and evaluating the plan.
- Promoting safe sexual behavior.¹⁹
- Providing counseling and other services including voluntary HIV testing.
- Conducting surveillance, reporting, and blood testing.

The legal, ethical, and human rights aspects of the plan are addressed in the following section.

8.3 Law

8.3.1 Domestic Initiatives

Although the HIV/AIDS policy makes no specific recommendations for legal reform, it does provide that legal reform be based on non-discrimination, in order to produce an “enabling” environment. This recommendation recognizes that the epidemic has raised a number of human rights concerns. These include problems of discrimination in the workplace, as well as access to and confidentiality around HIV testing. The epidemic has also raised important questions around the legal regulation of prostitution and needle exchange programs. Some of the issues emphasized in the legal section include the need to ensure:

- The continuity of the employment of HIV-infected persons “wherever they are.”
- People with HIV/AIDS are given the necessary hospital treatment and access to services without discrimination.
- Counseling is provided to positive people as well as to their families.

To date, no laws have been enacted pursuant to the policy on HIV/AIDS adopted by the Nepali government. Persons with HIV/AIDS, persons suspected of having the virus, and communities in which the virus has appeared (i.e., sex workers, drug users, business

¹⁹ This is a particularly significant section of the plan, which states that “Injectables are the preferred method of contraception and so, condom use within the context of a relationship has been difficult. In a report of an NGO working with women, 65% of the women who come for their services are married and 95% of them have STDs.” In contrast, in the Badi community, more than 90% of the women practiced condom use and they also reported peer education happening among hidden commercial sex workers.

travelers) are still discriminated against. In fact, the current laws as well as some of the proposed legal reforms still continue to discriminate against the groups where infections have already been detected. The personnel at the National Center for AIDS and STD Control have also stated that even when the identities of HIV-infected patients are not disclosed, most medical personnel discriminate against these patients. New laws are urgently needed to prohibit discrimination and inhumane behavior towards HIV-infected people.

Any legislative initiatives addressing the issue of HIV/AIDS should include provisions for:

- Respecting the human rights and dignity of HIV/AIDS people, regardless of how they acquired the illness, their behavioral background or sexual history.
- Guaranteeing the confidentiality of a patient.
- Developing an anti-discrimination policy and affirmative action measures that will assist HIV-positive people to secure educational opportunities, jobs and other state benefits.
- Providing facilities for HIV testing that are accessible to all citizens, confidential, safe, and free of prejudice.

The criminal law has no role to play in addressing the problem of HIV/AIDS. Any intervention of the criminal law in the area of HIV/AIDS will only serve to reinforce existing prejudices and the stigma associated with the illness, as well as drive the illness further underground.

9. The Relationship between the Proposed Interventions on Trafficking and the Control of HIV/AIDS in Nepal

The reform proposals currently under consideration offer several provisions that undermine the rights of those that the Strategic Plan for HIV/AIDS in Nepal seeks to protect. In fact, the proposals aggravate some of the problems that are associated with trafficking.

The Police Bill undermines the human rights of those who contract HIV/AIDS through its proposals for a mandatory health check-up for those rescued from trafficking and isolation of those found to be infected by HIV or other STDs (see detailed discussion in Section 5.3.2 of this document).

The MOWCSW bill endorses the criminalization of prostitution, which will only force the issue underground. Criminalization runs counter to the objective of the Strategic Plan for HIV/AIDS to provide services to those persons who have contracted HIV or other STDs or are vulnerable to HIV/AIDS, since they will not be able to seek redress or seek assistance for the harms they face (see detailed discussion in Section 5.3.3 in this document).

Women who have been involved in prostitution face severe stigmatization and social marginalization. The MOWCSW proposed bill does not contain any affirmative action measures to help remove this stigma. The proposal contains no recommendations for the treatment and care for women with STDs or HIV/AIDS. The MOWCSW proposal does not create an “enabling” environment for these women, and it reinforces much of the stigmatization and discrimination these women experience.

10. Conclusions

His Majesty's Government of Nepal has made considerable effort to develop policies and laws that specifically address the problem of trafficking. In addition, they have designated the Ministry of Women, Children, and Social Welfare as a clear focal point within government for anti-trafficking initiatives. The National Policy and Plan of Action call for collaboration with private sector NGOs and INGOs, as well as the establishment of coordination committees at the national, district and village levels.

Trafficking and Prostitution: The current law and policy in Nepal focuses on trafficking for the purpose of prostitution. By emphasizing the endpoint, the violence and abuse of human rights that occur during the process of trafficking for any purpose are not addressed. Although earlier drafts of the SAARC convention also referred to trafficking "for the purpose of prostitution", the current draft has omitted that phrase.

Although the MOWCSW reform bill defines trafficking as "buying and selling human beings with any motive," and "enslaving anyone, or keeping them in bonded labor," it also includes engaging in prostitution and having sexual intercourse with prostitutes as "offenses relating to traffic in human beings." This would effectively criminalize prostitution, whether or not it is a result of trafficking, for the first time in Nepal. This criminalization would effectively deny any avenue of redress for victims who have been trafficked into prostitution. In such cases, the "victim" risks impugning herself if she files a complaint against a trafficker. This undermines the intent of the bill, which is to prosecute traffickers and protect victims of trafficking.

The MOWCSW proposed bill takes a predominantly moralistic approach to trafficking, using this platform to address issues of rape, child sexual abuse, pornography, kidnapping, trafficking and prostitution, and defines them all as "trafficking." Each of these issues raises distinct and separate concerns and requires clear, precise, and elaborate definitions and rules of procedure and practice. Separate pieces of legislation should be drafted for each, as is the case in many other countries.

Trafficking and Migration: Although the Open Border Agreement effectively allows citizens of India and Nepal to travel freely between the two countries, several more recent laws and less formal "orders" in Nepal curtail this freedom. Most of the recent law and policy are directed particularly at limiting women's ability to migrate internationally. Although the current draft of the SAARC Convention does not call for limitation of migration, its definition of trafficking includes assisting a woman to migrate, even with her consent. Efforts to limit the legal migration of women will force women to migrate illegally, further increasing their vulnerability to traffickers.

Women's Rights: Nepal's constitution ensures equality under the law, especially for women. In keeping with this, the National Policy on combating trafficking (MOWCSW 2000) includes commitments by HMG/N to remove laws that discriminate against women, take all necessary measures to protect the rights of women, and take steps to alleviate poverty and provide employment opportunities to women. In addition, the National Plan of Action proposes training programs for behavior and attitude change on gender issues and trafficking. These commitments comply with the Government's obligations under the Convention for the Elimination of All Forms of Discrimination

Against Women (CEDAW). However, there are still several domestic laws that discriminate against women, especially in the area of property, inheritance, and migration. A legal environment that limits options and redress for women in difficult marital and financial situations may force them to migrate, legally or illegally, and increase their vulnerability to trafficking.

Consent: Current and proposed policy and legislation in Nepal does not address the issue of consent. An adult woman's right to make her own decisions must be recognized, even if this includes, for example, a decision to migrate for work in the sex trade. Policy and interventions need to clearly distinguish between the issues of trafficking and its control for adults versus those of children, where the issue of consent is not relevant. When these groups are considered together, women are infantilized and seen as being in need of paternalistic protection.

Other Human Rights Issues: Although the International Covenant on Civil and Political Rights (ICCPR) provides that anyone "charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law," the current anti-trafficking law denies this right.

The MOWCSW proposed reform bill raises several human rights concerns. It shifts the burden of proof onto the defendant in the context of certain offenses. In addition, it grants the State power to search without a warrant, denies housing for all sex workers and former sex workers, and blocks free speech through the prohibition of the production and distribution of "vulgar" materials without defining the term. On the other hand, the proposed bill does contain provisions to protect the victim including free legal aid, compensation in the amount of 50 percent of the fines collected from the convicted trafficker and protection from publicity.

Focus on Rescue and Rehabilitation: The National Plan of Action and the proposed anti-trafficking reform bill, both produced by MOWCSW, consistently emphasize rescue and rehabilitation operations and income generation schemes, although both approaches have been criticized for their ineffectiveness and paternalistic approach to trafficked persons and those vulnerable to trafficking. These services are directed at "helpless women who have been subjected to prostitution" with no provision for those returning from trafficking for other purposes. Furthermore, the desired outcome or content of such programs and the desired duration of stay at such centers are not specified.

Interface with HIV/AIDS Policy: The National Policy on AIDS and STD Control and the Strategic Plan for HIV and AIDS in Nepal are based on a pro-rights framework, while at the same time addressing those factors that render persons more vulnerable to HIV/AIDS. Although the Strategic Plan makes no specific recommendations for legal reform, it does provide that legal reform be based on non-discrimination, in order to produce an "enabling" environment. Many of the features of the anti-trafficking laws and policies are in direct conflict with the HIV/AIDS policy in Nepal. This is most striking in the areas of migration and prostitution. Although both are risk factors for HIV transmission, the Strategic Plan for HIV/AIDS calls for interventions that effectively address the spread of the epidemic and are consistent with the right to freedom of movement and the right to seek a better standard of living. This is in direct contrast to calls for restriction of women's migration and the limitation and/or criminalization of prostitution seen in anti-trafficking laws and policy.

11. Recommendations

In view of the above assessment, the following actions are recommended for consideration:

Definition: Anti-trafficking interventions that are based upon a definition of trafficking solely for the purpose of prostitution are untenable and unrealistic. The prevention of trafficking becomes synonymous with prevention of prostitution. Adoption of the UN Special Rapporteur's definition of trafficking would protect the rights of all trafficked persons, including those who are trafficked for purposes other than prostitution (see Section 2.2.1).

Data, Research and Evaluation: There is a lack of serious research and data on trafficking in Nepal. This gap should be urgently addressed by developing rigorous methodologies with qualitative and quantitative indicators, including impact-assessment indicators. Conflation of trafficking with illegal migration and prostitution has seriously impeded this task. The current statistics reflect either numbers of women and girls who have migrated in general or are engaged in sex work. Even the number of Nepali women and girls engaged in prostitution in Indian brothels is based upon assumptions and speculations about an underground sex industry. HIV/AIDS models should be examined for developing methodologies and indicators, and wherever useful, modified and replicated to gather and assess data about trafficking.

Consent versus Force: Many national laws and policies include the phrase “with or without consent” in their texts. While this may have some legitimate bearing in the case of children and under-18 year old victims, consent must be included as a rights issue in the case of adult women. Admittedly, the issue of “consent” and “choice” are complicated issues in the context of the multiple disadvantages suffered by women and girls. Nevertheless, disregarding the will and choice of an adult and confining her to forcible protection or rescue is a violation of her human rights.

Migration and Trafficking: Policy and legislative interventions must make clear distinctions between migration and trafficking. Simply controlling migration will not curb or prevent trafficking. The open-door agreement between Nepal and India should not be altered.²⁰ Stricter border controls, such as instituting a passport system or more stringent border surveillance, will stop neither trafficking nor migration. Traffickers will merely devise increasingly innovative and underground ways of transporting women and girls across the border, and the victims will be rendered still more vulnerable due to their increased invisibility and illegality of movement. Furthermore, it will restrict the movement of genuine migrants and travelers by making travel procedures more cumbersome. Other South Asian neighbors, such as Bangladesh have experimented with strict immigration control at the border and a passport system, yet the problem of trafficking is reportedly growing.

²⁰ This demand has been articulated by various advocates and experts from the NGO as well as the government sectors. The draft of the Pro-Public document supported by the Asia Foundation also recommends reversing the Indo-Nepal open-door agreement as a measure to prevent trafficking.

Gender Discrimination: As set out in its National Plan to Combat Trafficking, HMG/N must fulfill its commitment to repeal all laws that discriminate against women. This may require the government to adopt specific measures for women that are consistent with the equality provisions in the Nepal Constitution.

Principle of Non-discrimination: Consistent with its international commitments, HMG/N must ensure that anti-trafficking interventions do not subject trafficked persons to discriminatory treatment in law or practice on account of gender, race, color, sexual orientation, age, language, religion, age, cultural beliefs or practices, social origin, property, birth or other status, including their status as victims of trafficking or having worked in the sex industry.²¹ Current laws and policies under discussion do not actively follow the principle of non-discrimination and include punitive measures for women who work in the sex industry either consensually or non-consensually.

Sustainable Alternatives: His Majesty's Government of Nepal should move beyond an income generation approach to the problem of poverty and trafficking. This approach is not an adequate substitute for people seeking better economic opportunities in the city or across borders. Anti-trafficking programs should provide economic alternatives to women who chose to leave prostitution. These programs must meet the needs of the individual woman as well as her family. State benefits, including legal rights that are available to all other families should be made available to mothers and their children, regardless of their work.

Rescue, Repatriation and Rehabilitation: There is a need to move from a paradigm of rescue, repatriation and rehabilitation to an approach that protects and promotes the human rights of women both in countries of origin and destination. Certainly, some women and girls are traumatized by their experience and may require care and support services. However, an analytical evaluation of the problem in several countries and an assessment of the lessons learned teach us that it is not "rehabilitation" that women need. What they need is support and sustainable incomes.²² Anti-trafficking strategies must shift from paternalistic approaches that seek to "protect" innocent women to more holistic and participatory approaches that seek to protect and promote the human rights of all women including their civil, political, economic and social rights.

Support Services: Donors can assist in providing funding for safe houses and halfway homes that women in distress can turn to on a voluntary basis. These houses must be based on a policy of openness and accountability. The State should provide soft loans, infrastructural support, and educational scholarships to women, including the women who have been or are engaged in prostitution, pursuant to the States constitutional obligation to institute welfare measures for its citizens.

HIV/AIDS Policy as a Model: Any legal or policy proposals on anti-trafficking formulated by the government, or recommended by non-state stakeholders or donors, should be modeled along the objectives of the National Strategic Plan on HIV/AIDS in Nepal that enshrines the key principles of the human rights approach. This policy explicitly protects and promotes the human rights of all those who may be vulnerable to HIV/AIDS as a result of their situations of poverty, migrancy, and other factors

²¹ UDHR 2; ICCPR 2.1; ICESCR 2.2, 3; CEDAW 1,2, 16; CRC 2.

²² A recommendation echoing a similar principle is also included in the UN Special Rapporteur on Violence Against Women's Report of Trafficking.

identified in the strategic plan. Every policy must be evaluated against the objectives and concerns set out in this National Strategic Plan. Criminalizing any of the communities or individuals vulnerable to this disease will not facilitate education and awareness around the epidemic, and may in fact intensify their vulnerability.

Criminalization of Prostitution: No specific laws should be enacted to criminalize prostitution. The legal and constitutional rights of socially and sexually stigmatized communities, including those who are HIV positive or engaged in sex work need to be protected. Protecting and ensuring their legal rights are important and essential steps in countering the social stigmatization and marginalization and creating viable ways to exit sex work. Criminalization of prostitution and withholding protection to stigmatized communities from constant harassment by law enforcers and exploiters in the sex industry will further disempower these women, their families, and communities.

References

Acharya, Usha. 1998. "Trafficking in Children and Their Exploitation in Prostitution and Other Intolerable Forms of Child Labor in Nepal: A Country Report." With support from ILO/IPEC, Kathmandu.

Altink, Sietske. 1995. *Stolen Lives*, Harrington Press, New York.

ASMITA. 1998. "Efforts to Prevent Trafficking in Women and Girls: A Pre-Study for Media Activism." Kathmandu.

Azize-Vargas, Yamila. 1996. "Regional report on Trafficking of women in Latin America and the Caribbean" sponsored by GAATW, Thailand, and the Foundation Against Trafficking in Women, The Netherlands.

Barry, Kathleen. 1995. *The Prostitution of Sexuality*, New York University Press, New York.

Bhandari, B.P. and P.M. Sharma. 2000. "An Assessment of Policies and Legislative Measures for Prevention and Control of Trafficking in Nepal." The Asia Foundation (ed.). Kathmandu: Pro Public.

CeLLRd. 2000. "Condemned to Exploitation: Impact of Corruption in Criminal Justice System on Women." Kathmandu: Centre for Legal Research and Resource Development.

Coomaraswamy, Radhika. 2000. "Report on Trafficking by the Special Rapporteur on Violence Against Women, Its causes and Consequence." Submitted in accordance with the Commission on Human Rights resolution 1997/44 , E/CN.4/2000/68, 56th Session of the Commission on Human Rights, January, 2000.

Frederick, J. 1998. "Deconstructing Gita," *Himal* 11(10): 12-23.

Gurbacharya, V.L. 2000. "HIV/AIDS: Everybody's Concern," in *Redlight Traffic*, ed. Durga Ghimire. Produced by ABC/ Nepal, a Nepali Women's NGO working against girl trafficking and AIDS, September 21, 2000.

http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/repro2/RED_LIGHT_TRAFFIC.htm.

Johnston, Hugh and Khan, Sona (eds.). 1998. *Trafficking in Persons in South Asia*, Shastri Indo-Canadian Institute, New Delhi.

Lap-Chew, Lin and Marijan Wijers. 1997. *Trafficking in Women, Forced Labor and Slavery-like Practices in Marriage, Domestic Labor and Prostitution*. Foundation Against Trafficking in Women (STV), The Netherlands, and Global Alliance Against Traffic in Women (GAATW), Bangkok, Thailand.

Ministerial Conference. 1999. Communiqué of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime. Moscow, October 19-20, 1999.

Mahbub ul Haq Human Development Centre. 2000. *Human Development in South Asia 2000: The Gender Question*.

Population Council. 1999. "Intervention Needs for the Prevention of Trafficking and the Care and Support of Trafficked Persons in the Context of an Emerging HIV/AIDS Epidemic in Nepal," project proposal document. New Delhi: Horizons Project, Population Council.

Rajbhandari, Renu. 2000. Personal communication. WOREC, Kathmandu, Nepal, September 18.

Ramanathan, Usha. 1996. "Women, Law and Institutionalization: A Manifestation of State Power," in *Indian Journal of Gender Studies*, 3.2.

Salunke, S., M. Shaikat, S.K. Hira, and M.R. Jagtap. 1998. "HIV/AIDS in India: A Country Responds to a Challenge." *AIDS*. 12:S27-31.

Sanghera, Jyoti. 1999. "Trafficking of Women and Children in South Asia: Taking Stock and Moving Ahead – A Review of Anti-Trafficking Initiatives in Nepal, Bangladesh and India," sponsored by UNICEF-ROSA and Save the Children Alliance.

Sangraula, Yubaraj. 2000. Draft study on Trafficking in Nepal. Kathmandu: Centre for Legal Research and Resource Development.

Tuladhar, Siddhartha. 1998. "Situation Analysis of Sex Work and Trafficking in Nepal with Reference to Children," in the Proceedings of the Consultative Workshop on the Development of a National Plan of Action against Trafficking in Children and Their Commercial Sexual Exploitation, organized by the MOWCSW and ILO-IPEC, April 22-24, 1998, Kathmandu.

UNDP. 1999. "ASEAN Workshop on Population Movement and HIV Vulnerability. South East Asia HIV and Development Project." Chiang Mai, Thailand, November 10-12, 1999.

UN Task Force. 1999. "Beyond Trafficking of Women and Girls in Nepal." Project proposal document on the trafficking of women and Girls in Nepal, prepared by the special UN Mission set up under the UN Task Force. Kathmandu.

Widgren, Jonas. 1994. "Multinational Cooperation to Combat Trafficking in Migrants and the Role of the International Organizations: International Response to Trafficking in Migrants and Safeguarding of Migrant Rights." IOM Seminar on Trafficking in Migrants and Safeguarding Migrant Rights, Geneva, October 26-28, 1994.

UNAIDS. 2000. "Report on the Global HIV/AIDS Epidemic." Geneva: UNAIDS.

USAID. 1999. "USAID Strategic Treatment for the Asia Regional Anti-Trafficking Initiative." May 25, 1999 draft. Washington, D.C., USA.

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Annex 2

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Executive Summary

Although slavery was long ago legally abolished from the Himalayan Kingdom of Nepal, it continues to flourish. The victims are women and children, especially young girls from poor rural families, who are sold into prostitution and bonded labor each year. The victims are trafficked within Nepal, across the open border to India, and to Arab countries. This illicit trade continues despite a decade of policy initiatives, legislation, social activism, international donor aid, media attention, and improving social and economic conditions for women. According to a recent UNICEF study, an estimated 300,000 Nepalese women and girls have been sold into forced prostitution. Each year, that number increases with the sale of another 5,000 to 7,000 victims. This flagrant violation of human rights often results in death of the victims from HIV/AIDS, and increases the spread of the epidemic to the general population.

This report assesses the political, legal, and social framework that underpins efforts to control trafficking in Nepal. It recommends a broad range of measures to curtail this illicit trade, including new legislation; better implementation and enforcement of existing legislation; improved financial and technical resources; improved judicial processes; and long-range efforts to improve the economic and social well-being of women.

Human slavery was first outlawed in Nepal under the *Muluki Ain* legal code developed during the century-long Rana oligarchy (1850-1950). It was forbidden twice more under the Panchayat system (1951-89), first in 1963 under the revised *Muluki Ain* (New Civil Code), and then again under the 1986 Human Trafficking (Control) Act.

Despite this early legislation, there was no concerted effort to control or combat trafficking until Nepal adopted a democratic system in 1990. That year, the new Constitution of the Kingdom of Nepal outlawed “traffic in human beings, slavery, serfdom or forced labor.” In 1992, both the Labor Act and the Children’s Act further reinforced the anti-trafficking legislation with explicit bans on forced child labor and use of children in immoral professions. During the 1990s, Nepal also signed several major international agreements forbidding trafficking and discrimination against women, including the 1949 United Nations Convention for Suppression of the Traffic in Persons and the Exploitation of Others; the 1979 Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); and SAARC anti-trafficking resolutions.

These national and international sanctions outlaw trafficking and punish traffickers. They also protect the human rights of women and children, and lay the groundwork for their improved economic and social well being. They have been reinforced with extensive government and social initiatives against trafficking, initiated through the HMG Ministry of Women and Social Welfare, and coordinated with the International Labour Organization, UNICEF, USAID, other government ministries, the National Center for AIDS and STD Control, the Nepal Police, and a number of NGOs and INGOs. Other major policy initiatives include recommendations of the Ninth Five Year

Plan (1997-2002), a Gender Equity and Women Empowerment Plan of Action, the National Policy to Combat Trafficking, National and District Task Forces on Trafficking, and a National Plan of Action.

The failure of this concerted effort to control trafficking is due to flaws in the legislation, poor implementation, weak enforcement, deep-rooted social attitudes toward women and children, and the endemic poverty of the country.

A major legal obstacle to apprehending traffickers when they transport victims across the Indian border is the 1950 Open Border Agreement, which allows citizens of Nepal and India to travel freely between countries, without displaying passports or visas. Although designed to facilitate trade and transit, the open border enables traffickers to easily transport victims from Nepal to India, where brothels are eager to buy them – especially teenage girls believed to be HIV negative. The Open Border Agreement needs revisions that would enable tighter control on trafficking.

Flaws in police and judicial procedures, as well as minimal capacity to extradite criminals, further aggravate the border situation. Informants and witnesses are subjected to a bureaucratic reporting procedure that effectively discourages getting involved, and often delays police action until too late to save the victim. Many informants also fear retaliation from trafficking syndicates, due to open judicial procedures.

Although Nepal and India have agreed to an Extradition Treaty, trafficking is not listed as one of the crimes for which criminals can be extradited. Even when traffickers are apprehended, many are released, while those convicted are often punished with only minimal sentences. The SAARC countries need a legally binding convention that would both enable the extradition of traffickers and streamline the extradition process.

Although growing numbers of Nepalese women seek foreign employment, the 1999 National Labor Policy fails to protect them from harassment and exploitation, and, in fact, barely mentions them except in references that imply that being a woman is a form of physical handicap.

Many women and girls who seek legitimate employment in Gulf Countries through licensed and unlicensed recruitment agencies created under the 1985 Foreign Employment Act are subjected to trafficking and sexual abuse. The government sought to eliminate this practice through a 1998 amendment that restricts the rights of Nepalese women and minors to seek work in foreign countries. While designed as a protective measure, this amendment to the Foreign Employment Act is a human rights violation outlawed in the 1990 Constitution. This abuse of women's human rights has not resulted in elimination of trafficking to Gulf countries, but only resulted in changed methods that still indirectly channels victims through the open Indian border.

The control of trafficking is inseparable from the urgent need to contain the rapidly spreading HIV/AIDS epidemic, a major threat to public health. This epidemic has unfortunately increased the trade in younger girls, in higher demand than ever due to their lower chances of previous exposure to the virus. Protection of the human rights of HIV/AIDS patients also needs attention. The privacy of HIV/AIDS patients has often been violated both in well-intended media reports, and in the allocation of separate bed areas in hospitals.

A major step forward will be passage of the Human Trafficking (Control) Bill, 2000, designed to update the 1986 Human Trafficking (Control) Act. The new legislation would strengthen existing statutes by broadening the definition of trafficking; prohibiting operation of brothels; strengthening police powers of search and arrest; strengthening judicial power to impose penalties; imposing stronger financial penalties on traffickers; punishing public officers, relatives and guardians for collusion with traffickers; protecting informants with closed judicial procedures when requested; assisting victims with financial compensation and legal aid; protecting victims from damaging publicity; and exempting victims from punishment for actions of self-defense.

However, this proposed legislation should be further amended to:

- specifically focus on human rights of women,
- articulate reasonable restrictions to judicial powers to impose anti-trafficking penalties,
- enable victims to initiate cases for compensation simultaneously with criminal cases,
- award the victim the entire financial penalty paid by the convicted trafficker,
- streamline the process of authenticating court testimony in trafficking cases,
- make closed judicial procedures mandatory, rather than optional, and
- provide some minimal financial assistance for witnesses.

Other factors in the government failure to implement and enforce anti-trafficking measures include:

Inadequate government resources: For instance, only US\$ 9,695 has been budgeted to implement the 1999 National Plan of Action. Against Trafficking in Children and Their Sexual Exploitation.

Anti-trafficking policies are poorly integrated with other social initiatives: There is no adequate coordination between the Ministry of Women and Social Welfare and other ministries dealing with infrastructure development, community development, employment generation, and poverty alleviation.

Collusion between politicians and traffickers: This results in poor political will to control the problem, enhanced by corruption and lack of gender sensitivity.

Negative official attitudes: The judicial system allows traffickers to operate with almost total impunity. Even when traffickers are convicted, judges tend to impose minimum sentences. Decision-makers throughout the judicial and police systems need training to improve their sensitivity and awareness. This would include public prosecutors, police officials, members of judicial and quasi-judicial bodies, and members of local governments. Although the Nepal police now cooperate with National and District Task forces, gender sensitization training would improve their enforcement effort, but only limited funding has been allocated for that purpose.

Inadequate legal and social protection for migrating women workers: Women who migrate to foreign countries for employment should be protected through strengthened administrative capacity in diplomatic missions abroad. The National Policy to Combat Trafficking fails to address this issue, and the National Labor Policy has no specific

provisions to protect women. The Foreign Employment Act restricts the rights of women to seek employment abroad, a violation of their human rights. Serious attention should be given to revising this flawed legislation. The government should strengthen its regulatory mechanisms both within Nepal and abroad.

Inconsistent definitions: A “child” as defined by the 1992 Children’s Act is age sixteen and under, while the 1992 Labor Act defines “child” as age fourteen and under. In other legislation and policy initiatives, definitions of the term “trafficking” vary, in some cases isolating the actual sale of victims from abuses that occur afterwards, such as forced prostitution and forced labor. Such inconsistencies complicate enforcement and judicial procedures, and need to be clarified in the relevant policies and legislation.

Ineffective NGO efforts: NGOs often lack adequate financial and technical resources, and fail to coordinate their efforts due to ideological differences.

Lack of Local Task Forces: Village and municipal task forces should be created to enhance the efforts of District Task Forces established in the areas most prone to trafficking.

Constitutional rights of HIV/AIDS victims are often violated: Although the 1990 Constitution protects human rights, the HIV/AIDS epidemic poses new legal, ethical and human rights issues for its victims. There is urgent need to strengthen the capacity of the National Center for AIDS and STD Control to address these issues and enact appropriate legislation to stop discrimination against HIV/AIDS victims and protect their privacy. This would include such measures as guaranteed confidentiality of HIV/AIDS testing, anti-discrimination policy and provisions to enable victims to remain in their communities.

Negative social attitudes: There is still deep prejudice against the victims of trafficking, due to widespread belief that they have willingly become prostitutes. More legal education and para-legal training programs are needed to help abolish this prejudice at the grassroots level.

The government must seek long-term solutions to the underlying economic and social causes of trafficking – widespread poverty, high female illiteracy, and widespread social discrimination against women: Protecting the human rights of women should be a key component of all government programs to reduce poverty, create jobs, promote balanced development, and improve educational opportunities.
