

ASIA PACIFIC LEGAL GUIDE: CHILD TRAFFICKING



**Baker
McKenzie.**

World Vision



3M



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ABOUT WORLD VISION END VIOLENCE AGAINST CHILDREN PROGRAM (EVAC)

The End Violence Against Children (**EVAC**) program is a five-year global initiative launched by World Vision to fortify protections, ignite community movements and eradicate violence against vulnerable children by 2021. Violence against children takes many forms that include, physical, sexual and mental violence, neglect or negligent treatment, maltreatment or exploitation, harm or abuse, commercial sexual exploitation, trafficking, child labor, cyber abuse and other harmful practices. Given that the Asia Pacific region faces an overwhelming number of children affected by violence, there remains a huge gap for these child victims to understand and access the law for their protection. According to data collected by the International Labour Organization¹, the Asia Pacific region contains the highest amount of working children in the world, representing a significant challenge for local communities to provide adequate support to these vulnerable children.

In line with the UN's Sustainable Development Goals and global CSR principles, World Vision and its corporate partners endeavour to provide essential protections and resources necessary to build new lives for affected children.

The Asia Pacific Legal Guides

Underpinned by a robust regional framework, the Asia Pacific offices of World Vision are committed to building long lasting relationships with the private sector and developing pragmatic solutions to combat violence against children. Based on these principles of cooperation, World Vision, Baker McKenzie and other prominent corporate clients are teaming together to develop a series of 6 Asia Pacific Legal Guides to educate community leaders and social workers in relation to core legal frameworks.

The Asia Pacific Legal Guides will confront the following themes:

- Child Trafficking
- Physical Violence
- Sexual Violence
- Child Marriage
- Child Neglect
- Psychological Abuse

¹ <http://www.ilo.org/ipcc/Regionsandcountries/Asia/lang--en/index.htm>



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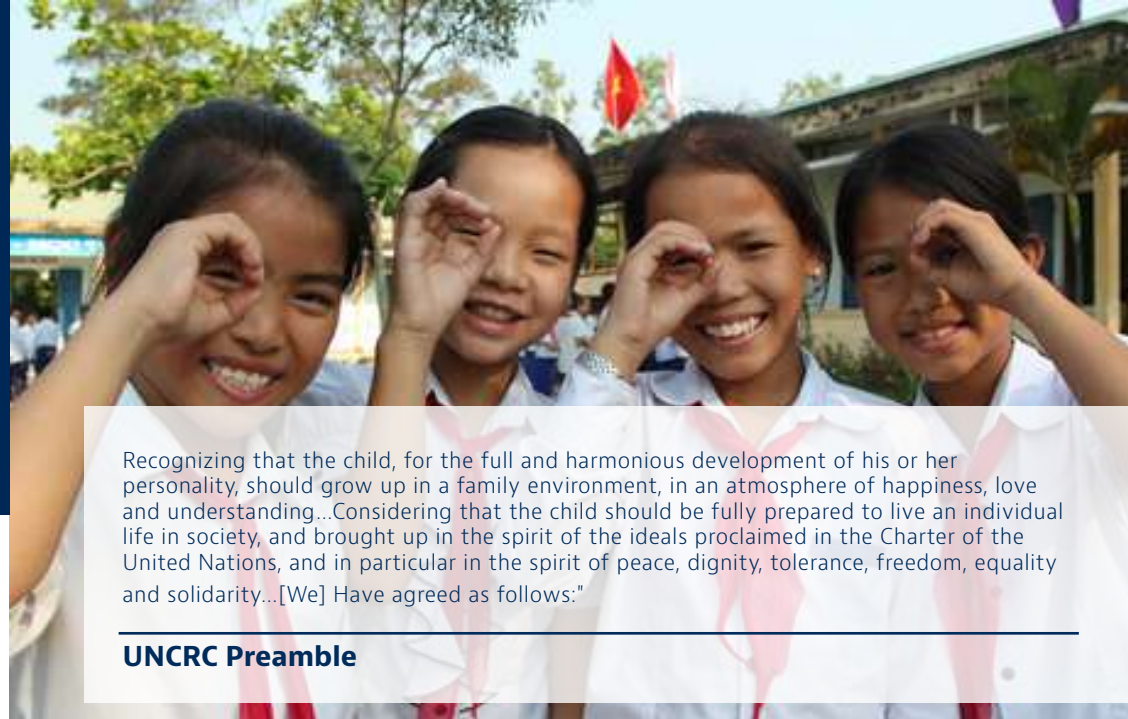
Child Trafficking Legal Guide Introduction

This Child Trafficking Legal Guide has been produced by Baker McKenzie, World Vision, State Street and 3M to support the End Violence Against Children Program. This first legal guide addresses frequently asked questions encountered by World Vision relating to protecting child victims of human trafficking in Australia, Hong Kong, Indonesia Japan, Malaysia, the Philippines, Singapore, Taiwan, Thailand and Vietnam. The objective is to empower and educate users as how to best navigate regulatory hurdles that may arise when assisting children affected by human trafficking.

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Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding...Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity...[We] Have agreed as follows:"

UNCRC Preamble

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"To positively impact the lives of millions of the most vulnerable boys and girls by 2021, making a significant contribution towards ending violence against children as a contribution towards achieving the Sustainable Development Goals."

- World Vision, EVAC Mission Statement

UN Convention on the Rights of the Child

The Asia Pacific Legal Guides are intended to benefit local communities within the region by breaking down legal barriers; however, without the robust support of governments to strengthen child protection mechanisms, children affected by violence would inevitably lack the resources to rehabilitate themselves and prosper into responsible members of society. In order to ensure that the human rights of children are protected, we call upon governments worldwide to align domestic laws and introduce legislation that adheres to the United Nations Convention on the Rights of the Child (UNCRC)² and its corresponding three optional protocols that include: (1) the Optional Protocol on the Involvement of Children in Armed Conflict (2002), (2) the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2002) and lastly, (3) the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2014). For more information on this human rights treaty, please refer to the United Nations Human Rights Office of the High Commissioner website at <https://www.ohchr.org/EN/Pages/Home.aspx>.

² <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

AUSTRALIA

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

A *child* is defined within the Australian Government's trafficking in persons legislation as being someone under the age of 18.

A *minor* also means someone under the age of 18 years.

2. Is there any specific legislation that deals with trafficking of children or minors?

Yes.

The *Commonwealth Criminal Code Act 1995 (the Criminal Code)* criminalises all trafficking-related activities. It includes the offences of:

- trafficking in children (in and out of Australia); and
- domestic trafficking in children.

Both offences have a maximum penalty of 25 years imprisonment.

There are also general provisions within the States and Territories criminal codes and legislation that are not specific to trafficking but allow the police in those states to act in circumstances including but not limited to children having been trafficked and forced to work in prostitution.

3. Is there a legal definition of child trafficking?

Yes.

The Criminal Code defines the offence of:

- trafficking in children (in and out of Australia) - section 271.4; and
- domestic trafficking in children - section 271.7.

A person commits these offences if:

- a person organises or facilitates:
 - the entry or proposed entry into Australia, or the receipt in Australia, of another person; or
 - the exit or proposed exit from Australia of another person; or
 - the transportation of another person from one place in Australia to another place in Australia; and
- the other person is under 18 years; and
- the first person intends that, or is reckless as to whether, the other person will be used to provide sexual services or will be otherwise exploited.

Exploitation is defined to occur in conditions of slavery, conditions similar to slavery, servitude, forced labour, forced marriage or debt bondage.

4. Is there legislation to impose a duty to provide shelter to children in need?

No.

However, a key component of Australia's anti-human trafficking strategy and the National Action Plan is the *Support for Trafficked People Program* which is administered by the Commonwealth Department of Social Services and delivered by the Australian Red Cross.

Once referred by the Australian Federal Police, under the Program children are entitled to a number of benefits for up to 90 days (longer, in cases of forced marriage) including secure accommodation, case management support, a living allowance, and access to health care, interpreters, legal services and migration advice.



5. In a criminal case in connection with trafficking of a child or minor:

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?

Anyone can report suspected child trafficking cases.

If someone is in immediate danger, contact the police on 000.

Otherwise, contact the Australian Federal Police on 131 AFP (237) or email AOCC-Client-Liaison@afp.gov.au.

In the case of child trafficking, consent of the child is not required when reporting to the Australian Federal Police.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

The Australian Federal Police.

In forced marriage cases:

- state departments responsible for child protection can apply directly to the Family Court or Federal Circuit Court for orders preventing a child being forced to travel to marry overseas.

In forced labour and work rights cases:

- Fair Work Ombudsman will refer criminal matters to the police;
- Fair Work Ombudsman may commence civil action against employers to recover unpaid wages or entitlements for the victim.

5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

For *child trafficking*, evidence that:

- the trafficked person is under 18 years;
- the alleged trafficker organised or facilitated the movement or proposed movement of the victim into or out of Australia, or from one place in Australia to another place in Australia; and
- the alleged trafficker intended that, or was reckless as to whether, the trafficked person would be used to provide sexual services or would be otherwise exploited (slavery, slavery-like conditions, servitude, forced labour, forced marriage and/or debt bondage).

Other evidence may include:

- use of coercion, threat, or deception;
- economic relationship;
- written or verbal agreements;
- victim's personal circumstances:
 - entitlement to be in Australia;
 - ability to speak, write, or understand English or other language;
 - social and physical dependence on alleged trafficker;
- provision of sexual services;
- exploitation such as slavery or slavery-like conditions, servitude, forced labour, forced marriage, or debt bondage;
- confiscation of travel or identity documents;
- cruel, inhuman, or degrading treatment;
- death or serious harm.



5.4 What are the protocols for interviewing a child victim?

There are no publicly available formal protocols for the interviewing of child trafficking victims by Australian Federal Police.

Best practice suggests that:

- the child should be interviewed by two police officers with appropriate training;
- a support person should be present during the interview;
- the child's privacy should be protected;
- the interview should be video recorded;
- the security and integrity of the recording must be maintained;
- if the matter is to be prosecuted, the child is referred to the Commonwealth Department of Public Prosecution's Witness Assistance Services (see below);
- the police should refer the child to the Australian Government's Support for Trafficked People Program which is run by the Australian Red Cross (see below).

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker:

a. Does such victim have the right to refuse?

No.

However before a child can give evidence, the Court must be satisfied that the child is competent to give evidence, which requires that the child:

- understands that they are under an obligation to give truthful evidence; and
- is able to understand the question that they are being asked

and can give an answer that can be understood.

b. Can such victim testify via video link from another room?

Yes.

Possible arrangements for a child to give evidence include:

- evidence by video link or CCTV;
- pre-recorded interviews;
- the use of screens;
- planned seating arrangements;
- holding the proceedings in private or excluding certain people from the court room;
- Victim Impact Statements may be read out on behalf of the victim after a trafficker has been convicted but before sentencing.

c. Can such victim provide testimony separately without a court appearance and return to the country of origin?

Victims may record their evidence and then return home before the hearing.

Victims may also record their evidence in their home country, provided the interview is conducted by police or other law enforcement officials

In these situations, victims must be available to be questioned in court about the video-recorded evidence. Questioning may be via video link.

d. What other means of protection are available to a child or minor testifying in court?

See response to Question 5.7 below



5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

The Office of the Commonwealth Director of Public Prosecutions' national Witness Assistance Service (WAS) is responsible for providing vulnerable victims of crime with information and support.

WAS may provide child witnesses with:

- information about court procedures, the legal processes and their role as a witness;
- case-specific information;
- support during meetings with prosecutors and in court;
- referral to support services such as counselling;
- liaison between the child and prosecutor;
- assessment of the child's need for special measures;
- support before, during and after the child's participation in judicial proceedings; and
- assistance and information concerning Victim Impact Statements.

Lawyers can prepare a witness for giving evidence but, for ethical reasons, cannot "coach" a witness or prepare their testimony.

5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does such victim need to appear in court?

On average, a victim is required to testify only once in court for the purpose of:

- providing evidence in chief (if it has not been pre-recorded);
- cross-examination; and
- re-examination.

In some circumstances, a victim may be required to return and give evidence in reply.

In circumstances where it is necessary to hold a new trial (eg: jury dismissed), a victim may be required to give evidence at the new trial.

5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

Before a child can give evidence, the Court must be satisfied that they are competent to give evidence, which requires that they:

- understand that they are under an obligation to give truthful evidence; and
- are able to understand the question that they are being asked and can give an answer that can be understood.

Australian legislation provides that the judge may:

- prevent inappropriate or aggressive cross-examination of the victim;
- make orders in relation to questioning of witnesses;
- allow the victim to give evidence by way of pre-recorded interview, and/or by video link/CCTV;
- hold the proceedings in private or exclude certain people from the court room;
- allow the victim to be accompanied by a support person when giving evidence;
- make orders to prevent publication of any material that would disclose the victims' identity.

Legislation also:

- prevents an alleged trafficker from using the defence that the victim consented to the trafficking;



- makes it an offence to publish material which identifies a child witness.

5.9 Who supports the victim during the criminal case proceedings?

Victims may receive support from various sources.

- Australian legislation provides that, during the trial process, the child may choose an adult to accompany them while they give evidence.
- The Commonwealth Director of Public Prosecutions' Witness Assistance Service is responsible for providing vulnerable victims of crime with information and support during the trial process (see Q 5.5 above). It is mandatory for prosecutors to refer child trafficking victims to the Witness Assistance Service.
- The Australian Government's Support for Trafficked People Program provides assistance to victims of child trafficking. Case managers may organise support and counselling; secure accommodation; medical treatment; referral to legal and migration advice; and skills development training including English language classes and vocational guidance. The Program is delivered by the Australian Red Cross.
- Various non-governmental organisations also offer support. Eg: The Salvation Army's Freedom Partnership.

6. In a civil case:

6.1 Whether the local World Vision organisation, which provides shelter to a trafficked child or minor may be regarded as the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

Guardianship

World Vision would not be regarded as the guardian of a child trafficking victim simply because it provides shelter to the child.

In Australia, a *person* wishing to be appointed guardian of a child must make an application to the appropriate court for guardianship. The application process and criteria differ between jurisdictions.

If the child arrives in Australia and does not have a parent or close relative, the Minister for Immigration is usually the child's guardian until they leave Australia or turn 18 years.

Civil compensation proceedings

World Vision could assist *find* a lawyer to assist a child trafficking victim. Usually, the child's guardian would be involved in *appointing* a lawyer.

In Australia, children may not commence or carry on proceedings except by their 'tutor' or 'litigation guardian'. The rules surrounding litigation representatives differ between jurisdictions. Litigation representatives must be competent adults and may be liable for adverse costs orders in court proceedings.

Provided that an appropriate litigation representative is appointed, a child victim can sue the alleged trafficker for compensation, or to recover unpaid wages and entitlements.

Further, the Fair Work Ombudsman may commence civil action against the trafficker to recover unpaid wages and entitlements for the child victim.



6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

In Australia children cannot commence legal proceedings except by their '*litigation guardian*' or '*tutor*'.

The rules of the various Courts set out who may be a '*litigation guardian*' or '*tutor*'. For example, they must have legal capacity and not have adverse interests to the child.

Subject to those Court rules, a child's guardian could be the child's '*litigation guardian*' or '*tutor*'.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

Yes UNLESS the criminal case is brought under the *Migration Act*.

In some circumstances, the Court must or may stay the civil proceedings if there are criminal proceedings running at the same time (eg: applications for compensation under the *Fair Work Act*).

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

This depends on the source of compensation.

For court-ordered compensation, the judge decides the amount.

For statutory victim compensation schemes, the amount of compensation varies depending upon:

- the type of harm or injury;
- the maximum awards prescribed by the statute (varies from AU\$10,000 to AU\$100,000 depending on the state where the offence took place)

A national scheme requiring co-operation across states and territories to provide compensation for victims of slavery and

people trafficking is currently being considered by the Australian Government.

7. How long can a trafficked victim stay in a shelter?

A victim may stay in a shelter as long as the victim has a valid visa to remain in Australia, provided that the shelter will accommodate the victim.

The time and circumstances under which a child can leave a shelter and return home will depend upon the circumstances of each case.

Under the Human Trafficking Visa Framework, a child trafficking victim may be granted a Bridging F visa which:

- is valid for 45 days and may be extended for a further 45 days;
- allows the victim to access the Australian Government's Support for Trafficked People Program, which provides support services, including secure accommodation and living allowances.

For a 12 month trial period, commencing on February 2018, victims of forced marriage can now access up to a further 110 days of support through the Support for Trafficked People Program, without having to participate in a criminal justice process.

For all other trafficking victims, upon expiry of the Bridging F visa, the victim cannot remain in Australia unless they have a new visa.

Where a trafficked victim contributes to an investigation or prosecution of a human trafficking related offence, the person may be eligible for a further temporary visa or a permanent Referred Stay visa, if they would be in danger if returned to their home country.

Where a trafficked victim applies for asylum in Australia, that person may move to a temporary bridging visa while applying for asylum or appealing a decision relating to their visa.



The Australian Federal Police are involved in identifying the child's family.

Whether it is appropriate for the child to be reunited with the family, will depend upon the circumstances of each case. (For example: who was responsible for the trafficking?)

If the child is to be reunited with their family, the Trafficking Team within the Department of Immigration, Citizenship and Multicultural Affairs will assist with visa arrangements if it is appropriate for the family to be brought to Australia.

8. **Can a trafficked victim be allowed to receive education while staying in the shelter?**

Yes. Educational opportunities, including English language classes, are available under the Australian Government's Support for Trafficked People Program.

Other specialist non-governmental organisations may also be able to organise education for trafficking victims.

9. **Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?**

No.

- If the child arrives in Australia and does not have a parent or close relative, the Minister for Immigration is usually the child's guardian until they leave Australia or turn 18 years.
- The Minister may delegate some or all of his/her powers and functions as guardian to Commonwealth officers, or officers of a State/Territory child welfare agency.
- As their guardian, the Minister (or his/her delegate) should refer the child to a lawyer/migration agent for assistance to apply for asylum.

- The child is the applicant for the purpose of seeking asylum.
- Applying for asylum in Australia is not easy. Assistance from a migration agent is recommended and the provisions of the *Migration Act 1958 (Cth)* apply.
- Essentially, subject to health and security issues, to successfully apply for asylum it is necessary to show that:
 - the child has a real chance of being seriously harmed in their country of nationality because of their ethnicity, religion, political opinion, nationality or membership of a particular social group;
 - nobody in the child's home country (including the authorities) can protect them from that harm;
 - they will not be safe in any other part of their home country.
- The child may also qualify for asylum if they satisfy the 'complementary protection' test, ie: there is a real risk that the child will suffer significant harm if they are returned to their home country.

10. **Where can World Vision look for pro bono legal services to help a trafficked victim?**

- Baker McKenzie
- For free migration law advice - Immigration Advice & Rights Centre
- For assistance to apply for asylum in Australia - specialist asylum seeker and refugee community legal centres such as Refugee Advice & Casework Service (NSW) and Refugee Legal (Victoria)
- For assistance to recover unpaid wages and entitlements - Fair Work Commission
- State and Territory Law Societies

HONG KONG

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

Depending on the situation, the definition of a “child” varies from Ordinance to Ordinance.

The Prevention of Child Pornography Ordinance (Cap. 579) defines “child” as a person under the age of 16 while the Juvenile Offender Ordinance (Cap. 226)¹ defines “child” as a person under the age of 14.

For the purpose of granting “vulnerable witness” status in court proceedings, section 79A of the Criminal Procedure Ordinance (Cap. 221) defines a “child” as a person who is under 17 years of age, and under 14 years of age in the context of any offence other than sexual abuse.

The Crimes Ordinance (Cap. 200) does not define “child” but categorises certain crimes by reference to age.

The Employment Ordinance (Cap. 57) defines a “child” as a person under the age of 15 years.

Under the United Nations Convention on the Rights of the Child, a “child” is defined as a human being below the age of 18, unless the age of majority is attained earlier, under a law applicable to the child².

Under the Interpretation and General Clauses Ordinance (Cap.1)³ an “infant” or “minor” means a person who has not attained the age of 18.

2. Is there any specific legislation that deals with trafficking of children or minors?

There is no specific legislation in Hong Kong that deals with the trafficking of children or minors. There are, however, various provisions relating to prostitution, immigration, employment, and physical abuse under which trafficking crimes may be prosecuted⁴, namely:

- Crimes Ordinance (Cap. 200) (“CO”)
 - Trafficking in persons to or from Hong Kong for the purpose of prostitution (section 129 of CO)
 - Controlling, or directing of a person for the purpose of prostitution or unlawful sexual intercourse (section 130 of CO)
 - Procuring a person to engage in prostitution or commercial sex acts (section 131 of CO)
 - Procurement of a girl under the age of 21 to have unlawful sexual intercourse in Hong Kong, or elsewhere (section 132 of CO)
 - Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl or boy under 16 (section 135 of CO)
 - Living on earnings of prostitution of others (section 137 of CO)
 - Use, procurement or offer of persons under 18 for making pornography or for live pornographic performances (section 138A of CO)
 - Permitting a girl or boy under 13 to resort to or be on premises or vessel for intercourse (section 140 of CO)
 - Permitting a young person to resort to or be on premises or vessel for intercourse, prostitution, buggery or homosexual act (section 141 of CO)

¹ The Ordinance deals with offenders below the age of 16, which restricts punishment on children and young persons.

² <https://www.unicef.org/what-we-do/un-convention-child-rights/>

³ The Ordinance is used to consolidate and amend the law relating to the construction, application and interpretation of laws, to define terms and expressions used in laws and public documents, etc.

⁴ <https://www.state.gov/documents/organization/282801.pdf>



- Protection of Children and Juveniles Ordinance (Cap. 213) ("**PCJO**")
 - Unlawful abduction of child or juvenile (section 26 of PCJO)
 - Powers of detention of children or juveniles in a place of refuge, or to protect children and juveniles from moral or physical danger (sections 34E and 35 of PCJO)
- Prevention of Child Pornography Ordinance (Cap. 579) ("**PCPO**")
 - Printing, making, producing, reproducing, copying, importing or exporting, advertising or possessing child pornography (section 3 of PCPO)
- Employment Ordinance (Cap. 57) ("**EO**")
 - Failure to grant any rest days to employees (section 63 of EO)
 - Non-payment/under-payment of wages or delay in payment of wages (section 63C of the EO)⁵
- Human Organ Transplant Ordinance (Cap. 465) ("**HOTO**")
 - Prohibition of commercial dealings in human organs (section 4 of HOTO)

To enhance prosecutors' awareness of trafficking in persons ("**TIP**"), the Prosecution Code published in 2013 by the Department of Justice introduced a new paragraph on "Human Exploitation Cases"⁶. It provides guidance to prosecutors as to what may amount to TIP by reference to the United Nations TIP Protocol's definition of trafficking and exploitation, as well as the proper approach to be adopted in such cases.

Additionally, the Hong Kong Police Force ("**Police Force**"), Immigration Department and Customs and Excise Department have put in place enhanced mechanisms for TIP victim screening

and identification⁷. The Labour and Welfare Bureau has also established a 24 hour hotline which is available for trafficking victims to receive crisis support counselling and assistance with referral to authorities or services⁸.

3. Is there a legal definition of child trafficking?

Hong Kong law does not provide a clear-cut definition for 'child trafficking'⁹.

While there is no specific legislation criminalising human trafficking (including child trafficking), the Hong Kong Bill of Rights ("**Bill of Rights**") provides that:

- No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
- No one shall be held in servitude.
- No one shall be required to perform forced or compulsory labour.

Under international law, child trafficking is a crime involving the organised movement of a child for the purposes of their exploitation.

4. Is there legislation to impose a duty to provide shelter to children in need?

The duty to provide any shelter to a child at risk is not by virtue of legislation but by court order. The court has the power and discretion to grant orders to provide protection and accommodation for a child at risk. Under the **PCJO**, child victims

⁵ Pursuant to the Employment of Children Regulations (Cap. 57B) sections 5 and 6, children are employable subject to certain requirements relating to age, type of work and parental or guardian consent.

⁶ <https://www.doj.gov.hk/eng/public/pdf/2014/pdcode1314e.pdf>

⁷ <http://www.info.gov.hk/gia/general/201706/21/P2017062100698.htm>

⁸ https://www.lwb.gov.hk/eng/press/21032018_4.htm

⁹ There are no Hong Kong cases relating to child trafficking so far nor any cases which provides for a definition of "child trafficking"



of trafficking may be admitted to three refuge centers¹⁰. One refuge center is operated by an NGO while the other two are operated by the Social Welfare Department. In most instances, a child victim has to be referred by social workers to gain admittance into a refuge center¹¹.

5. In a criminal case in connection with trafficking of a child or minor,

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?

Any victim or any person, that is aware of any suspected human trafficking offence, may file a report with the Police Force.

Due to the criminal nature of human trafficking, suspected offenses should be directly reported to law enforcement agencies such as the Police Force or the Security Bureau¹². That said, suspected instances of human trafficking may also be reported to various government departments such as the Immigration Department, the Social Welfare Department and the Labour and Welfare Bureau for handling, but it is expected that these departments will ultimately forward such reports to the aforementioned law enforcement agencies.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

Generally only law enforcement agencies are authorized to file a criminal case directly with the prosecutor. However, whether the prosecutor decides ultimately to pursue a case depends on the

circumstances of the case and the sufficiency of evidence¹³.

5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

Hong Kong does not have any standalone legislation that specifically prohibits trafficking in persons to the same extent as set out under the Palermo Protocol. Instead, it relies on a combination of ancillary legislations to build cases against trafficking offences¹⁴. Accordingly the type of evidence required will depend on the elements of the specific offence alleged as set out under the respective Ordinances.

For example, to prosecute a person (i.e. a trafficker) for trafficking persons to or from Hong Kong for prostitution, the following elements must be proven:

- the trafficker's participation in bringing another person into or out of Hong Kong;
- the trafficker's purpose of such transportation is for prostitution; and
- the trafficker's knowledge of such purpose¹⁵.

Furthermore, any prosecution case must be supported by legally sufficient evidence. The test for sufficiency is whether the evidence (being reliable and admissible to court, together with any reasonable inferences) demonstrates a reasonable prospect of conviction¹⁶. The standard of proof (i.e. evidential threshold) required to secure a criminal conviction is beyond a reasonable doubt¹⁷.

¹⁰ Under Cap. 213B Protection of Children and Juveniles (Places of Refuge) Order, the three places of refuge are the Po Leung Kuk, Tuen Mun Children and Juvenile Home, Po Leung Kuk Wing Lung Bank Golden Jubilee Sheltered Workshop and Hostel.

¹¹ https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_temporarys/

¹² https://www.police.gov.hk/ppp_en/t1_useful_info/trafficking.html

¹³ Section 5 of the Prosecution Code; <https://www.doj.gov.hk/eng/public/pdf/2014/pdcode1314e.pdf>

¹⁴ E.g. Crimes Ordinance, Immigration Ordinance, Offences against the Person Ordinance, Employment Ordinance, etc

¹⁵ Crimes Ordinance (Cap. 200), section 129

¹⁶ Hong Kong (SAR) Department of Justice, Prosecution Code 2013 page 15

¹⁷ Beyond a reasonable doubt" refers to evidence or proof that is of such convincing character that a reasonable person would not hesitate to rely on or act upon it.



5.4 What are the protocols for interviewing a child victim?

Hong Kong does not have any specific guidelines or protocols tailored for interviewing child victims of trafficking. However, the Social Welfare Department which often conducts joint investigations and interviews with the Police Force has an interview protocol which is generally applicable to any child involved in an alleged offence involving assault, injury or cruelty, or the threat of any assault, injury or cruelty¹⁸.

The child's welfare is always the paramount concern and takes precedence over the criminal prosecution of any alleged perpetrator¹⁹. Once it becomes clear that a criminal offence may have been committed and the investigator has agreed to interview the child through video, careful steps should be taken in conducting the interview to minimize the stress on the child, such as:

- obtaining parental or guardian consent to conduct the interview. If no consent is obtained, reasons for not obtaining it should be recorded;
- conducting interviews in sympathetically designed suites which are equipped with video / audio equipment;
- assessing the child's ability to communicate;
- giving consideration to who conducts the interview (as children respond differently to different people); and
- conducting the interview in a phased approach²⁰.

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker,

a. does such victim have the right to refuse?

Yes, a victim may refuse the prosecutor's request to testify as a witness.

Generally, all witnesses, including a trafficked victim, will be called upon by the court if they are likely to have material evidence²¹. If a witness is unlikely to comply with the court summons, the prosecutor may make an application to the court to order the victim to testify by issuing a warrant for the witness' arrest²². However, the court will not issue such arrest warrants lightly and will first consider whether or not the evidence sought is critical to the case concerned, when determining whether to issue such a warrant²³.

If a victim fails to testify, it may have an adverse impact on the prosecution.

b. can such victim testify via video link from another room;

Yes, provided the trafficked victim qualifies as a 'witness in fear', the court may, either on application by the victim or on its own volition, allow such victim to give evidence by way of a live television link subject to conditions as the court considers appropriate in the circumstances²⁴.

A witness qualifies as a 'witness in fear' if the court hearing the evidence is satisfied on reasonable grounds, that the witness is apprehensive as to his/her own safety or to the safety of any family member, if he/she gives evidence²⁵.

c. can such victim provide testimony separately without a court appearance and return to the country of origin;

Yes, such victim may provide testimony separately without a court appearance by providing (i) a pre-recorded video of an

¹⁸ Social Welfare Department: Procedural Guide for Handling Child Abuse Cases (2015), page 98-107

¹⁹ Social Welfare Department: Procedural Guide for Handling Child Abuse Cases (2015), page 94; Guardianship of Minors Ordinance (Cap. 13), section 3(1)

²⁰ Social Welfare Department: Procedural Guide for Handling Child Abuse Cases (2015), Appendix XIV

²¹ Section 34, Criminal Procedure Ordinance (Cap. 221); Section 21, Magistrates Ordinance (Cap. 227).

²² Section 37, Criminal Procedure Ordinance (Cap. 221); Section 21, Magistrates Ordinance (Cap. 227).

²³ *R v Bradford JJ, Ex p Wilkinson* 91 Cr App R 390, contained in 8-19 of Archbold (2018)

²⁴ Criminal Procedure Ordinance (Cap. 221), section 79B(4)

²⁵ Criminal Procedure Ordinance (Cap. 221), section 79B(1)



interview, (ii) a deposition or (iii) conduct an interview via live television link from outside of Hong Kong.

Provided that leave (i.e. permission) is obtained from the court:

- i. a pre-recorded video recording of an interview with a child victim may be admitted into evidence²⁶;
- ii. a deposition in writing may be taken from a child victim by a magistrate in respect of proceedings where (a) for good reason it is unavoidable that a trial cannot be heard without delay, or (b) exposure to a full trial would endanger the physical or mental health of the child²⁷; and
- iii. a party to a criminal case (other than the defendant) may give evidence to the court by way of a live television link from a place outside of Hong Kong, subject to the following considerations: (a) whether the person concerned is actually in Hong Kong, (b) whether the evidence can be more conveniently given in Hong Kong; (c) whether there are any measures to ensure that the person concerned is giving evidence without coercion; and (d) whether it is in the interests of justice to do so²⁸.

d. what other means of protection are available to a child or minor testifying in court.

To reduce the trauma of giving evidence, a child's evidence in criminal proceedings must be given unsworn²⁹. Hong Kong law provides that any evidence given by a child (despite being unsworn) is capable of corroborating the testimony of another person³⁰ and age alone is not a sufficient basis to exclude the

unsworn evidence of a child³¹. Furthermore, a deposition of a child's unsworn evidence may be taken for the purpose of criminal proceedings as if that evidence had been given on oath.

Additionally, subject to the court's approval (which is usually given in proceedings involving children or minors), any testimony provided via video recording or deposition by children or minors may be admitted as evidence³². Evidence admitted in such a manner generally stands as direct evidence and the child may not be questioned in-chief (i.e. questioned in a courtroom setting) on any matter which in the court's opinion has been adequately dealt with in the recordings or depositions³³.

5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

A trafficked victim is normally briefed by a prosecutor on court processes and layout before the scheduled court date as all victims are entitled to have their role in the proceedings fully explained and are to be consulted during the course of the proceedings. However, training and coaching are strictly prohibited in the preparation of a victim's testimony, which includes providing a summary of the witness' statement³⁴.

Should there be any evidence to suggest the presence of coaching, the court retains the power to direct that a part of the evidence to be excluded (including parts of pre-recorded videos and depositions)³⁵.

26 Criminal Procedure Ordinance (Cap. 221), sections 79C and 79D

27 Criminal Procedure Ordinance (Cap. 221), section 79E

28 Criminal Procedure Ordinance (Cap. 221), section 79I

29 Evidence Ordinance (Cap. 8), section 4

30 Evidence Ordinance (Cap. 8), section 4

31 DPP v M [1997] 2 WLR 604

32 Criminal Procedure Ordinance (Cap. 221), sections 79C(7), 79D and 79E(8)

33 Criminal Procedure Ordinance (Cap. 221), sections 79C(7), 79D and 79E(8)

34 HKSAR v Lee Wing Kan [2007] 3 HKC 368; Archbold Hong Kong (2018), page 766

35 Criminal Procedure Ordinance (Cap. 221), sections 79D and 79E(9)



5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does such victim need to appear in court?

Yes. Typically, if a trafficked victim accepts a request to testify, then he/she is usually called to appear in court at least once.³⁶ Generally, any trafficked victim giving testimony should also be prepared to make a second appearance in court as defendants often want to cross-examine the testimony of such victims.

In the case of a child victim giving evidence, the court's approval is usually required in order to make a request for such child victim to make a second appearance in court³⁷.

5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

Under the Victim's Charter and the Statement on the Treatment of Victims and Witnesses, a trafficked victim who is a child or a minor, as a witness in a criminal proceeding has a range of rights such as privacy and confidentiality³⁸. To that end, video links, video recordings and depositions as discussed in questions 5.4(b) to (c) above are commonly used. Additionally, the names and identities of child victims are almost never disclosed.

Child victims should be informed of their right to ask for protection and be informed about the witness protection program of the Police Force³⁹. To qualify for the witness protection program the child victim must, as a minimum, cooperate by providing evidence and obtain consent from

a parent or guardian⁴⁰. Where appropriate, child victims are also provided with medical care throughout a proceeding, and where it helps (such as in cases of sexual assault or abuse), law enforcement agencies will put such victims in touch with the appropriate agency (whether medical, social or any other kind of assistance) and remain in touch with the victims for as long as is reasonably required⁴¹.

5.9 Who supports the victim during the criminal case proceedings?

During criminal proceedings, a victim will be supported by the Department of Justice as prosecutors must guide them through the court process. Legal aid, the Duty Lawyer Scheme and relevant NGOs may also provide further support in the form of advice, information and shelter (in the case of NGOs).

Where the witness is a child, a 'support person' may also be present with the permission of the court to provide emotional support. The support person may not be a witness in the case and may not be directly involved in the investigation of the case. Judges will typically warn the support person not to prompt or seek to influence the child witness in any way⁴².

If victims are able to make an application under the Unified Screening Mechanism (as discussed in question 9 below) for a claim of torture, cruel, inhumane or degrading treatment or punishment, deprivation of the right to life or risk of persecution, the victim may be eligible for financial assistance in the form of a monthly rental allowance of HK\$ 1,500 and a monthly food allowance of HK\$ 1,200⁴³.

Victims may also be financially compensated for their cooperation with the prosecutor. Compensation under statute

36 End Trafficking in Persons - AP Legal Guide 2016, page 27

37 Criminal Procedure Ordinance (Cap. 221), sections 79D and 79E(8)

38 The Victim's Charter outlines the rights and duties of victims, and the standard of service that they can expect to receive from professionals working in the criminal justice system. However, the Charter is not a binding document: https://www.doj.gov.hk/eng/public/pdf/vcc_e.pdf

39 The Victims Charter, Article 8 - The victim's right to seek protection https://www.police.gov.hk/ppp_en/04_crime_matters/vic_charter.html

40 Witness Protection Ordinance (Cap. 564), sections 2 and 4

41 The Victims Charter, Article 11 - The victim's right to support and after-care https://www.police.gov.hk/ppp_en/04_crime_matters/vic_charter.html

42 Practice Direction 9.5; R v Chan Wai [1994] 2 HKCLR 75

43 <http://www.unhcr.org/hk/en/2675-usm-procedures-2.html>



and the Criminal and Law Enforcement Injuries Compensation Scheme ("**Injuries Compensation Scheme**") may be available. Compensation payable by a convicted trafficker to victims for personal injury and/or loss or damage to property suffered by the victims may also be available. Furthermore, subject to fulfilling eligibility requirements, the Injuries Compensation Scheme may also provide monetary compensation to victims if the victim's injury resulted from a crime of violence, such as assault, robbery, theft, burglary, murder, rape, or sexual assault⁴⁴.

6. In a civil case in connection with trafficking of a child or minor,

6.1 Whether the local World Vision organisation, which provides shelter to a trafficked child or minor may be regarded as the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

Yes, World Vision may apply to the court to be appointed as the guardian of the child or minor⁴⁵. The court is empowered, as it thinks fit, to commit the care of the child, to any person who is willing to undertake the care of the child or to any institution which is willing to do so⁴⁶.

If World Vision obtains court approval to be appointed as the guardian of the child or minor, then it may appoint a lawyer on behalf of the child or minor in order to pursue compensation in a civil proceeding.⁴⁷

6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

A child or a minor may not independently commence civil proceedings in his/her own capacity⁴⁸. However, a child's guardian or "next friend" may file a civil complaint on behalf of the child.⁴⁹ The term "next friend" refers to someone (i.e. a parent or relative) who represents another person that is unable to bring a lawsuit in his/her own capacity, such as a child or minor.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

Yes, however the defendant (i.e. traffickers) may apply to have the civil proceedings stayed (i.e. put on hold) pending the outcome of the criminal proceedings⁵⁰.

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

The amount of damages recoverable will vary depending on what specific civil claim the victim has made and as determined by the court. Typically, such compensation can include loss of earnings and non-pecuniary damages (such as pain, suffering and loss of amenity)⁵¹.

44 End Trafficking in Persons - AP Legal Guide 2016, page 25

45 Re G (A Minor) [2018]; Guardianship of Minors Ordinance (Cap. 13), sections 8D(2) and 8G

46 Section 34, The Protection of Children and Juveniles Ordinance (Cap. 213); Guardianship of Minors Ordinance (Cap. 13), sections 8D(2) and 8G

47 The Rules of the High Court (Cap. 4A), Order 80, r. 2.

48 The Rules of the High Court (Cap. 4A), Order 80, r.2; A 'minor' means any person who has not attained the age of 18.

49 Re G (A Minor) [2018] - at [2] - a "next friend", who was the Chief operating officer of Pathfinders, a charitable organisation, issued court proceedings in this case.

50 End Trafficking in Persons - AP Legal Guide 2016, page 28

51 End Trafficking in Persons - AP Legal Guide 2016, page 29; Note: the Victims Charter, Article 12, empowers victims to lodge civil proceedings in appropriate circumstances, and seek compensation under the Criminal and Law Enforcement Injuries Compensation Scheme: <https://www.elegislation.gov.hk/hk/cap57>. Further, if the circumstances allow, a victim could make a civil claim under the Employment Ordinance (Cap. 57). Specifically, under the 'failure to grant any rest days to employees' (section 63) or 'non-payment/under-payment of wages or delay in payment of wages (section 63C) sections: <https://www.elegislation.gov.hk/hk/cap57>. Pursuant to the Employment of Children Regulations (Cap. 57B) sections 5 and 6, children are employable subject to certain requirements relating to age, type of work and parental or guardian consent.



7. How long can a trafficked victim stay in a shelter?

Shelters will generally take in any child victim in need and the accommodation periods for each shelter will vary depending on the particular needs of the child.

For example, some criteria of well-known Hong Kong shelters are as follows:

Shelter	Criteria	Length of Stay
Po Leung Kuk Newcomer's Ward	Boys and girls under the age of 18	Maximum of 6 months
Tuen Mun Children and Juvenile Home	Boys and girls aged 8 to under 18	Unspecified.
Wing Lung Bank Golden Jubilee Sheltered Workshop and Hostel	Mentally and/or physically disabled boys and girls aged 8 to under 18	Unspecified.

7.1 Who is responsible for tracking down the guardians/family of trafficked victims? Who supports the trafficked victim's family to visit Hong Kong? At what point and under what circumstances can a child leave the shelter and return home?

Where a child has been identified as a trafficked victim and the whereabouts of his/her guardian or family is unknown, the Police Force will first make attempts to search for the victim's guardian or family members through mediums such as newspaper and radio (even if the child is from another country outside of Hong Kong). If the Police Force's search attempts are unsuccessful and no person or agency applies for guardianship of the child, the Social Welfare Department will apply to the court for guardianship of the child, locate a suitable shelter for the child and continue searching for the child's family.

In the event someone claims to be the child's guardian or family

member, the identity of the claimant must be verified through an in-person interview. The claimant (i.e. guardian or family member) is responsible for arranging his/her own travel expenses to attend the interview. The Social Welfare Department will only relinquish its care of the child if, following the in-person interview, (a) it can verify the claimant's identity, and (b) it is satisfied that the claimant is in fact the guardian or family member of the child⁵².

8. Can a trafficked victim be allowed to receive education while staying in the shelter?

Yes, provided a trafficked victim is entitled to remain in Hong Kong, there is no legislation to prevent such victim from receiving education while staying in a shelter.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

Yes, provided that World Vision has been appointed as the guardian of the minor it may apply for asylum on behalf of the trafficked victim⁵³.

⁵² Social Welfare Department, Cross-boundary and Inter-country Social Service, https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_2724/

⁵³ Guardianship of Minors Ordinance (Cap. 13), sections 8D(2) and 8G



9.1 Under what conditions can trafficked victims apply for asylum?

Hong Kong has instituted a 'Unified Screening Mechanism' to screen and determine all claims for non-refoulement protection (including asylum) lodged by any person who may be put in harm's way if removed or deported to his/her country of origin. Circumstances that qualify as being put in harm's way are limited to the following⁵⁴:

- 'torture' as defined under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁵;
- torture or cruel, inhuman or degrading treatment or punishment as set out under Article 3 of the Bill of Rights⁵⁶;
- deprivation of the right to life as set out under Article 2 of the Bill of Rights⁵⁷; and/or
- risk of persecution as defined by the 1951 Refugee Convention ("**Refugee Convention**") with reference to humanitarian considerations⁵⁸.

Although the Refugee Convention does not directly apply to Hong Kong, the Hong Kong Court of Final Appeal ruled in the case *C & Ors v the Director of Immigration*, that the director of immigration must take humanitarian considerations in account when exercising its power of removal or deportation⁵⁹.

10. Where can World Vision look for pro bono legal services to help a trafficked victim

There is no legislation stipulating that victims residing in Hong Kong must be provided with free legal counsel, however, there are a variety of aid options available to victims. Examples include the Hong Kong Law Society's Free Legal Consultation Service, Duty Lawyer Scheme, Bar Free Legal Service Scheme and the Justice Centre⁶⁰.

A draft bill to criminalise human trafficking and modern slavery in Hong Kong has been tabled. The main purposes of the bill are:

- to give effect to Article 4 of the Bill of Rights by prohibiting slavery and slave-trade in all their forms, forced labour, domestic servitude and human trafficking;
- to give effect to Article 1 of the Supplementary Convention on the Abolition of Slavery of 1957 by prohibiting forced marriage; and
- to provide protection for slavery or trafficking victims.⁶¹

If the bill comes in, it will have a large impact on the relevance of information contained in this document.

A link to the Explanatory Memo: <https://www.legco.gov.hk/yr17-18/chinese/panels/se/papers/secb2-765-1-ec.pdf>

54 Unified Screening Mechanism Procedures; <https://www.unhcr.org/hk/en/2675-usm-procedures-2.html>; https://www.immd.gov.hk/eng/useful_information/non-refoulement-making-claim.html.

55 Immigration Department - Notice to Persons Making a Non-refoulement Claim, section 9.

56 Immigration Department - Notice to Persons Making a Non-refoulement Claim, section 10.

57 Immigration Department - Notice to Persons Making a Non-refoulement Claim, section 10.

58 Immigration Department - Notice to Persons Making a Non-refoulement Claim, sections 6 and 13; *Ubamaka v the Secretary for Security* [2013] 2 HKC 75.

59 Immigration Department - Notice to Persons Making a Non-refoulement Claim, section 6; *C & Ors v the Director of Immigration and Another* [2013] 4 HKC 563

60 End Trafficking in Persons - AP Legal Guide 2016, page 29; https://www.hklawsoc.org.hk/pub_e/pro-bono/; Other services can be found at: <http://www.choosehklawyer.org/>; <http://www.dutylawyer.org.hk/en/duty/duty.asp>; <https://hkba.org/zh-hant/content/bar-free-legal-services-scheme>; <http://www.justicecentre.org.hk/free-legal-services-for-refugees/>

61 <https://www.legco.gov.hk/yr17-18/chinese/panels/se/papers/secb2-765-1-ec.pdf>

INDONESIA

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

Indonesian law does not differentiate between the definition of a *child* and a *minor*

Under Law No. 21 of 2007 on the Eradication of the Criminal Act of Trafficking in Persons ("**Human Trafficking Law**"), and Law No. 23 of 2002 (as amended by Law No. 35 of 2014) on Child Protection ("**Child Protection Law**") a *child/minor* is defined as a person under the age of 18 years old, including an unborn baby.

2. Is there any specific legislation that deals with trafficking of children or minors?

Yes.

In general human trafficking, including the trafficking of adults is regulated under the Human Trafficking Law.

The Human Trafficking Law provides that anyone who commits human trafficking (see definition in para 3 below) is subject to penalty of imprisonment of at least three years up to 15 years and fines in the amount of at least 120 million Rupiah up to 600 million Rupiah.

For human trafficking that is committed against children, the Human Trafficking Law stipulates that the offenders are subject to an additional penalty of 1/3 (one-third) of the total penalty.

The Child Protection Law also provides that anyone who is involved in child trafficking is subject to penalty of imprisonment of at least three years up to 15 years and fines in the amount of at least 60 million rupiah up to 300 million Rupiah.

3. Is there a legal definition of child trafficking?

Indonesian law does not have a specific definition of child trafficking. The Human Trafficking Law defines human trafficking/ trafficking in persons as follows:

"the recruitment, transportation, harboring, sending, transfer, or receipt of a person by means of threat or use of force, abduction, incarceration, fraud, deception, the abuse of power or a position of vulnerability, debt bondage or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, whether committed within the country or cross-border, for the purpose of exploitation or which causes the exploitation of a person."

Any conduct that fulfils the definition above, involving a child (as defined in para 1) will qualify as child trafficking.

4. Is there legislation to impose a duty to provide shelter to children in need?

Yes.

The Child Protection Law was issued to guarantee the fulfilment of child rights so that they are able to live, grow, develop and participate optimally as human beings, and to receive protection from violence and discrimination.

Article 59 of the Child Protection Law stipulates that the Government, Regional Government, and other state institutions have the obligation and responsibility to provide special protection to children.

The special protection for children includes protection for children who are victims of child trafficking.

The special protection of children is given in the form of:

- a. Immediate handling, including physical and psychological



treatment and/or rehabilitation, and prevention of diseases and other health issues.

- b. Psychosocial assistance during treatment until recovery.
- c. Provision of social assistance for children from poor families.
- d. Providing protection and assistance to every judicial process.

More specifically, for victims of child trafficking, the special protection to children is done through the efforts of supervision, protection, prevention, care and rehabilitation.

5. In a criminal case in connection with trafficking of a child or minor:

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?

Anyone is able report to the relevant authorities if they suspect or have information of any conduct of child trafficking.

Such reports can be made directly to the Indonesian National Police and the Indonesian Commission for the Protection of Children (*Komisi Perlindungan Anak Indonesia*).

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

The Indonesian National Police.

However, anyone is able to file a report to the police if they suspect or have information of any conduct of child trafficking. After the police receive information of a possible child trafficking case, they will start their preliminary investigation.

The preliminary investigation is the early stage of the

investigation that focuses on finding and collecting preliminary evidence in order to determine whether or not the alleged offence has taken place.

There is no clear definition of preliminary evidence. However, it is generally accepted that preliminary evidence should consist of a minimum of two items of evidence.

If it is decided that a criminal act (in this case child trafficking) occurred, the police will launch an investigation to further build a case.

5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

Preliminary investigation

As mentioned above, it is generally accepted that preliminary evidence should consist of a minimum of two items of evidence.

Investigation

Throughout the investigation, before handing the case over to the prosecutors, the investigators must be able to show that the action of the alleged trafficker fulfils/violates any provisions provided under the Human Trafficking Law (e.g., bringing people into Indonesian territory with the purpose of exploiting them in Indonesia or another country).

Specifically for *child* trafficking, the trafficked person is under 18 years old.

5.4 What are the protocols for interviewing a child victim?

The Human Trafficking Law provides the following:

- The investigation, prosecution and court hearings for child victims are held by paying attention to the best interests of the child, without wearing robes or official uniforms (Article 38).



- The court hearing must be held in private, and the child must be accompanied by his/her parents, foster parents, attorney, or other companions, without the presence of the defendant (Article 39).
- The examination of the child victim may be done outside of court through recording in front of the investigators or prosecutors (Article 40).

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker:

a. Does such victim have the right to refuse?

No.

However, Indonesian law provides that children under the age of 15 that have never been married may give testimonies not under oath.

The testimony given by a child will not be considered as binding evidence, but it will be considered as information to help the consideration of the judges.

Indonesian law provides special methods in relation to the testimony of children. This is to ensure the protection and comfort of the children in giving their testimonies. (Please see para 5.3 above).

b. Can such victim testify via video link from another room?

Yes.

Possible arrangements for a child to give evidence include:

- video conference
- pre-recorded interviews
- holding the proceedings in private or excluding certain people from the court room

c. Can such victim provide testimony separately without a court appearance and return to the country of origin?

Article 40 of the Human Trafficking Law provides that with the permission of the judge, the hearing of the child witness/victim can be given outside of the court proceedings through recording in front of investigators or prosecutors.

There is no express requirement on whether such recorded testimony alone is sufficient for the proceedings, which allows the victim to immediately return to their country of origin.

The court may require additional information from the victim, which can be given through another recording or through direct questioning via video conference.

d. What other means of protection are available to a child or minor testifying in court?

See our response to para 5.7 below

5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

A trafficked victim is entitled to receive information on the progress of the case in the preliminary investigation, prosecution and examination process.

A child who is a trafficking victim shall also be accompanied by his/her parents, guardian (*wali*), advocate or other companions (such as psychologist, psychiatrist, medical expert, *rohaniawan* (priest, monk, chaplain, etc.) and family members) in the court examination.

The examination of a child trafficking victim is conducted in a closed trial and without the attendance of the defendant.



5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does such victim need to appear in court?

A trafficked victim can be required to testify more than once. There is no standard number of times for a victim to appear in court. It will depend on the panel of judges who presides over the case.

5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

Other than what has been set out in our response to para 5.5 above, the law also protects the best interest of a trafficked victim who is a child or minor as a witness by entitling him/her to, *inter alia*:

- get protection for himself/herself, his/her family and assets
- participate in determining the type of protection and security support
- give information free from duress
- get a translator
- have identity concealed/new identity
- get a temporary/new domicile
- get legal advice
- get living costs assistance until the end of the protection period

5.9 Who supports the victim during the criminal case proceedings?

Parents, guardian (*wali*), attorneys or other companions (such as psychologists, psychiatrists, medical experts, *rohaniawan* (priest, monk, chaplain, etc.) and family members

6. In a civil case:

6.1 Whether the local World Vision organisation, which provides shelter to a trafficked child or minor may be regarded as the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

No.

The provision of protection and support to victims is conducted by the Victims and Witness Protection Agency (*Lembaga Perlindungan Saksi dan Korban* or "LPSK").

6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

No.

A child of under 21 years is unable to lodge a civil claim. The child's legal guardian will act on behalf of the child's interests.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

A civil case can be lodged in court at the same time as a criminal case.

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

An application for restitution (i.e., compensation granted to a victim or his/her family by a trafficking actor or a third party) is submitted by the victim, or his/her family or attorney to the court through LPSK. The application shall include, *inter alia*, description of actual suffered loss and form of requested restitution. The checking result of LPSK on such application will be determined in a LPSK decree and accompanied with its



consideration. Thereafter, LPSK will submitted such application to the court to be (i) examined and ordered (if such application is submitted before the existence of a final and binding court order) or (ii) examined and stipulated (if such application is submitted after the existence a final and binding court order).

7. How long can a trafficked victim stay in a shelter?

Provision of protection and support to victims are conducted by LPSK. Protection by LPSK (inter alia stay in a shelter) for a victim can be terminated based on any of the following reasons:

- a. Such victim requests that protection to him/her is terminated in the event application for protection is submitted by such victim.
- b. Upon request of an authority in the event application for protection is submitted by such authority.
- c. Such victim breaches the terms of statement of willingness to follow the terms and conditions of protection.
- d. LPSK is of the view that such victim is no longer need a protection based on convincing evidence.

The relevant regulations are silent on (i) who is responsible to track down the guardians/family of the trafficked victims and (ii) who supports the trafficked victims' family to visit Indonesia. However, the Indonesian police should be in charge of tracking down the guardians/family of the trafficked victims. It might be possible for LPSK to supports the trafficked victims' family to visit Indonesia if LPSK considers necessary.

8. Can a trafficked victim be allowed to receive education while staying in the shelter?

Yes.

A trafficked victim can be allowed to receive education while staying in the shelter.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

No.

As previously set out in our response to paragraph 6.1, the provision of protection and support to victims are conducted by LPSK.

A trafficked victim can apply for asylum if such trafficked victim faces a threat which endangers his/her life, soul and/or assets.

10. Where can World Vision look for pro bono legal services to help a trafficked victim?

LPSK

Legal Aid Agencies (*Lembaga Bantuan Hukum*)

Indonesian Commission for the Protection of Children (*Komisi Perlindungan Anak Indonesia*)

JAPAN

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

This depends on each respective piece of legislation.

Under the Penal Code and Civil Code, a "minor" is defined as a person under the age of 20 (an amendment to the Civil Code will become effective starting in April 2022. Under the amended Civil Code, any person under the age of 18 will be considered a minor.) Under the Juvenile Act, the term "juvenile" refers to a person under 20 years old.

The definition of a "child" under each regulation is as follows;

- There are no legal definitions for a "child" under both the Penal Code and the Civil Code.
- Labor Standards Act – a person (a) under the age of 15 and (b) aged 15 but has not reached March 31st (i.e. this definition covers persons that are 15 years old within the compulsory education term)
- Act on Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children (the "Act") – a person under the age of 18.
- Child Welfare Act – a person under the age of 18 years old.

2. Is there any specific legislation that deals with trafficking of children or minors?

The Penal Code establishes that the kidnapping of minors, kidnapping for profit, kidnapping for ransom, kidnapping for transportation out of a country and the buying/selling of a minor is a criminal act.

Further, the Act prohibits the buying/selling of children for the purposes of child prostitution.

3. Is there a legal definition of child trafficking?

No, there is no general legal definition for child trafficking. Each individual legislation sets out prohibited acts like the buying/selling of children and/or kidnapping.

4. Is there legislation to impose a duty to provide shelter to children in need?

The Child Welfare Act sets out that the Director of the Child Guidance Center (Jido Soudan sho, a governmental office)¹ may take temporary custody of a child as they deem necessary.

5. In a criminal case in connection with trafficking of a child or minor,

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?

Anyone can report cases of child trafficking to the police by dialing #110 (in the event of an emergency), #9110, or by visiting a police station in person. Afterwards the police will initiate an investigation.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

There is no specific agency with the authority to do so. Any person or agency, including the Child Guidance Center, Immigration Bureau, the Labor Standards Office, an individual, NGOs or the local municipal government, upon becoming aware of a suspected human trafficking offense, can file a complaint with the police/prosecutor. If the police receive a complaint, they can investigate, make arrests (under writ) and bring matters to

¹ The Child Guidance Center is a governmental office which has multiple functions from a child welfare perspective. One of the functions is to serve as a shelter.



the prosecutor's office.

5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

The types of evidence required to build a case vary from case-to-case. The selling/buying of children for purposes of child prostitution, under the Act, requires traffickers to sell/buy children specifically for the "purpose" of child prostitution. Evidence would then typically consist of circumstantial evidence, such as establishing the intentions of traffickers, in addition to evidence that objectively proves the existence of trafficking.

5.4 What are the protocols for interviewing a child victim?

There is no formal protocol for interviewing a child victim but typically, prosecutors/police officers/judges will take into consideration the impact of the interview on the child victim as well as the risk of influence or "contamination" by an interviewer towards the child victim. In consideration, some practitioners and scholars endorse a method of forensic interview, and some prosecutors and police officers do study this method. Forensic interview² is a technique to elicit information from a child for criminal investigation.

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker,

a. does a victim have the right to refuse;

Prosecutors can generally obtain a writ from the court requiring testimony from witnesses with relevant information. Victims (like any other witness) do not have a right to refuse to testify unless there is a justifiable reason for refusing (unless, for instance, the victim's testimony would be self-incriminatory), though in practice prosecutors rarely compel victims to testify when they do not wish to testify.

b. can a victim testify via video link from another room;

Yes. Permission is typically granted by judges.

c. can a victim provide testimony separately without a court appearance and return to their country of origin; and

No. If the court wishes to examine them, victims need to appear in court to provide testimony in principle. In practice, documents which contain statements made before prosecutors are often submitted to the courts under certain conditions; one of the justifications is that the person making the statements is out of country. Thus, depending on the contents of the statement and other evidence, a victim providing statements to the prosecutor before the court proceeding starts, leaves Japan and then the prosecutor submits the documents. This is dependent on if the judge permits the submission of evidence by document rather than the witness appearing in court. The prosecutor will need to submit the evidence and ask for a grant of permission.

d. what other means of protection are available to a child or minor testifying in court.

Below are several means of protection available, judge permitting: 1) the victim may provide their testimony on a date aside from a trial date; 2) with a screen concealing them from the criminal defendant and/or observers; 3) with the assistance of someone who is deemed appropriate (i.e. mother of the child); 4) dismissal of the criminal defendant and/or a specific spectator (who in the presence of, will cause the witness to be unable to comfortably provide sufficient testimony) while remaining in the presence of the judge, the prosecutor and the criminal defendant's attorney.

We also note that the court may keep the identity of the victim confidential during the court proceedings or during its ruling.

² One of the reference materials is: <https://www.childwelfare.gov/pubPDFs/forensicinterviewing.pdf>



5.6 How is a trafficked victim thoroughly prepared for their testimony before the appointed court date?

Generally, witnesses would visit the prosecutor's office prior to the court date and practice their testimony with the prosecutor based on a list of questions prepared by the prosecutor or by the criminal defendant's lawyer. However, over preparation may risk influencing, or otherwise "contaminate" the testimony.

5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does a victim need to appear in court?

This depends on each case, but typically, the court would consider the burden and try to keep it as minimum as possible if the prosecutor requests so.

5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

The measures set forth in the above 5.4 are applicable to children and minors, and judges will consider the age of victims as one of the factors in evaluating the necessity of implementing these measures.

5.9 Who supports the victim during the criminal case proceedings?

If the victim satisfies certain conditions, such as having less than a certain amount of cash and cash equivalents and income, they can apply to the Legal Support Center to have a lawyer appointed for them and have the government cover occurring legal costs.

6. In a civil case:

6.1 Whether the local World Vision organization, which provides shelter to a trafficked child or minor may be regarded as the guardian of a child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

- a. The local World Vision organization may be regarded as the guardian (*Miseinen Kokennin*) of a child or minor if it is a juridical person appointed by a family court.

If a father or mother surrenders parental authority or the right of administration of property, or if the necessity to appoint a guardian arises as a result of a ruling of loss of parental authority, or the suspension of parental authority, or loss of the right of administration of property arises, the family court will appoint a guardian. Under the current Civil Act, not only individuals but also juridical persons can become guardians. If the person to become the guardian is a juridical person, the family court will consider the type and content of the business, as well as any existence of an interest vested between the child or minor and the juridical person or its representative.

- b. The local World Vision organization can help the victim appoint a lawyer to represent them for several kinds of cases without the cooperation from their legal representative.

Generally speaking, the victim cannot file a claim for damages without being assisted by their representative like a parent or guardian. It is also hard for third parties to appoint a lawyer to represent the victim if the victim's legal representative does not approve.

Under the current Japanese Domestic Relations Case Procedure Act, however, victims maintain the legal capacity to file several types of adjudication cases, like cases for the appointment of a special representative* for a child or a guardian, cases for



the loss of parental authority or cases for the suspension of parental authority. Regarding these matters, the victim can appoint a lawyer themselves**. Therefore, the local World Vision organization can help the victim appoint a lawyer by assisting them exercise their legal capacity.

*Under the Japanese Civil Act, if an act involves a conflict of interest between a father or mother, who exercises parental authority, and a child, a special representative for the child should be appointed by the family court.

**Moreover, if the victim does not appoint a lawyer, the family court may, upon petition, appoint a lawyer as their counsel as deemed necessary.

6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

No, trafficked children cannot file civil complaints independently in principle, but their (appointed) guardian can file on their behalf. Please see our input in Section 6.1 above for more details.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

Yes, there is also a system to provide a fast track for civil claims filed by victims of trafficking, sex crimes or some other types of crimes prescribed under the Act on Measures Incidental to Criminal Proceedings for Protecting the Rights and Interests of Crime Victims. In this process, a criminal victim may file a petition for a compensation order with the court where the criminal case against the relevant criminal defendant is pending. If the court finds the criminal defendant guilty, the same court will determine whether the petitioner has a valid cause of action for damages based on, at most, four court hearings for the civil case (typical Japanese civil claims require many more hearings).

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

There does not seem to be any well-established precedents in respect of how the court determines the amount compensated on this matter. We expect, however, that the compensation would be calculated in accordance with principles of general tort law.

Under tort law and court precedents, compensation for damages generally covers, including but not limited to, medical costs and other necessary costs, compensation for mental/physical suffering and lost profits. Typically, in the case of trafficking, compensation for damages from mental/physical suffering would be the most important.

There is no established formula for the amount of compensation for mental/physical suffering; however, the court would consider the following factors:

- **Frequency:** The amount will increase if the trafficking is routine. Trafficking may include not only trafficking itself but also abuse and therefore if abuse is routine (if it is done frequently), compensation will increase.
- **Duration:** The amount will increase if the trafficking continues for a long time. It is reasonable that the longer the time a victim is under captivity, the more a victim's rights are infringed on, and therefore, the victim should receive more compensation.
- **Means:** The amount will increase if the way of trafficking is extraordinary.
- **Degree:** The degree of infringement on the victim's life, body, and personal rights.
- **Status of the victim after trafficking:** The amount will increase if he or she suffers from trauma or missed entering further education.



7. How long can a trafficked victim stay in a shelter?

There is no clear cut answer for this question, but we reasonably believe that the police, Ministry of Foreign Affairs of Japan, Immigration Bureau of Japan, and/or other responsible organizations will be in charge of tracking down the guardians/family of trafficked victims. Japanese government (the police, Ministry of Foreign Affairs of Japan, and Immigration Bureau of Japan) supports the victims themselves, through The International Organization for Migration, to return to their home country. However, generally speaking, we do not think this includes financial support for transportation etc. When and in what situations children can leave the shelter and return home depends on the circumstances of cases.

Japan has public shelters under The Child Welfare Act. Under the act, the victim has to leave the shelter when they become 18 years old. If necessary, however, said victim can stay until 20 years old. Also, the duration of stay shall be 2 months in principle (under guidelines issued by the Ministry of Health, Labor and Welfare); however, in reality, it is often extended multiple times.

The Child Welfare Act also provides a legal basis for private shelters for victims to use and are usually in the form of Not-for-Profit Organizations. The length of stay is more flexible in private shelters.

8. Can a trafficked victim be allowed to receive education while staying in the shelter?

Yes, the victim can attend school, from kindergarten to high school, but it is difficult for him or her to enter a university. Below are entrance rates to high schools and universities for victims living in shelters as of December 2017:

- **Entrance Rate to High School:** 96.0%
- **Entrance Rate to University:** 12.4% (Considering 52.2% of children entered universities in 2017 nationwide, namely

more than half of high school students go to universities after graduation, it is an issue that children in shelters have disadvantage or difficulty (e.g., financially) to enter and study at a university.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

In observance that Japan has joined the Refugee Convention, to receive asylum protection, victims must satisfy four criteria to qualify as a refugee that include fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion. At the same time, such victims may possibly receive other protections set forth in this legal guide.

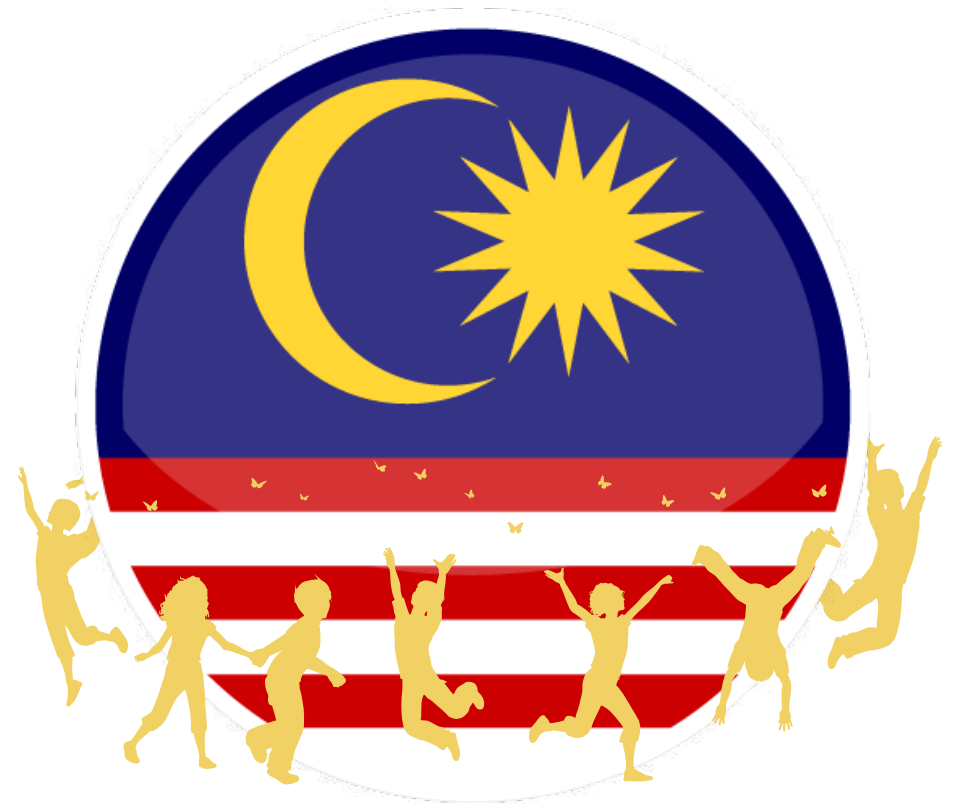
World Vision cannot apply for asylum directly, but can and should notify municipalities, welfare offices, or Child Guidance Centers under the Act on the Prevention, etc. of Child Abuse³ to support victims receive support and seek asylum. The Ministry of Health, Labor and Welfare has set up a nation-wide common telephone number (0570-064-000) for persons to contact the nearest Child Guidance Center.

10. Where can World Vision look for pro bono legal services to help a trafficked victim?

Please contact the Japan Legal Support Center (the "JLSC") known as "Houterasu" (<https://www.houterasu.or.jp/en/index.html>) to assist victims receive legal aid. JLSC provides Legal Aid for Children, under which the victims can retain a lawyer as their representative to file lawsuits or to request administrative procedures with monetary assistance even if they cannot receive approval from their parents. However, please note that Legal Aid for Children can be used only for minor/child victims (i) who need to recover their human rights due to circumstances such as child abuse and (ii) who cannot receive help from their parents.

MALAYSIA

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

Pursuant to the Malaysian Child Act 2001 ("**CA**"), "*child*" is defined as a person under the age of eighteen. The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("**ATPASMA**") also applies the same definition in the context of establishing an offence for child trafficking.

Similarly, "*minor*" is defined under the Age of Majority Act 1971 as one who has not attained the age of majority (i.e. eighteen years old).

However, for the purposes of the Evidence of Child Witness Act 2007 ("**ECWA**"), "*child witness*" is defined as a person under the age of sixteen who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence.

2. Is there any specific legislation that deals with trafficking of children or minors?

It is an offence under Section 14 of the ATPASMA for any person who traffics a child for the purposes of exploitation.

In addition to the above, Part VIII (Trafficking in and Abduction of Children) of the CA provides that it is an offence to commit any of the following:

- an unlawful transfer of possession, custody or control of child;
- an importation of child by false pretenses; and
- the taking or sending out a child without appropriate consent of person having lawful custody of such child.

3. Is there a legal definition of child trafficking?

"Child trafficking" is not specifically defined in the CA and the ATPASMA. Nonetheless, Malaysian case law (Pendakwa Raya v Heng Chun Sim [2017] AMEJ 1986) has provided some helpful guidance on the elements which constitute "child trafficking" under Section 14 of the ATPASMA.

Accordingly, "child trafficking" involves the following:

- Activity: all actions involved in acquiring or maintaining the labour or services of a person through coercion, including the act of recruiting, conveying, transferring, harbouring, providing or receiving a person;
- Purpose: for the purpose of exploitation, which includes sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs; and
- Child: where the trafficked person is a "child" for the purposes of the ATPASMA (as set out above).

4. Is there legislation to impose a duty to provide shelter to children in need?

The CA provides that children in need may be placed in "a place of safety", "a place of refuge" or "the custody of a fit and proper person" in the following circumstances, as the case may be:

Child in need of care and protection

Pursuant to Section 30 of the CA, the Court has the power to order (amongst others) one of the following if it finds that a child "is in need of care and protection":

- that the child be placed in the custody of a fit and proper person for a specified period;
- that the child be placed in a place of safety for a period of three years from the date of the order or until the child



- reaches the age of eighteen, whichever is shorter; or
- c. in the case of a child who has no parent or guardian or who has been abandoned, in the care, custody and control of a foster parent found to be suitable by the Director General for a period of two years or until the child reaches the age of eighteen, whichever is shorter, and pending that, place the child in a place of safety.

Generally, a child is considered to be "in need of care and protection" if (amongst others) such child has been or there is a substantial risk that the child will be physically or emotionally injured or sexually abused by his/her parents or guardian or a member of his/her extended family; or behaves in a manner that is harmful to himself or to any other person; or has been neglected or abandoned. These are further elaborated in Section 17 of the CA.

Child in need of protection and rehabilitation

Children who are victims of commercial sexual exploitation are accorded different treatment under the CA, and are considered to be "in need of protection and rehabilitation", as opposed to being "in need of care and protection".

Children in need of protection and rehabilitation are defined by Section 38 of the CA as those who are induced to perform any sexual act, or are in any physical or social environment which may lead to the performance of such act; live in or frequent any brothel or place of assignation; or are habitually in the company or under the control of brothel keepers or procurers or persons employed or directly interested in the business carried on in brothels or in connection with prostitution.

Pursuant to Section 40 of the CA, if the Court is satisfied that the child is in need of protection and rehabilitation, it may (amongst others) make one of the following orders:

- a. that the child be detained in a place of refuge for a period of three years; or

- b. that the child be placed in the care of a person who the Court considers to be fit and proper (whether a relative or not) for a period of up to three years.

For both cases involving a child in need of care and protection and child in need of protection and rehabilitation, the Court has to treat the best interests of the child as the paramount consideration in determining the orders to be made.

5. In a criminal case in connection with trafficking of a child or minor,

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?

Anyone can report child trafficking cases. All formal reports on child trafficking should be received by the police. That said, reports are occasionally received by immigration officers as well. The reports are often redirected to the police and/or immigration officers through various channels such as the 1Malaysia One Call Centre (1MOCC) Hotline (set up by the Home Ministry to receive reports on human trafficking and smuggling of migrants) and the helpline of NGOs such as Tenaganita.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

The Royal Malaysia Police, the Immigration Department of Malaysia, the Royal Malaysian Customs Department, Malaysian Maritime Enforcement Agency and the Labour Office may file a case with the Public Prosecutor. No prosecution for an offence under ATPASMA shall be instituted except by or with the written consent of the Public Prosecutor.



5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

Oral and/or documentary evidence establishing the elements of the offence. In general, this includes the testimony by the victim on how the victim has been trafficked into the country (e.g. by coercion, recruitment on promise of a job and etc.), and evidence relating to the alleged trafficking for the purpose of exploitation (see answers to Question 3).

5.4 What are the protocols for interviewing a child victim?

During court proceedings, a child victim may be accompanied by an adult, typically a legal guardian or an officer from the Department of Social Welfare. The child victim may be prevented from seeing or being seen by the accused by means of a screen between the accused and the child victim or any other arrangement. The examination of a child victim may be conducted through the Court, or an interpreter or any person authorized by the Court as intermediary to communicate and explain questions asked to or answers given by the child victim, so far as necessary to enable them to be understood by the child victim. If a video recording is submitted, it must be accompanied by a transcript of the original language and translation of the transcript if the language used in the video recording is other than the national language.

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker,

a. does such victim have the right to refuse;

Yes. However, the refusal to testify will weaken the prosecutor's case.

b. can such victim testify via video link from another room;

Yes. Child victims may give evidence by means of a live link from a location other than the courtroom. This location would be

deemed to be a part of the courtroom in which the proceeding is being held.

c. can such victim provide testimony separately without a court appearance and return to the country of origin; and

Yes. A video recording of a child victim may be admitted as evidence of examination-in-chief of the child victim, provided that it is accompanied by a transcript of the original language used in the video recording and is accompanied by a translation of the transcript of the original language and translation of the transcript if the language used in the video recording is other than the national language. However, such evidence is not ideal as it deprives the accused the opportunity to cross examine the child witness. In the case of evidence of a child victim of tender years, the Court, when considering statements in the video recording as evidence, shall assess and form an opinion as to whether the child victim possesses sufficient intelligence and understands the duty of speaking the truth, though not given upon oath.

d. what other means of protection are available to a child or minor testifying in court.

The child's identity is protected by the law. Any particulars that may lead to the identification of the child witness, such as name, address of the child, educational institutions the child attends, and picture, persons or place that may lead to the identification of the child witness shall not be published in any mass-media or transmit through any electronic medium.

5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

The investigating officer and/or the prosecutor may prepare the victim by explaining the trial process, go through the evidence with the victim to refresh his/her memory, prepare the victim for cross examination, and familiarize the victim with the layout



of the court for site visits with the victim prior to the appointed court date.

5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does such victim need to appear in court?

A victim who gives evidence in court will go through the trial process of examination-in-chief, cross examination and re-examination once, unless there is an appeal or a re-trial, where the victim would go through the same trial process.

5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

The ECWA reduces the trauma experienced by child witnesses in court appearances. It sets out the manner in which a child witness may give evidence in a court proceeding such as giving evidence in a courtroom but shielded by a screen between the child witness and the accused person, giving evidence by a live link and by video recording.

The ECWA also provides that the examination of a child witness may be conducted through the Court, or an interpreter or any person authorized by the Court to serve as a communication intermediary:

- a. to the child witness, questions put to the child witness; and
- b. to any person asking such questions, the answers given by the child witness in reply to them,

and explain such questions or answers so far as necessary to enable them to be understood by the child witness. A child witness may also be accompanied by an adult when giving evidence in court proceedings. However, the intermediary and the adult company shall not prompt the child witness to answer any question, influence the answers of the child witness, or disrupt the questioning of the child witness.

In addition, the ECWA protects the identity of the child witness (see answer to Question 5.4(d)).

5.9 Who supports the victim during the criminal case proceedings?

The case officer, investigation officer, officers of the Department of Social Welfare, prosecutor and the Court (intervention of the judge) shall provide such support to the child victim to ensure the interests of the child is protected.

6. In a civil case:

6.1 Whether the local World Vision organisation, which provides shelter to a trafficked child or minor may be regarded as the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

Pursuant to the CA, a "guardian" of a child means: (a) a person lawfully appointed by deed or will or by the order of a competent court to be the guardian of the child; or (b) who has lawfully adopted the child. The Malaysian Adoption Act 1952 further provides that a "guardian" means any person or body of persons, other than a child's natural parents, who has custody of the child.

In other words, the local World Vision organization will only be regarded as the guardian of a child if it has been lawfully appointed as a guardian or has legally adopted the child - the mere provision of shelter to the trafficked child will not automatically grant guardianship status to the local World Vision organization. If this is in the affirmative, the local World Vision organization, in its capacity as a lawful guardian, may, on behalf of a child, appoint a lawyer to represent the child to pursue compensation in a civil case.



6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

No. A trafficked child or minor cannot file civil complaints independently. All actions on behalf of children must be commenced through a litigation representative (typically the child's next-of-kin or a guardian that a court appoints to watch after the child during the case), who has to act by a solicitor.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

Yes. However, please note that under certain circumstances Malaysian courts may exercise discretionary powers under the Malaysian Rules of Court 2012 to order a stay in proceedings in a civil suit until the conclusion of the hearing and final disposal of the criminal proceedings.

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

The determination of compensation amount for a trafficked victim in a civil case is a fact sensitive exercise and will depend on the cause(s) of action raised by the trafficked victim against the trafficker as well as the type of harm or injury suffered by the trafficked victim.

As an overview, the determination of the same will generally be based on the following key heads of damages, which the Court may grant in favour of the trafficked victim in the event that a civil suit can successfully be established against the trafficker:

- a. Compensatory damages - compensatory damages are meant to restore the claimant back to his or her position before the injury occurred. There are generally two types of compensatory damages: (i) economic, also known as special damages (for example, lost earnings, medical expenses, cost of psychiatric care etc.); and (ii) non-economic loss, also

known as general damages (for example, loss of enjoyment of life, physical pain suffered by the victim, emotional distress such as, among others, PTSD, suffered by the victim etc.);

- b. Exemplary damages - exemplary damages are generally awarded to punish and deter egregious conduct. The award of exemplary damages is highly arbitrary and within the discretion of the judge and may only be awarded in limited circumstances (for example, in instances involving false imprisonment etc.).

7. How long can a trafficked victim stay in a shelter?

Generally, trafficked victims are allowed to stay in shelter homes until they are repatriated to their country of origin. This would also depend on the capacity and resources of the relevant shelter homes.

The Department of Social Welfare and the Immigration Department of Malaysia will be responsible for tracking down the guardians/family of trafficked victims, but do not typically support the trafficked victim's visit to Malaysia. Where the trafficked child is placed under a protection order, the child can leave the shelter and return home upon the revocation or expiry of the protection order. The relevant immigration officer is required to take all necessary steps to facilitate the return of the trafficked child to his/her country of origin without unnecessary delay and with due regard for the child's safety.

8. Can a trafficked victim be allowed to receive education while staying in the shelter?

Yes. This may be organized through specialist non-governmental organisations. As for access to the national education system, non-citizen children generally are only allowed to attend schools in Malaysia pending the processing of their citizenship application if either one of the child's parents is a Malaysian national.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

Yes. As there is no specific legislation in Malaysia that governs asylum-seeking, activities relating to the registration and documentation of asylum-seekers are conducted by the United Nations High Commissioner for Refugees ("UNHCR") for temporary protection. World Vision can approach the UNHCR to apply for asylum on behalf of the trafficked victim. Generally, a trafficked victim can apply for asylum if the victim has a well-founded fear of persecution on account of grounds such as race, religion, or political beliefs. However, UNHCR Cards issued to asylum-seekers are not legally recognised by the Malaysian government.

10. Where can World Vision look for pro bono legal services to help a trafficked victim?

The following key organisations generally provide pro bono services in aid of trafficking victims:

- a. Asylum Access Malaysia (see link [here](#));
- b. Tenaganita (see link [here](#));
- c. Malaysian Bar Council via its Legal Aid Centre programme (see link [here](#));
- d. SUKA Society (see link [here](#)); and
- e. United Nations High Commissioner for Refugees (see link [here](#)).

PHILIPPINES

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

Republic Act No. 9208 or the "Anti-Trafficking in Persons Act of 2003" as amended by Republic Act No. 10364 or the "Expanded Anti-Trafficking in Persons Act of 2012" ("**RA 9208 as amended**") and Republic Act No. 7610 or the "Special Protection of Children Against Abuse, Exploitation and Discrimination Act" ("**RA 7610**") defines a "child" as a person below eighteen (18) years of age or one who is over eighteen (18) "but is unable to fully take care of or protect himself/herself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition."¹

2. Is there any specific legislation that deals with trafficking of children or minors?

Yes, RA 9208 as amended and RA 7610.

3. Is there a legal definition of child trafficking?

Yes,

RA 9208, as amended.

Trafficking in Persons is defined as "the recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation,

forced labor or services, slavery, servitude or the removal or sale of organs."²

RA 9208 further provides that the "recruitment, transportation, transfer, harboring, adoption or receipt of a child for the purpose of exploitation or when the adoption is induced by any form of consideration for exploitative purposes shall also be considered as 'trafficking in persons' even if it does not involve any of the means listed in the paragraph above" (e.g. threat, force, fraud, etc.).³

If the trafficked person is a child, RA 9208 classifies the crime as Qualified Trafficking in Persons which carries with it a higher penalty of life imprisonment and a fine of not less than Two million pesos (P2,000,000.00) but not more than Five million pesos (P5,000,000.00).⁴

The following acts are considered attempting to commit child trafficking:

- a. Facilitating the travel of a child who travels alone to a foreign country or territory without valid reason therefor and without the required clearance or permit from the Department of Social Welfare and Development, or a written permit or justification from the child's parent or legal guardian;
- b. Executing, for a consideration, an affidavit of consent or a written consent for adoption;
- c. Recruiting a woman to bear a child for the purpose of selling the child;
- d. Simulating a birth for the purpose of selling the child; and
- e. Soliciting a child and acquiring the custody thereof through any means from among hospitals, clinics, nurseries, daycare

¹ RA 9208, as amended, Section 3(b); RA 7610, Section 3(a).

² RA 9208, as amended, Section 3(a).

³ *Id.*

⁴ RA 9208, as amended, Section 10 (e).



centers, refugee or evacuation centers, and low-income families, for the purpose of selling the child."⁵

RA 7610

Child trafficking is defined as "trading and dealing with children including, but not limited to, the act of buying and selling of a child for money, or for any other consideration, or barter".

Persons who are guilty of child trafficking "shall suffer the penalty of reclusion temporal to reclusion perpetua. The penalty shall be imposed in its maximum period when the victim is under twelve (12) years of age."⁶

There is an attempt to commit child trafficking:

- a. When a child travels alone to a foreign country without valid reason therefor and without clearance issued by the Department of Social Welfare and Development or written permit or justification from the child's parents or legal guardian;
- b. When a person, agency, establishment or child-caring institution recruits women or couples to bear children for the purpose of child trafficking; or
- c. When a doctor, hospital or clinic official or employee, nurse, midwife, local civil registrar or any other person simulates birth for the purpose of child trafficking (i.e. simulating birth equates to revising the birth certificate to show that the parents of the child are persons other than the child's biological parents); or
- d. When a person engages in the act of finding children among low-income families, hospitals, clinics, nurseries, day-care centers, or other child-caring institutions who can be offered for the purpose of child trafficking."⁷

4. Is there legislation to impose a duty to provide shelter to children in need?

Yes. RA 9208, as amended, provides that the Department of Social Welfare and Development ("**DSWD**") shall "provide counseling and temporary shelter to trafficked persons and develop a system for accreditation among NGOs for purposes of establishing centers and programs for intervention in various levels of the community."⁸

The DSWD "shall establish free temporary shelters, for the protection and housing of trafficked persons to provide the following basic services to trafficked persons:

- a. Temporary housing and food facilities;
- b. Psychological support and counseling;
- c. 24-hour call center for crisis calls and technology-based counseling and referral system;
- d. Coordination with local law enforcement entities; and
- e. Coordination with the Department of Justice, among others."⁹

5. In a criminal case in connection with trafficking of a child or minor,

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?

The victims themselves may file the complaint, or on their behalf, it could be their parent or legal guardian, relatives, barangay chairman, social workers, or at least (3) concerned citizens. Under A 7610, any person may report, orally or in writing, a case of child abuse, neglect, or exploitation to the following concerned

⁵ RA 9208, as amended, Section 4-A.

⁶ RA 7610, Section 7.

⁷ RA 7610, Section 8.

⁸ RA 9208, as amended, Section 16 (b).

⁹ *Id.*



agencies:

- a. DSWD;
- b. Commission on Human Rights (CHR);
- c. Local Social Welfare and Development Office (LSWDO) of the municipality, city or province;
- d. Philippine National Police (PNP), National Bureau of Investigation (NBI) or other law enforcement agencies;
- e. Punong barangay, barangay kagawad or tribal leader;
- f. Any member of the Barangay Council for the Protection of Children (BCPC); and
- g. Barangay help desk officer or Violence Against Women (VAW) help desk officer.¹⁰

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

Any person who has personal knowledge of the offense may file a complaint for trafficking.¹¹

5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

There are only two elements of the crime of child trafficking :

- a. the act of recruiting or harboring, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national border and
- b. that the purpose of the act is to exploit, prostitute, or subject the child to forced labor or servitude.

Notably, performing any of the acts listed above is already considered child trafficking. Therefore, it is immaterial that the

child gave his/her consent¹² or that the consent of the child was obtained through force or fraud.¹³

Direct evidence through a valid police operation is the best way to prove that child trafficking was committed.¹⁴ Hence, it is highly recommended to immediately report any suspected child trafficking activities to law enforcement.

5.4 What are the protocols for interviewing a child victim?

Investigators must comply with the A.M. No. 004-07-SC (21 November 2000) or the "Rule on Examination of a Child Witness".¹⁵

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker,

a. does such victim have the right to refuse;

A.M. No. 004-07-SC does not compel a child to be a witness or to testify.

b. can such victim testify via video link from another room;

Yes, the child may testify via video link from another room. Section 25 of A.M. No. 004-07-SC provides:

"Section 25. Live-link television testimony in criminal cases where the child is a victim or a witness. -

- a. The prosecutor, counsel or the guardian ad litem may apply for an order that the testimony of the child be taken in a room outside the courtroom and be televised to the courtroom by live-link television.

Before the guardian ad litem applies for an order under

¹⁰ RA 7610, Section 27.

¹¹ RA No. 9208, as amended, Section 8(b).

¹² People v. Casio, GR No. 211465, 3 December 2014.

¹³ People v. Villanueva, GR No. 210798, 14 September 2016.

¹⁴ *Id.*

¹⁵ A.M. No. 004-07-SC, 21 November 2000, as provided in the IRR of RA No. 9208.



this section, he shall consult the prosecutor or counsel and shall defer to the judgment of the prosecutor or counsel regarding the necessity of applying for an order. In case the guardian ad *litem* is convinced that the decision of the prosecutor or counsel not to apply will cause the child serious emotional trauma, he himself may apply for the order.

The person seeking such an order shall apply at least five (5) days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

- b. The court may *motu proprio* hear and determine, with notice to the parties, the need for taking the testimony of the child through live-link television.
- c. The judge may question the child in chambers, or in some comfortable place other than the courtroom, in the presence of the support person, guardian ad litem, prosecutor, and counsel for the parties. The questions of the judge shall not be related to the issues at trial but to the feelings of the child about testifying in the courtroom.
- d. The judge may exclude any person, including the accused, whose presence or conduct causes fear to the child.
- e. The court shall issue an order granting or denying the use of live-link television and stating the reasons therefor. It shall consider the following factors:
 - The age and level of development of the child;
 - His physical and mental health, including any mental or physical disability;
 - Any physical, emotional, or psychological injury experienced by him;
 - The nature of the alleged abuse;
 - Any threats against the child;

- His relationship with the accused or adverse party;
- His reaction to any prior encounters with the accused in court or elsewhere;
- His reaction prior to trial when the topic of testifying was discussed with him by parents or professionals;
- Specific symptoms of stress exhibited by the child in the days prior to testifying;
- Testimony of expert or lay witnesses;
- The custodial situation of the child and the attitude of the members of his family regarding the events about which he will testify; and
- Other relevant factors, such as court atmosphere and formalities of court procedure.

- f. The court may order that the testimony of the child be taken by live-link television if there is a substantial likelihood that the child would suffer trauma from testifying in the presence of the accused, his counsel or the prosecutor as the case may be. The trauma must be of a kind which would impair the completeness or truthfulness of the testimony of the child.
- g. If the court orders the taking of testimony by live-link television:
 - The child shall testify in a room separate from the courtroom in the presence of the guardian ad litem; one or both of his support persons; the facilitator and interpreter, if any; a court officer appointed by the court; persons necessary to operate the closed-circuit television equipment; and other persons whose presence are determined by the court to be necessary to the welfare and well-being of the child;
 - The judge, prosecutor, accused, and counsel for the parties shall be in the courtroom. The testimony of the child shall be transmitted by live-link television into



the courtroom for viewing and hearing by the judge, prosecutor, counsel for the parties, accused, victim, and the public unless excluded.

- If it is necessary for the child to identify the accused at trial, the court may allow the child to enter the courtroom for the limited purpose of identifying the accused, or the court may allow the child to identify the accused by observing the image of the latter on a television monitor.
- The court may set other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the best interests of the child.

h. The testimony of the child shall be preserved on videotape, digital disc, or other similar devices which shall be made part of the court record and shall be subject to a protective order as provided in section 31(b)."

c. **can such victim provide testimony separately without a court appearance and return to the country of origin; and**

Yes, the child may give a videotaped deposition. Section 27 of A.M. No. 004-07-SC provides:

"Section 27. *Videotaped deposition.* -

- a. The prosecutor, counsel, or guardian ad litem may apply for an order that a deposition be taken of the testimony of the child and that it be recorded and preserved on videotape. Before the guardian ad litem applies for an order under this section, he shall consult with the prosecutor or counsel subject to the second and third paragraphs of section 25(a).
- b. If the court finds that the child will not be able to testify in open court at trial, it shall issue an order that the deposition of the child be taken and preserved by videotape.
- c. The judge shall preside at the videotaped deposition of a

child. Objections to deposition testimony or evidence, or parts thereof, and the grounds for the objection shall be stated and shall be ruled upon at the time of the taking of the deposition. The other persons who may be permitted to be present at the proceeding are:

- The prosecutor;
- The defense counsel;
- The guardian ad litem;
- The accused, subject to sub-section (e);
- Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child;
- One or both of his support persons, the facilitator and interpreter, if any;
- The court stenographer; and
- Persons necessary to operate the videotape equipment.

d. The rights of the accused during trial, especially the right to counsel and to confront and cross-examine the child, shall not be violated during the deposition.

e. If the order of the court is based on evidence that the child is unable to testify in the physical presence of the accused, the court may direct the latter to be excluded from the room in which the deposition is conducted. In case of exclusion of the accused, the court shall order that the testimony of the child be taken by live-link television in accordance with section 25 of this Rule. If the accused is excluded from the deposition, it is not necessary that the child be able to view an image of the accused.

f. The videotaped deposition shall be preserved and stenographically recorded. The videotape and the stenographic notes shall be transmitted to the clerk of the court where the case is pending for safekeeping and shall



- be made a part of the record.
- g. The court may set other conditions on the taking of the deposition that it finds just and appropriate, taking into consideration the best interests of the child, the constitutional rights of the accused, and other relevant factors.
- h. The videotaped deposition and stenographic notes shall be subject to a protective order as provided in section 31(b).
- i. If, at the time of trial, the court finds that the child is unable to testify for a reason stated in section 25(f) of this Rule, or is unavailable for any reason described in section 4(c), Rule 23 of the 1997 Rules of Civil Procedure, the court may admit into evidence the videotaped deposition of the child in lieu of his testimony at the trial. The court shall issue an order stating the reasons therefor.
- j. After the original videotaping but before or during trial, any party may file any motion for additional videotaping on the ground of newly discovered evidence. The court may order an additional videotaped deposition to receive the newly discovered evidence."

d. what other means of protection are available to a child or minor testifying in court.

A.M. No. 004-07-SC makes the following available for the protection of the child witness:

- Guardian *ad litem*;¹⁶
- interpreter;¹⁷
- facilitator, who will pose the questions to the child;¹⁸
- support persons to provide emotional support to the child;¹⁹

- waiting area for the child, separate from other persons;²⁰
- a comfortable courtroom environment;²¹
- testimonial aids, such as dolls, puppets, or mannequins for assistance;²²
- emotional security item;²³
- prohibiting counsel from approaching the child if it appears that the child is intimidated or fearful of counsel;²⁴
- the exclusion of the public while the child is testifying;²⁵
- preventing persons from entering and leaving the court room while the child is testifying;²⁶
- screens, one-way mirrors, and other devices to shield the child from the accused;²⁷
- court-issued protective orders, including but not limited to confidentiality and privacy orders.²⁸

5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

The child will be prepared according to the best practices of the prosecution taking into consideration the child's welfare and best interest.

¹⁶ A.M. No. 004-07-SC, Section 5.

¹⁷ A.M. No. 004-07-SC, Section 9.

¹⁸ A.M. No. 004-07-SC, Section 10.

¹⁹ A.M. No. 004-07-SC, Section 12.

²⁰ A.M. No. 004-07-SC, Section 12.

²¹ A.M. No. 004-07-SC, Section 13.

²² A.M. No. 004-07-SC, Section 16.

²³ A.M. No. 004-07-SC, Section 17.

²⁴ A.M. No. 004-07-SC, Section 18.

²⁵ A.M. No. 004-07-SC, Section 23.

²⁶ A.M. No. 004-07-SC, Section 24.

²⁷ A.M. No. 004-07-SC, Section 26.

²⁸ A.M. No. 004-07-SC, Sections 30 and 31.



5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does such victim need to appear in court?

Yes. The court may require the child witness to testify until the child's testimony is concluded. In general, A.M. No. 15-06-10-SC or the "Revised Guidelines for Continuous Trial of Criminal Cases" mandates the courts to "strictly adhere to the rule that a witness has to be fully examined in one (1) day".²⁹

A.M. No. 004-07-SC provides that the child may be allowed recesses or periods of relief as often as necessary. The court may also order that the testimony of the child should be taken during a time when the child is well-rested.

5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

The Philippine Supreme Court enacted A.M. No. 004-07-SC, to protect the best interests of child witnesses.

A victim of child trafficking is also entitled to the witness protection program under Republic Act No. 6981 or the "Witness Protection, Security and Benefit Act".

5.9 Who supports the victim during the criminal case proceedings?

A child may be assisted and supported by a guardian to be appointed by the court. The parents of the child are given preference in the appointment of the child's guardian. The guardian shall make recommendations to the court concerning the welfare of the child and shall assist the child and his family in coping with emotional effects of the proceedings.

²⁹ A.M. No. 004-07-SC, Section III 13(f)

6. In a civil case:

6.1 Whether the local World Vision organisation, which provides shelter to a trafficked child or minor may be regarded as the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

The local World Vision office, as an organization, may **not** be appointed as the judicial guardian of trafficked child or minor.

The Rules on Guardianship of Minors³⁰ provides that absent any legal or court-appointed guardians, only the following persons may be appointed as guardian of a child or a minor:

- Surviving grandparent and in the case of several surviving grandparents, the court shall select any of them taking into account all relevant considerations;
- Oldest brother or sister of the minor over 21 years of age, unless unfit or disqualified;
- Actual custodian of the minor over 21 years of age, unless unfit or disqualified; and
- Any other person who in the sound discretion of the court would serve the best interests of the minor.

Based on the list above, only natural persons may be appointed as guardian for children or minors. Aside from age, the guardian's moral, physical, mental, and psychological conditions (among others) are taken into consideration by the courts. All these are attributes of natural persons, but not of juridical persons like World Vision.

Any of World Vision's employees/personnel may be appointed as guardian for the trafficked child or minor. In this connection, the appointed guardian may then choose a lawyer who will represent the victim to pursue compensation in a civil case.

³⁰ A.M. No. 03-02-05-SC (01 May 2003).



6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

Yes, provided it is **done with the assistance** of his father, mother, guardian, or if he has none, a guardian *ad litem*.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

Yes, a civil case may be lodged in court at the same time as a criminal case.

A civil action for the recovery of civil liability arising from the offense charged is deemed filed with the criminal action unless the offended party waives the civil action, reserves the right to institute the civil case separately, or files the civil case prior to the criminal action. However, after commencement of the criminal action, said reserved civil action cannot be instituted until final judgement has been entered in the criminal action. Further, pending civil cases prior to filing a criminal case shall be suspended in whatever stage until final judgement of the criminal case.

On the other hand, **independent** civil actions may be filed by the offended party anytime, without regard to the timing for filing of the criminal case. Independent civil actions are those covered by Article 32 (violation of constitutional rights), Article 33 (defamation, fraud, and physical injuries), Article 34 (failure to render aid or protection by a police officer in case of danger to life or property), and Article 2176 (quasi-delicts or damage done without fault, negligence, or contract) of the Philippine Civil Code.

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

Both RA 9208, as amended, and RA 7610 do not specify the manner of determining the amount of compensation for a trafficked victim in a civil case. Thus, Civil Code provisions on granting/awarding actual, moral, exemplary, nominal, temperate and/or liquidated damages shall apply.

For actual or compensatory damages, the courts may include costs of medical treatment, transportation, damages to properties, and other pecuniary losses. In addition, at the court's discretion, the court may award civil indemnities for physical and/or mental suffering of the trafficked child.

7. How long can a trafficked victim stay in a shelter?

The law does not provide for a specific duration within which the trafficked victim can stay in a shelter provided by the DSWD or other accredited NGOs. The law provides that the best interest of the child should always be the paramount consideration. Consequently, it will be to the discretion of the DSWD or accredited NGOs to evaluate whether it is in the best interest of the child to leave the shelter and return home.

The law also does not provide the specific government agency responsible for tracking down the guardian/family of trafficked victims or who will support the trafficked victim's family to visit a foreign country. However, the law does provide that the following government agencies to render assistance to trafficked victims:

- a. Department of Foreign Affairs;
- b. DSWD;
- c. Department of Labor and Employment;
- d. Department of Justice;
- e. Philippine Commission on Women;



- f. Bureau of Immigration;
- g. Philippine National Police;
- h. National Bureau of Investigation;
- i. Philippine Overseas Employment Administration;
- j. Overseas Workers and Welfare Administration;
- k. Department of Interior and Local Government; and
- l. Commission on Filipinos Overseas.³¹

8. Can a trafficked victim be allowed to receive education while staying in the shelter?

Yes, RA 9208, as amended, provides that one of the required services to trafficked persons is educational assistance.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

Yes, provided that World Vision is a DSWD-accredited organization, and providing an asylum to the trafficked victim is for his/her best interest.

World Vision may assist the trafficked victim in applying for asylum with the DSWD. There are no particular conditions for a trafficked victim to apply for shelter. Emergency shelter or appropriate housing is a mandatory service for victims of human trafficking.³²

10. Where can World Vision look for pro bono legal services to help a trafficked victim?

World Vision may tap various organizations or associations such as:

- a. DSWD (national and local offices);
- b. International Justice Mission and other accredited NGOs;
- c. Integrated Bar of the Philippines;
- d. Ateneo Human Rights Center;
- e. Ateneo Clinical Legal Education (CLED); and
- f. University of the Philippine Office of the Legal Aid (OLA).

³¹ RA 9208, as amended, Sec. 16.

³² RA 9208, as amended, Sec. 23.

SINGAPORE

LEGAL PROCEEDINGS





1. Research and Background Information

1.1 The main pieces of legislation in Singapore relevant to human trafficking offences include the following:

- a. Prevention of Human Trafficking Act (PoTHA);
- b. Children and Young Persons Act (CYPA);
- c. Penal Code;
- d. Women's Charter;
- e. Immigration Act;
- f. Employment Act/Employment of Foreign Manpower Act.

All have been used to varying extents so far, but based on the US Department of State's "*Trafficking in Persons Report 2018*" (TIP Report 2018), Singapore is still classified as Tier 2 - because it "*does not fully meet the minimum standards for the elimination of trafficking*".

Significantly, prosecutions in Singapore have revolved around the supporting legislation, rather than being based on the PoTHA itself. This was noted in the TIP Report 2018, which states that the "*government investigated most suspected labor trafficking cases as labor law offenses under the Employment of Foreign Manpower Act (EFMA) or the Employment Act; these laws carried significantly lower penalties than the anti-trafficking law and excluded domestic workers and fishing crews.*"

Indeed, the first reported successful prosecution under the PoTHA was only in January of 2016³, when a Muhammad Khairulanwar Rohmat was found guilty of sexually exploiting at least two teenage girls and forcing them into prostitution.

1.2 Furthermore, a report by ECPAT International identified that Singapore was primarily a 'destination country'⁴, particularly for child trafficking. This is so largely due to the nature of Singapore's living conditions and economy - the rule of law is relatively strong, standard of living is generally high, and the opportunity to traffic children out of Singapore is relatively low compared to neighbouring countries.

1.3 This is exacerbated by the attractiveness of the Singapore economy, the strength of the Singapore Dollar, and the high standard of living that can be found here; making it an ideal location for traffickers to take advantage of children.

1.4 Given the nature of Singapore's economy and the subsequent lack of a large industrial workforce that specializes in providing cheap outsourced labour - it follows that the majority of trafficking cases, especially involving children, are sex related.

- a. The figures in the TIP Report bear this out - 22 out of all 34 trafficking cases investigated in 2017 were sex-related (although there is no indication to how many involved children).

When considering **Child Trafficking** in Singapore, the current regime and future action plans must recognise and account for the effect of relevant legislation that aims to combat sex-related crimes.

¹ <https://www.state.gov/documents/organization/282803.pdf> at [380]-[382]

² *ibid.* 380

³ <https://www.channelnewsasia.com/news/singapore/man-gets-75-months-jail-in-first-conviction-under-new-human-traf-8185558>

⁴ http://www.ecpat.org/wp-content/uploads/legacy/Factsheet_Singapore.pdf



- 1.5 The general feeling currently surrounding the TIP prevention regime is that more can be done with regards to victim protection and assistance; particularly relevant for NGOs and CSOs seeking to get involved. It goes without saying that there is scope within the current regime for 3rd parties to get involved, particularly in the Protection and Partnership initiatives identified by the National Approach against Trafficking in Persons Report.⁵
- 1.6 *Protection & Partnership* are 2 of the 4 key initiatives which were implemented in 2012, and continues to be part of the Government's strategy going forward through to 2026. It encompasses various strategies which CSOs/NGOs (such as World Vision International) and Corporates (3M, State Street Bank) can contribute to and get involved in.
- a. **Protection** -
 - i. The government has and will continue to support CSOs/Corporates that provide and fund victim support services such as shelter, sustenance and counselling. In addition, there is a concerted effort to develop a network to enhance victim care arrangements.
 - ii. Another aspect that the government is looking to develop is enhance rehabilitation opportunities. While this may be difficult to implement with Corporates, CSOs will definitely be able to contribute in this regard.
 - b. **Partnership** -
 - i. The focus on increasing Global dialogue can include CSOs and Corporates who have a presence across the region or even globally. Training, forums, and study visits can all be arranged and facilitated through cooperation with international partnerships.
 - ii. There is also a clearly stated aim to "**Increase Public-**

Private Partnerships to support TIP victims"⁶, exhibiting a desire to partner companies keen on exercising CSR.

- iii. This extends to collaborating with CSOs and Corporates to champion best practices, particularly in labour recruitment and working with 3rd party suppliers, so as to reduce opportunities for TIPs.
- iv. One key Partnership so far established is with Hagar International, through which 4,000 Singapore Police Force officers have so far been trained to identify victims of TIP.

Hagar also has established a *Trauma Recover, Safe Transit and Resettlement Programme*, to assist trafficking victims and survivors to reintegrate into society and thrive again⁷.

⁵ <https://www.mom.gov.sg/~media/mom/documents/foreign-manpower/trafficking/national-approach-against-trafficking-in-persons.pdf?la=en>

⁶ *ibid.* 16.

⁷ Hagar International: <https://hagar.org.sg/victim-care/>



1. What is the legal definition of a child and what is the legal definition of a minor?

1.1 Prevention of Human Trafficking Act

- a. A child is defined as "an individual below the age of 18 years" under the Prevention of Human Trafficking Act 2014 ("PHTA"). There is no definition of "minor" in the PHTA.

1.2 Children and Young Persons Act

- a. A child is defined as "a person who is below the age of 14" under the Children and Young Persons Act (Chapter 38 of Singapore) ("CYPA").
- b. There is no legal definition of a "minor" under the CYPA but there is a definition of "young person" which means a person between 14 to 16 years old.

1.3 Penal Code and Women's Charter

- a. No relevant definition of a "child" in the Penal Code and Women's Charter.
- b. Under the Penal Code, a "minor" refers to a person under the age of 21 years.
- c. Under the Women's Charter, a "minor" means a person who is below the age of 21 years and who is not married or a widower or widow.

2. Is there any specific legislation that deals with trafficking of children or minors?

2.1 Yes, the following legislation criminalises human trafficking:

- a. PHTA;
- b. CYPA;
- c. Penal Code; and

- d. Woman's Charter.

3. Is there a legal definition of child trafficking?

3.1 PHTA:

- a. Under the PHTA, a person will be guilty of the offence of "child trafficking" if the person recruits, transports, transfers, harbours or receives a child for the purpose of exploitation (whether in Singapore or elsewhere) of the child.
- b. It does not matter whether the act of trafficking in persons is done partly in and partly outside Singapore provided that the act, if done wholly in Singapore, would constitute an offence under the PHTA.

3.2 CYPA:

There is no definition of "trafficking" in the CYPA but the following are offences under the CYPA:

- a. unlawful transfer of possession, custody or control of a child;
- b. importation of a child by false pretences;
- c. sexual exploitation of children.

3.3 Penal Code

There is no definition of "trafficking" in the Penal Code but the following are offences under the Penal Code:

- a. importing, exporting, removing, buying, selling or disposing of any person as a slave, accepting, receiving or detaining against his will, any person as a slave;
- b. habitually importing, exporting, removing, buying, selling, trafficking or dealing in slaves;
- c. selling, letting to hire, or otherwise disposing of any person



under the age of 21 years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose; and

- d. buying, hiring or otherwise obtaining possession of any person under the age of 21 years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful or immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose.

3.4 Women's Charter

There is no definition of "trafficking" in the Women's Charter but;

- a. any person who buys, sells, procures, traffics in, or brings into or takes out of Singapore for the purpose of such traffic, and whether or not for the purpose of present or subsequent prostitution, any woman or girl, shall be guilty of an offence.
- b. There are also offences in the Women's Charter related to prostitution and importation of women or girls by false pretenses.

4. Is there legislation to impose a duty to provide shelter to children in need?

4.1 PHTA:

- a. No. Under the PHTA, the Director may provide a trafficked victim with temporary shelter and counselling services but there is no obligation to provide shelter to a child in need.

4.2 CYPA:

- a. No. Under the CYPA, the Director of Social Welfare (the "**Director**"), a protector or police officer may commit a child to a place of temporary care and protection or to the care of a fit person until the child can be brought before a Youth Court or dealt with under Section 49 of the Act but there is no obligation to provide shelter to a child in need.

4.3 Penal Code:

- a. No. The Penal Code does not impose any duty on anyone to provide shelter to children in need.

4.4 Women's Charter:

- a. No. Under the Women's Charter, a girl may on her own application be received by the Director into a place of safety, or be committed by the Director to the care of a fit individual, if the Director is satisfied that the woman or girl is in urgent need of refuge, but there is no obligation to provide shelter to a child in need.

5. Criminal cases in connection with a child/minor

5.1 Who can report child trafficking cases and which government authorities or social service units are responsible for receiving reports?

- a. The CYPA at s 87 states that any person who knows or has reason to suspect that a child or young person is in need of care or protection may make a notification to the Director or a police officer of the facts and circumstances on which his knowledge or suspicion is based.
 - i. Where the Director or a police officer not below the rank of sergeant receives any such notification, the Director or police officer may, without prejudice to any other power conferred on him by this Act, transmit any information contained in the notification



to a protector or any other person assisting the Director in the administration or enforcement of this Act; and any other person or class of persons specified by the Director.

b. See also 5.2 below.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

Anyone can make a police report, it need not be an agency or NGO.

- a. There are numerous ways of making a police report;
 - i. call 6435 0000 or email SPF-Report-Trafficking@spf.gov.sg
 - ii. <https://www.police.gov.sg/iwitness>
 - iii. <https://eservices.police.gov.sg/content/policehubhome/homepage/police-report.html>
- b. Alternatively, under the Inter-Agency Taskforce initiative, one is able to contact the Ministry of Manpower at:
 - i. 6438 5122 or email mom_fmmd@mom.gov.sg
- c. However, while anyone may make a report to the police, initiating a prosecution under
 - i. *s 22 PHTA 2014* - must be by, or requiring the consent of, the Public Prosecutor.
 - ii. *s 20 CYPA 2001* - must be
 - A. by consent of Public Prosecutor or Deputy PP
 - B. upon complaint made by:
 1. Protector
 2. Justice of Peace

3. Police Officer - Rank Sergeant or above
4. any other person authorized in writing by Minister or Protector to make a complaint. (can person be a NGO/CSO?)

5.3 In general, what evidence is required to build a case against alleged traffickers?

Evidence required:

- a. The evidence must be enough to satisfy the burden of proof 'beyond reasonable doubt' under the section that the accused is charged under.
 - i. I.e *s 3 PoTHA 2014* - There must be sufficient (the more the better) evidence that the accused did so commit such offences as set out in the Act.

5.4 What are the protocols for interviewing a child victim?

Protocols for interviewing child victims:

- a. There is no special protocol for interviewing child witnesses - all persons shall be competent to testify under *s 120 Evidence Act*.
- b. The rules for interviewing witnesses in general are set out in *ss 137 - 168 Evidence Act* and *ss 282 - 297 Criminal Procedure Code*.
- c. Children who are victims and/or witnesses also have their identities protected by statute.
 - i. *s 35(1)* of the CYPA makes it a criminal offence for any person to publish or broadcast any information which would lead to the identification of the child/young person in the proceedings.
 - ii. Nor can any person publish or broadcast and picture which includes the child/young person in the proceedings.



Such actions would lead to criminal liability on the part of the person doing such acts.

5.5 If the Prosecutor requires the trafficked victim to testify against the alleged trafficker;

a. does the victim have the right to refuse?

Depends:

- i. If victim is served a subpoena and required to attend as witness, cannot refuse unless set aside by court.
- ii. *s 21 Criminal Procedure Code* gives police power to require attendance of witness, *s 22* gives power to examine witness.
- iii. *s 414* states that (paraphrasing) if any witness refuses to answer questions and does not offer reasonable excuse why, the court may sentence him to imprisonment for 7 days.
- iv. However, given the sensitive nature of the victim giving evidence as witness, it is likely the court will make arrangements for the witness to give evidence in a manner that will not upset the victim any more than is necessary to achieve justice as the case may be (see below).

b. Can such a victim testify via video link from another room?

YES: s 281 Criminal Procedure Code - but needs to meet requirements;

s 281(1)

- i. the witness is below the age of 16 years;
- ii. the offence charged is an offence specified in subsection (2);

- iii. the court is satisfied that it is in the interests of justice to do; OR
- iv. the Minister certifies that it is in the public interest to do so.

s 281(2) - the relevant sub-sections are;

(b) An offence under Part II of the Children and Young Persons Act (Cap. 38) (relating to protection of children and young persons);

(d) an offence under Part XI of the Women's Charter (Cap. 353) (relating to offences against women and girls)

s 264A - the recent amendments to the CPC now means that a statement made by a person recorded in form of audiovisual recording will be admissible as evidence in a criminal proceeding to the same extent and effect as oral evidence, subject to the conditions that must be met.

- v. *s 264A(1)(b)* sets out the various conditions that must be met, but essentially any offence involving children and/or trafficking and prosecuted as such will fall under the scope of this section.
- vi. *s 264(2)-(9)* set out the rest of the operation of the section.

s 62A Evidence Act - as discussed below.

c. Can a victim testify without appearance then return to country of origin?

Depends:

- i. This is also linked to (b), but also comes under the *Evidence Act*.
- ii. *s 62A Evidence Act* is lengthy but comprehensive in setting out the full list of scenarios in which



witnesses may give evidence via video link.

- A. Specifically, victims may be able to give evidence via video link (as per above), and it is also possible (subject to meeting requirements) that under s 62A(2), the court may grant leave for a witness **outside** Singapore to give evidence by live video or television link.
- iii. Whether a victim can **leave** Singapore while the trial is still ongoing and where the victim is also a witness is less clear, although s 284 (1) CPC would suggest it is unlikely where the witness is an important one, particularly given the answer at 5.6.

d. Are there other general means of protection?

- i. See 5.8, Witness Support Programme.

5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

- a. Obtain practical guidance from the prosecution
- b. See also - https://hagar.org.sg/files/HAGAR_SCILPWorkshop_TrainingManual_ENG.pdf

See pages 40 - 84 of the above HAGAR Training Manual. While the legal aspects of the manual are tailored to the Cambodian legal system, the practical advice relating to preparation of children for appearing in court and gathering evidence is highly relevant regardless of jurisdiction

5.7 Can a trafficked victim be required to testify more than once, and if so, how many times on average does such victim need to appear in court?

- a. See s 230 CPC detailing the **Procedure at trial**;
- i. s 230 (1)(e): the prosecutor must then examine his

witnesses, if any, and each of them may in turn be cross-examined by the accused and every co-accused, after which the prosecutor may reexamine them;

- ii. s 230(1)(p)(ii): any witness for the defence of the accused shall give evidence and they may in turn be cross-examined first by the other co-accused (if any) and then by the prosecutor after which he may be re-examined;
- iii. s 230(1)(q): an accused **may** apply to the court to issue process for compelling the attendance of any witness for the purpose of examination or cross-examination or to produce any exhibit in court, whether or not the witness has previously been examined in the case;
- iv. s 230(1)(t): at the close of the defence case, the prosecution shall have the right to call a person as a witness or recall and re-examine a person already examined, for the purpose of rebuttal, and such witness may be cross-examined by the accused and every co-accused, after which the prosecutor may reexamine him

It is therefore foreseeable that a witness may be called up to 4 times during a trial, and will almost certainly be required to give evidence/be examined/cross-examined at least 2 times.

- b. Recall of witnesses on trial of altered or new charge
s 131 CPC: If a charge is altered or a new charge is framed by the court after the start of a trial, the prosecutor and the accused must, on application to the court by either party, be allowed to recall or resummons and examine any witness who may have been examined, with reference to the altered or newly framed charge only, unless the court thinks that the application is frivolous or vexatious or is meant to cause delay or to frustrate justice.



5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

- a. Firstly, there is a general level of protection afforded to all children/minors who appear in court, regardless of whether it is a criminal or civil proceeding.
 - i. s 35(1) of the CYPA, in conjunction with s 35(3), makes it a criminal offence to :
 - A. publish or broadcast any information relating to any proceedings in any court or on appeal from any court that reveals the name, address or school or that includes any particulars that are calculated to lead to the identification of any child or young **person concerned in the proceedings, either as being the person against or in respect of whom the proceedings are taken or as being a witness therein**; or
 - B. publish or broadcast any picture as being or including a picture of any child or young person so concerned in any such proceedings.

The child/minor is therefore protected from having his/her identity revealed, regardless of whether he/she is the accused, victim, and/or witness.
 - b. Secondly, where trafficked victims are sexually exploited, s 18(1)(a) of the PHTA states that if the victim is a child, the court **shall** hear the matter or proceedings (brought under Part 2 of the PHTA) in camera.
- s 18(1)(b) provides that in any other case, the court **may** order the matter or proceedings (or any part of it) to be heard in camera.

Furthermore, s 18(2) prohibits the publishing of any material

which is likely to lead to the identification of sexually exploited trafficked victims, regardless of age.

- c. Other protections of witnesses are set out in other areas of this document; see 5.8.

5.9 Who supports the victim during the criminal case proceedings?

a. **During Trial**

The "*Witness Support Programme*" is an initiative by the State Courts in conjunction with the Singapore Children's Society to provide support to vulnerable witnesses in criminal cases who have to give evidence in Court against the perpetrators/the accused.

They are volunteers who provide emotional support, information on proceedings, and assist in managing stress which may arise from being in a court environment.

If necessary, the prosecutor may request the Judge to allow the Volunteer to sit with (behind) the witness while the witness is giving evidence, either in open court or via video link.

b. **Post Trial**

Where necessary, under s 19(1)-(2) *PoTHA*, the Director of Social Welfare may provide assistance to the victim as necessary, including shelter and counselling services.

This is separate and distinct from emotional support during the trial, as Volunteers under the Witness Support Programme are not allowed to provide counselling or post-trauma treatment either before or during the trial.



6. Civil cases in connection with a child/minor

6.1 Whether the local World Vision organization, which provides shelter to a trafficked child or minor may be regarded at the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

a. **PRE-Trafficking:**

This requires clear understanding of the terms employed. "Guardian" as used is only defined in the CYP, as "in relation to a child or young person, includes any person who, in the opinion of the court having cognizance of any case in relation to the child or young person, or in which the child or young person is concerned, has for the time being the charge of, or control over, the child or young person".

It is used as a term describing the control **PRIOR** to the real/alleged trafficking.

Therefore, no one but the child's legal parent/guardian will be considered the 'Guardian' prior to trafficking; and there is no realistic scenario in which an NGO will be in a position to be appointed as guardian in accordance with s 12(4) *Children and Young Persons Act* to be considered the 'legal guardian'.

b. **POST-Trafficking:**

Under s 19(1)-(2), however, where the Director of Social Welfare may provide assistance to a trafficked victim, the Director may **authorize in writing any other person** (to perform the Director's function and thus provide assistance as per s 19(1)).

This is the aspect of **Protection/Partnership** that the Government is seeking to encourage and develop - but it must be highlighted that the NGOs/Corporates will not be considered "**Guardians**" per se.

6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

- A minor, defined as an individual who is of age below 18 years old (Civil Law Act), may not pursue a civil complaint independently as per s 36 of the Civil Law Act.
- However, his/her (appointed) guardian, as a litigation representative, may begin civil proceedings on his/her behalf.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

- Yes. There is nothing against this scenario occurring. It must be noted that a criminal case is started by the Public Prosecutor, and not initiated at the victim's time of choosing.
- Additionally, "A party may also see an advantage in forcing a defendant to deal with multiple proceedings simultaneously and hope that this will make reaching a settlement easier."⁸
- In fact, "where there were concurrent criminal and civil proceedings, the court in control of the civil proceedings had the discretion to stay the proceedings where justice so demanded. However, the burden was on the applicant for the stay to show that there would be a real danger of prejudice to justify the grant of a stay."⁹
 - This was further reinforced by reference to the case of *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108, where it was highlighted that justice so required the court to order a stay of civil proceedings.
- Theoretically criminal and criminal cases can and do run concurrently and are only stayed in rare circumstances

⁸ <http://www.elexica.com/en/legal-topics/crime-fraud-and-investigations/22-civil-and-criminal-proceedings-staying-proceedings>

⁹ *Velstra Pte Ltd (in liquidation) v Dexia Bank Belgium* [2003] SGHC 253



where the weight of circumstances compels the court to stay civil proceedings.

- e. However, in the case of human trafficking, specifically *child* trafficking, the victim rarely has the financial means, knowhow, or capability to commence such proceedings, particularly if the victim only commences proceedings after the criminal case is completed (especially in light of their uncertain immigration status and likely return to their home country).
- f. *Wong and Juay*¹⁰ therefore recommend compensation to be mandatory/appropriate in all cases of TIP, particularly given the likely inability of victims to commence civil proceedings for harm caused.

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

- a. It will be a matter for the court to consider as part of civil or criminal proceedings

Although the *PoTHA* does not specifically provide for civil compensation to be afforded to the victim, s 359(1) *Criminal Procedure Code* empowers the court to order a convicted person to compensate any person injured - "*The Court... shall consider whether to make an order for payment by way of compensation*".

This will take place *after* conviction is secured, but during the same proceedings.

7. Shelter for Trafficked Victims

7.1 How long can a trafficked victim stay in a shelter?

- a. There is no prescribed minimum or maximum period for staying in shelter in the CYPA, PHTA and Women's Charter.

7.2 Who is responsible for tracking down the guardians/family of trafficked victims?

- a. This is not provided for in legislation, but the National Approach against TIP seems to place CSOs at the heart of the "Protection" limb, envisaging that CSOs will grant assistance and daily support of victims of trafficking. This is supported by government funded shelters and victim care arrangements that are ultimately run by CSOs, NGOs and VWOs.

7.3 Who supports the trafficked victim's family to visit the victim?

- a. See 7.2.

7.4 At what point and under what circumstances can a child leave the shelter and return home?

- a. While this is not addressed specifically in the Prevention of Human Trafficking Act, it appears that under s 19 PHTA, such assistance that the Director of Social Welfare may give is at the discretion of the victim to accept for as long as he or she likes.
- b. The CYPA and Women's Charter provides that the child may be discharged from the shelter on the occurrence of certain events:
 - i. Under s 163(5) of the Women's Charter, a woman or girl who has been received under this section into a place of safety, or committed under s 165(1) to the care of a fit individual, ceases to be in the care of the place of safety or fit individual (as the case may be),

¹⁰ Ronald Wong and Juay Wei Tian, *The Prevention of Human Trafficking Act 2014: Legislation Comment*, SJLS (2015) 261-272, at 270.



after the woman or girl attains the age of 21 years or marries.

- ii. Under the CYP, a child/minor may be discharged at the discretion of the Minister at any time (s 69); otherwise the maximum age that such a minor may be housed in the "place of safety" is 19 years (s 47).

8. Can a trafficked victim be allowed to receive education while staying in the shelter?

8.1 There is no prohibition or restriction against a trafficked victim receiving education while staying in the shelter, under the CYP, PHTA, or Women's Charter.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

9.1 PHTA and Women's Charter

- a. No, only the Director may provide shelter to a trafficked victim.

9.2 CYP

- a. No, only the Director, a protector or a police officer may commit a child to a place of temporary care and protection or to the care of a fit person, pending the child being brought before the Youth Court.
- b. Once the child has been brought before the Youth Court, the Youth Court has the power to, inter alia, order that the child or young person to be committed to the care of a fit person for such period as may be specified by the Court or order that the child or young person to be committed to a place of safety or a place of temporary care and protection for such period as may be specified by the Court.

9.3 Under what conditions can trafficked victims apply for asylum?

- a. The Singapore Government does not accept asylum applications. There is no legislation addressing asylum in Singapore.
- b. Nevertheless, World Vision can render assistance as a Victim Care Provider in line with the National Approach Against Trafficking in Persons targets, particularly in light of Singapore's efforts to further engage foreign entities under its "Partnership" arm; by
 - i. Engaging the Singapore arm of World Vision to partake in dialogues with the Taskforce to reach out to trafficked migrant workers.
 - ii. Serving as an intermediary to facilitating heightened Public-Private Partnerships between the Taskforce and CSOs and partner companies.
- c. This will be crucial in assisting the integration of victims, especially if they qualify for the Temporary Job Scheme for those willing and able to work

10. Where can World Vision look for pro bono legal services to help a trafficked victim?

10.1 World Vision can reach out to the Pro Bono Services Office (PBSO) of the Law Society who will be able to match World Vision with a law firm willing to provide free non-litigation commercial legal services.

10.2 World Vision can email the PBSO at AssistNPOs@lawsoc.org.sg to seek assistance.

TAIWAN

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

- Below are the definitions according to *The Protection of Children and Youths Welfare and Rights Act*:
 - Minors: Under the age of eighteen.
 - Teenagers: Between the ages of twelve and eighteen.
 - Children: Twelve and under.

2. Is there any specific legislation that deals with trafficking of children or minors?

- Although there is no specific legislation that addresses the trafficking of minors and children, the *Human Trafficking Prevention Act*, *Child and Youth Sexual Exploitation Prevention Act* and *The Protection of Children and Youths Welfare and Rights Act* directly cover these issues.

3. Is there a legal definition of child trafficking?

- Article 2.1 of the *Human Trafficking Prevention Act* provides the legal definition of human trafficking:
 - (1) to recruit, trade, take into bondage, transport, deliver, receive, harbor, hide, broker, or accommodate a local or foreign person, by force, threat, intimidation, confinement, monitoring, drugs, hypnosis, fraud, purposeful concealment of important information, illegal debt bondage, withholding important documents, making use of the victim's inability, ignorance or helplessness, or by other means against his/her will, for the intention of subjecting him/her to sexual transactions, labor to which pay is not commensurate with the work duty, organ harvesting; or to use the above-mentioned means to impose sexual transactions, labor to which pay is not commensurate with the work duty, or organ harvesting on the victims; or(2) to recruit, trade, take into bondage, transport, deliver, receive, harbor, hide, broker people under

eighteen years of age with the intention to subject them to sex transactions, labor to which pay is not commensurate with the work duty, or organ harvesting, or to subject people under eighteen years of age to sexual transactions, labor to which pay is not commensurate with the work duty, or organ harvesting.

- The above mentioned clause applies to children as well.

4. Is there legislation to impose a duty to provide shelter to children in need?

- Yes, according to Chapter 3 (Article 12-30) of the *Human Trafficking Prevention Act*, there are provisions that impose a duty to provide shelter or protect trafficking victims (that includes children and minors).
- As stipulated in Article 20, in the event that the victim is recognized as being a child or minor and adheres to the circumstances described below, the child or minor shall be sheltered and protected in accordance with the *Child and Youth Sexual Exploitation Prevention Act*:
 - (1) discovered to be suspected of engaging in sexual transactions; and
 - (2) fitting circumstances set forth in the preceding subparagraph and deemed by a court at trial to be engaged in sexual transactions in accordance with the *Child and Youth Sexual Exploitation Prevention Act*.

5. In a criminal case in connection with trafficking of a child or minor,

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?



- Any person who is aware of a child / minor trafficking case can issue a report.
- Prosecutors, police and local city governments are responsible for receiving reports.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

- Any person who is aware of a child / minor trafficking case.
- Note that the government official who is aware of an incident of child / minor trafficking is obligated to file/ report such a case.
- Note that the personnel / agencies relating to the functions below, government agencies or not, are obligated to file / report such a case:
 - labor affairs
 - social affairs
 - medical services
 - civil affairs
 - household registration affairs
 - education
 - tourism industry and immigration service industry
 - human trafficking prevention and control
- For child / minor trafficking involving child or minor sexual exploitation, the personnel / agencies relating to the functions below are obligated to file / report such a case:
 - medical services
 - social affairs
 - education
 - caregiving

- tourism and immigrant affairs
- household registration affairs
- village chief or manager
- electronic game or computer entertainment businesses
- employment services
- child or youth welfare services.

5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

- Any evidence that proves and indicates that the below circumstances are present would be helpful:
A person who is under duress, imposed by an alleged trafficker, and is providing and / or going to provide his/her service / labor / organs for unreasonably low consideration.
- To be specific, any evidence that indicates the following will help build a case against alleged trafficker(s):
 - debt bondage
 - using another person's inability, ignorance, or helplessness
 - using force, threat, intimidation, confinement, monitoring, drugs, fraud, hypnosis, or by other means against a person's will
 - recruiting, transporting, delivering, receiving, harboring, hiding, brokering or accommodating any person under 18 years of age

5.4 What are the protocols for interviewing child victims?

- The police / prosecutor / court must notify a social worker of the interview
- The police / prosecutor / court must allow a relative / professional, including the victim's legal representative, lineal relatives by blood or collateral relatives by blood within the



third degree of kinship, spouse, parents, family members, physicians, psychologists, or social workers, to accompany the victim at the site and state their opinions,

- The police / prosecutor / court must be cautious about the victim's safety and must separate the victim from the suspects if necessary
- Any person who has learned relevant information of a child victim must protect the victim's confidentiality
- The prosecutor / judge must take protective measures to protect the victim's safety if summoned to an interview or testifies as a witness

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker,

- a. does such victim have the right to refuse;
 - If the prosecutor does not summon the trafficked child / minor victim to testify as a witness, but just identifies the trafficked child / minor as a victim, this victim can refuse to testify. However, if the victim refuses to testify, it would be more difficult for the prosecutor to build a case.
 - Nevertheless, if the prosecutor summons the trafficked child / minor victim to testify as a witness, only on limited grounds does the victim have the right to refuse to testify, including:
 - certain relationship with the alleged trafficker;
 - self-incrimination.
- b. can such victim testify via video link from another room;
 - Yes. It is within the prosecutor / judge's authority to allow a victim to testify via video link from another room or any other appropriate methods that can achieve the goal of separating the victim from the defendant.

- In addition, any human trafficking victim located outside the country may testify through audiovisual telecommunications equipment in an ROC embassy or representative office.

- c. can such victim provide testimony separately without a court appearance and return to the country of origin; and
 - Situations detailed below will allow a victim to provide testimony separately without a court appearance and return to the country of origin:
 - unable to provide statements because of his/her physical and psychological trauma;
 - unable to provide statements because of pressure at trial;
 - cannot be summoned or fails to appear after being summoned because he/she is not in the Taiwan Area or his/her whereabouts is unknown.
- d. what other means of protection are available to a child or minor testifying in court.
 - Please refer to our response under 5.3 and 5.4(b)(c). These protections all apply to child / minor victims testifying in court.

5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

- In Taiwan, a trafficked victim can simply speak on his or her own experience to assist in uncovering the truth.
- If victims want to prepare his/her testimony well, he/she could find a lawyer to assist. The victim's lawyer could brief the victim on procedures, their testimony, rules on cross-examination, etc. Note that a lawyer is prohibited from teaching the victim false statements or to falsely testify.



5.7 Can a trafficked victim be required to testify more than once, and if so, how many times on average does such victim need to appear in court?

- Generally around two to three times.
 - If the victim reported his/her situation to the police, he/she will provide his/her testimony to the police first
 - The prosecutor would review his/her first testimony and then summon the victim to confirm the facts and/or to clarify more details as a witness during the investigation procedure.
 - If the victim's testimony is challenged in court, the judge would normally allow a motion to summon the victim to testify again.
- Related to child or minor sexual exploitation: once.
 - If a victim is a child / minor trafficked for reasons relating to child or minor sexual exploitation, and has been legally questioned during an investigation or trial and made such a clear statement, the victim must not be summoned again.

5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

- Our response under 5.3 and 5.4(b)(c) also applies to protecting the best interests of child / minor victims as a witness.
- The legal system in general also provides protection via the following two approaches:
 - Legal aid

A trafficked victim is generally qualified to receive legal aid services from the Legal Aid Foundation. The Foundation is founded to provide legal services and will assign a lawyer to the victim. The lawyer will advocate for and protect the victim throughout subsequent criminal proceedings.

- Non-legal support.

The local government authority is responsible for this matter. Relevant support includes providing shelter, economic support, medical support, psychologist/ psychiatrist, translator, access to legal aid, social workers, and any other necessary support

5.9 Who supports the victim during the criminal case proceedings?

- Please refer to our response under 5.7.

6. In a civil case:

6.1 Whether the local World Vision organization, which provides shelter to a trafficked child or minor may be regarded as the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

- Unless approved by the court, the local World Vision organization cannot be regarded as the guardian of a trafficked child or minor.
- However, with the approval of a trafficked child or minor or their guardian appointed by the court, the local World Vision organization could assist in appointing a lawyer on behalf of the victim.

6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

- No, a trafficked child or minor cannot file civil complaints independently.
- Yes, the child's guardian or appointed guardian can file on behalf of the child.



6.3 Can a civil case be lodged in court at the same time as a criminal case?

- Under the Taiwan legal system, criminal cases and civil cases are separate and are reviewed and investigated by different courts. Usually, the injured party/victim is the one to initiate both civil and criminal action separately.
- Notwithstanding, under current criminal proceedings, if the injured party files a criminal complaint against the accused, the injured party may also initiate a civil action against the accused alongside the criminal procedure. In this case, a victim does not have to pay court fees for initiating the supplementary civil action that is normally required in a standalone civil lawsuit. .

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

- Under Taiwan law, compensation is limited to monetary compensation for actual injury and the losses incurred by victims. The courts grant compensation to the extent that damages can be proved. The victim may also request for compensation for the pain suffered by the victim as a result of severe damage to their body, health, reputation, liberty, credit, privacy or chastity.
- According to recent court judgments, the courts generally weigh the entirety of the circumstances of the case including the circumstances surrounding the victims, the status, position, the financial status of the victims and accused, to determine the proper compensation amount.
- In addition to the above, human trafficking victims may also apply for compensation from the Ministry of Interior (MOI).

7. How long can a trafficked victim stay in a shelter?

- There should be no limitation for Taiwanese citizens or anyone who maintains a valid Taiwan visitor (or resident) permit,

under the condition that there is a legitimate need.

- In the event that the victim is a person with no valid Taiwan visitor (or resident) permit, according to Article 16 of the *Human Trafficking Prevention Act*, the Central Authority shall issue a temporary visitor permit valid for no more than six months. In addition, according to Article 28 of the said act, the Central Authority may, based upon the necessity of an investigation or trial, extend temporary visitor (or resident) permits for a period of six months to be issued to victims that do not hold a valid visitor (or resident) permit.
- For cases that apply to Article 20 of the *Human Trafficking Prevention Act* regarding child and minor sexual exploitation, according to Article 19 of the *Child and Youth Sexual Exploitation Prevention Act*, the duration of shelter replacement can reach up to two years if the court deems it necessary. After this period of time, the Central Authority should review the case on a quarterly basis to understand whether the victim still requires shelter. Victims may apply for shelter up until the age of twenty on the condition a court deems it necessary and issues formal approval. (Article 21 of the said act).
- The Central Authority "may" coordinate the relevant authorities and/or NGOs to track down the guardians/family of the trafficked victims after the judicial authority considers that the victims are no longer required in the relevant investigation and/or trial.
- The law is unclear regarding who supports the trafficked victim's family visit Taiwan but nevertheless, the law does require that traffickers bear the fees for "sending" the victims back to their family/country.
- The child may leave the shelter to return home after the judicial authority decides the child is no longer needed in the relevant investigation / trial or no longer requires a shelter.



8. Can a trafficked victim be allowed to receive education while staying in the shelter?

- General education is not provided under the *Human Trafficking Prevention Act*. However, according to Article 17, victims are eligible to receive the following assistance:
 - protection of personal safety;
 - necessary medical assistance;
 - interpretation assistance;
 - legal assistance;
 - psychological advice and counseling;
 - being accompanied when questioned (interrogated) throughout the investigation or trial;
 - necessary financial assistance; and
 - other necessary assistance.
- In addition to the assistance above, according to *Regulation of Governing Shelter and Protection Due To Human Trafficking* (<http://glrs.moi.gov.tw/LawContent.aspx?id=FL049289>), the shelter can also provide vocational training, such as skill training, life adaption training, language training and other training. These forms of training are not considered official education.
- However, for cases regarding child and minor sexual exploitation as considered in Article 20 of the *Human Trafficking Prevention Act*, Article 22 of *Child and Youth Sexual Exploitation Prevention Act* stipulates that the Central Education Authority and the Central Competent Authority shall jointly work to establish transition schools that offer placements to victims. Said transition schools may provide further education for subjects of the placement program who are beyond the age for compulsory general education. Students of transition schools shall have their student status registered at different regular schools, and their diplomas shall be awarded by said schools.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

- For temporary shelter – Victims whose parents or country of origin cannot be identified are still protected by the *Human Trafficking Prevention Act*. World Vision can assist the Ministry of Health and Welfare to provide protection and shelter for the trafficked victim. However, the Ministry of Health and Welfare has the authority to decide the sheltering measures and institution after considering the victim's well-being.
- Conditions for an asylum application, such as permanent residency etc. – If sending the trafficked victims back to his/her own country would expose him/her to danger, the victims are entitled to apply for asylum.

10. Where can World Vision look for pro bono legal services to help a trafficked victim?

- Victims or suspected victims of human trafficking can apply for legal aid services with the Legal Aid Foundation. You can directly dial the Legal Aid Hotline at 412-8518 for help, contact the Foundation via their online system, or visit the office in person. More details can be found at: <http://www.laf.org.tw/en/index.php?action=contact>.

THAILAND

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

The definition of a child and minor is given in several pieces of legislation in Thailand, each with slightly different definitions:

- a. Section 4 of the Anti-Trafficking Act B.E. 2551 (2008) (as defined below): a child means a person below the age of 18 years old;
- b. Section 4 of the Child Protection Act B.E. 2546 (2003): a child means a person below the age of 18 years old, excluding those who have attained majority through marriage;
- c. Section 4 of the Juvenile and Family Court and Legal Procedures on Juvenile and Family Cases Act B.E. 2553 (2010): a child means a person between 10 and 15 years old as prescribed in Section 73 of the Penal Code, while a minor means a person of or above 15 years old but who has not reached 18 years old;
- d. Section 19 of the Civil and Commercial Code ("CCC"): when people reach the age of maturity (20 years old), they will not be classified as a minor; and
- e. in addition to Thai domestic laws, the Convention on the Rights of the Child, which Thailand is a state party to, defines a child as "every human being below the age of eighteen years, unless, under the law applicable to the child, maturity is attained earlier."¹

2. Is there any specific legislation that deals with trafficking of children or minors?

Currently, there is no specific piece of legislation in Thailand that deals with the trafficking of children or minors. However, there is domestic, international and bilateral legislation that aims to stop human trafficking both in Thailand and across the region.

Recently, the Thai government has taken a firm stance against human trafficking by passing numerous pieces of legislation relating to the matter.

I. National Legislation

The Prevention and Suppression of Human Trafficking Act B.E. 2551 (2008), as amended by the Prevention and Suppression of Human Trafficking Act (No. 2) B.E. 2558 (2015), and the Prevention and Suppression of Human Trafficking Act (No. 3) B.E. 2560 (2017) (collectively, the "**Anti-Trafficking Act**") is the primary piece of legislation combatting human trafficking in Thailand.

The Anti-Trafficking Act, while not explicitly established to solely combat the trafficking of children, does have sections covering the issue. The latest amendment provided clarifications and added provisions which have increased protection for children under the age of 18 (e.g. heavier penalties when the offense is committed against a child). The Anti-Trafficking Act mandates that if any person commits the following actions for the purpose of exploitation², that person is guilty of committing the crime of human trafficking:

- i. Section 6 (1): procuring; buying; selling; vending; bringing from or sending to; detaining or confining; harboring; or receiving any person by means of threat or use of force; abduction; fraud; deception; abuse of power; illegal exertion of influence over others on account of their physical, psychological, educational or any kind of vulnerability; threat to take abusive legal action against others; or the giving money or benefits to achieve the consent of a person having control over another person

¹ Article 1 of the Convention on the Rights of the Child.

² "Exploitation" means seeking benefits from prostitution; production or distribution of pornographic materials; other forms of sexual exploitation; enslavement, or slave-like or forced labour or service; causing another person to be a beggar; coerced removal of organs for the purpose of trade; or any other similar practices resulting in forced extortion, regardless of such person's consent. Furthermore, forced labour or service means compelling another person to work or provide a service by: (i) making that person fear for the life, body, liberty, reputation, or property, of themselves or another person; (ii) means of intimidation; (iii) use of force; (iv) confiscation of identity documents or debt bonds of that person or others; or (v) coercive situations.



in allowing the offender to exploit the person under his control; or

- ii. Section 6 (2): "procuring; buying; selling; vending; bringing from or sending to; detaining or confining; harboring; or receiving a child."

Distinguishing between the two sub-provisions above, when dealing with a child, there is no requirement that trafficking acts are conducted through the use of threats or force, abduction, fraud, etc., unlike the sub-provision for adults as stipulated in Section 6 (1). Therefore, it would be easier to prove that an alleged defendant has committed an offence of human trafficking against a child under Section 6 (2) than it is to prove under Section 6 (1). In this sense, the Anti-Trafficking Act provides higher protection for children than adults.

In addition, any person engaging in any of the following actions will also be classified as committing the offense of human trafficking:

- a. abetting human trafficking;
- b. subsidizing trafficking by providing property to or procuring a place for meeting or lodging for the trafficker;
- c. assisting the trafficker by any means so that they are not arrested;
- d. demanding, accepting, or agreeing to accept property or any other benefits from the trafficker to prevent him or her from being punished; or
- e. inducing, suggesting, or contacting a person to become a member of an organized criminal group, for the purpose of human trafficking.

With respect to the penalties for committing human trafficking crimes under the Anti-Trafficking Act, if the victim is between the ages of 15 and 18, the defendant may be subject to imprisonment for six to 15 years and a fine of ฿600,000 to ฿1,500,000. If the

victim is not over 15 years old or is a person with disabilities or mental impairment, the defendant may be subject to imprisonment for eight to 20 years and a fine of ฿800,000 to ฿2,000,000. In other cases in which the victim is an adult, the defendant may be subject to imprisonment for four to 12 years and a fine of ฿400,000 to ฿1,200,000.³

If human trafficking is committed by a legal person, the legal person may be subject to a fine ranging from ฿1,000,000 to ฿5,000,000.⁴ The director, manager, or responsible persons of the juristic person may also be subject to imprisonment for six to 12 years and a fine of ฿600,000 to ฿1,200,000 if human trafficking is committed under the representative's instruction, action or failure to do their duty to instruct or act. If the offense is committed against a child, as mentioned above, the representative is subject to the same penalty as the offender themselves. Different penalties will be applied depending on whether the victim is an adult or child. If the victim is an adult, the penalties mentioned in the beginning of this paragraph would apply. If the victim is a child, the representative is subject to the same penalty as the offender themselves, which are the penalties applied to child victims as mentioned in the previous paragraph.

The Human Trafficking Procedure Act B.E. 2559 (2016) (the "**Human Trafficking Procedure Act**") also serves as a guideline to prevent human trafficking and prosecute traffickers. It attempts to increase the success rate of reaching verdicts efficiently, and to protect witnesses and victims while testifying. However, the Human Trafficking Procedure Act does not lay down any procedures specific to children. The Criminal Procedure Code supplements the Human Trafficking Procedure Act when dealing with children in certain court procedures.

The Child Protection Act B.E. 2546 (2003) (the "**Child Protection Act**") ensures that trafficked children are legally afforded protection. The Child Protection Act was enacted to ensure that

³ Section 52 of the Anti-Trafficking Act.

⁴ Section 53 of the Anti-Trafficking Act.



all children in Thailand are protected from any practices that can impair their physical or mental wellbeing. Guardians must ensure that their children are raised in a responsible manner and that their needs are cared for. State officers are also obligated to protect children affected by human trafficking. The Child Protection Act also states that regardless of whether the child's consent is provided, no person may:

- a. act or fail to act in any manner which leads to torture of a child's physical or mental condition;
- b. compel; threaten; induce; encourage; or allow a child to act inappropriately;
- c. compel; threaten; induce; encourage; or allow a child, or act in a way that results in the child becoming a beggar; living on the street; being used as an instrument for begging or committing crimes; or acting in any way that results in the exploitation of a child;
- d. use or employ a child; or ask a child to work or act in such a way that might be physically or mentally harmful to the child, affect the child's growth, or hinder the child's development;
- e. compel; threaten; use; induce; instigate; encourage; or allow a child to commit any acts indicative of commercial exploitation in a manner which hinders the child's growth and development or constitutes an act of torture against the child; or
- f. compel; threaten; use; induce; instigate; encourage; or allow a child to perform or act in a pornographic manner, regardless of whether the intention is to obtain monetary consideration.⁵

The Penal Code B.E. 2499 (1956) prohibits numerous offenses committed against children's rights, for example: in Section 282, Paragraphs 2 and 3 (indecenty for sexual gratification with

victim's consent); Section 283 (indecenty for sexual gratification by deceitful means); Section 283 *bis* (indecenty against a child irrespective of consent given); Section 312 *bis* in conjunction with Section 312 (child slavery); Section 312 *ter* (taking of a child); Section 313 (kidnapping of a child); Section 316 (confinement or abduction); Section 317 (abduction of a child under 15); Section 318 (abduction of a child who is at least 15 years old but has not reached 18 years old); and Section 319 (abduction for lucre or indecenty). The Labour Protection Act B.E. (1998) (the "**LPA**") also has strict regulations that prohibit child labour exploitation. Section 44 prohibits an employer from hiring children under 15 years of age; Section 45 states the conditions for employing a child from 15 to 18 years old; Sections 47 and 48 cover restrictions on working days and hours for children; Section 49 covers the restrictions on duties that can be assigned to children; and Section 50 covers the restrictions on locations where children cannot be employed.

II. International Agreements

Thailand is currently a state party to the United Nations Convention Against Transnational Organized Crime (the "**Palermo Convention**"); the Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; and various International Labour Organization conventions: the Forced Labour Convention; the Abolition of Forced Labour Convention; the Minimum Age Convention (1973); the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999); the Occupational Safety and Health Convention; and the Maritime Labour Convention.

III. Bilateral and Regional Agreements

Thailand is currently a state party to the following:

- a. the Memorandum of Understanding on Cooperation to Combat Trafficking in Persons, Especially Women and Children, with Myanmar;

⁵ Section 26 of the Child Protection Act.



- b. the Memorandum of Understanding on Cooperation to Combat Trafficking in Persons, Especially Women and Children, with the Lao PDR;
- c. the Memorandum of Understanding on Cooperation in the Employment of Workers, with Cambodia;
- d. the Memorandum of Understanding on Cooperation in the Employment of Workers, with Myanmar;
- e. the Memorandum of Understanding Between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on the Establishment of Transit and Reception Center for Victims of Trafficking and Other Vulnerable Groups;
- f. the Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking;
- g. the Memorandum of Understanding on Cooperation against trafficking in persons in the Greater Mekong Sub-Region, between the Governments of the Kingdom of Cambodia; the People's Republic of China; the Lao PDR; the Republic of the Union of Myanmar; the Kingdom of Thailand; and the Socialist Republic of Vietnam;
- h. the Memorandum of Understanding Between the Government of the Lao PDR and the Government of the Kingdom of Thailand on Labour Cooperation;
- i. the Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Persons and Protecting Victims of Trafficking;
- j. the Memorandum of Cooperation Between the Government of Japan and Thailand Concerning the Exchange of

Information for the Purpose of Preventing and Combating Trafficking in Persons;

- k. the Agreement Between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking;
- l. the ASEAN Convention Against Trafficking in Persons, Especially Women and Children;
- m. the ASEAN Declaration Against Trafficking, in Persons Particularly Women and Children; and
- n. the ASEAN Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN.

3. Is there a legal definition for child trafficking?

Under current Thai legislation, there is no established legal definition for child trafficking. However, the Anti-Trafficking Act provides a definition of a child and includes a specific provision dealing with children (in addition to the general description of human trafficking that applies to all victims). Please see Question 2, Item I above.

4. Is there legislation to impose a duty to provide shelter to children in need?

Before a child is taken into a shelter, a child can be held in custody. Under Section 30 (2) of the Child Protection Act B.E. 2546 (2003), if a child is in need of assistance, the child may be brought to the office of a competent official who is appointed by the Minister of Social Development and Human Security pursuant to the Child Protection Act. This action may be taken without undue delay and the child can be held in protective custody for up to 12 hours.



The Palermo Convention was ratified by Thailand in October 2013, under which Thailand must implement measures to provide for the physical, psychological, and social needs of children victimized by child trafficking. Child victims should be provided with suitable accommodation, counseling and relevant information in a language they are accustomed to; medical and psychological assistance; and employment, educational and training opportunities. Thailand also has the responsibility to ensure that child victims are physically safe while they are in Thailand. Child victims of trafficking must also be provided with appropriate shelter and other necessities to ensure their physical and psychological wellbeing during their time in the shelter.

Section 33 of the Anti-Human Trafficking Act requires the Ministry of Social Development and Human Security (the "MSDHS") to provide victims of trafficking with food; shelter; security; medical treatment; physical and mental evaluation; education; vocational training; legal aid; repatriation; and legal assistance so that compensation can be claimed. The MSDHS has 76 short-stay residences and nine long-term residences accessible to victims of human trafficking.

5. Criminal cases in connection with trafficking of a child or minor

5.1 Who can report child trafficking cases and which government authorities or social service units are responsible for receiving reports?

Any individual can report child trafficking cases to the Royal Thai Police (Royal Thai Police Centre for Children, Women Protection and Anti-Trafficking in Persons (CCWP & ATIP)) who will then forward their findings to the Office of the Attorney General for prosecution.

In addition to filing a report with the police inquiry officer at the CCWP and ATIP, the report can be filed with an inquiry officer in a police station and a DSI officer as well. (The difference between

reporting to an inquiry officer at a police station and at the CCWP and ATIP is only the scale of the case. If the case requires more investigation facilities and/or international cooperation, then the report should be made to the CCWP and ATIP).

As a matter of prevention, hotlines to government agencies were promoted in 2015 so that anyone can report and file complaints on human trafficking and other related wrong doings such as government officials' complicity in human trafficking cases. The following are hotlines for human trafficking and related offences:

- Hotline 1191 (Anti-Human Trafficking Division, Royal Thai Police) and 1300 (One Stop Crisis Center by MSDHS) are the main contact points for receiving reports on human trafficking. Both victims and informers can report such behaviors. They are responsible for receiving reports relating to human trafficking and providing advice to the victims and informers on the legal procedures.
- The Department of Special Investigation or the DSI will accept reports relating to human trafficking behaviors. However, they will not receive verbal reports through their hotline channel. The victim or informer will be required to report to the DSI in person. Once the DSI completes the review of the report, they will send the case to the Anti-Human Trafficking Division, Royal Thai Police for necessary actions.
- Hotlines 1546 (Labor Protection) and 1694 (Migrant Workers) will not accept matters purely relating to human trafficking but will provide advice in relation to labor-related cases.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

Inquiry Police Officer: generally an inquiry officer has a duty under the Criminal Procedure Code to gather evidence relating to criminal cases reported to the police and forward the case file to the public prosecutor. Criminal cases in this sense also include human trafficking cases.



Department of Special Investigation (DSI): the DSI is an organization under the Ministry of Justice. The DSI has been granted power to investigate and inquire in special criminal cases which may have significant impacts to the economic, social and political systems. Human trafficking cases also come under DSI authority.

5.3 In general, what evidence is required to build a case against alleged traffickers?

The prosecutor will be required to provide evidence to prove that the trafficker procured; bought; sold; transported; detained or confined; harbored; or received a person via threats; force; kidnapping; fraud or deceit; unlawfully exercising their power; unlawfully using force to dominate the other person due to their physical inability, mental disability, lack of education, or other disadvantage; unlawful threats of legal proceedings; or giving money to the child's parents in return for the parents' consent to the wrongdoer. In addition, it has to be proven that the trafficker intended to commit the offense and intended to exploit (profit from) the victim.

5.4 What are the protocols for interviewing a child victim?

Please refer to our response in (e)(iv) of the same question below.

Prior to an official interview or interrogation, there will be an informal interview to determine whether the person is a victim and gather useful information. This session will be conducted by the official interrogator together with a supporting team. This process is not required by law; however, it would be very helpful to both victims and the interrogators if done efficiently. If the interviewee is a child, a professional or team with experience of dealing with children should participate in the interview.

If it is determined that the interviewee is a victim, the person will be transferred to the official interrogator together with the interview script for further legal processing pursuant to the Human Trafficking Procedure Act.

As a respondent of the Bali Process⁶, Thailand has to adhere to the following principles:

Preparing for the formal interview

- Conduct the interview as soon as the child is ready to talk about their experiences of human trafficking.
- Find relevant information regarding the victim, including name, age, languages, religion/culture, developmental ability and general health.
- A victim's story could be better understood once information has been gathered by all relevant parties to the case.
- Another official should be present in an administrative capacity. The other official can take notes to avoid delaying the victim's interview. Where legally permitted, video or audio recordings can be used.
- Preferably, a victim should be interviewed by the gender they identify with.
- The interviewer should refrain from wearing an official uniform and should resort to wearing civilian clothing. The interviewer must refrain from intimidating the victim, ensuring the interview room is comfortable and the victim should be provided with paper and pencils to aid their testimony. Further, the victim must be supplied with food and water, have access to the toilet at all times and be provided with adequate rest breaks.
- Important: To identify a victim of human trafficking, the Palermo Protocol stipulates that the interview needs to establish both activities and purpose.

Formal interview

- Ensure the interview is conducted in friendly manner.

⁶ The Bali Process on People Smuggling, Trafficking in Persons and Related Transactional Crime (Bali Process) is a forum for policy dialogue, information sharing and practical cooperation to help address human trafficking issues in the region.



- The victim should be made to feel comfortable.
- Close attention should be paid to the victim's behaviour, language and emotions.
- Privacy issues
 - The interview should be kept private at all times.
 - Ensure that all unnecessary electronic devices are muted.
- Clear explanation
 - The interviewer must identify themselves clearly and explain the necessity of conducting the interview.
 - Explain the interview procedure to the victim in clear, concise language so that they understand.
 - Introduce others in the room and ascertain that why they are there.
 - Inform the victim that how their information will be used and that it will kept private at all times.
 - The victim should be informed of the following:
 - If they do not have information about the incident or do not have an answer to a question, they should reply "I do not know".
 - If they fail to understand a question, they should say "I do not understand". The interview should then proceed with trying to rephrase the question in a way the victim will understand.
 - If they have forgotten information or cannot recall an incident, they should say "I do not remember".
- Use an appropriate question style
 - The interviewer must ensure their questions are suitable for the age and mental ability of the victim.
 - No matter what the victim's age or mental ability, open-ended questions should be used.

- Do not confuse the victim with multiple questions or overcomplicated questions.
- Victims must be given the time and the space to answer questions to the best of their ability.
- Victims should not be given leading questions. Leading or closed-ended questions should not be used except when required for clarification.
- Carefully observe
 - The interviewer must ensure that his/her assistant officer takes detailed notes and records.
 - The victim's body language must be closely observed at all times during the interview.

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker

a. Does the victim have the right to refuse?

The public prosecutor cannot force anyone to testify against their will. However, if the person is an important witness, the public prosecutor may submit a motion to the court requesting that the court summon the person to testify. If that is the case for a trafficking victim, they cannot disobey the court's summons, or else they may be held in contempt of court, which is a criminal offense.

b. Can the victim testify via video link from another room?

Although this does not apply specifically to trafficked victims, the Human Trafficking Procedure Act provides that for pre-trial depositions, preliminary examinations, or trial proceedings, if it is not reasonably possible for a witness to testify in court, the court may allow the witness to testify from another court, a government agency office, or any other place located within or outside Thailand by using teleconference technology, at the party's request or at the court's own discretion. This testimony



will be deemed equally valid. Therefore, a trafficked victim may testify via video for trafficking cases from another location, with approval from the court.

c. Can the victim provide testimony separately without a court appearance and return to the country of origin?

As mentioned above, a trafficking victim may testify separately without a court appearance provided that it falls under the conditions mentioned above.

d. What other means of protection are available to a child or minor testifying in court?

As mentioned above, although the Human Trafficking Criminal Procedure Act is in place, it does not address nor provide protections specifically for child victims; however, the Act does specify that if there is no specific provision under the Act or under the Rules of the President of the Supreme Court that is adequate, the Criminal Procedure Code will be applied, to the extent it does not conflict with the Act.⁷

The Criminal Procedure Code provides several protections to child victims or child witnesses, as described below.

With respect to the criminal investigation process, Section 133 *bis* of the Criminal Procedure Code states that with respect to offenses under the law on protection and suppression of the trafficking of women and children, if the victim or witness is a child (under 18 years old), the inquiry officer must, at the child's request, investigate the victim or witness separately, at a location suitable for the child, and in the presence of a psychologist or social worker, a person requested by the child, and a public prosecutor. If the psychologist or social worker believes that the investigation of any child or any question may have a severe impact on the mental condition of the child, the inquiry officer must convey the question through the psychologist or

social worker, and the child must be prevented from hearing the question.⁸ In addition, the child must not be questioned repeatedly without justifiable reasons. The inquiry officer has the obligation to inform the psychologist or social worker, the person requested by the child, the public prosecutor, and the child victim or witness of these rights.⁹ Furthermore, the inquiry officer must record both video and audio of the interview in a manner that can be reproduced as evidence.¹⁰ The Criminal Procedure Code also prescribes the approach to be taken when a child victim or witness is required to identify a suspect; this approach describes the steps necessary to prevent the suspect from seeing the child victim.¹¹

A victim may also file a complaint to an administrative or police official, who will then forward it to an inquiry officer.¹² However, if the victim is a child, the aforementioned methods applied to the criminal investigation process also apply.¹³

The Criminal Procedure Code also addresses pre-trial depositions and trial proceedings in which the witness is a child. As for trial proceedings (e.g. witness examinations), per Section 172 *ter* of the Criminal Procedure Code, the court must arrange for the witness to be in an environment appropriate for a child, and either:

- i. examine the witness themselves, or through a psychologist or social worker; or
- ii. allow the parties to examine, cross-examine, and re-examine the child through a psychologist or social worker.¹⁴ Prior to the witness examination, if the court deems it appropriate, or the child witness or any party submits a

⁸ Section 133 *bis*, para. 1, of the Criminal Procedure Code.

⁹ Section 133 *bis*, para. 2, of the Criminal Procedure Code.

¹⁰ Section 133 *bis*, para. 3, of the Criminal Procedure Code.

¹¹ Section 133 *ter* of the Criminal Procedure Code.

¹² Section 124 of the Criminal Procedure Code.

¹³ Section 124/1 of the Criminal Procedure Code.

¹⁴ Section 172 *ter*, para. 1, of the Criminal Procedure Code.

⁷ Section 8 of the Human Trafficking Criminal Procedure Act.



reasonable request, whereby it may be detrimental to the child if the request is not granted, the court must show before the parties, the video and audio of the child victim or witness which was recorded during the investigation pursuant to Section 133 bis and Section 171, paragraph 2 as part of the witness testimony. The parties may further examine, cross-examine, and re-examine the witness.¹⁵ The methods under sections 133 bis (as described above) and 172 ter also apply to pre-trial depositions.

5.6 How is a trafficked victim thoroughly prepared for their testimony before the appointed court date?

Officers of the MSDHS who work at the shelter will brief the victim of the procedures at the court, and coordinate with the police and the prosecutor to prepare necessary documents before the appointed court date.

5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does the victim need to appear in court?

Under Thai law, a witness is only required to testify once. However, in practice, the testimony of one witness may last longer than one court appointment, depending on the details of the case. Therefore, the victim may be required to attend court more than once for the same witness testimony.

5.8 How does the law protect the best interests of a trafficking victim who is a child or minor as a witness in a criminal proceeding?

Under the Regulations of the Department of Juvenile Observation and Protection on the reporting methods and protection measures that an officer can provide to a witness and at the end of witness protection B.E. 2549 (2006), the main provisions which provide child protection are as follows:

- i. a child or minor that is a witness in a criminal proceeding who is likely to be in danger must receive protection, if an officer knows of the danger or at the witness' request;
- ii. a witness may request protection of their husband, wife, parent, or heir, or a child or minor who has a close relationship with the witness;
- iii. the process is to be kept confidential; and
- iv. child witness protection can include closely looking after the child; relocating them to a dormitory or to suitable accommodation with the approval of the director of the Department of Juvenile Observation and Protection; or any other action which provides reasonable help and protection, which may involve coordinating with other government entities to provide protection, including coordinating with the Witness Protection Office to provide necessary help for a child or minor.

Please also see section (e) (iv) of our response to question 5.

5.9 Who supports the victim during the criminal case proceedings?

The police, public prosecutor and officers of the MSDHS will provide support to victims of human trafficking during criminal proceedings.

6. In a civil case

6.1 Whether the local World Vision organization, which provides shelter to a trafficked child or minor may be regarded as the guardian of the child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case

¹⁵ Section 172 ter, para. 2, of the Criminal Procedure Code.



Guardianship

Please note that only a 'person', **not an entity**, who has reached maturity can be a guardian **of a child** (Section 1587 of the CCC); therefore, if this provision is strictly interpreted, an organization may not be appointed as a guardian of a child or a minor.

Appointing a lawyer

The World Vision organization may appoint a lawyer to represent the victim to pursue compensation in a civil case.

Please note that when initiating a criminal case against traffickers, the public prosecutor may also request compensation on behalf of the victim along with the criminal case, or **later** file a petition during the first instance court hearing. This does not deprive the victim of the right to request additional compensation under the Penal Code (per section 13 of the Human Trafficking Procedure Act).

6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

A child or minor is an incapacitated person under Thai law. Therefore, a child or minor can file a claim to the court or any other proceedings only in accordance with the provisions stipulated in the Civil and Commercial Code governing capacity and of the Civil Procedure Code (first paragraph of section 56 of the Civil Procedure Code). Generally, the legal representative of a child or minor is his/her parent. The legal representative can file a complaint on behalf of a child or minor.

However, when a child or minor file a complaint independently, it is considered as a mere lack of capacity. It is not a lack of legal standing. Therefore, the court can order for rectification, i.e. appointing legal representative to act on a child or minor's behalf until he/she becomes mature, before continuing with the proceedings. (second paragraph of section 56 of the Civil

Procedure Code)

In the case that a child or minor does not have legal representation, or his/her legal representative cannot conduct the duty, the court has the power to permit or appoint legal representative for this particular case to the child or minor. If there is no other person, the court has the power to appoint the Public Prosecutor or other administrative official as legal representative. (fourth paragraph of section 56 of the Civil Procedure Code)

6.3 Can a civil case be lodged with the court at the same time as a criminal case?

Yes, the Human Trafficking Procedure Act explicitly states that the public prosecutor may claim compensation for damages relating to the Anti-Trafficking Act along with pursuing a criminal case or by filing a petition during the first instance of court proceedings. The victim may also file a petition claiming additional compensation under the Criminal Procedure Act before the court issues a final decision.¹⁶ In addition, even if compensation was not requested by the victim, the court maintains the authority to order the defendant to compensate the victim in an amount deemed appropriate (if the defendant is ruled guilty).¹⁷ This does not affect the victim's right to bring a civil case against the defendant to claim other compensation.¹⁸ Furthermore, if committing the offense involves violence; detention; physical harm; or severely inhumane oppression, the court has the authority to impose punitive damages on the defendant as it deems appropriate.¹⁹ The court should take into account surrounding factors such as the severity of the damage; benefits gained by the defendant; the defendant's financial status; and the defendant's criminal record related to human

¹⁶ Section 13, para. 1, of the Human Trafficking Procedure Act.

¹⁷ Section 14 of the Human Trafficking Procedure Act.

¹⁸ Section 14 of the Human Trafficking Procedure Act.

¹⁹ Section 14 of the Human Trafficking Procedure Act.



trafficking.²⁰ The court's judgment with respect to compensation and punitive damages will be assessed in conjunction with the court's judgment of the criminal case. For legal execution and enforcement of compensation and punitive damages, the victim is considered to be and is provided with the same rights as a judgment creditor (under the Civil Procedure Code).²¹ The term "judgement creditor" is a term used in Thai civil law to define the party who the court has ruled as the creditor as opposed to the other party, who would be the judgment debtor. The Civil Procedure Code provides the judgment creditor with several rights and mechanisms in terms of enforcement and legal execution to ensure that the judgment creditor receives the entire amount of debt, as determined by the court, from the judgment debtor. Therefore, in enforcing the court's judgment regarding compensation or punitive damages granted to the victim, Section 15 of the Human Trafficking Procedure Act requires that the victim is treated the same as a judgment creditor under the Civil Procedure Code, so they are entitled to the same rights and mechanisms.]

6.4 How will the court determine the compensation for a trafficking victim in a civil case?

There are no specific guidelines or rules which the court will follow. In addition, as Thailand is a civil law country, court precedents are not legally binding; therefore, compensation will be considered on a case-by-case basis, depending on the facts of each case. However, as mentioned above, for cases that involve violence; detention; physical harm; or severely inhumane oppression, the court may impose punitive damages, taking these factors in to account.²²

7. How long can a trafficked victim stay in a shelter?

a. Thai victims

A victim under 18 years old is obliged to stay in a shelter until the case finishes, and may continue to stay after the case finishes, depending on their mental condition as evaluated by a doctor or specialist.

b. Foreign victims

A foreign victim may stay in a shelter until the end of their lawsuit, but may request to return to their country of origin after police finish their investigation.

Most victims of human trafficking will be placed in MSDHS shelters; therefore, the onus will be on the MSDHS to support the trafficking victims in all their needs, including contacting family, if any. The MSDHS will conduct their work on a case-by-case basis when deciding if a child can leave a home and return to their family. It should be noted that due to the fact an evaluation of all concerned parties takes place, some families show signs that they are not yet ready to take care of the victims.

Furthermore, on the MSDHS' proposal, the government issued the Regulation Permitting NGOs to Establish Shelters to Assist Victims of Trafficking B.E. 2560 (2017). This Regulation enables NGOs involved in anti-trafficking to register with the MSDHS to establish their own privately run shelters. The MSDHS works closely with such shelters and allow them to apply for financial support from the MSDHS's Anti-Human Trafficking Fund. Moreover, this will give victims of human trafficking to freely choose the service that best suits their needs. For example, talks are underway to establish shelters specifically catering to minors.

²⁰ Section 14 of the Human Trafficking Procedure Act.

²¹ Section 14 of the Human Trafficking Procedure Act.

²² Section 14 of the Human Trafficking Procedure Act.



8. Can a trafficked victim be allowed to receive education while staying in the shelter?

Yes. The MSDHS is responsible for providing trafficked victims with education per section 33 of the Anti-Human Trafficking Act. The education program is "Non – Formal Education" (Kor Sor Nor). Shelters also provide other therapeutic activities (art, etc.).

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

The MSDHS is responsible for the application for asylum on behalf of trafficked victims. Such applications will be forwarded to the Permanent Secretary of the Ministry of Interior for consideration as stipulated in the Announcement of the Ministry of Interior on the permission for certain aliens to stay in the Kingdom in special cases: human trafficking victims B.E. 2554 (2011).

It is unlikely as this is deemed to be a government-to-government issue, according to MOUs signed between the Thai government and other countries.

Thailand is home to approximately 130,000+ refugees/asylum seekers; however, the country is not a party to the 1951 Refugee Convention and has no domestic legislation pertaining to protect the rights and freedoms of those residing in the Kingdom. Refugees and those asylum seekers with United Nations protections are considered illegal migrants and are routinely denied fundamental rights including legal status, freedom from detention and deportation, access to safe and lawful employment, and equal protection of the law.

Thailand has taken great strides to strengthen national legislation to combat human trafficking and to upgrade the rights of children to meet its international obligations. Thailand's Child Protection Act 2003 was a step forward into improving and

sustaining the rights of children in Thailand; however, protection under the Act has failed to extend to those children who are not holding Thai nationality and are illegally residing in the country.

10. Where can World Vision look for pro bono legal services to help a trafficking victim?

As the MSDHS is responsible for providing legal services to trafficked victims per section 33 of the Anti-Human Trafficking Act, World Vision could consider working alongside officers of the MSDHS and the victims, to ensure victims' rights are upheld in accordance with the law. However, as an NGO, World Vision is subject to strict regulations and procedures to be able to operate in Thailand.

International organisations looking to play a social role in Thailand must contend with complex bureaucratic procedures, which require foreign NGOs to apply for permission before they are able to establish an office in Thailand. Thai government bureaucracy is a complex mechanism that can sometimes dissuade foreign NGOs from operating in the country.

The operation of foreign NGOs in Thailand is the responsibility of the Ministry of Labour and Social Welfare and is regulated through the following two laws:

- Regulations of the Ministry of Labour and Social Welfare on the Entry of Foreign Private Organisations to Operate in Thailand B.E. 2541 (1998); and
- Regulation of the Committee on Consideration of the Entry of Foreign Private Organisation Governing Principles for consideration and instructions on the entry of foreign private organizations to operate in Thailand and the establishment of regional offices in Thailand B.E. 2543 (2000).

VIETNAM

LEGAL PROCEEDINGS





1. What is the legal definition of a child and what is the legal definition of a minor?

Article 1 of the Law on Children¹ ("LoC") defines a child as a human being below the age of 16.

Additionally, Articles 20.1 and 21.1 of the Civil Code² stipulate that "adults are persons who are 18 years of age or older," and "minors are persons who are under 18 years of age." As a result, under Vietnamese law, those between the ages of full 16- under 18 would be considered as minors, though they would be considered as still children under international standards.

2. Is there any specific legislation that deals with trafficking of children or minors?

Yes, there are provisions under the Penal Code³ criminalizing human trafficking, which includes child trafficking.

Accordingly, the trafficking of minors is treated the same as general human trafficking,⁴ while child trafficking (i.e., trafficking those under 16 years of age) is subject to harsher punishment.⁵

3. Is there a legal definition of child trafficking?

Yes. Pursuant to Article 151 of Penal Code, any of the following acts would be deemed as child trafficking:

- Transferring or receiving a person under 16 years old for the transfer of money, property or other financial interests, except for humanitarian purposes;

- Transferring or receiving a person under 16 years old for sexual slavery, coercive labour, taking body parts or for other inhuman purposes; and
- Recruiting, transporting, harbouring a person under 16 years old for the commission of any of the acts specified above.

4. Is there legislation to impose a duty to provide shelter to children in need?

Article 50.2.b of the LoC regulates that at the intervention level, responsible agencies have to arrange a safe temporary residence for children and separate them from environments or individuals that are threatening, violent or exploitative of children.

Article 50.2.c of the LoC regulates that at the intervention level, responsible agencies have to arrange temporary or long-term surrogate care for children in need, including:

- Double-orphans, abandoned children, and homeless children;
- Children who cannot live together with their parents for the sake of their safety; their parents are unable to protect and nurture their child or themselves abuse the child;
- Children who are affected by natural disasters, catastrophes or armed conflict need to be protected with priority; and
- Refugee children whose parents are unidentified.

Child protective measures at the intervention level, as regulated in Article 50.1 of the LoC, include measures that are applicable to abused children and their families for preventing harmful acts to children and assisting disadvantaged children with functional rehabilitation and social inclusion.

¹ Law No. 102/2016/QH13 on Children adopted on 5 April 2016 of the National Assembly ("LoC").

² Law No. 91/2015/QH13 on the Civil Code adopted on 24 November 2015 of the National Assembly ("Civil Code").

³ Law No. 100/2015/QH13 on the Penal Code, adopted on 27 November 2015 of the National Assembly amended and supplemented by Law No. 12/2017/QH14 adopted on 20 June 2017 ("Penal Code").

⁴ Article 150, the Penal Code.

⁵ Article 151, the Penal Code.



5. In a criminal case in connection with trafficking of a child or minor:

5.1 Who can report child trafficking cases and which government authorities or social services units are responsible for receiving reports?

According to Article 19 of the Anti-Human Trafficking Law,⁶ any individual or entity can do the report once they detect a child trafficking case.

The direct recipients of these cases will be the police departments or the People's Committees at the commune-level. Child trafficking cases can also be reported to any feasible organizations or agencies, who must then promptly report to the competent authorities to proceed with investigation, rescue, pressing charges, etc.

5.2 Which agency or agencies have the authority to file a case with the prosecutor?

Under Vietnam's Criminal Procedural Code No. 101/2015/QH13 adopted by the National Assembly on 27 November 2015 ("CPC"), the competent police department in the area would be the one to file a criminal case (e.g., child trafficking) to the prosecutor of the same jurisdiction after its investigation and collection of sufficient evidence for prosecution.

The competent police department to handle the case can be the district-level police if no aggravating factors have been found that may categorize the alleged trafficking as an extremely serious crime (i.e., crimes carrying the maximum sentences prescribed in the Penal Code, which are 15 or more years of imprisonment, life sentences or death sentences). Otherwise, the file shall be transferred to the provincial-level police department.

5.3 In general, what evidence is required to build a case against alleged trafficker(s)?

Generally, in order to prove that alleged trafficker(s) have actually committed a crime, the police/prosecutors need to prove all elements constituting such crime as provided by the Penal Code.

⁶ Law No. 66/2011/QH12 on Human Trafficking Prevention and Combat ("Anti-Human Trafficking Law") adopted on 29 March 2011 of the National Assembly.

Moreover, if the police and prosecutors find other aggravating elements, such as the number of victims, the extent of their suffering, the nature of the crime (e.g., organisational, professional, etc.) or the presence of abuse of power, among other things, they will also have to prove these elements accordingly.⁷

5.4 What are the protocols for interviewing a child victim?

As a matter of protocol, before interviewing a child victim, the child's representative or protector of his/her rights shall be informed about the time and location of the interview in advance and must attend such interview with the child.⁸

The interview sessions must not be conducted more than twice a day, and must not exceed 2 hours per session, except for special complicated cases. Moreover, the authority officers conducting the interview are required to have a necessary knowledge of child psychology and educational science, and must use language that is friendly and accessible to children.

Furthermore, interaction with the alleged trafficker will not be applied to child victims, unless the authority officers deem such interaction to be of the utmost necessity.¹¹

5.5 If the prosecutor requires the trafficked victim to testify against the alleged trafficker:

a. Does such victim have the right to refuse?

Vietnamese law is unclear whether the victim has the right to refuse to testify. However, the CPC implies that the crime victim may refuse to disclose information which may be used against them. So arguably, the victim can refuse to testify on the grounds that provided testimony would be self-incriminating and could be used against him/her.

⁷ Articles 150.2, 150.3, 151.2, and 151.3, the Penal Code.

⁸ Articles 421.1 and 421.2, CPC.

⁹ Article 421.4, CPC.

¹⁰ Article 70.4, LoC.

¹¹ Article 421.6, CPC.



On the other hand, the victim is still obliged to comply with the decisions and/or requirements of competent authorities,¹² and thus, they might still need to provide testimony if so requested by the prosecutor. That being said, the victims still have the right to reach out to their representatives or legal aid to assist them during the preparation of testimony.

- b. Can such victim testify via video link from another room?

Yes, subject to approval by the trial panel. In addition, the CPC requires that if victims are less than 18 years old, the trial panel must limit the interaction between the victims and the defendants when the victims are giving testimony in court.¹³ Therefore, video communication may be used if it is deemed necessary to limit said interaction.

- c. Can such victim provide testimony separately without a court appearance and return to the country of origin?

All participants of criminal proceedings must attend the trial if subpoenaed, and child victims are also not exempted from this obligation.¹⁴ However, in practice, the court may, at its discretion, decide not to summon trafficked victims to trial for their best interests and try to obtain their testimonies in other forms that are deemed convenient.

- d. What other means of protection are available to a child or minor testifying in court?

Under the LoC, children who are victims of crimes are subject to child protective measures at the support level (e.g., advice on intervention measures, knowledge and skills must be given to parents, teachers or caregivers; or assistance must be provided to the victim and his/her family for accessing social support policies and other resources, such as legal aid) and at the intervention level (e.g., children must be provided with health care, psychological treatment, physical and mental health rehabilitation; or must be arranged with a safe temporary residence).¹⁵

¹² Article 62.4, CPC.

¹³ Article 423.5, CPC.

¹⁴ Article 62.4.a, CPC.

¹⁵ Article 71.2, LoC.

Necessary measures will also be taken to protect the life, health, dignity, honour and privacy of children who are testifiers. The forced escort or placing of children who are testifiers under psychological pressure should be minimized.¹⁶

In addition, Vietnam has established the specific "Court for Families and Juveniles" (under the district-level or the provincial level courts) to handle and settle cases which involve matters related to families and children.¹⁷

- 5.6 How is a trafficked victim thoroughly prepared for his/her testimony before the appointed court date?

The law does not specifically address how the victim is to be prepared before giving his/her testimony before the appointed court date. As a general principle, the victim may receive assistance for giving testimony from lawyers, legal aid assistants (for cases requiring participation of legal aid centres), the victim's representative or protector of his/her legitimate rights and interests, or other individuals or organisations, given that the testimony is presented honestly and truthfully before the court.

- 5.7 Can a trafficked victim be required to testify more than once and if so, how many times on average does such victim need to appear in court?

There is no clear regulation on the number of times the victim is required to appear in court. Therefore, it is possible that the trafficked victim will be required to testify more than once.

- 5.8 How does the law protect the best interests of a trafficked victim, who is a child or minor as a witness in a criminal proceeding?

The CPC provides general principles for criminal proceedings applicable to a minor, including that the proceedings must be conducted in a manner congenial and appropriate for the minor's mentality, age, maturity and awareness. In addition, if the victim is a minor and is serving as a witness, his/her deposition must satisfy the following specific conditions:¹⁸

¹⁶ Article 71.3, LoC.

¹⁷ Article 423.7, CPC; Article 36.2 and Article 38.2, Vietnam's Civil Procedural Code No. 92/2015/QH13 adopted by the National Assembly on 25 November 2015.

¹⁸ Article 421, CPC.



- (i) Time and location must be communicated to the minor's counsel, representative and protector of such person's legitimate rights and benefits in advance;
- (ii) Attendance of the victim's representative or protector of legitimate rights and interests is compulsory;
- (iii) The duration shall not exceed two sessions per day and each session shall not exceed 2 hours, except for complicated cases.

The sessions of questioning and debate must be conducted in a manner compatible with the age and development of the victim. The court room must be organized in a way that is congenial and appropriate for the victim (e.g., the victim is allowed to sit next to his/her representative, counsel or protector of legitimate rights and interests).¹⁹

The hearing panel must limit interaction between the minor victim and defendant(s) when the victim testifies in court.²⁰

5.9 Who supports the victim during the criminal case proceedings?

Victims may receive support from various sources:

- (i) Under Vietnamese law, the representative or teacher of the minor, or the representative of the minor's school, Youth Union, or other organisations where the minor pursues education or performs daily activities is required to participate in the case proceedings upon the decision of the investigation authority, the procuracy authority or the court.²¹
- (ii) The law also provides that during legal proceedings, minors may request for legal support from state legal aid centres or other legal aid centres as prescribed by law.²²

Various authorities and organisations offer financial, medical and mental support even before the case is brought before the courts, including commune-level People's Committees, district-level Divisions of Labor, War Invalids and Social Affairs ("DOLISA"), social security and victim support establishments, state

legal services centres or legal aid organisations, or the provincial DOLISA.²³

6. In a civil case:

6.1 Whether the local World Vision organisation, which provides shelter to a trafficked child or minor may be regarded as the guardian of such child or minor, and whether it can appoint a lawyer to represent the victim to pursue compensation in a civil case?

Under the Civil Code, there are two forms of guardianships, natural and appointed. The determination of a natural guardian shall follow the statutory orders as below:

- Where one spouse has lost his/her capacity for civil acts, the remaining spouse shall be the guardian;
- Where both parents have lost their capacity for civil acts, or where one parent has lost the capacity for civil acts and the other parent fails to satisfy all the conditions to act as guardian, then the eldest child shall be the guardian. If the eldest child fails to satisfy all conditions to be the guardian, the next eldest child shall be the guardian; and
- Where an adult who has lost his/her capacity for civil acts does not have a spouse or other children, or his/her spouse or children all fail to satisfy all conditions to be a guardian, the parents of that adult shall be the guardian.

For natural guardians, no additional authorization or power of guardianship is required. In practice, to enable a person to act on behalf of his/ her spouse or relative who is unable to perform all civil transactions as declared by a court's decision, he/she only needs to provide evidence proving that he/she is the natural guardian of the ward. Such evidence may be the court decision and marriage certificate or birth certificate, etc.

²³ Article 39, Anti-Human Trafficking Law.

¹⁹ Article 423.4, CPC; Article 6.1, Circular No. 01/2017/TT-TANDTC issued by the Chief Judge of the Supreme People's Court on 28 July 2017 providing regulations on the courtroom.

²⁰ Article 423.5, CPC.

²¹ Article 420, CPC.

²² Article 7, Law No. 11/2017/QH14 on Legal Aid adopted by the National Assembly on 20 June 2017.



The power of guardianship may be granted in the event where a non-natural guardian is appointed. Pursuant to Article 54 of the Civil Code, where an individual who has lost his/her capacity for civil acts and does not have a natural guardian, the People's Committee of the district where such person resides shall be responsible to appoint a guardian for the ward. Such appointment will be in the form of a Guardianship Recognising Decision ("Quyết định công nhận việc giám hộ" in Vietnamese).

An organisation /entity may be appointed to take care of, and protect the legitimate interests of a minor if the following conditions are met:

- (i) having a civil legal personality in conformity with the role of guardianship; and
- (ii) having necessary means to exercise the rights and fulfil the obligations of a guardian.²⁴

To that end, the local entity of World Vision organisation may be appointed as a guardian of a ward. However, such appointment must have the consent of (i) the People's Committee, and (ii) the consent of such person (if the minor is aged 6 or above).²⁵

6.2 Can a trafficked child or minor file civil complaints independently? If not, would the child's guardian or appointed guardian file on behalf of the child?

Minors under the age of 15 do not have the legal capacity to file a law suit independently. In such situations, the child's legal representative (parent or guardian) would file on behalf of the child.

6.3 Can a civil case be lodged in court at the same time as a criminal case?

Technically, it is possible to lodge a civil case at the same time as a criminal case, as there are no provisions under the law that would limit a plaintiff from seeking redress through civil proceedings while a criminal proceeding is currently in process.

6.4 How will the court determine the compensation amount for a trafficked victim in a civil case?

²⁴ Articles 48 and 50 of the Civil Code.

²⁵ Article 54.2 of the Civil Code.

Pursuant to Article 6 of the Anti-Human Trafficking Law, victims of human trafficking have the right to be compensated for any damages under the law. This provision, however, is general and does not provide specific guidance on how compensation amounts for a trafficked victim will be determined. Like any claims for compensation, however, it will depend on the type of damages that the claimant is seeking, and the evidence provided.

7. How long can a trafficked victim stay in a shelter?

The law does not stipulate a time limit for how long a victim may remain in a shelter. Under Article 24.3 of the Anti-Human Trafficking Law, the provincial-level DOLISA has the obligation to collaborate with the police to verify the initial information provided by the victim / legal representative of the victim.

Following this, in the case of child-victims, the provincial-level DOLISA will have the obligation to notify the relative of such trafficked victim, or assign a person to take the victim to his / her place of original residence.

Article 24.3 of the Anti-Human Trafficking Law also states that the provincial-level DOLISA shall 'consider paying travel expenses for the victim to return to his / her place of original residence'.

Under Article 28 of the Anti-Human Trafficking Law the provincial-level DOLISA will use the following information for when considering to pay for the victim's travel expenses:

- Certificate of trafficking from district-level police office;
- Certificate from rescue agencies;
- Certificate of investigation agencies, agencies assigned to conduct investigation; and/or
- Papers and documents proving the victim's status issued by foreign agencies which are consularly legalised by overseas Vietnamese representatives / Vietnam's Ministry of Foreign Affairs.



However, please note that key terms such as 'place of original residence' has not been clearly defined, and the procedure for contacting the relative of the victim / assigning a person to escort such victim has not been clearly laid out under Vietnamese law. Furthermore, please also note that the provincial-level DOLISA only has *administrative* obligations (i.e., to contact the relatives / assign an escort for the victim, but *not* to support the trafficked victim's family to visit Vietnam.)

8. Can a trafficked victim be allowed to receive education while staying in the shelter?

Under Article 14.3 of the Anti-Human Trafficking Law, schools, and educational and training institutions have the obligation to create favourable conditions for victim pupils, students and trainees to follow general education or vocational training. Furthermore, under Article 37 of the Anti-Human Trafficking Law, victims who are minors and who are from poor households may be provided with school tuition and expenses for textbooks and other learning aids during their first school year. Under Article 39.5, the provincial-level DOLISA shall provide such allowances.

9. Can World Vision apply for asylum on behalf of the trafficked victim if the victim's parents or country of origin cannot be identified?

Domestically trafficked victims

For domestically trafficked victims (i.e., victims who have been trafficked within the territory of Vietnam), either the victim or the victim's lawful representative may report on his/her trafficking to the commune-level People's Committee. Within three days after receiving notice from the commune-level People's Committee, the district-level DOLISA shall receive and assist the victim to coordinate with the police office to verify initial information of the victim. However, the law does not provide a clear definition for what a 'lawful representative' of a domestically trafficked victim is. Therefore, it is unclear as to whether World Vision may constitute a 'lawful representative' and thereby apply for asylum on behalf of the trafficked victim.

Internationally trafficked victims returning from abroad

Under Article 26 of the Anti-Human Trafficking Law, the receipt and verification of victims of trafficking from abroad must be effected via an overseas Vietnamese diplomatic mission, consulate or another agency authorized to perform consular functions. As a result, World Vision may not be able to apply for asylum on behalf of internationally trafficked victims who are returning to Vietnam.

Vietnamese anti-human trafficking laws do not provide provisions for victims to apply for asylum *per se*, but instead, grants the victim the right to self-report on their victimhood.

Under Article 6.1 of Joint Circular No. 01/2014/TTLT-BCA-BQP-BLDTBXH-BNG, a victim may report on being trafficked to the People's Committee or the police department of the commune, or to a foreign authority, international organisation, domestic organisation, informer.²⁶

10. Where can World Vision look for pro bono legal services to help a trafficked victim?

Please see below a number of contacts that may be relevant to World Vision:

National Legal Aid Agency	58 - 60 Tran Phu, Ba Dinh district, Hanoi, VIETNAM Tel: +844373395386
The Asia Foundation	10-03 Prime Centre 53 Quang Trung Street Hanoi, Vietnam Tel: + 84 (4) 3943-3263 Email: vietnam.general@asiafoundation.org

²⁶ Article 8.1 of Joint Circular No. 01/2014/TTLT-BCA-BQP-BLDTBXH-BNG of the Ministry of Public Security, Ministry of National Defense, Ministry of Labour, War Invalids and Social Affairs, and Ministry of Foreign Affairs dated 10 February 2014.

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