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THE LEGAL FRAMEWORK OF ORPHANAGE TRAFFICKING IN NEPAL:

Enhancing Identification, Prosecution & Prevention

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Disclaimer

The opinions expressed in this publication are those of the authors. They do not purport to reflect the opinions or views of Griffith University, Better Care Network or UBS Optimus Foundation.

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Section One: Introduction and Background

Orphanage trafficking is a form of child trafficking, in which children are removed from their families, often under false pretences, and transferred or recruited into child care institutions where they often face various forms of exploitation for profit. When a child is trafficked in this way, their identity is frequently falsified so in documents they appear to be an orphan – a process known as ‘paper orphaning’.¹ The exploitation of children in these circumstances ranges from sexual abuse to forced labour, begging, or being sold for illegal adoption or servitude. Some are trafficked for their organs, while others simply disappear.²

From the outset, it is important to acknowledge that Nepal ratified the international law on human trafficking, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, in June 2020. Since then, advocates have called for the Nepali government to align the domestic laws on human trafficking with the international protocol. In 2021, the Ministry of Women, Children and Senior Citizens of the Government of Nepal indicated that they are in the process of working to make amendments and to create a National Action Plan for Combatting Human Trafficking. The timeframe for amendment and the National Action Plan is not clear. This report has been drafted based on the current law and policy.

The *Constitution of Nepal 2015 (Constitution of Nepal)* states that a child who is helpless, orphaned, with disabilities, a victim of conflict, displaced or vulnerable shall have the right to special protection and facilities from the State.³ Likewise, the *Act Relating to Children 2018 (Nepal) (Act Relating to Children)* provides various rights to children and prescribes obligations to the Government of Nepal for the care and protection of various categories of children, including orphans. The Act also provides for alternative care for children and prescribes that institutional care should be the last resort.⁴ Despite these constitutional and legal arrangements, in the absence of substantive and sustainable child protection services and facilities from the government,⁵ a number of child care homes have been established by individuals, groups and organizations in various parts of Nepal. The Government of Nepal contributes very little funding to residential care which essentially privatises the system and makes it reliant on international funding.⁶

¹ Kathryn E. van Doore, ‘Paper Orphans: Examining Child Trafficking for the Purpose of Orphanages’, *The International Journal of Children’s Rights* 24(2) (2016) 378.

² Chloe Setter, ‘Hope is on the horizon for tackling orphanage trafficking’, Lumos Foundation, 29 March 2019, <<https://news.trust.org/item/20190329133756-c3x2z/>>.

³ Constitution of Nepal 2015 (Nepal) Art 39(9) (‘Constitution of Nepal’).

⁴ Act Relating to Children 2018 (Nepal) s 49 (‘Act Relating to Children’).

⁵ Many local levels are yet to establish Local Child Rights Committee. There is no accurate data on the numbers of local committees established thus far.

⁶ Samantha Chaitkin et al, ‘Towards the right care for children: Orientations for reforming alternative care systems – Africa, Asia, Latin America’, 20.

In Nepal, terms such as ‘children’s home’, ‘child care home’ or ‘orphanage’ are used interchangeably, and provide alternative care to children in vulnerable situations or those in need of special protection.⁷ In 2019, there were 533 functional child care homes in 46 of 77 districts, housing 15,565 children.⁸ In 2020, the number of functional child care homes dropped to 489 in 45 districts, housing 11350 children.⁹ Some 90% of these child care homes are in the top five tourist areas (the three districts of the Kathmandu Valley, Pokhara and Chitwan) and more than half of them are in the Kathmandu Valley,¹⁰ ‘where foreign visitors see the poor condition of children and donate generously’.¹¹

The National Child Rights Council (NCRC) rescued around 80 children from various childcare homes in the first six months of 2020, finding that the children were ‘in an abject state of negligence’.¹² The Council found that the majority of the children living in child care homes have families.¹³ According to the NCRC 2020 State of Children Report, monitoring of 216 childcare homes in 12 districts showed that 12 child care homes were in a critical condition while 100 were in satisfactory and 102 were in good condition.¹⁴ There are, however, many unregistered child care homes where standards are likely to be lower.

The 2021 US Trafficking in Persons Report (‘TIP Report’) indicated that there were more than 11,000 children residing in both registered and non-registered children’s homes and orphanages in Nepal.¹⁵ According to that report, in some of those institutions, children are forced into manual labour, begging as well as entertaining visitors to attract donations.¹⁶ In the Nepal country narrative, the report stated:

Nepali parents give their children to brokers who promise education or work opportunities but instead take them to frequently unregistered children’s homes

⁷ Next Generation Nepal, ‘Orphanage trafficking and orphanage voluntourism frequently asked questions’, *Better Care Network*, April 2014, <<https://bettercarenetwork.org/sites/default/files/Orphanage%20Trafficking%20and%20Orphanage%20Voluntourism%20FAQs.pdf>>.

⁸ National Child Rights Council, Nepal. *State of Children in Nepal*, 2019, ix.

⁹ National Child Rights Council, Nepal, *State of Children in Nepal*, 2020, 46. (‘NCRC 2020 State of Children Report’).

¹⁰ Claire Bennett, Anna McKeon, Christian Larsson, Daniela Papi, Maryann Bylander, ‘Collected Viewpoints on International Volunteering in Residential Care Centers: Country Focus-Nepal’, *Better Care Network*, October 2014, <<https://bettercarenetwork.org/sites/default/files/Collected%20viewpoints%20on%20international%20volunteering%20in%20residential%20care%20centres%20%20Country%20Focus%20Nepal.pdf>>.

¹¹ Bhrikuti Rai, ‘Selling sympathy: Beware of fake orphanages that exploit children and fleece bleeding-heart donors’, *Nepali Times*, 11 April 2014, <http://archive.nepalitimes.com/article/nation/fake-orphanage-exploit-children-in-nepal>.

¹² Shuvam Dhungana, ‘Government rescues hundreds of children every year but does little for their care’, *Kathmandu Post*, 12 January 2020, <<https://tkpo.st/2tb70aH>>.

¹³ Ibid.

¹⁴ NCRC, 2020 State of Children Report, 50.

¹⁵ United States Department of State, *Trafficking in Persons Report 2021* (‘2021 US TIP Report’), Nepal narrative, <<https://www.state.gov/reports/2021-trafficking-in-persons-report/nepal/>>.

¹⁶ Ibid.

and force them to pretend to be orphans to garner donations from tourists and volunteers and where some force children into manual labor or begging, force them to entertain visitors for donations and sexually abuse them. International organizations and NGOs estimated that 80 to 85 percent of children in “children’s homes” and orphanages had at least one living parent at home. NGOs noted that, although there is increased willingness to take action against the operators of children’s homes, prosecution remains a challenge. Many of the individuals running these exploitative institutions are politically connected and viewed favorably within their community. NGOs state that even when arrested, they are almost never prosecuted and often use political connections to thwart child protective agencies. Prior to the pandemic-related lockdowns, the government directed children’s homes to return children to their families. The government did not report screening the children for trafficking indicators before they were sent home. While 1,500 children were reunited with their families, NGOs reported 11,000 remained in registered homes and orphanages.¹⁷

Internal trafficking is one of Nepal’s serious human rights concerns, with women, men and children internally trafficked for various purposes.¹⁸ However, few reports cover illegal transfer and placement of children in orphanages and there is a lack of data regarding orphanage trafficking. Despite legal protection afforded to the children by international and Nepali laws, they remain at risk of sexual abuse, exploitation, trafficking and neglect. While families and communities play a significant role in the protection of children, the state is instrumental in defining and ensuring a child’s right to protection.

ORPHANAGE TRAFFICKING IN NEPAL

Child care homes, or orphanages, are operated by individuals or non-governmental organisations for the purpose of providing residential care for children in vulnerable situations or those in need of special protection. While some of these institutions provide much-needed support to these children, others are solely based on profiting from their vulnerability.

The activity of orphanage trafficking has been well documented in Nepal. In 2008, a seminal report authored by UNICEF and Terre des Hommes outlined how 1,000 children had been transported from the western districts of Humla and Jumla, to orphanages in Kathmandu.¹⁹ The parents had been convinced that their children would obtain an excellent education and as such paid between NPR 10,000 and NPR 20,000 to agents to take the children to school. They understood that the children would return home on school holidays. However, the children

¹⁷ US Department of State, Trafficking in Persons Report 2021, Nepal narrative.

¹⁸ Ligia Kiss, Anthony Davis, David Fotheringham, Alys McAlpine, Nambusi Kyegombe, Ludmila Abilio, Joelle Mak, *The Trafficking of Girls and Young Women: Evidence for Prevention and Assistance*, Plan International, 2019.

¹⁹ UNICEF and Terre des Hommes, ‘Adopting the rights of the child: A study on intercountry adoption and its influence on child protection in Nepal’, 2008, 13.

were not admitted to school and instead were taken to unregistered and illegal orphanages where they were maintained in very poor conditions. Many of them had their names changed and their families were unable to find them.²⁰ After two years, an investigation was launched, and the subsequent report stated that only 400 of the 1,000 children could be traced.²¹

These practices were rampant from 1996 until 2007.²² A Study of Children's Homes in Nepal in 2009 found that 11% of orphanages were utilising brokers to recruit children into orphanages.²³ The United States Department of State's Trafficking in Persons Report 2011 stated that 'there were reports of traffickers in the remote Karnali region who deceive families into sending their children to urban areas with false promises of schooling'.²⁴ Following this, several NGOs started to focus on this issue. The Programme Cooperation Agreement 2011–2012 ('the Agreement') made by Terre des Hommes and UNICEF, outlines how families seeking a better education for their children were deceived by a 'network of traffickers who strategically convinced parents to turn over relatively large sums of money or exchange of precious goods or land in return for taking their children to Kathmandu or India'.²⁵ The network falsified death certificates of parents, declared the children as orphans, and placed them into orphanages.²⁶ By 2012, the issue had gained international attention. The Committee on the Rights of the Child stated that families were 'reportedly relinquishing their children as a consequence of soliciting, coercion or inducement' and that there were 'cases of children being abused by foreign paedophiles who run so-called orphanages and street shelters'.²⁷

The 2015 earthquakes in Nepal led to reports of recruiters removing children from their families to place them in orphanages.²⁸ The Government of Nepal instigated both an intercountry adoption moratorium and a ban on new orphanages being registered in order to attempt to address the issue. Despite this, the number of children institutionalised increased

²⁰ Meera Dhungana, Basant B. Basnet, Uma Rai and Rameshwar Pradhan, 'Fact-finding Mission on Displacement of Children from Humla 29 December 2004–1 January 2005', UNICEF and Forum for Women, Law and Development, Nepal, 2005.

²¹ Ibid.

²² Ibid.

²³ CPCS International Belgium and Central Child Welfare Board Nepal, 'A Study of Children's Homes in Nepal', 2009, 20.

²⁴ United States of America Department of State, 'Trafficking in Persons Report 2011', 2011, 270.

²⁵ Save the Children, 'Programme document protection of children temporarily or permanently Humla programme cooperation agreement 2011–2012' (Report, Save the Children, 2010), 6.

²⁶ Ibid.

²⁷ Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 12, paragraph 1, of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Concluding observations: Nepal, UN CRC, 60th Sess, 1725th mtg, UN Doc CRC/C/OPSC/NPL/CO/1, (11 July 2012), 23.

²⁸ See, for example, Om Astha Rai, 'Ban on new orphanages', Nepali Times, 20 May 2015 <<http://archive.nepalitimes.com/blogs/thebrief/2015/05/20/ban-on-new-orphanages/>>

from 2015 to 2016²⁹ and statistics reflected that up to 80 percent of children growing up in those orphanages could be raised by at least one of their parents.³⁰ The 2016 Concluding Observations on Nepal by the Committee on the Rights of the Child noted that children were being placed in residential care unnecessarily due to an 'absence of an assessment system based on necessity and appropriateness' exacerbated by a lack of government enforcement or oversight of private institutions.³¹

A further 2016 report stated that 'very few children in residential facilities are orphans, or those that have been subject to abuse and exploitation'.³² It noted that the major reason for children being admitted to orphanages was due to parental desire to have their children educated:

One major concern is the manner in which families, especially from remote rural areas, are being persuaded to relinquish their children, often with a request for a financial donation. The children are then removed far away from their communities often to Kathmandu and other large urban areas where the promises made to parents are not necessarily fulfilled, documents are being falsified and, some children are being subjected to exploitation and abuse.³³

The United States Trafficking in Persons Report 2017 highlighted the links between trafficking and orphanages in the Nepal narrative. It stated that,

under false promises of education and work opportunities, Nepali parents give their children to brokers who instead take them to frequently

unregistered children's homes in urban locations, where they are forced to pretend to be orphans to garner donations from tourists and volunteers; some of the children are also forced to beg on the street.³⁴

After years of advocacy, Nepal was the first country to have this form of trafficking included in the annual Trafficking in Persons Report.³⁵ The explicit link between orphanage tourism, where people visit or volunteer in orphanages, and the recruitment of children into such orphanages, was the first official acknowledgement that orphanage trafficking was a form

²⁹ Nepal Central Child Welfare Board, 'The State of the Children in Nepal 2016', 2016, 115-116.

³⁰ UNICEF and Terre des Hommes, 'Adopting the rights of the child', 19.

³¹ Committee on the Rights of the Child, *Concluding observations on the combined third to fifth periodic reports of Nepal*, UN CRC, 72nd session, 2137th mtg, UN Doc CRC/C/NPL/CO/3-5, (7 July 2016) ('*Concluding observations Nepal 2016*') [28].

³² Ibid.

³³ Chrissie Gale and Chandrika Khatiwada, 'Alternative child care and deinstitutionalisation: A case study of Nepal', 2016, 8.

³⁴ United States Department of State, 'Trafficking in Persons Report 2017', (Report, United States of America Department of State, 2017), 296.

³⁵ Martin Punaks, 'Exploiting children in orphanages recognised as trafficking', *Anti-Slavery International*, 18 July 2017 <<https://www.antislavery.org/orphanage-trafficking/>>.

of trafficking. Subsequently, a Special Interest section on 'Child Institutionalisation and Trafficking' appeared in the Trafficking in Persons Report 2018,³⁶ which further explored the issue of orphanage trafficking.

In 2021, it is still reported orphanages bring children from rural parts of Nepal with a promise of providing better education opportunities.³⁷ Children who still have one or both parents are registered as orphans to attract international donations from the sponsors, donors, and volunteers.³⁸ The willingness of travellers and volunteers to invest large amounts of money to gain an orphanage experience has served the intention of child traffickers. Voluntourism and orphanage tourism has become such a profitable business for some orphanages that they recruit children to meet the requirements of tourists and donors.³⁹ This is a serious issue as it not only separates children from family-based care but also traps them in unfavourable environments, eventually affecting their development.⁴⁰

The parents or caregivers who hand over their children with the expectation of better education and healthcare are deceived as their children are often placed in exploitative environments.⁴¹ In Nepal, orphanage trafficking operates on deceiving both the poor families in rural areas and the foreigners who provide monetary support to these orphanages. In extreme cases, there might be unintentional involvement of tourists in child trafficking.⁴²

EXPLOITATION OCCURRING IN ORPHANAGES

The Nepal Multiple Indicator Cluster Survey 2019 has shown that approximately 66% of children aged 0-17 live with both of their parents. Children living with neither of their biological parents amount to 5.3 %.⁴³ Children with no biological parents alive made up 0.3%, while 0.2% had missing information about them. The survey also showed that 1.3% of children were adopted or living with foster parents or were stepchildren.⁴⁴ The role of the state is essential

³⁶ United States Department of State, 'Trafficking in Persons Report 2018', (Report, United States of America Department of State, 2018).

³⁷ Trafficking in Persons Report (2021) US Department of State.

³⁸ Ibid.

³⁹ Bronwen Maher, 'The link between voluntourism, orphanage tourism and child sexual exploitation', Ecpat, 26 August 2019, <<https://www.ecpat.org/news/voluntourism-orphanage-tourism-sexual-abuse/>>.

⁴⁰ UNICEF, 'Volunteering in orphanages', <<https://www.unicef.org/rosa/what-we-do/child-protection/volunteering-orphanages>>.

⁴¹ Bronwen Maher 'The link between voluntourism, orphanage tourism and child sexual exploitation'.

⁴² The Guardian, 'Nepal's bogus orphan trade fuelled by rise in "voluntourism"', 26 May 2014, <<https://www.theguardian.com/global-development/2014/may/27/nepal-bogus-orphan-trade-voluntourism>>.

⁴³ Government of Nepal National Planning Commission Central Bureau of Statistics and UNICEF Nepal, *Nepal Multiple Indicator Cluster Survey 2019* (Survey Findings Report) 126.

⁴⁴ Ibid, p. 130.

in ensuring the rights of children who need special protection. However, there have been cases where children with parent(s) are brought into child care homes to attract donations from volunteers, foreign donors, and tourists, making them 'paper orphans'.⁴⁵ The forceful declaration or registration of child as an orphan along with unauthorised placement a child in children's home constitutes an offence against the child in Nepal.⁴⁶

The case of Rajan Kumar Nepali offers a shocking example of child trafficking in Nepal's orphanages. He handed over his two children to a local orphanage in Kathmandu as he had to be admitted to a drug rehabilitation centre. He had separated from his wife, so the children were institutionalised until his return. However, his three-year-old daughter was put up for adoption by the orphanage to an American couple. Rajan also detailed gaps in care for children in the orphanage.⁴⁷

In addition to fraudulent documents and illegal adoption, there have been instances of sexual violence against children in the orphanage/child care homes in Nepal. Children in these institutions are vulnerable to several forms of abuse by foreign paedophiles due to ineffective regulation in the system.⁴⁸ In one of the cases, Canadian national Ernest Macintosh was convicted of sexually abusing a fifteen-year-old boy with a disability who was living in an orphanage to which the offender had offered donations.⁴⁹ Macintosh was sentenced to seven years in prison, but he was released after he served half of the sentence because he was over 70 years old.⁵⁰ Similarly, other foreign orphanage volunteers, including Jean-Jaques Hayes (French),⁵¹ Simon Jasper-MacCarthy (British),⁵² and Geoffrey John Prigge (Australian), have been prosecuted for sexually abusing children in orphanages in Nepal.⁵³ According to

⁴⁵ Emma Batha, 'Calls mount to stop orphanages exploiting poor children to lure money, tourists', Thompson Reuters Foundation, 14 November 2018, <<https://www.reuters.com/article/us-slavery-conference-orphanages-idUSKCN1NJ0AE>>.

⁴⁶ The Act Relating to Children s 66(2)(k).

⁴⁷ Anup Kaphle, 'Nepal: Corruption and fraudulent documents set hurdles for adoption', Pulitzer Center, 10 February 2011, <<https://pulitzercenter.org/stories/nepal-corruption-and-fraudulent-documents-set-hurdles-adoption>>.

⁴⁸ Nicole Smith, 'Foreign paedophiles prey on Nepal', The Times, 23 August 2015, <<https://www.thetimes.co.uk/article/foreign-paedophiles-prey-on-nepal-8xvxqd5wpv3>>.

⁴⁹ The Straits Times, 'Nepal convicts Canadian orphanage volunteer of sexual assault of disabled boy, 15', 27 January 2016, <<https://www.straitstimes.com/asia/south-asia/nepal-convicts-canadian-orphanage-volunteer-of-sexual-assault-of-disabled-boy-15>>.

⁵⁰ CTV News, 'Canadian convicted of abusing underage boy released from Nepal prison', 30 September 2018, <<https://www.ctvnews.ca/canada/canadian-convicted-of-abusing-underage-boy-released-from-nepal-prison-1.4114988>>.

⁵¹ Janakraj Sapkota, 'Under the guise of humanitarian aid, high-profile paedophiles are abusing Nepali children', Kathmandu Post, 5 February 2015, <<https://kathmandupost.com/2/2019/11/15/under-the-guise-of-humanitarian-aid-high-profile-paedophiles-are-abusing-nepali-children>>.

⁵² Kerry McQueeney, 'Son of YardBirds drummer Jim McCarty jailed for 30 years for sexually abusing children' Daily Mail U, 7 September 2012, <<https://www.dailymail.co.uk/news/article-2199835/Son-Yardbirds-drummer-Jim-McCarty-jailed-30-years-sexually-abusing-children.html>>.

⁵³ Arlington, K, 'Nepal charity work hid predator's sex abuse of children', Sydney Morning Herald, <<https://www.smh.com.au/national/nsw/nepal-charity-work-hid-predators-sex-abuse-of-children-20101114-17sq2.html>>.

Tomozo Hozumi (the then-UNICEF Nepal representative), 'background checks are often not conducted on volunteers, which can increase the risk of child exploitation and sexual abuse.'⁵⁴

These serious offences have been committed by Nepalese nations as well. In 2014, Rabin Shrestha and Rabin Chalise were sentenced to a 17-year jail term for repeated sexual abuse against minors in Bal Mandir.⁵⁵ Similarly, there have been several high-profile cases in which Nepali orphanage directors have physically and sexually abused children in their care.⁵⁶ These cases highlight the existence of rampant violation of child rights in institutional care where many cases go unreported.

Against this background, this study examines Nepal's compliance with international legal obligations, its child protection and anti-trafficking laws, and its criminal and procedural laws that regulate illegal transfer and trafficking of children. The study also raises issues regarding victim identification, inspection of child care homes and complaint mechanisms.

⁵⁴ UNICEF, 'Nepal earthquakes: UNICEF speeds up response to prevent child trafficking', 19 June 2015, <https://www.unicef.org/media/media_82328.html>.

⁵⁵ The Kathmandu Post, 'Two jailed for 17 years', 3 December 2014, <<https://kathmandupost.com/miscellaneous/2014/12/03/two-jailed-for-17-years>>.

⁵⁶ S. Neupane, 2012, 'Importance of effective regulation in orphanages', Republica, <http://myrepublica.com/portal/index.php?action=news_details&news_id=37574>.

Section Two: Overview of the Nepali Legal System

After democracy was reinstated in 1990, Nepal adopted its new constitution guaranteeing fundamental human rights. It implemented a due process model of justice, with protections including a guarantee of individual liberty, the right to be presumed innocent until proven guilty, the right to legal counsel and defence, privilege against self-incrimination and freedom from torture.⁵⁷ Nepal switched to an adversarial system with the repeal of the *State Cases Act 1960* and enactment of *State Cases Act 1992*, and Nepal's police were assigned the role of investigator, government attorneys acted as prosecutors and judges occupied a neutral role in the trial and adjudication process.

Nepal adopted yet another new constitution in 2015 when it moved from a unitary to a federal model of governance with federal, provincial, and local levels of government.⁵⁸ The federal legislature, or Federal Parliament, is the law-making body in Nepal.⁵⁹ It consists of two houses: the House of Representatives and the National Assembly. Though provincial parliaments and the local levels can make necessary laws for the execution of federal laws, only the Federal Parliament has powers to enact substantive laws that define crime and prescribe punishment.⁶⁰ Following the adoption of the 2015 constitution, significant law reform commenced. In 2017 new criminal, procedural and sentencing legislation was enacted. The *Criminal (Code) Act 2017 (Nepal) (Criminal Code)* repealed the *State Cases Act 1992* but incorporated major provisions of it, continuing the adversarial model of justice.

Despite Nepal having three levels of government, Nepal Police and the Office of the Attorney General operate a unitary governance model. While Nepal Police has provincial offices all over Nepal, its headquarters are in Kathmandu and it functions as a single unit which operates under the federal law.⁶¹ Likewise, there is a single Office of the Attorney General, along with District Government Attorney Offices in 77 districts of Nepal. There are no provincial attorneys in Nepal.⁶²

Judicial power in Nepal is exercised by courts and other judicial bodies in accordance with the *Constitution of Nepal*, other laws and recognised principles of justice.⁶³ Nepal has three

⁵⁷ Constitution of Nepal art 20.

⁵⁸ Ibid pt 5.

⁵⁹ Ibid art 83.

⁶⁰ Ibid schs 5–8.

⁶¹ Ibid art 268.

⁶² See: 'वमिगहनु', Attorney-General of Nepal, <<https://ag.gov.np/oag-post/505>>.

⁶³ Ibid art 127.

tiers of courts: the Supreme Court, High Court and District Court.⁶⁴ There is also a special court and other tribunals with powers to dispense justice.⁶⁵ The Supreme Court is the apex court and the court of record, with all judicial bodies and tribunals falling under the Supreme Court.⁶⁶

TREATMENT OF INTERNATIONAL HUMAN RIGHTS TREATIES

The *Constitution of Nepal* provides for constitutional supremacy:

the Constitution is the fundamental law of Nepal and any law inconsistent with the Constitution shall, to the extent of such inconsistency, be void.⁶⁷

Article 279 provides for the ratification of, accession to, acceptance of, or approval of, treaties or agreements, with sub-article (1) providing that:

the ratification of, accession to, acceptance of, or approval of, treaties or agreements to which Nepal or the Government of Nepal is to become a party shall be as provided for in the federal law. The Treaty Act 1990 is the Federal Law which addresses the application of ratified treaty provisions in Nepal.

The *Treaty Act 1990* (Nepal) (Treaty Act) is a piece of legislation which prescribes consequences of treaty ratification. Section 9(1) of the Act provides that:

In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance, or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.

This means the treaty provision prevails over the domestic law to the extent there is any inconsistency. The provisions of the *Constitution of Nepal* and the *Treaty Act* when read in their entirety, suggest that ratified international treaties or conventions are not automatically enforceable in Nepal but that it is the obligation of the state to incorporate those frameworks into domestic law. Section 9(2) of the *Treaty Act* obliges the government to 'initiate action as soon as possible to enact laws for' the enforcement of ratified or acceded treaties when such

⁶⁴ Ibid art 127.

⁶⁵ The formation of the Special Court, its powers and its procedures are prescribed in the Special Court Act 2002 (Nepal). The Court has jurisdiction over the cases under the *Narcotic Drugs (Control) Act 1976* (Nepal), *Crime against State and Punishment Act 1989* (Nepal), *Commission for the Investigation of Abuse of Authority Act 1991* (Nepal), *Prevention of Corruption Act 2002* (Nepal) and *Money Laundering Prevention Act 2008* (Nepal).

⁶⁶ Constitution of Nepal art 128.

⁶⁷ Ibid art 1.

treaties impose any additional legal obligation or burden upon the Government of Nepal.⁶⁸ Where a domestic law is incomplete or silent as to rights under ratified international treaty then the court can, and does, use such treaty provisions to confer additional rights or interpret domestic legislation so that it is consistent with international law.

The *Constitution of Nepal* also provides that the relevant Constitutional Commissions must oversee the implementation of international obligations.⁶⁹ These Commissions include the National Human Rights Commission, the National Natural Resources and Fiscal Commission, the National Women Commission, the National Dalit Commission, the National Inclusion Commission, the Indigenous Nationalities Commission, the Madhesi Commission, the Tharu Commission, and the Muslim Commission.

Nepal is a party to various international and regional human rights treaties and commitments concerning protection of children, namely, the *Convention on Right of Child (CRC)*, the *Optional Protocol on the Sale of Children*, the *Child Prostitution and Child Pornography (OPSCPCP)*, the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, the *South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, the *South Asian Association for Regional Cooperation Convention on Child Welfare*, and the *Declaration and Agenda for Action against Commercial Sexual Exploitation of Children (Stockholm Agenda for Action 1996)*⁷⁰ as well as the *Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents* (2008).

Nepal is also a party to other important instruments relevant to the issue of child protection, including the *Slavery Convention 1953*, the *Supplementary Convention on the Abolition of Slavery 1956*, the *Slave Trade and Institution and Practices Similar to Slavery 1956*, the *Convention on the Suppression of Immoral Trafficking 1949*, the *Forced Labour Convention 1930*, and the *Abolition of Forced Labour Convention 1957*. Nepal has ratified the *Convention against Transnational Organised Crime* and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.

Despite the limitations on how international instruments are incorporated into domestic law, the CRC and its optional protocols have provided clear direction to States on their obligations in protecting children from all forms of abuse, exploitation, neglect, and abandonment.

⁶⁸ Treaty Act 1990 (Nepal) s 9(2).

⁶⁹ For example, *Constitution of Nepal* art 249.

⁷⁰ Nepal adopted the *Stockholm Declaration and Agenda for Action* in 1996 and reaffirmed its commitment at Yokohama in 2001.

THE ROLE OF INTERNATIONAL LAW IN STATUTORY INTERPRETATION - CASE LAW

Nepali statutory and constitutional provisions are silent on what happens when Nepal ratifies a convention or accedes to any international instrument in circumstances where there is no domestic law which covers the rights provided by international instrument. The Supreme Court has, however, issued directives to the State to enact necessary laws for the full implementation of ratified treaties. Similarly, the Supreme Court has declared null and void Nepali legal provisions that were inconsistent with ratified treaties. The Supreme Court has held that provisions of international law can be the primary basis of testing ultra vires and judicial review.

In the Supreme Court case of *Ashish Adhikari v HMG Council of Ministers and Others*,⁷¹ the petitioner claimed that despite the legal provisions in the Children's Act 1992, the government failed to establish a Central Child Welfare Board, District Child Welfare Committees, and Juvenile Correction Homes, and failed to appoint Child Welfare Officers. In the absence of such bodies and authorities, children's rights only applied in principle and not in practice. The petitioner requested a court directive for the establishment of a regulatory body and response mechanism. The Supreme Court issued a writ of mandamus and directed the government to establish such bodies and mechanisms, referring to Article 10(3) of the International Covenant on Civil and Political Rights which states 'juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status'. Whilst the implementation of international law was not the focus of the case, the Court referred to the provisions of the *Convention on the Rights of the Child* and reminded the government that, as a party to these instruments, Nepal was obliged to take legal, administrative, and other appropriate measures for ensuring the rights of the child.

*Tilottam Poudel v. HMG Ministry of Home Affairs*⁷² concerned a petitioner and his friends who were denied permission to register an organisation by the District Administration Office (DAO) because they were minors. The petitioner challenged the DAO's decision before the Supreme Court, on the basis that Article 15 of the CRC establishes children's right to freedom of association and to freedom of peaceful assembly. Even though there was no legal provision in Nepalese domestic law that provided children the right to form an association, the court quashed the decision of the DAO and directed it to register the petitioner's organisation. Likewise, in *Devendra Ale v. HMG Office of the Prime Minister and Council of Ministers*,⁷³ the court declared section 7 of the *Children's Act 1992* – which allowed parents, guardians or teachers to scold, slap or beat children by way of discipline – null and void as it contradicted the CRC.

⁷¹ *Ashish Adhikari v. His Majesty's Government and Others* Writ No. 3391 of 2001 (Supreme Court of Nepal)..

⁷² *Tilottam Poudel v. Home Ministry*, Writ No. 174 of 2001 (SC 2058 BS) (Supreme Court of Nepal).

⁷³ *Devendra Ale v. His Majesty's Government and Others*, Writ No 57 of 2005, 6 January 2005 (Supreme Court of Nepal).

The trend of referring to international human rights law standards in Supreme Court decisions is increasing, especially in the directive orders made by the Court in response to writ petitions. In *Prakash Mani Sharma's writ*,⁷⁴ regarding the right of people with hearing impairment to education, the court referred to the Covenant on Economic, Social and Cultural Rights. The court has also issued directive orders or declared null and void several domestic legal provisions for being inconsistent with the *Convention on the Elimination of Discrimination against Women* (CEDAW). In the case of *Sapana Pradhan Malla v. Office of the Prime Minister and Council of Ministers and Others*, the petitioner challenged the provisions of the then *National Code* (Nepal) which allowed a husband to have a second marriage if his wife suffered from an incurable contagious sexual disease or was incurably mentally ill. The court issued a directive to the defendant to ensure that the provisions prescribed under the Chapter on Marriage were consistent with the (then) *Interim Constitution 2007* (Nepal), and with the provisions prescribed in the CEDAW. They accordingly directed the defendant to amend the law.⁷⁵

In *Som Prasad Paneru's case*, the petitioner drew the attention of the Supreme Court to the harmful traditional practice of 'kamalari' which subjected young girls in parts of Nepal to work as bonded labour. In making their case, the petitioner relied on domestic laws and international instruments.⁷⁶ The court held that sections 2 and 3 of the *Bonded Labour (Prohibition) Act 2002* effectively outlawed the kamalari custom. Accordingly, a judicial majority issued a directive order for the Government of Nepal to implement the provisions of the *Bonded Labour (Prohibition) Act 2002* and for the Ministry of Education to incorporate child human rights education into the school curricula.⁷⁷

These are just some of the cases in which the Supreme Court have referred to international human rights instruments and considered Nepali legal provisions that were contradictory or inconsistent with these instruments. This demonstrates that the court has an important role in the domestic implementation of international legal human rights frameworks.

⁷⁴ *Prakash Mani Sharma and Others v. His Majesty's Government and Others*, (SC 2065 BS) Writ No. 0283 of 2008 (16 April 2008) (Supreme Court of Nepal).

⁷⁵ *Sapana Pradhan Malla v. Office of the Prime Minister and Others*, Writ no. 3561 of 2006 (Supreme Court of Nepal).

⁷⁶ *Som Prasad Paneru v. Office of the Prime Minister and the Council of Ministers and Others*, Writ no. 3215 (SC 2063 BS) (2006) (Supreme Court of Nepal).

⁷⁷ *Som Prasad Paneru v. Office of the Prime Minister and the Council of Ministers and Others* (Justice Balaram K.C.).

Section Three: Overview of the Nepali Criminal Justice System

RELEVANT CRIMINAL CODE/LAW

The *Criminal Code*, which came into force in 2018, outlines the general principles of criminal justice⁷⁸ and identifies aggravating and mitigating factors.⁷⁹ Principles and provisions of this Code are generally applicable for crimes committed under this Code, as well as under other laws of Nepal. The *Criminal Procedure (Code) Act 2017* sets out the procedures relating to the investigation, prosecution, filing, proceeding, hearing and adjudication of criminal cases, and execution of judgments on such cases.⁸⁰

Provisions of the *Criminal Code* that are potentially relevant to orphanage trafficking include sections 215 and 119. Section 215 of the *Criminal Code* prohibits anyone from inciting, conspiring, ordering, or trading for prostitution, pornography or nudity, and section 119 states that no one should promote, or influence anyone to promote, prostitution, and if anyone is found doing so, the person can receive a jail sentence of up to 3 years and a fine of up to NPR 30,000. The Code also forbids kidnapping and hostage-taking and anyone committing such a crime may be liable to a sentence of imprisonment for a term of seven to ten years and a fine of NPR 75,000 to NPR 100,000.⁸¹

The Human Trafficking and Transportation (Control) Act 2007 (Nepal) ('Human Trafficking and Transportation Act') and the Act Relating to Children are other specific laws that also address trafficking in persons, including children.

Reporting criminal offences

The victim, the victim's relatives or any person who knows that an offence has been committed or is likely to be committed shall, as soon as possible, make a first information report (FIR) in writing or give information on the offence, verbally or through electronic means, along with any evidence, to the police.⁸² The FIR should contain the area and date of commission of the crime, the names of the culprits, their actions, evidence and any other information regarding the offense. If a verbal report is made, the officer in charge of the police station should keep a written record of the complaint as narrated by the person.⁸³

⁷⁸ Criminal (Code) Act 2017 (Nepal) ch 2 ('Criminal Code').

⁷⁹ Ibid chs 4–5.

⁸⁰ Preamble to Muluki Criminal Procedure (Code) Act 2017 (Nepal) ('Criminal Procedure Code').

⁸¹ Criminal Code ss 211–213.

⁸² Criminal Procedure Code s 4(1); Act Relating to Children s 68(1); Human Trafficking and Transportation (Control) Act 2007 (Nepal) s 5 ('Human Trafficking and Transportation Act').

⁸³ Criminal Code s 4.

It is the responsibility of the police to accept an FIR and lead the investigation. If police authorities refuse to file an FIR, the Code permits the complainant to approach a higher police authority (if it exists in the area), or the office of the Chief District Officer.⁸⁴ If the Chief District Officer also refuses to register the FIR, the complainant can approach the Ministry of Home Affairs.⁸⁵

Process for commencing investigations and laying charges

Upon receipt of an FIR, the investigating authority should immediately start collecting evidence and investigating.⁸⁶ A police employee whose rank is at least Assistant Sub-Inspector should be designated as the investigating authority and they should inform the Government Attorney Office and the higher Police Office of the matter. Under the *Criminal Procedure Code*, the investigators should send the preliminary report to the concerned Government Attorney Office explaining the matters to be investigated.⁸⁷

In conducting the investigation, the investigating authority shall prepare a deed on the scene of crime containing the following matters:

- the date and time when the offence was committed
- the address, description, and sketch of the place where the offence was committed
- the circumstance of such place and its connection with the offence or offender, and
- the exhibits or evidence found or seen at or around the place where the offence was committed, and any other significant matters related to the offence.

The investigating authority can detain or arrest a suspect based on the information received.⁸⁸ An arrest warrant is required, and the arrestee should be told the reason for the arrest.⁸⁹ The interrogation of a suspect should be carried out in the presence of a government attorney,⁹⁰ who should document and authenticate any statements made. However, any statement made by the accused cannot be accepted if the accused was forced or tortured to give it.⁹¹

The investigating authority (Nepal Police) is responsible for preparing an investigation report, which is accompanied by the case file of documents and evidence, and identifies the appropriate legal provisions.⁹² The investigating authority must send the report to the office

⁸⁴ Ibid s 5.

⁸⁵ Ibid s 5(4).

⁸⁶ Criminal Procedure Code s 8.

⁸⁷ Ibid s 10.

⁸⁸ Ibid ss 9(1), 13(1).

⁸⁹ Ibid s 9(2).

⁹⁰ Ibid s 16(1).

⁹¹ *Evidence Act 1994* (Nepal) s 9(2)(a)(2).

⁹² Criminal Procedure Code s 31(1).

of limitation under the relevant law in relation to a case not involving a detainee and three days in advance of the filing of the case, in relation to cases involving a detainee.⁹³ Upon receipt of the case file and investigation report, the Government Attorney Office should study the case file, evaluate the proofs and evidence collected in the course of investigation, and send it to the Attorney General to decide whether to commence a prosecution.⁹⁴ Once the government attorney has considered the case file along with the view of proof and evidence collected, if they decide to proceed to prosecution, they should prepare and submit the charge sheet to the concerned court within the time limit.⁹⁵ If the accused is being detained, even if the investigating authority submits that a case cannot be instituted against the person, the accused must nevertheless remain in detention until the government attorney evaluates the matter and makes their decision.

Role of the police

The police and Office of the Attorney General are the most important actors in bringing cases for prosecution. The Nepalese Police is headed by the Inspector General of Police of Nepal. They report directly to the Ministry of Home Affairs and is appointed by the Government of Nepal.⁹⁶

There are four major departments in the Police Headquarters: the Operation and Crime Investigation Department;⁹⁷ the Central Investigation Bureau;⁹⁸ the Administration Department; and the Human Resource Development Department. Each of these departments is headed either by an Additional Inspector General of Police (AIGP) or a Deputy Inspector General of Police (DIGP).

Criminal investigations are carried out by the Crime Investigation Department (CID), which is headed by an Assistant Inspector General. It is structured as follows:⁹⁹

⁹³ Ibid s 31(2).

⁹⁴ Ibid s 31(3).

⁹⁵ Ibid s 31(1).

⁹⁶ *Police Act 2012* (Nepal) s 9.

⁹⁷ Nepal Police, 'Operation and Crime Investigation Department', <<https://cid.nepalpolice.gov.np/>>.

⁹⁸ Nepal Police, 'Central Investigation Bureau', <<https://cib.nepalpolice.gov.np/>>.

⁹⁹ Nepal Police, 'Crime Investigation Department', <<https://cid.nepalpolice.gov.np/index.php/about-us>>.

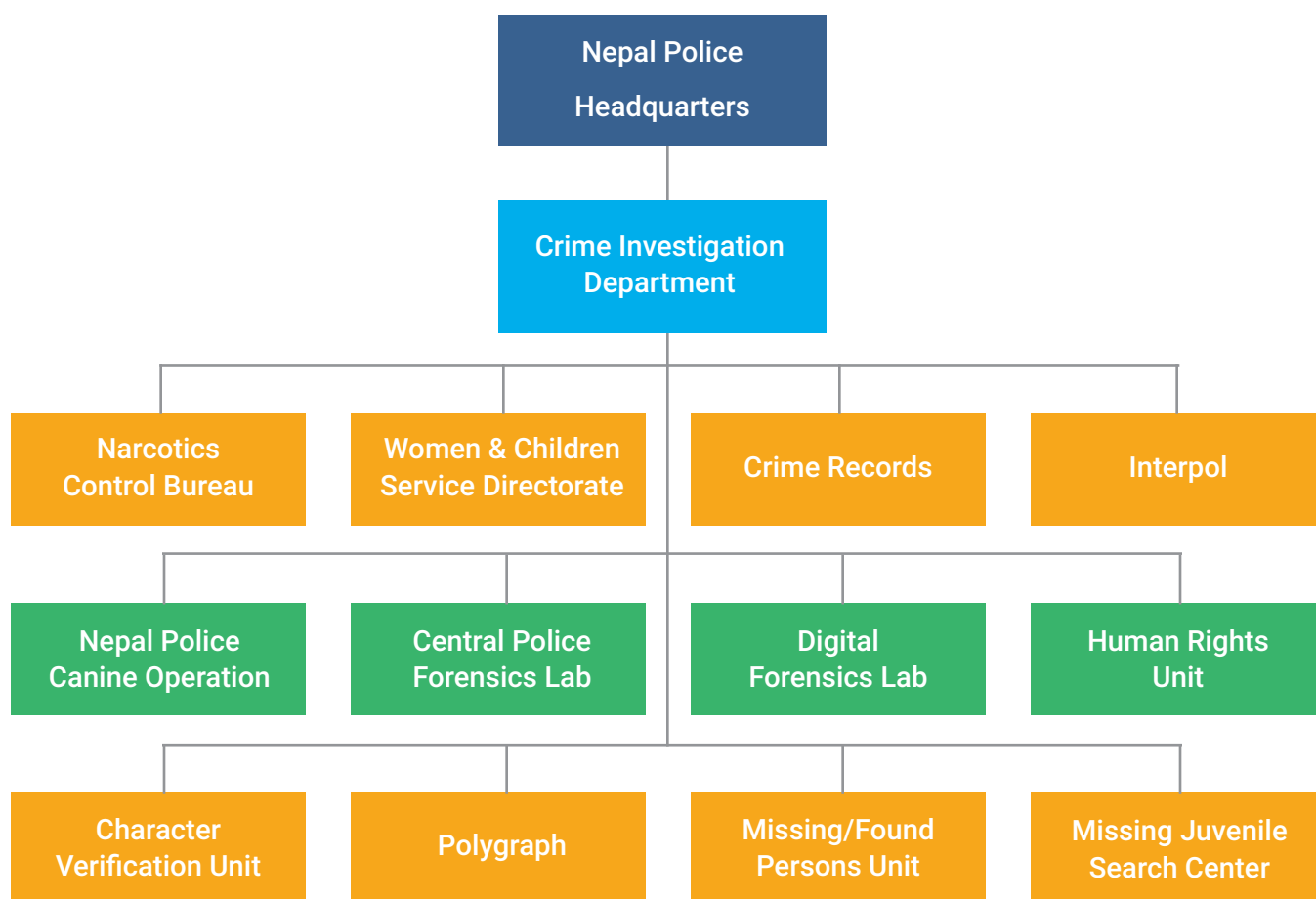


Figure 1: Website of the Nepal Police¹⁰⁰

It comprises a number of different units:¹⁰¹

Central Investigation Bureau (CIB)	1
Narcotics Control Bureau (NCB)	1
Metropolitan Police Ranges	3
Metropolitan Police Circles	18
District Police Offices	74
Area Police Offices	100
Ward Police Offices	7

Source: Nepal Police Website

¹⁰⁰ Nepal Police, 'About Us', <<https://www.nepalpolice.gov.np/index.php/about-us/organization-structure>>.

¹⁰¹ Ibid.

The Central Investigation Bureau (CIB) investigates specific crimes nationally and may seek the assistance of the relevant District Police Office.

CIB has prioritised six major areas for criminal investigation:

1. heinous and organised crime
2. banking and financial crime
3. fraud
4. wildlife-related crime
5. absconded cases, and
6. high-tech crime.¹⁰²

The District Police Offices are local investigating bodies with a mandate to investigate cases in their territory (that is, within the district).¹⁰³ They take possession of all evidence from investigations.¹⁰⁴ Major sections involved in crime investigation include Women, Children and Senior Citizen Offices (commonly known as Women's Cell),¹⁰⁵ Records Section, Investigation Section, Crime Investigation Information Section and White Collar Crime Section.¹⁰⁶

Role of the Prosecutors Department and prosecutors

The Attorney General is the chief legal advisor to the government. The President appoints the Attorney General on the recommendation of the Prime Minister. The Attorney General must be qualified to be a judge of the Supreme Court and holds office during the tenure of the Prime Minister. The prosecution of state-party crimes is the Attorney General's constitutional responsibility, with the Attorney General (or a subordinate) representing the government in court.¹⁰⁷ The Attorney General functions as the sole prosecutor in Nepal, having the power to make the final decision as to whether to initiate proceedings in any case on behalf of the government in any court or other judicial authority.¹⁰⁸ There are four basic Divisions within the Attorney General's Office: the Crime Management Unit; the Planning, Investigating and Inspecting Unit; the Human Resource Management Unit; and the Human Rights Protection Unit.¹⁰⁹

¹⁰² Nepal Police, 'Central Investigation Bureau (CIB) – investigates', <<https://cib.nepalpolice.gov.np/index.php/component/jce/?view=popup&tmpl=component&img=images/pillar-all-2076-05-25.jpg&title=&width=700>>.

¹⁰³ Criminal Procedure Code s 4(6).

¹⁰⁴ Ibid s 6(7).

¹⁰⁵ The Women and Children Service Directorate has been renamed, and is now the 'Women, Children and Senior Citizen Service (WCSCS) Directorate'.

¹⁰⁶ Nepal Police, 'Structure of Nepal Police', <<https://www.nepalpolice.gov.np/index.php/about-us/organization-structure>>.

¹⁰⁷ Constitution of Nepal arts 157–158.

¹⁰⁸ Criminal Procedure Code ch 12.

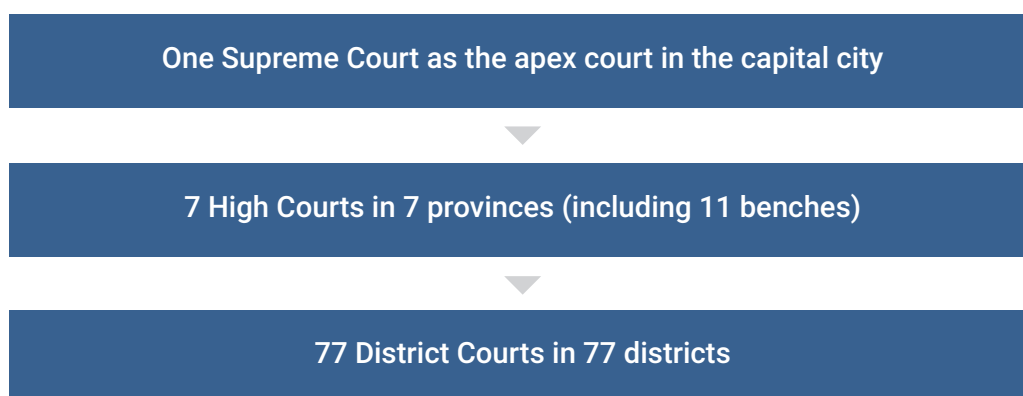
¹⁰⁹ Attorney General Rules 2020 (Nepal) r 4.

The Office of the Attorney General is based in Kathmandu and each of the seven provinces has Government Attorney Offices. There is a Chief Attorney Office in each province, one Special Attorney Office in Kathmandu (to prosecute cases in the Special Court) and 77 District Attorney Offices in Nepal.¹¹⁰ The Attorney General,¹¹¹ chief attorney,¹¹² or district attorney¹¹³ have the responsibility to prosecute cases on behalf of Government of Nepal. The District Government Attorney Office or Police Office must also maintain records and forward information to the relevant Police Office for necessary action if the initial information report is made at a different office from the one that is responsible for investigating the matter.¹¹⁴

The prosecutor plays a vital role in the pre-trial, trial, and post-trial stages, providing directions to the police from the investigation stage, and can interrogate the suspect about the crime. Police should take the suspect's statement in the presence of a public prosecutor, who may advise on legal issues at any time during the investigation and may provide permission to release a suspect from custody.¹¹⁵ Under the *Constitution of Nepal* and prevailing laws, the prosecutor has sole authority to decide whether to prosecute or not.¹¹⁶ The prosecutor prepares a charge sheet, files a case in and appears in court on behalf of the state.

Role of courts

According to the Constitution of Nepal, the Supreme Court is the highest court, with the High Courts and District Courts sitting below it. The President appoints the Chief Justice in the Supreme Court on recommendation from the Constitutional Council and other judges of Supreme Court.¹¹⁷



¹¹⁰ Government Attorney Rules 2020 r 4.

¹¹¹ Ibid r 11(1)(b)(c).

¹¹² Ibid r 15(1)(a)(c).

¹¹³ Ibid r 19(1)(b).

¹¹⁴ Criminal Procedure Act s 5(2).

¹¹⁵ *Police Act 2012* (Nepal) s 15; *Criminal Procedure Code* s 15.

¹¹⁶ *Constitution of Nepal* art 158; *Criminal Procedure Code* ch 12.

¹¹⁷ *Constitution of Nepal* art 129.

District Courts are courts of first instance, with jurisdiction over both civil and criminal cases within their territory.¹¹⁸ There is one court for each of the 77 districts. High Courts are the courts of appeal and hear cases. They also have the right to hear writ petitions.¹¹⁹ The Supreme Court is a writ jurisdictional court,¹²⁰ whereby a single bench hears writ petitions while other hearings are heard by a divisional bench or a full bench depending on the circumstances of the case. The Supreme Court provides a constitutional remedy to the violation of fundamental rights of the *Constitution of Nepal*.¹²¹ Decisions of the Supreme Court are final unless there is a flaw in the interpretation of the law or non-observance of past precedents, whereupon a case can be reviewed by the full bench in the Supreme Court.

Criminal courts and prosecution

Nepal does not have a separate criminal court; the District Courts hear both civil and criminal cases.¹²² The bench follows the general criminal procedure prescribed in the *Criminal Procedure Code*. Generally, the trial of a criminal case is carried out by the District Court in the relevant jurisdiction.¹²³ Criminal trials in Nepal begins with a bail hearing.¹²⁴ If bail is not granted, the alleged offender remains detained for the duration of the matter.

The main legal instruments governing the procedures relating to the trial of criminal cases are the *Criminal Procedure Code*, the *Judicial Administration Act 1991*, *District Court Regulations 2018*, and the *Evidence Act 1974*. The trial process can be divided into three parts: the bail hearing, post-bail hearings and the final hearing. There is no jury system in Nepal.

The Constitution of Nepal guarantees a fair trial, including the right to legal representation. A victim's case is represented by the district government attorney and the alleged offender(s) may appoint their legal representatives. Courts tend not to proceed with the trial if any party to the case is unable to retain legal representation. If the defendant is unable to appoint a lawyer, the court may appoint and pay for legal representation from the roster of lawyers in the court.

After all the witnesses have been heard, the final hearing is scheduled. It begins with the opening statement of the prosecutor in which the charges against the accused are outlined and supported with facts and evidence. The prosecutor will also propose a sentence in

¹¹⁸ Judicial Administration Act 2016 (Nepal) s 7.

¹¹⁹ Constitution of Nepal art 144.

¹²⁰ Ibid art 133(3).

¹²¹ Ibid arts 16–46.

¹²² Kamal Pathak, 'Criminal Justice System in Nepal,' University of Gothenburg, March 2008, <<https://www.researchgate.net/publication/283017617>>.

¹²³ District Court Regulation 2018 (Nepal).

¹²⁴ Ibid.

accordance with the charge sheet. Next, the defence offers their version of events, including any evidence in favour of the accused person. The prosecution is entitled to a final closing argument, rebutting this defence. Finally, the court delivers its judgment, deciding on both the facts of the case and the sentence. The judge is given discretionary power to decide the type of punishment and length of imprisonment depending on the gravity of the offence.

Appeals process

Judgments of District Courts can be appealed to the relevant High Court – there is one for each of the seven provinces. The *Criminal Procedure Code* has provisions relating to appeal, and provides that:

if any party is not satisfied with a judgment or final order made by a court, the party may make an appeal within thirty days from the date of knowledge of the judgment.¹²⁵

If the court considers there are reasonable grounds for an appeal, it may extend the time limit for appeal up to thirty days. A person wishing to make an appeal shall file it with the relevant court. In the context of an imprisoned person, the Code provides authority to file an appeal either through the court which made the judgment, or via the prison.¹²⁶ The appeal court should complete the hearing of appeal within six months after the date of receipt of the case file from the lower court.¹²⁷

EXTRADITION PROVISIONS, EXTRATERRITORIALITY, AND EXTRATERRITORIAL JURISDICTION

A person is criminally liable if they commit a serious criminal offence against a Nepali citizen, even if the offence is committed outside Nepal. The *Criminal Code* provides that extraterritorial jurisdiction will apply for certain criminal offences. Those offences include abduction of a child (defined as taking a child without the consent of their parent or guardian),¹²⁸ as well as murder, grievous hurt, hostage-taking, and rape, but only where the victim is also a Nepali citizen.¹²⁹

The sale of children is penalised under the *Human Trafficking and Transportation Act*, which includes selling or purchasing a person for any purpose.¹³⁰ Offences under the *Human Trafficking and Transportation Act* apply when they are committed domestically and transnationally, including the sale of a child and child trafficking. The *Human Trafficking and*

¹²⁵ *Criminal Procedure Code* s 134, see also ss 135–144.

¹²⁶ *Ibid* s 135(1).

¹²⁷ *Ibid* s 140.

¹²⁸ *Code* s 211.

¹²⁹ *Ibid* s 2(3).

¹³⁰ *Human Trafficking and Transportation Act* s 4(1)(a).

Transportation Act states that its jurisdiction extends throughout Nepal and to anyone from a foreign territory committing an offence against a Nepali citizen.¹³¹

However, having extraterritorial jurisdiction does not automatically allow Nepali law enforcement officials to bring a Nepali citizen who has committed an offence outside of Nepal back to Nepal. To return the alleged offender and prosecute them as per Nepali law, there must be an extradition treaty with that respective country. The *Extradition Act 1988* allows for extradition in relation to crimes specified in an extradition treaty signed with a foreign country, as well as offences stipulated in a convention relating to the extradition of accused or offenders to which Nepal is a party.¹³² Relevant conventions that Nepal has ratified include the *Convention on the Rights of the Child* and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, the *Convention on the Elimination of All Forms of Discrimination against Women* and many other treaties related to slavery, human trafficking and forced labour.

Nepal signed an extradition treaty with India on 2 October 1953. Under this treaty, extradition is to be granted for a list of 17 types of offences including, murder, rape, abduction, or kidnapping.¹³³ That treaty includes abduction as an extraditable offence, but not the sale of children, commercial sexual exploitation of a child, child pornography or child trafficking.¹³⁴ Therefore, human traffickers or child traffickers may not be extradited from India to Nepal or from Nepal to India. While there are media reports of Nepal signing an extradition agreement with China, the scope of discussions appear to be limited to apply to nationals of the two countries who cross the China-Nepal border illegally.¹³⁵ It does not include extradition of persons charged or convicted with criminal offences.

¹³¹ Ibid s 1(3).

¹³² Extradition Act 1988 (Nepal) s 2(2).

¹³³ *India Nepal Extradition Treaty*, India–Nepal (signed and entered into force 2 October 1953) art 3.

¹³⁴ Ibid.

¹³⁵ 'Nepal and China have signed an extradition treaty, Nepal's foreign Affairs Minister Confirms', Free Tibet, 24 January 2020, <<https://freetibet.org/news-media/na/nepal-and-china-have-signed-extradition-treaty-nepal%E2%80%99s-foreign-affairs-minister>>.

Section Four: Analysis of Laws and Offences Relevant to Orphanage Trafficking

This section examines the legal framework relating to trafficking in persons generally, and provisions specific to children, and seeks to identify offences under which charges for orphanage trafficking, or its constituent elements, could be brought against perpetrators.

There are four key laws in Nepal that are relevant to orphanage trafficking. They are the *Constitution of Nepal*, the *Criminal Code 2017* (and related *Criminal Procedure Code 2017*), the *Act Relating to Children 2018*, and the *Human Trafficking and Transportation Act 2007*.

RELEVANT TRAFFICKING LAW

There are several laws that explicitly or implicitly address human trafficking in Nepal. The *Constitution of Nepal* provides the framework for taking legal action against human trafficking and sexual exploitation in Nepal. Other applicable laws include the *Criminal Code 2017*, *Criminal Procedure Code 2017*, the *Act Relating to Children 2018*, the *Human Trafficking and Transportation Act 2007*, *Child Labour (Prohibition and Regulation) Act 1999*, *Labour Act 2017*, *Foreign Employment Act 2007*, *Crime Victim Protection Act 2018* and *Directives for Protection against Economic and Sexual Exploitation of Women and Girls in the Entertainment Sector, such as Dance Bars, Cabin Restaurants 2008*. As noted above, Nepal ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, in June 2020. National laws now require amendment to be aligned with the international law. The timeframe for such amendment and development of a National Action Plan is not clear, but it is anticipated it will be in the next few years.

HUMAN TRAFFICKING AND TRANSPORTATION ACT 2007

The Human Trafficking and Transportation Act 2007 (HTTA) defines ‘human trafficking’ and ‘transportation’ as two separate offences and criminalises them. The HTTA also prohibits the transportation of a person for the purpose of exploiting them. The offence of human transportation is defined as:

HTTA Section 4. Acts considered as Human Trafficking and Transportation

(2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:

¹³⁶ Ibid s 4.

HTTA Section 4. Acts considered as Human Trafficking and Transportation

(2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:

(a) taking a person out of the country for the purpose of buying and selling

(b) taking anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

- (a) *taking a person out of the country for the purpose of buying and selling*
- (b) *taking anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.*¹³⁷

The main difference between the trafficking and transportation offences is that the transportation offences include the movement of the victim, whether over state borders or domestically. Further, the act of transportation in Section 4(2)(b) includes what is commonly referred to as the 'means' requirement. The means requirement is found in the international definition of trafficking; however, it is only applicable to the trafficking of adults and is specifically stated not to apply in the context of children. However, the HTTA transportation offence found in section 4(2)(b) implies that the means requirement applies to both child and adult trafficking due to the inclusion of the words 'by means of inducement, fear, threat or coercion **to the guardian or custodian**'.

Under the same section in subsection (e), exploitation is defined as 'an act of keeping human being as a slave and bonded and this word also includes to remove human organ except otherwise provided by prevailing law'. The HTTA criminalises exploitation, the definition of which includes 'an act of keeping human being as a slave and bonded',¹³⁸ but does not explicitly define forced labour or bonded labour as forms of exploitation falling under human trafficking offences. This is vastly different from Article 3 of the international Trafficking Protocol which provides that exploitation includes 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services,

¹³⁷ Ibid.

¹³⁸ Ibid s 2.

slavery or practices similar to slavery, servitude or the removal of organs'. Thus, significant amendment will be required for the Nepali law to align more closely with the international law on human trafficking.

The current HTTA prohibits the buying or selling of a person as a form of human trafficking, criminalising both the buyer and seller.¹³⁹ As an exceptional provision which differs from the Criminal Procedure Code, the HTTA places the burden of proof on the accused and provides that the court shall keep the accused in custody during the prosecution of all but one of the acts defined as 'human trafficking'.¹⁴⁰ Other key provisions of the HTTA are that the victim has a right to separate legal representation and a right to ask permission for a translator or interpreter.¹⁴¹

The HTTA provides that, after the court takes their certified statement, the victim does not appear in the court for the remainder for proceedings, with the burden of proof resting with the accused. Part 3 of the HTTA is concerned with rescue, rehabilitation, and reconciliation of the victim. The HTTA also states that the government of Nepal will arrange the rescue of any Nepali citizen sold in a foreign country and provides for the establishment of a rehabilitation centre.¹⁴² Other provisions of the Act which address victim's rights include the establishment of a rehabilitation fund, compensation to the victims, the confidentiality of the informant and the provision of in camera proceedings.¹⁴³

Application of the HTTA to orphanage trafficking

It has been reported that cases of orphanage trafficking have been prosecuted in the lower courts of Nepal as trafficking and/or transportation; however the decisions are not publicly available.¹⁴⁴ However, applying a technical interpretation of the HTTA, particularly as it relates to human trafficking, is difficult in the context of orphanage trafficking because the elements of both trafficking and transportation under the HTTA are vastly different to those found in international law.

The first step in applying the HTTA to the context of orphanage trafficking is to determine the age of children under the Act. Section 2 (d) defines a 'child' as 'a person who has not reached the age of eighteen years'. The second step is to ascertain whether the typical components of orphanage trafficking – that is, the recruitment or transfer of a child to a residential care

¹³⁹ Ibid s 3.

¹⁴⁰ Ibid ss 8–9.

¹⁴¹ Ibid ss 11–12.

¹⁴² Ibid ss 12–13.

¹⁴³ Ibid ss 14, 17, 20, 27.

¹⁴⁴ Bhrikuti Rai, 'Selling Sympathy: Beware of fake orphanages that exploit children and fleece bleeding-heart donors', Nepali Times, 11 April 2014 <<http://archive.nepalitimes.com/article/nation/fake-orphanage-exploit-children-in-nepal,1277>>.

HTTA Section 4. Acts considered as Human Trafficking and Transportation

(1) If anyone commits any of the following acts, that shall be deemed to have committed human trafficking:

- (a) To sell or purchase a person for any purpose,
- (b) To use someone into prostitution, with or without any benefit,
- (c) To extract human organ except otherwise determined by law,
- (d) To go for in prostitution.

centre for the purpose of exploitation – are covered under the HTTA as a form of trafficking or transportation.

The HTTA defines four types of acts as ‘human trafficking’:

HTTA Section 4. Acts considered as Human Trafficking and Transportation

(1) If anyone commits any of the following acts, that shall be deemed to have committed human trafficking:

- (a) To sell or purchase a person for any purpose,*
- (b) To use someone into prostitution, with or without any benefit,*
- (c) To extract human organ except otherwise determined by law,*
- (d) To go for in prostitution.¹⁴⁵*

To meet the definition of trafficking under the HTTA, the elements involved in orphanage trafficking would need to include either the sale or purchase of a person for any purpose; the ‘use’ of someone into prostitution, with or without any benefit; the extraction of human organs (except where allowed by law); or to ‘go in for prostitution’, all of which fall under Section 4(1) of the HTTA. The most likely application would be Section 4(1)(a), the sale or purchase of a person; however, this would only include where money has been exchanged for the child being transferred to the orphanage. Under international law, this would be likely regarded as ‘sale of children’ rather than child trafficking, as international law does not require purchase or sale to have taken place for trafficking to occur. Under Nepali law, it would need to be proven that the child had been sold to the orphanage to prove trafficking had occurred.

Given the history of child sexual exploitation in orphanages in Nepal highlighted earlier in this report, there is some potential for section 4(1)(b) to be applied; however, how the term ‘prostitution’ has been interpreted in Nepali case law would need to be examined to ensure it could encapsulate the sexual exploitation of children in orphanages as a form of trafficking.

¹⁴⁵ Human Trafficking and Transportation Control Act s 4 (1).

Having examined the difficulty of prosecution of orphanage trafficking as a form of trafficking, we turn to the offence of transportation:

HTTA Section 4. Acts considered as Human Trafficking and Transportation

(2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:

(a) taking a person out of the country for the purpose of buying and selling

(b) taking anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

To meet the requirements of section 4(2)(1), a child would need to be moved over a state border into the orphanage. There are documented cases of this occurring – see, for example, the case of the Michael Job Centre in India where children from Nepal were recruited over the border and taken to an Indian orphanage. At the orphanage, their names were changed and anglicised, and stories were invented of the children being orphans of Christian martyrs that had been killed in Nepal for their beliefs, all for the purpose of advertising and securing child sponsorship internationally.¹⁴⁷ However, in order to meet the elements in section 4(2)(1), sale also needs to take place, in addition to movement across a state border.

The offence in section 4(2) involves

taking anyone from his/her home, place of residence or from a person by any means such as enticement,

HTTA Section 4. Acts considered as Human Trafficking and Transportation

(2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:

(a) taking a person out of the country for the purpose of buying and selling

(b) taking anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

¹⁴⁶ Ibid.

¹⁴⁷ Rubeena Mahato, 'Long Journey Home', Nepali Times, 6 October 2011, <<http://nepalitimes.com/news.php?id=18594#.WK-DPrZ97BI>>.

*inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.*¹⁴⁸

This explicitly refers to custodians and guardians, and therefore appears to come the closest to contemplating orphanage trafficking. However, to meet section 4(2) requires that ‘means’ are involved. This is in direct contradiction to international law which provides that means is not an element of child trafficking. In addition to means as a required element for this section, there is a purpose requirement of prostitution or exploitation. Recalling the definition of exploitation from section 2(e) of the HTTA, exploitation ‘means an act of keeping a human being as a slave and bonded and this word also includes to remove human organs except otherwise provided by prevailing law’. To meet this definition of exploitation, a child transported to an orphanage where there has been inducement, fear, threat or coercion aimed at the guardian or custodian would then need to have proven that they were kept as a slave in order for the offence of transportation to be proven. This is the most likely offence for orphanage trafficking to be prosecuted under the current law.

It is well documented that threats and inducements to parents and guardians often form part of orphanage trafficking. The United Nations General Assembly *Guidelines for the Appropriate Use and Conditions of Alternative Care of Children 2009* provide that ‘financial and material poverty, or conditions directly and uniquely imputable to such poverty should never be the only justification for removal of a child from parental care’;¹⁴⁹ however, despite this, orphanages are often seen by parents as a way of ensuring their child attains an education. There have been reports of orphanages in the Kathmandu Valley having ‘field staff’ whose job it is to ‘explore the villages and bring in children’;¹⁵⁰ with one report finding that 100 per cent of parents surveyed said that the promise of a good education was a reason for allowing their children to be taken to an orphanage.¹⁵¹ Given this context, orphanage trafficking is more likely to be successfully prosecuted under the offence of human transportation in Nepal.

Amendments required

The *Human Trafficking and Transportation Act* and its Regulation were enacted before the adoption of the Constitution of Nepal, the changed governance structure from unitary to federal system, and the ratification of the *Protocol to Prevent, Suppress and Punish Trafficking*

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 22.

¹⁵¹ UNICEF and Terre des Hommes, ‘Adopting the rights of the child’, 19.

in Persons Especially Women and Children ('Palermo Protocol').¹⁵² Nepal was the 176th country to ratify the latter and did so in June 2020. Following ratification of the *Palermo Protocol*, Nepal's anti-trafficking laws need to be harmonised and the definition of trafficking refined. Major provisions of the Act that require amendment are the extraterritoriality provision (section 1(3)), the definition of exploitation (section 2(e)), the list of actions considered human trafficking and transportation (section 4), the provision of a translator or interpreter (section 11) and acts relating to rescue and rehabilitation (section 13). Section 14 relating to the establishment and utilisation of victim's fund, also requires amendment.¹⁵³

The *Human Trafficking and Transportation (Control) Rules 2008* (Nepal) were enacted to bring into effect the provisions of the *Human Trafficking and Transportation Act* and focus upon creation of the National Committee, district committees, rehabilitation centres and rehabilitation funds. The National Committee works on the formulation and submission of necessary policies, plans and programs against human trafficking and transportation to the Ministry of Women, Children and Senior Citizen (MoWCSC).¹⁵⁴ District Committees are tasked with establishing and operating rehabilitation centres for the physical or mental treatment and social rehabilitation of victims of trafficking. It provides a place for victims to stay until they are rehabilitated or reunited with family.

OTHER RELEVANT LEGISLATION

Aside from the dedicated *Human Trafficking and Transportation Act*, the *Criminal Code 2017* also contains provisions that criminalise human trafficking and exploitation of persons. Section 119 of the *Code* states that no one should promote or influence anyone to promote prostitution. If anyone is found doing so, they may be sentenced to up to 3 years in prison and fines of up to NPR 30,000. Section 215 prohibits anyone from inciting, conspiring, ordering or trading for prostitution, pornography or nudity, and section 162 prohibits forced labour. Section 163 prohibits slavery, servitude, or slavery-like practices. Section 164 prohibits hostage-taking or keep anyone as bonded labour, while section 219 prohibits rape. Sexual intercourse with a girl below 18 (even with consent) is considered to be rape. Section 224 identifies acts that constitute sexual harassment and section 225 prohibits child sexual exploitation.

ACT RELATING TO CHILDREN 2018

Section 2(j) of the *Act Relating to Children 2018* defines a child as a person who has not attained the age of 18. The Act replaced the *Children's Act 1992* and extends the areas of

¹⁵² United Nations Convention against Transnational Organized Crime, GA Res 55/25, UN Doc A/RES/55/25 (8 January 2001, adopted 15 November 2000) annex II ('Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children').

¹⁵³ Ibid s 14.

¹⁵⁴ Human Trafficking and Transportation (Control) Rules 2008 (Nepal) s 4..

protection for children. Where the components of orphanage trafficking – unlawful removal of a minor from guardianship and forcibly declaring or registering them as an orphan and keeping them in a children’s home – do not fall within the definition of ‘human trafficking’, the unlawful removal of a minor from guardianship for the purpose of exploitation may fall within the definition of ‘human transportation’ under the *Human Trafficking and Transportation Act*. Once a child is in a children’s home, the act of keeping them there is then deemed to be violence against children under the *Act Relating to Children*.

The *Act Relating to Children* guarantees children the right to protection and states that ‘no father, mother, other member of the family or guardian shall abandon or leave the child of their own or under his or her guardianship unattended’.¹⁵⁵ If a child is removed from the custody of their legal guardian unlawfully, that act may amount to the offence of human transportation. The lawful authority for the removal of children and their placement into alternative care comes from the *Act Relating to Children*. Chapter 5 of that *Act Relating to Children* provides that children who are deprived of appropriate care due to the serious physical or mental disability or incapacity of their parents need special protection. This provision requires government and the Child Welfare Authority to arrange for alternative care for children but states that this is not to be interpreted as termination of parental powers.¹⁵⁶

Similarly, the *Act Relating to Children* provides that if a child needs to be protected from the abuse, violence or neglect of a parent or guardian, they may be separated from the family, but there is no provision for termination of parenthood.¹⁵⁷ The *Act Relating to Children* prescribes an obligation on the National Child Welfare Council, Provincial Rights Committee, Local Child Rights Committee and the Child Welfare Authority as responsible authorities to provide protection to children in need.¹⁵⁸ If the Child Welfare Authority (CWA) finds it necessary to urgently rescue the child, they should do so and keep them in temporary protection.¹⁵⁹ If, after examination or inquiry, it appears that alternative care for children is necessary, the CWA should make arrangements for such care. Such children may include abandoned children or victims of abuse, violence, and neglect.

Each local government is expected to enact a document called the *Procedure for Child Protection*, which lays out procedures to be followed and thresholds to be met for the removal of children from parental guardianship and placement in alternative care. The document should also incorporate the appointment of Child Welfare Authority and the Roles and Powers of CWA. However, very few of the 753 local bodies have enacted such legislation.

¹⁵⁵ Ibid s 7(3).

¹⁵⁶ The Act Relating to Children s 48(1)(c).

¹⁵⁷ Ibid s 48(1)(g).

¹⁵⁸ Ibid s 50.

¹⁵⁹ Ibid s 50(2).

Section 72 of the Act Relating to Children sets out relevant penalties for breaches of the Act:

(1) if any person, organization or body violates any of the child rights set forth in Chapter 2 of the Act Relating to Children 2018 (Rights of the Child) or does not fulfil any of the liabilities towards the child set forth in Chapter 3 (Responsibilities towards children), such a person or the chief of such organization or body shall be liable to a fine of up to fifty thousand rupees.

(2) "If the guardian or any family member does not fulfil his or her liabilities or if the mother, father or guardian alters the name and surname of the child with the intention of acquiring undue benefits or misappropriates the child's property, such a mother, father or family member or guardian shall be liable to a fine of up to one hundred thousand rupees."¹⁶⁰

Amendments required

As discussed above, parents or guardians cannot devolve parental responsibility, nor can they abandon their children. The Criminal Code prohibits abandoning a person, stating:

a person, being bound to care or maintain an infant, child, disabled patient or elderly person, shall not abandon or desert as to cause danger to the body or life of such infant, child, patient or elderly person.¹⁶¹

An abandoned, unaccompanied, or separated child falls under the category of 'child in need of special protection'.¹⁶² The Child Welfare Authority in the Local Level, Local Child Rights Committee, Provincial Child Rights and NCRC have responsibilities to arrange guardianship of such children, and the Child Welfare Authority is mandated to make arrangements for alternative care for the children in special need.¹⁶³

Section 72 of the Act Relating to Children

(1) if any person, organization or body violates any of the child rights set forth in Chapter 2 of the Act Relating to Children 2018 (Rights of the Child) or does not fulfil any of the liabilities towards the child set forth in Chapter 3 (Responsibilities towards children), such a person or the chief of such organization or body shall be liable to a fine of up to fifty thousand rupees.

(2) If the guardian or any family member does not fulfil his or her liabilities or if the mother, father or guardian alters the name and surname of the child with the intention of acquiring undue benefits or misappropriates the child's property, such a mother, father or family member or guardian shall be liable to a fine of up to one hundred thousand rupees.

¹⁶⁰ The Act Relating to Children s 72.

¹⁶¹ Criminal Code s 184(1).

¹⁶² The Act Relating to Children s 48.

¹⁶³ Ibid s 49(2).

Whilst parents are not able to devolve parental responsibility, orphanages are able to report children as abandoned to support admission. It is much easier for an orphanage 'to declare a child as abandoned than to go through the relinquishment process' due to the 'legal framework and the prevailing practices'.¹⁶⁴ When a child is relinquished, a formal process must be adhered to involving both the approval of the biological parents and the local government, usually the Village Development Committee or similar. The local government body must then submit a recommendation providing the financial, cultural, and social circumstances of the relinquishment of the child, in addition to the biological parents authorising the relinquishment.¹⁶⁵

However, where a child is declared abandoned, there is no requirement for the Village Development Committee, or even the main government agency responsible for the alternative care for children, to be involved. To prove abandonment requires a letter from a hospital, or a police report and certificate outlining how the child was found and their circumstances.¹⁶⁶ In 2011, the Nepal Government Ministry of Women, Children and Social Welfare announced that children who were declared abandoned would not be eligible for intercountry adoption indicating that the requirements to be declared abandoned lacked the rigour necessary to ensure a child had actually been abandoned. However, this does not apply to children who grow up in an orphanage.¹⁶⁷

Legal powers for referring or placing a child to residential care

Section 49 of the *Act Relating to Children* relates to the alternative care of children. Under that provision, referring or placing a child into residential care should be the last resort. Likewise, the *Comprehensive Standard for Operation and Management of Residential Child Care Homes 2009* mentions residential childcare homes as the last resort for children.¹⁶⁸ That document prescribes entry process and admission procedures as follows:

- Placement in residential care should be a measure of last resort and for the shortest possible time.
- Residential child care homes should prepare and maintain personal files for every child who is admitted and lives there.
- Any child who was a victim of abuse, torture, or discrimination or otherwise injured should be immediately sent for health check-ups, psycho-social care. Where appropriate, legal procedures should be initiated.

¹⁶⁴ UNICEF and Terre des Hommes, 'Adopting the rights of the child: A study on intercountry adoption and its influence on child protection in Nepal', 2008, 21.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ministry of Children, Women and Social Welfare, Nepal, 'Notice 1', 2011, 1.

¹⁶⁸ Government of Nepal, Ministry of Women, Children and Social Welfare, *Comprehensive Standard for Operation and Management of Residential Child Care Homes 2009* standard 1.

- Upon admission, the child should be provided with food, shelter, and clothing.
- The child care homes should prepare and implement standardized procedures covering the admission process, its facilities and services, roles and responsibilities, confidentiality provisions, rules and regulations for discipline, the departure process, and follow up plans for each child.
- If the parents or relatives of the child are located, they should be informed of the whereabouts of their children.
- The residential child care homes should take responsibility to preserve the property or inheritance of children, and coordinate with relevant government agencies where appropriate.

The Child Welfare Authority is responsible for arranging alternative care for children in need of special protection.¹⁶⁹ The Child Welfare Authority must arrange alternative care based on the following order of priority:

- (a) immediate relative of the child
- (b) family or person willing to provide care to the child
- (c) organisation that provides foster (family-modelled) care, and
- (d) children's home.

Despite this provision, the admission of children to institutional care is still widespread.

[Legal basis for a residential care service provider to receive and retain a child in residential care.](#)

The Act Relating to Children provides a list of children in need of special protection as follows:¹⁷⁰

- (a) *Orphan children,*
- (b) *Children that have been left or found abandoned in hospitals or other public places or separated from parents or left unclaimed, with the identity of their parents unknown,*
- (c) *Children that are deprived of appropriate care due to serious physical or mental disability or incapacity of their parents,*
- (d) *Out of the children in conflict with law, those who have been referred for alternative care under the diversion process,*
- (e) *Children who are staying in prison being dependent on their father or mother who is detained or imprisoned,*
- (f) *Infants born due to rape or incestuous relationships that are punishable by law and concerning whom application has been made to the child welfare authority, stating*

¹⁶⁹ Ibid.

¹⁷⁰ The Act Relating to Children s 48.

inability to maintain them,

- (g) *Children who have been separated from their families for their best interests due to abuse, violence or neglect by their respective father, mother or guardian,*
- (h) *Children who are earning their living by engaging in labour that is forced or bonded or hazardous or worst in form or that contravenes a prevailing law, who are addicted to smoking, drinking or other narcotic drugs, or are infected with HIV,*
- (i) *Children who are experiencing difficulty leading normal life or whose lives are at risk, having been suffering from serious physical or mental health problems or serious disability, due to the inability of their parents or families to afford treatment,*
- (j) *Children who are the victims of offences against children or are at such risks,*
- (k) *Children who have lost both or either of their parents, or whose parents have disappeared, or have themselves got injured physically or mentally or disability due to a disaster or armed conflict,*
- (l) *Children belonging to deprived Dalit communities,*
- (m) *Such other children as may be specified as children in need of special protection by the Ministry by publishing a notice in the Nepal Gazette.*

The Act further states that the children referred to in clauses (a)–(g) shall be considered as children who require alternative care in order of the priority set out above, with children's homes as the last resort.¹⁷¹

Standard 1 of the *Comprehensive Standard for Operation and Management of Residential Child Care Homes 2009* allows the admission of any child who was a victim of abuse, torture or discrimination or met with an accident; a deserted infant; or any child found who could not provide details of their parents.¹⁷² If the director of the child care home finds that the child is in need of institutional care, they must make the decision about the admission of children in the presence of at least other two members of staff, note the decision in the decision register book and admit the child.¹⁷³ There are no requirements for a government authority to approve of the placement, to facilitate case assessments, to monitor the child's welfare, or to conduct placement reviews. This makes manipulation of the gatekeeping system for the purpose of orphanage trafficking very easy.

For all children admitted, the child care homes are required to keep:

- a personal file along with their legal documents
- a health record file, and

¹⁷¹ The Act Relating to Children s 49.

¹⁷² Government of Nepal, Ministry of Women, Children and Social Welfare, *Comprehensive Standard for Operation and Management of Residential Child Care Homes 2009* (Nepal).

¹⁷³ *Ibid.*

These files should be maintained, updated, and submitted immediately upon request of the competent authority (NCRC, Provincial Child Rights Committee or Local Child Rights Committee).

However, it should be noted that the *Comprehensive Standard for Operation and Management of Residential Child Care Homes 2009* was adopted before the *Act Relating to Children*, and it therefore requires amendment to make it consistent with the Act.

Relationship between specific offences and orphanage trafficking

The Act Relating to Children sets out a list of acts which are deemed to be violence against children.¹⁷⁴ Such acts include:

- to keep a child in illegal confinement, detention, prison, or house arrest, or handcuff them¹⁷⁵
- to treat a child in a cruel or inhumane manner or torture them¹⁷⁶
- to forcibly declare or register a child as an orphan,¹⁷⁷ and
- to keep a child in a children's home, except in accordance with law.¹⁷⁸

The legal process for admitting and keeping a child in a children's home is set out above. Relevant to orphanage trafficking, if this procedure is not followed, or if a child is forcibly declared or registered as an orphan, these acts fall within the crime of 'violence against children'.¹⁷⁹ Similarly, depending on how the child is removed from their home, it may fall within the definition of 'human transportation' under the *Human Trafficking and Transportation Act*. Specifically, if a child:

*is taken from his /her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keeps him/her into ones custody or takes to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.*¹⁸⁰

Where children are transported into an orphanage for a purpose of exploitation, they may be charged and prosecuted for committing the crime of 'human transportation'. Likewise, if anyone sells a child to an orphanage or any person running the orphanage buys a child, both

¹⁷⁴ The Act Relating to Children s 66(2).

¹⁷⁵ Ibid s 66(2) (h).

¹⁷⁶ Ibid s 66(2) (j).

¹⁷⁷ Ibid s 66(2) (k).

¹⁷⁸ Ibid s 66(2) (r).

¹⁷⁹ Ibid.

¹⁸⁰ Human Trafficking and Transportation Act s 4(2)(b).

persons can be charged under the 'human trafficking' offence. If the operator of the orphanage exploits children or uses them to gain monetary or benefits from others, such acts may not amount to orphanage trafficking, but would meet the definition of 'violence against children' under the *Act Relating to Children*. If a person admits a child who is not an orphan and does not need institutional care into orphanage, that act can fall within the definition of 'violence against children'.¹⁸¹

Therefore, while neither the *Human Trafficking and Transportation Act* nor the *Act Relating to Children* explicitly define orphanage trafficking as a crime, they do criminalise its components, such as separating children from their family, transporting them from their place of origin, bringing them into orphanages and exploiting them for profit, and falsifying their identity.

Offences for sexual exploitation or assault occurring in conjunction with orphanage trafficking

Section 66 of the *Act Relating to Children* applies in cases of crimes against children, including sexual exploitation or assault. The Act defines 'sexual abuse against children' as follows:

- a) *Showing of obscene audio-visual material, vulgar behaviour with children, or showing of pornographic materials;*
- b) *Storage, dissemination or use of real or virtual pornographic audio-visual material of children;*
- c) *Proposing, alluring, coercing, or threatening for involving in sexual activities;*
- d) *Involving children in making of sexual acts or involving children in making of sexual materials/contents;*
- e) *Touching, kissing, catching of sensitive organs with sexual intention, or hugging, or making to touch or catch one's or third persons sensitive organs, or making unconscious for sexual purpose or showing or making the children to show sexual organs;*
- f) *Use of children for sexual stimulation;*
- g) *Use of children for sexual satisfaction;*
- h) *Sexual exploitation or making others to do so;*
- i) *Use of children for sexual gratification;*
- j) *Use of children for sexual abuse;*
- k) *Use of children for indulging them in prostitution or other sexual activities.*¹⁸²

If any of the acts mentioned above is committed against a child, whether in private or public places – including child care homes – they fall within the definition of 'sexual abuse against children'. If a child is transported to a child care home and put into prostitution or other forms

¹⁸¹ The Act Relating to Children s 66(2)(r).

¹⁸² Ibid s 66(3).

of sexual exploitation for benefits, or if a child is otherwise placed into a child care home for the purpose of exploitation, that will constitute the crime of child trafficking.¹⁸³

ANCILLARY OFFENCES FOR ORPHANAGE TRAFFICKING FROM THE CRIMINAL CODE

Nepal's *Criminal Code* prohibits abandoning someone under one's guardianship.¹⁸⁴ It also prohibits hostage-taking and kidnapping of persons, which it defines as 'to take by force any person to any place without his or her consent or any child or any person who is under shelter of any one due to his or her physical incapacity or any person of unsound mind due to mental illness without the consent of his or her father, mother or guardian or by way of misrepresentation'.¹⁸⁵

Some of the child care homes in Nepal have reportedly used children for the purpose of begging to collect food grains or money for their child care homes. However, the Criminal Code prohibits all forms of begging, causing or abetting begging, including using a child for the purposes of begging under the pretence of singing, dancing, playing, or doing any act.¹⁸⁶ Section 225 of the *Criminal Code* prohibits child sexual abuse, but the *Act Relating to Children* tends to be used instead in cases of child sexual abuse and exploitation.

The *Criminal Code* also has a provision that any act done in good faith for the benefit of a child by consent of their guardian is not considered offence.¹⁸⁷ This is a controversial provision as child care home operators may attempt to benefit from this vague provision.

¹⁸³ Human Trafficking and Transportation Act s 2.

¹⁸⁴ Criminal Code s 184.

¹⁸⁵ Ibid s 66(3).

¹⁸⁶ Ibid s 126.

¹⁸⁷ Ibid s 17.

Section Five: Detecting and Reporting Cases of Orphanage Trafficking

INDICATORS OF ORPHANAGE TRAFFICKING

There are a wide range of indicators that may be manifest in cases of orphanage trafficking. However, as acts of orphanage trafficking are typically masked as child welfare and protection interventions, they can be difficult to discern. In most cases, more than one indicator may be required for the formation of a reasonable suspicion that orphanage trafficking or child exploitation may be occurring.

Indicators of orphanage trafficking may include:

- the operation of an unapproved home (unlawfully operating institution)
- the operation of a residential care institution that fails to meet the stipulated national standards
- the irregular admission of children into residential care
- the active recruitment of children from their families for the purpose of admission into residential care
- minors travelling from rural into urban centres unaccompanied by their parents, families or guardians
- reports of payments made by parents or to parents in conjunction with recruitment or transfer of children into residential care
- contracts (verbal or written) with parents or guardians attempting to prevent parents from exercising parental powers, and/or containing threats
- facilitation of orphanage tourism and volunteering by operators of residential care facilities, including with involvement from voluntourism companies
- marketing materials or methods (online or otherwise) that disclose children's identities and other confidential information, such as previous traumas or HIV status, for fundraising purposes
- a lack of appropriate documentation of children, or irregular documentation (including birth certificates, parental death certificates, and incomplete or inaccurate child history forms)
- suspicion, allegations or indicators of child abuse, severe neglect, violence, or extreme control exerted over the children by directors or staff
- inconsistencies in children's stories, particularly respect to names, status of their parents (deceased or alive), circumstances of their removal, and reasons for admission (abuse, trafficking, abandonment, orphanhood and so on)

- evidence of children begging or performing for tourists or visitors, and
- evidence of children providing labour to farms, businesses or domestic service within households associated with the orphanage management or personnel.

There are currently no guidelines on victim identification in existence in Nepal and, as such, there is no formal list of indicators consistently used by all authorities to detect potential cases of trafficking. Should such guidelines be developed, it would be important to incorporate indicators of orphanage trafficking to enhance detection and referral to law enforcement for investigation and for prosecution.

DETECTION OF ORPHANAGE TRAFFICKING INDICATORS

There are a range of actors who may encounter victims of orphanage trafficking, receive reports that could suggest trafficking has occurred, or uncover indicators in the course of their duties. The extent to which this results in detection and referral depends on their degree of awareness of orphanage trafficking and its indicators. Actors who may come across indicators include:

Local authorities:

Concerned parents, relatives or community members may report instances of children being recruited and transported to orphanages, in particular in instances where they are subsequently unable to locate or contact their children, or where they are concerned about the situation of the orphanages to which their children were transferred. Reports of this nature typically increase in frequency after community-level awareness raising efforts have been conducted, alerting families to the potential risks and indicators of orphanage trafficking. Reports may be directed towards child welfare authorities or Child Rights Committees operating at the local or provincial level.

Inspectors of residential care facilities:

Mandated authorities responsible for conducting regular minimum standards inspections of residential care facilities may come across indicators of orphanage trafficking in the course of such inspections. Mandated authorities with inspectorate functions include the National Child Rights Council (NCRC), Provincial Child Rights Committee (PCRC) and the Local Child Rights Committee (LCRC). To enhance detection, inspection procedures and guidelines should be adapted, and training provided to inspectorate personnel to ensure they are attentive to the indicators of orphanage trafficking, are accurately documenting those indicators when discovered, and are given clear guidance as to referral and reporting procedures.

Social workers:

Social workers implementing case management for the purpose of reintegrating children out of residential care facilities, including in the context of forced closures, may come across indicators of orphanage trafficking in their case work. As with inspectorate personnel, social workers involved in reintegration efforts should be trained in detecting indicators of orphanage trafficking and exploitation and in response and reporting procedures.

Transport providers:

Public and private transport providers may come across indicators of orphanage trafficking as children are transferred from remote communities, often without a parent or guardian, to urban centres where orphanages are located. This was noted in the aftermath of the 2015 earthquake when vehicle checkpoints were installed along provincial arterial roads as a means of intercepting the transportation of children removed unlawfully from their parents/guardians for admission into institutions.¹⁸⁸ Awareness raising that includes transport providers (both public and private), coupled with simple and accessible real-time reporting mechanisms, may lead to enhanced detection and reporting of cases of orphanage trafficking by transport providers.

Civil society organisations:

CSOs, including child protection, anti-trafficking and human rights organisations, may come across indicators of orphanage trafficking, in the context of their work to support vulnerable children, victims of trafficking or exploitation or in legal cases pertaining to human rights violations. Unless specifically trained or made aware of how indicators may point to orphanage trafficking, they may be misinterpreted. Child protection actors often classify indicators of orphanage trafficking as harmful on the basis of children receiving substandard care. They may act to improve standards or remove and refer the child to another residential care service or reintegrate them in response, however, may not suspect trafficking and refer cases to law enforcement for investigation. Similar gaps in understanding amongst anti-trafficking organisations and human rights organisations may result in indicators being overlooked or misclassified, affecting the type of supports offered to victims and the legal remedies sought. Therefore, as with other actors, awareness raising of orphanage trafficking specific indicators amongst these CSO stakeholder groups is likely to improve detection and legal redress.

¹⁸⁸ Punaks M. Lama, S. (2021) 'Orphanage Trafficking and Child Protection in Emergencies in Nepal: A Comparative Analysis of the 2015 Earthquake and the 2020 COVID-19 Pandemic', *Institutionalised Children Explorations and Beyond* 8(1) 26–37.

Volunteers:

In a number of past cases in Nepal, orphanage volunteers have received direct reports of abuse, maltreatment or exploitation in institutional care settings, from children with whom they interact in the course of volunteering. This may result in on-reporting to authorities and spark investigations which uncover orphanage trafficking. However, in past cases, detection by volunteers has also resulted in inappropriate volunteer-led rescues and the establishment of new institutions, rather than legal redress.¹⁸⁹ Given that orphanage tourism remains a driver of orphanage trafficking, awareness raising with volunteers should continue to focus on discouraging orphanage volunteering rather than on the detection of orphanage trafficking indicators. General awareness targeting tourists regarding on how to report child protection concerns through the use of national hotlines or other such mechanisms may, however, result in the reporting of some cases of orphanage trafficking.

CHALLENGES WITH DETECTING INDICATORS OF ORPHANAGE TRAFFICKING

There are many factors that make detection of orphanage trafficking challenging in Nepal as with other jurisdictions. Firstly, the indicators for orphanage trafficking differ significantly from more traditional indicators of trafficking, and may not be well understood by law enforcement, child welfare authorities and the wider community. As such, they may be overlooked, misinterpreted, or incorrectly categorised. Despite holding concerns regarding the circumstances of whereabouts of children, families and children may not realise acts perpetrated against them constitute a criminal offence. Even when child welfare reports are made about children who have been transported to residential care institutions, the gravity of the situation may not be well articulated by those making reports or perceived by those receiving them. As such they may not be acted upon appropriately. Secondly, some of the most readily detectable indicators, such as the presence of an unlawfully operating institution, or irregular admission of children into institutional care, have been normalised in Nepal to the point of desensitisation. As such, despite these acts constituting offences under the Act Relating to Children, these indicators alone do not typically raise sufficient suspicion to prompt further investigation or intervention. In addition, as many of the institutions implicated in orphanage trafficking are unregistered, they operate outside of the system of government monitoring. They are therefore not subject to regular inspections which could uncover more nuanced indicators and trigger reporting to law enforcement. This, coupled with the characteristically closed environment of residential care institutions, reduces opportunities for detection, referral and for victim identification and rescue.

CONDUCTING RESIDENTIAL CARE FACILITY INSPECTIONS

The *Act Relating to Children* prescribes the National Child Rights Council, Provincial Child Rights Committee and Local Child Rights Committee and Child Welfare Authority as the major bodies to oversee child rights and child protection in Nepal.¹⁹⁰ Article 5 of this Act deals with the monitoring and reporting of care and maintenance of children and states that the person or organisation working on providing care for children should submit the details of the child to Local Child Rights Committee (LCRC) via the Child Welfare Authority. Further, the LCRC is to submit an annual report to the Provincial Child Rights Committee (PCRC). The article sets out the responsibilities of LCRC and PCRC for the periodic inspection and monitoring on of the overall status of children along with the quality and effectiveness of the service provided at the local and provincial level.¹⁹¹

The *Local Government Operation Act 2017* sets out the local government's functions and duties related to the operation, management, monitoring and regulation of rehabilitation centres established for orphans, homeless children and children with physical and mental disabilities.¹⁹² Similarly, the *Procedure on Operation of Children's Home, 2019* issued by the Ministry of Women, Children and Senior Citizens, states that all level of government are to meet the minimum standards for the operation and management of residential child care homes set by the Government of Nepal.¹⁹³ The level of government that grants the approval for the operation of a child care home is responsible for the monitoring, regulation and management of that home.¹⁹⁴ The procedure clearly highlights the role of provincial government, Social Development Ministry and concerned municipalities in monitoring the child care homes. It also states that the child care home's administrator, operator, and management committee should follow the recommendations provided by the monitoring authorities.¹⁹⁵

The *Provincial Government (Work Division) Rules 2018* outlines the roles of Social Development Ministry in each province.¹⁹⁶ Those roles include the formulation and implementation of policies and action plans on gender-based violence, human trafficking and transportation and implementation of international treaties, agreements and commitments, preventive and protective measures and rehabilitation.¹⁹⁷ In addition, provincial governments are responsible for the formulation and implementation of provincial policies, laws, standards, planning, and

¹⁹⁰ *Act Relating to Children* ch 6.

¹⁹¹ *Ibid* s 58.

¹⁹² *Local Government Operation Act 2017* (Nepal) s 3, art 11.

¹⁹³ *Procedure on Operation of Children's Home 2019* art 5.

¹⁹⁴ *Ibid* art 6.

¹⁹⁵ *Ibid* art 15.

¹⁹⁶ *Provincial Government (Work-Division) Rules 2018* annex 5.

¹⁹⁷ *Ibid*.

regulation, conducting research, delivering child-friendly governance and services, managing child rescue funds, and overseeing child rehabilitation.¹⁹⁸ Monitoring and evaluation of work related to children at the provincial level together with other organisations fall under the responsibility of provincial Social Development Ministry.¹⁹⁹

The Provincial Child Rights Committee and Local Child Rights Committee have powers and responsibilities to monitor the child care homes which are registered with them, while the National Child Rights Council (NCRC) can monitor child care homes all over Nepal. In practice, there is some degree of overlap of monitoring between the committees. These bodies are vital in controlling orphanage trafficking, and therefore need to work in close coordination.

Status of monitoring

According to the NCRC report, in the 45 districts of Nepal there are currently 489 child care homes, which house 11350 children.²⁰⁰ The report states that the NCRC carried out monitoring in 216 child care homes in 12 districts during 2019–2020.²⁰¹ The NCRC rescued 247 children from 11 child care homes in Kathmandu, Bhaktapur, Lalitpur and Nawalparasi from 2019 to 2020. The rescues were conducted because it was found that the institutions were not meeting the minimums standard of care. Despite these monitoring efforts, the coverage of monitoring was only 44% in 2020 which means that standards in the remaining 273 institutions across 33 districts were not examined.

A 2015 Ministry report pointed out insufficient coordination between the government and child care homes as one of the challenges in standardised care of children in the child care homes.²⁰² All three tiers of governments have been assigned responsibilities for the monitoring of child care homes, but large gaps still exist despite the introduction of the *Local Government Operation Act 2017* and standard operating procedures in 2019.²⁰³ For example, while inspection of child care homes established in the local levels is the responsibility of the Local Child Rights Committee, it appears that most local governments are failing to follow prescribed procedures and ensure accountability for the protection and care of children in child care homes. For example, while each of the 753 local areas should have a Child Rights Committee²⁰⁴ responsible for monitoring child care homes, Padam Lama, Chairperson

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ NCRC 2020 *State of Children Report* 51.

²⁰¹ Ibid 52.

²⁰² The Government of Nepal Ministry of Women, Children and Social Welfare Central Child Welfare Board, *State of Child Care Homes in Nepal 2015*, 2015, 11–12.

²⁰³ The Government of Nepal Ministry of Women, Children and Senior Citizens, 'Procedure on Operation of Children's Home', 2019.

²⁰⁴ Ministry of Federal Affairs and General Administration, <<https://www.mofald.gov.np/ne/nepal-nagarpalika-gaupalika-list>>

of Simkot, Humla district, has indicated that he was unaware of the provision regarding the formation of the Child Rights Committee at the local levels.²⁰⁵ This suggests that local authorities may be unaware of their obligations to address the issue of child trafficking in rural municipalities. Work to search for, deter or detect child trafficking has not been prioritised by local authorities and there has been a delay in formulating necessary policies, guidelines, and procedures.²⁰⁶

There have, however, been some exceptions. For example, Chandragiri Municipality has formed Child Rights Committee in all its wards which carries out monitoring and works to stop illegal trafficking and the violence against children.²⁰⁷ Likewise, on 17 February 2021, Dhulikhel Municipality was declared a child-friendly municipality, the first in Kavre District.²⁰⁸ Child-friendly municipalities achieve at least 80% of indicators related to children's survival, development, protection and participation. A municipality is only declared child-friendly after a rigorous validation process is undertaken by local government and the Ministry for Federal Affairs and General Administration provides consent for the declaration of a child-friendly municipality.

Child-friendly municipalities or villages are examples of best practice that could be used to compare to other municipalities or villages to identify necessary changes and interventions.

The *Local Government Operation Act 2017* sets out the local government's functions and duties related to the operation, management, monitoring and regulation of rehabilitation centres established for orphans, homeless children and children with physical and mental disabilities.²⁰⁹ Similarly, the *Procedure on Operation of Children's Home, 2019* issued by the Ministry of Women, Children and Senior Citizens states that all levels of government are to meet the minimum standards for the operation and management of residential child care homes set by the Government of Nepal.²¹⁰ The level of government that grants the approval for the operation of a child care home is responsible for the monitoring, regulation and management of that home.²¹¹ The procedure clearly highlights the role of provincial government, Social Development Ministry and concerned municipalities in monitoring the child care homes. It also states that the child care home's administrator, operator, and management committee should follow the recommendations provided by the monitoring authorities.²¹²

²⁰⁵ Janak Raj Sapkota, 'Trafficked children are "invisible" in the eyes of local authorities', *Centre for Investigative Journalism, Nepal*, 6 January 2020, <<https://cijnepal.org.np/trafficked-children-are-invisible-in-the-eyes-of-local-authorities/>>.

²⁰⁶ Ibid 1.

²⁰⁷ Ibid 6.

²⁰⁸ Dhulikhel Municipality, 'Dhulikhel Municipality declared the child-friendly municipality', <<https://dhulikhelmun.gov.np/en/news-notice>>.

²⁰⁹ Local Government Operation Act 2017 (Nepal) s 3, art 11.

²¹⁰ Procedure on Operation of Children's Home 2019 art 5.

²¹¹ Ibid art 6.

²¹² Ibid art 15.

The *Provincial Government (Work Division) Rules 2018* outlines the roles of Social Development Ministry in each province.²¹³ Those roles include the formulation and implementation of policies and action plans on gender-based violence, human trafficking and transportation and implementation of international treaties, agreements and commitments, preventive and protective measures and rehabilitation.²¹⁴ In addition, provincial governments are responsible for the formulation of provincial policies, laws, standards, planning, implementation and regulation, conducting research, delivery child-friendly governance and services, managing child rescue funds, and overseeing child rehabilitation.²¹⁵ Monitoring and evaluation of work related to children at the provincial level together with other organisations fall under the responsibility of provincial Social Development Ministry.²¹⁶

The Provincial Child Rights Committee and Local Child Rights Committee have powers and responsibilities to monitor the child care homes which are registered with them, while the National Child Rights Council (NCRC) can monitor child care homes all over Nepal. In practice, there is some degree of overlap of monitoring between the committees. These bodies are vital in controlling orphanage trafficking, and therefore need to work in close coordination.

²¹³ Provincial Government (Work-Division) Rules 2018 annex 5.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

Section Six: Formal Processes for Trafficking Victim Identification and Rescue

IDENTIFICATION OF VICTIMS

At present there are no standardised operating procedures in place in Nepal to guide formal human trafficking victim identification and referral processes. In 2019, UNODC in partnership with the Office of the Attorney General convened a consultation and drafting session for victim identification guidelines and a national referral mechanism;²¹⁷ however, to date, these have not been released. The critical need to address the deficit of standardised operating procedures for victim identification and referral has been the subject of recommendations in the Nepal narrative section of the TiP report for several years.²¹⁸

RESCUE AND REFERRAL

For the same reasons mentioned above, the procedures for rescue and referral of child victims of human trafficking are currently underdeveloped. However, there are some provisions within the HTTA and Act Relating to Children that are relevant and may be utilised in the rescue and referral of children subject to orphanage trafficking.

Part 3 of the HTTA deals with rescue, rehabilitation, and reconciliation. However, it lacks the detail and specificity required for effective operationalisation. Section 12 states that the responsibility for rescue of transnational trafficking cases rests with the Nepali government, but makes no mention of procedures for the rescue of victims of domestic trafficking who remain in a situation of exploitation.²¹⁹ In terms of social services, the Act focuses on the government's responsibility for the establishment, monitoring and funding of rehabilitation centres, which are responsible for providing residential based rehabilitation services. There is no mention in the Act of referral processes or cross-referral between victim support services and law enforcement. The Human Trafficking and Transport Rules developed to operationalise aspects of the Act are similarly vague with respect to provision for victim identification, rescue, or referral. Section 7 details the functions, powers and duties of district committees, stating that such committees are to 'relieve persons who are in danger of human trafficking in the district';²²⁰ however, it provides no guidance on the procedures or interaction between law enforcement, the committee and social services.

²¹⁷ <https://www.unodc.org/southasia/en/frontpage/2019/April/nepal_-engaging-experts-on-victim-identification-guidelines-to-counter-trafficking-in-persons.html>.

²¹⁸ TiP report 2018, 2020.

²¹⁹ HTAA s 12.

²²⁰ HTT Rules s 7.

The Act Relating to Children contains two important provisions that are relevant to the rescue and referral of children who are victims of orphanage trafficking. Firstly, the Act requires any person with information about a child in need of protection to report such matters to the child welfare authorities operating at the local level.²²¹ Children who are victims of violence and/or offences prescribed in the Act are included in the classification of 'children in need of protection'.²²² As per the definition of acts of violence found in section 66 of the Act, this includes children residing in unlawfully operating institutions and children subject to paper orphaning.²²³ When a report is received, child welfare authorities are authorised to immediately rescue a child, when it is deemed necessary, and refer the child to temporary protection.²²⁴ In cases of acts of violence against children (which, as mentioned above, includes a number of indicators of orphanage trafficking such as forcibly declaring or registering a child as an orphan, harbouring a child in a children's home other than under due process, and begging),²²⁵ the Act lists a number of mandatory reporters, including parents, guardians, caregivers, teachers and health workers, who are required to report such information immediately to the nearest police station. In such cases, and in conjunction with instigating investigation, the police are required to cross-refer to the child welfare authorities to initiate service access, according to the child's needs.²²⁶ Police are also authorised to enact a rescue if the child remains in a situation of violence or exploitation.²²⁷

The classification of keeping a child in an institution in the absence of due process and paper orphaning as violence warranting rescue by child welfare authorities or law enforcement is a significant provision within Nepali law to address orphanage trafficking. It circumvents the requirement for trafficking or more typical forms of abuse or exploitation to be suspected or evidenced before an intervention can be staged. It gives police and child welfare authorities powers to intercept and remove a child from a situation of exploitation based on the most readily detectable indicators of orphanage trafficking, regardless of whether orphanage trafficking is indeed suspected. Should police be directed to investigate all reported cases of violence against children in accordance with section 66 (k) and (r) of the Act for suspicion of orphanage trafficking, the rate of detection of orphanage trafficking and referral for prosecution could rapidly increase. Sensitising child welfare authorities and police to the links between these forms of violence against children and orphanage trafficking will therefore be a critical component of a prosecutorial strategy.

²²¹ Act Related to Children s 50.

²²² *Ibid* s 48 (j).

²²³ *Ibid* s 66.

²²⁴ *Ibid* s 50.

²²⁵ *Ibid* s 66.

²²⁶ *Ibid* s 68 (2).

²²⁷ *Ibid* s 70.

Section Seven: Conclusion

The problem of children being separated from family, transported from their place of origin to an orphanage and exploited is well documented in Nepal. In 2020, the National Child Rights Council rescued a number of children from various childcare homes, and found that majority of the children living in child care homes have families. In Nepal, 90% of orphanages are located in the top five tourist destinations which do not have evidence of a corresponding requirement of child vulnerability that might support the placement. They are established in these tourist hotspots in order to garner support from visitors and volunteers as outlined in the Trafficking in Persons Reports 2017–2021. Additionally, the TIP Report 2021 outlines that in some orphanages children are forced into manual labour, begging, and entertaining visitors and tourists to attract donations.²²⁸

The National Child Rights Council is responsible for the protection and promotion of children's rights in Nepal, while Provincial Child Rights Committees (PCRC) and Local Child Rights Committees are responsible for the protection and promotion of child rights in their respective areas. However, many local levels have not yet established such Committees. The Government of Nepal, provincial governments and local levels may establish children's homes as required, for the purpose of protection of the children requiring special protection. In practice, most such child care homes have been established by non-governmental organisations with an onus on the operator to register and obtain permission to operate residential care facilities. However, in practice, this is often not enforced.

While the Human Trafficking and Transportation Act does not explicitly define 'orphanage trafficking', many of its provisions nevertheless apply, particularly where the facts of orphanage trafficking fall within the definition of 'human transportation'. Until human trafficking laws are amended, the offence of human transportation is most likely to be successful if seeking to prosecute orphanage trafficking in Nepal.

The Act Relating to Children provides for alternative care of the children in special need and puts institutional as the care option of last resort, as does the Comprehensive Standard for Operation and Management of Residential Child Care Homes, 2009. Whilst the Act Relating to Children does not define sale or trafficking of children, it does define the act of forcibly declaring or registering a child as an orphan and keeping them in a children's home, except in accordance with law, as 'violence against children'.

As Nepal begins to harmonise domestic law on trafficking with international law, significant amendment of legislation and policy will be required. At this juncture, it is critical that Nepal

²²⁸ United States Trafficking in Persons Report 2021, Nepal narrative.

carefully considers both how to best amend their trafficking laws to include orphanage trafficking, and how to effectively monitor and enforce regulations pertaining to alternative care. Where there is a failure of regulation and enforcement in these two overlapping areas, orphanage trafficking emerges and thrives. Nepal has a unique opportunity in the coming years to incorporate orphanage trafficking into new human trafficking laws, policies and national action plans to effectively begin to combat this issue.

Section Eight: Annexes

ANNEX ONE: MATRIX OF RATIFICATION AND DOMESTICATION OF INTERNATIONAL TREATIES

INTERNATIONAL TREATIES		
Treaty Name	Date of Ratification/ Accession	Entry into Force by
Convention on the Rights of the Child	14 September 1990	
Implementing Legislation:		
1.	The Constitution of Nepal, 2015	
2.	The Act Relating to Children, 2018	
3.	Children's Rules, 1995	
4.	<i>Muluki</i> Criminal Code, 2017	
5.	<i>Muluki</i> Criminal Procedure Code, 2017	
6.	Child Labour (Prohibition and Regulation) Act, 2000	
7.	Labour Act, 2017	
8.	The Electronic Transactions Act, 2008	
9.	The Act Relating to Compulsory and Free Education, 2018	
10.	Bonded Labour (Prohibition) Act, 2002	
CRC Optional Protocol on the Sale of Children and Child Prostitution and Pornography (CRC-OP-CS)	8 September 2000	
Implementing Legislation:		
1.	The Constitution of Nepal, 2015	
2.	The Act Relating to Children, 2018	
3.	Children's Rules, 1995	
4.	<i>Muluki</i> Criminal Code, 2017	
3.	<i>Muluki</i> Criminal Procedure Code, 2017	
4.	The Electronic Transactions Act, 2008	

7.	Electronic Transaction Rules, 2007
8.	Crime Victim Protection Act, 2018
9.	Human Trafficking and Transportation (Control) Act, 2007
10.	Human Trafficking and Transportation (Control) Regulation, 2008
11.	Telecommunications Act, 1997
12.	The Evidence Act, 1974
13.	Treaty Act, 1990
14.	Cyber Security Bylaw 2077, 2020
15.	ICT Policy, 2015
16.	National Cyber Security Policy, 2016 (Draft)
17.	National Strategic Action Plan for Protection Cluster, 2016
18.	Online Child Safety Guidelines, 2019
19.	Telecommunication Policy, 2003
20.	Information Technology Bill, 2019
21.	Bonded Labour (Prohibition) Act, 2002

United Nations Convention Against Transnational Organized Crime	23 December 2011	
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Implementing Legislation:

1.	Asset (Money) Laundering Prevention Act, 2008
2.	Mutual Legal Assistance Act, 2014

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children	16 June 2020 (accession)	
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Implementing Legislation:

1.	Human Trafficking and Transportation (Control) Act, 2007
2.	Human Trafficking and Transportation (Control) Regulation, 2008
3.	The Act Relating to Children, 2018
4.	The Crime Victim Protection Act, 2018
5.	Local Government Operation Act, 2017

ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	3 January 2002	
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Implementing Legislation:

1.	The Act Relating to Children, 2018
2.	Human Trafficking and Transportation (Control) Act, 2008
3.	The Crime Victim Protection Act, 2018
4.	Child Labour (Prohibition and Regulation) Act, 2000
5.	Bonded Labour (Prohibition) Act, 2002
6.	Labour Act, 2017

Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption 1993	Signed but not ratified by Nepal	
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Implementing Legislation:

1.	Civil Code, 2017 (2074)
2.	Terms and Conditions and Process for Granting Approval for Adoption of Nepali Child by Alien, 2008

ANNEX TWO: MATRIX OF DOMESTIC LAWS RELEVANT TO ORPHANAGE TRAFFICKING

DOMESTIC LEGISLATION

Tier One: Constitution

Title of Legislation	Date Entered into Force	Abrogated / Repealed
Constitution of Nepal	20 September 2015	

Relevant Articles:

39	Article 39: Rights of Children
	(1) Every child shall have the right to name and birth registration along with his or her identity.
	(2) Every child shall have the right to education, health, maintenance, proper care, sports, entertainment and overall personality development from the families and the State.
	(3) Every child shall have the right to elementary child development and child participation.
	(4) No child shall be employed to work in any factory, mine or engaged in similar other hazardous work.
	(5) No child shall be subjected to child marriage, transported illegally, abducted/kidnapped or taken in hostage.

	<p>(6) No child shall be recruited or used in army, police or any armed group, or be subjected, in the name of cultural or religious traditions, to abuse, exclusion or physical, mental, sexual or other form of exploitation or improper use by any means or in any manner.</p> <p>(7) No child shall be subjected to physical, mental or any other form of torture in home, school or other place and situation whatsoever.</p> <p>(8) Every child shall have the right to juvenile friendly justice.</p> <p>(9) The child who is helpless, orphan, with disabilities, conflict victim, displaced or vulnerable shall have the right to special protection and facilities from the State.</p> <p>(10) Any act contrary to in clauses (4), (5), (6) and (7) shall be punishable by law, and a child who is the victim of such act shall have the right to obtain compensation from the perpetrator, in accordance with law.</p>
43	<p>Article 43: Rights of Children</p> <p>The indigent citizens, incapacitated and helpless citizens, helpless single women, citizens with disabilities, children, citizens who cannot take care themselves and citizens belonging to the tribes on the verge of extinction shall have the right to social security, in accordance with law.</p>
51(j)(5)	<p>Article 51, j (5): Policies of the State</p> <p>The State shall pursue the following policies:</p> <p>j(5) to take into consideration primarily of the best interests of the child.</p>

Tier Two: Laws and Codes

Title of Legislation	Date Entered into Force	Abrogated / Repealed
The Act Relating to Children	18 September 2018	
Relevant Sections:		
6.	<p>Right to live with and visit parents:</p> <p>(1) No child shall be separated or removed from her/his father or mother against her/his wishes.</p> <p>(2) Notwithstanding what is contained in Subsection (1), if necessary in the best interest of the child, the child court may pass an order for separating the child from her/his father or mother and entrusting her/him in a guardian's custody.</p>	
7.	<p>Right to protection:</p> <ul style="list-style-type: none"> - Every child shall have the right to obtain proper care, protection, maintenance, love and affection from his or her father, mother, other member of family or guardian. In cases where the parents are divorced or living separately due to any other reasons, financial expenses for the maintenance of their children shall be borne by both parents according to their capacity. - No father, mother, other member of the family or guardian shall abandon or leave the child of their own or under his or her guardianship unattended. - Children with disabilities, war victims, displaced, under vulnerable conditions, or living on street shall have the right to special protection as prescribed from the State for their secured future. - Every child shall have the right to protection against any type of physical or mental violence and torture, hatred, inhuman treatment, gender or untouchability-based mistreatment, sexual harassment and exploitation that might be caused by his or her father, mother, other family member or guardian, teacher and other person. - Every child shall have the right to protection from being exploited economically and shall also be entitled to be protected from any activity which may be harmful to him or her or be obstacle to his or her education or detrimental to his or her health, physical, mental, moral, social development. - Children below fourteen years of age shall not be deployed in any risky work or used as a house-servant or house-maid. 	
12	<p>Special rights of children with disabilities:</p> <ul style="list-style-type: none"> - Special arrangements shall be made, as prescribed, for the children with disabilities. - Every child with disability shall have the right to obtain special care and to be her parents or guardian, making decision on who has to take care of and maintain a child after divorce between his or her father and mother shall adopt the process as prescribed for the best interests of the child pursuant to this Act. 	

16	<p>Priority to be given for the best interests of children:</p> <ul style="list-style-type: none"> - The officials of every organization and institution that carries out activities related to children shall adopt necessary child-friendly process by giving priority to the best interests of children, while doing every activity. - It shall be the responsibility of everyone to instantly help children whose life is in risk. - The child welfare authority or Juvenile Court shall, while making arrangement for a child's alternative care, separating a child from his or her parents or guardian, making decision on who has to take care of and maintain a child after divorce between his or her father and mother shall adopt the process as prescribed for the best interests of the child pursuant to this Act.
17	<p>Responsibility of the family or guardian:</p> <ul style="list-style-type: none"> - Special arrangements shall be made, as prescribed, for the children with disabilities. - Every child with disability shall have the right to obtain special care and to be her parents or guardian, making decision on who has to take care of and maintain a child after divorce between his or her father and mother shall adopt the process as prescribed for the best interests of the child pursuant to this Act.
18	<p>Obligation of the State:</p> <ul style="list-style-type: none"> - The State shall make necessary arrangement for the basic needs including maintenance, protection, health and education of children in need of special protection, on the basis of the available means and resources.
25	<p>Rights of child victim:</p> <p>A child victim shall have the right to child-friendly justice as follows in every stage of investigation, prosecution and judicial process:</p> <ul style="list-style-type: none"> (a) To get information on the language he or she understands, (b) To participate or be involved, (c) To keep the details of personal identification confidential, (d) To get recovery of the reasonable compensation from the offender, <p>Provided that this clause shall not be considered as limiting the opportunity of the victim to receive compensation from the State.</p> <ul style="list-style-type: none"> (e) To get free legal aid and socio-psychological counselling service as required and to appoint a separate legal counsel if he or she so wishes, (f) To get free service of the translator, sign language expert or interpreter if the victim does not understand the language used by the investigating authority or Juvenile Court, (g) To get, free of cost, the copy of the documents including the decisions and orders made by the investigating authority or Juvenile Court,

- (h) To get police protection for safety against the probable threat that may be caused from the offender or his or her party,
- (i) To have his or her case heard in camera,
- (j) To have the indirect presence of the defendant in the course of hearing of the case as required.

48 **Children in need of special protection:**

(1) The following children shall be deemed to be children in need of special protection:

- (a) Orphan children,
- (b) Children that have been left or found abandoned in hospitals or other public places or separated from parents or left unclaimed, with the identity of their parent's unknown,
- (c) Children that are deprived of appropriate care due to serious physical or mental disability or incapacity of their parents,
- (d) Out of the children in conflict with law, those who have been referred for alternative care under the diversion process,
- (e) Children who are staying in prison being dependent on their father or mother who is detained or imprisoned,
- (f) Infants born due to rape or incestuous relationships that are punishable by law and concerning whom application has been made to the child welfare authority, stating inability to maintain them,
- (g) Children who have been separated from their families for their best interests due to abuse, violence or neglect by their respective father, mother or guardian,
- (h) Children who are earning their living by engaging in labour that is forced or bonded or hazardous or worst in form or that contravenes a prevailing law, who are addicted to smoking, drinking or other narcotic drugs, or are infected with HIV,
- (i) Children who are experiencing difficulty leading normal life or whose lives are at risk, having been suffering from serious physical or mental health problems or serious disability, due to the inability of their parents or families to afford treatment,
- (j) Children who are the victims of offences against children or are at such risks,
- (k) Children who have lost both or either of their parents, or whose parents have disappeared, or have themselves got injured physically or mentally or disability due to a disaster or armed conflict,
- (l) Children belonging to deprived Dalit communities,
- (m) Such other children as may be specified as children in need of special protection by the Ministry by publishing a notice in the Nepal Gazette.

(2) Other services and support, including rescue, temporary protection, health treatment, psycho-social support, family reunion, rehabilitation, alternative care, family support, social security and socialization, as required, to children referred to in subsection (1) shall be as prescribed.

50 Protection of children:

(1) A person who has information about a child in need of special protection at any place shall give information thereof to the child welfare authority.

- If information is received pursuant to sub-section (1), the child welfare authority shall, if he or she finds it necessary to urgently rescue the child, rescue the child and keep him or her in a temporary protection service.
- The child welfare authority may make arrangements for providing necessary services, upon conducting inquiry on the basis of the information received.
- While conducting inquiry, other services needed by the children in need of special protection shall be ensured. If it is deemed that special protection is not necessary and the child's father, mother, other family member or guardian has been traced, the child welfare authority may hand over the custody of such children to them.
- If, in making examination and inquiry pursuant to sub-section (3), it appears that alternative care is necessary, the child welfare authority shall make arrangements for such care.
- In a case involving a child as a victim, the child welfare authority shall arrange for separating a child victim from her or his parents or family and keep him or her in a temporary protection service for a certain period of time, if the child so desires, or the parent or guardian is the perpetrator or because of their complicity with the perpetrator there is a possibility of greater risk to the child, or there is likelihood of obstruction in the examination, inquiry, proceedings and fact-finding of the incident.
- If, in spite of making examination and inquiry, the paternity and maternity of the child cannot be determined, the child welfare authority shall recommend for her or his birth registration and government identity card setting out the identity.

66 Offences against the child:

(1) If any person does any act of violence or sexual abuse, he or she shall be deemed to have committed the offence against the child.

(2) If any person does any of the following acts against a child, he or she shall be deemed to have committed the act of violence against the child:

- (a) To involve the child in addictions such as smoking, drinking or gambling,
- (b) To allow him or her to enter to, or use him or her in, recreational facilities opened for the adults such as dance bars and casinos,
- (c) To show him or her motion pictures or other audio-visual materials classified as for the adults only,

- (d) To inflict physical or mental punishment on, or behave, in an undignified manner, him or her whether at home, school or any other place,
- (e) To inflict physical injuries or effect to, terrorize or intimidate, humiliate, neglect, discriminate, exclude or hate, isolate, or cause mental torture to, him or her,
- (f) To harass, cause pain to, him or her by using electronic or other means,
- (g) To organize him or her for the political purpose or use him or her in a strike, shutdown, transportation strike, sit-ins or rally,
- (h) To keep him or her in illegal confinement, detention, prison or house arrest, handcuff him or her,
- (i) To treat him or her in a cruel or inhumane manner or torture him or her
- (j) To cause him or her to beg or disguise as an ascetic, monk or mendicant, except for the tradition, custom or any religious or cultural activity,
- (k) To forcibly declare, or register him or her, as an orphan, (l) To offer or dedicate him or her in the pretext of a pledge, religious or any other purpose, or subject him or her to violence, discrimination, neglect or exclusion or mockery in the pretext of the custom, culture or ritual,
- (m) To engage him or her in a magic or circus show,
- (n) To teach or train him or her to commit any offense or involve him or her in such offense,
- (o) To fix his or her marriage, or marry, or cause to marry, him or her,
- (p) To remove any organ of him or her in contravention of the prevailing law,
- (q) To use him or her for medical or any other experiment,
- (r) To keep him or her in a children's home, except in accordance with law.

(3) If any person does any of the following acts against a child, he or she shall be deemed to have committed child sexual abuse:

- (a) To involve the child in addictions such as smoking, drinking or gambling,
- (b) To show, or cause to show, him or her an obscene picture, audio-visual recording or other material of similar kind or display, or cause to display, such expression or gesture that reflects obscene or sexual conduct or behaviour to him or her or display, or cause to display, child pornography,

	<p>(c) To distribute, store or use any actual or fictitious obscene picture or audio-visual material of him or her,</p> <p>(d) To propose, lure, coerce or threaten him or her for sexual activity,</p> <p>(e) To use him or her in the production of an obscene act and material,</p> <p>(f) To touch, kiss, hold sensitive parts of body of him or her, embrace him or her with sexual intent or cause him or her to touch or hold sensitive parts of own body or body of another person or render him or her unconscious with sexual intent or display, or cause him or her to display sexual organs,</p> <p>(g) To use, or cause to use, him or her for stimulating sexual lust or sexual excitement,</p> <p>(h) To use, or cause to use, him or her for the purpose of sexual gratification,</p> <p>(i) To engage, or cause to engage, in child sexual exploitation,</p> <p>(j) To use, or cause to use, him or her with the intent of providing sexual services,</p> <p>(k) To use, or cause to use, him or her with the intent of engaging in sexual abuse,</p> <p>(l) To use him or her in prostitution or other sexual work.</p>
67	<p>Not to be deemed eligible:</p> <p>If it is held that a person who is serving in any public or private organization commits any offence against the child, the person shall be dismissed in accordance with the prevailing law, and, based on the gravity and nature of the offence, such a person shall not be deemed eligible for up to ten years to be involved in the future in any act involving direct contact with the child or to be appointed, nominated or elected to such a private institution or organization.</p>
70	<p>Rescue, protection and health check-up to be made:</p> <p>(1) If the police employee receives any information, complaint or report about violence against the child or child sexual abuse, he or she shall write, or cause to write, necessary details and register it, and if the child needs to be rescued immediately, rescue him or her and refer the victim child to a temporary protection service.</p> <p>(2) If it appears that the child victim is in physical or mental pain, the police employee shall send him or her to a nearby hospital or health centre and have his or her health checked up and treated.</p> <p>(3) While taking the statement of the child victim, the police employee shall do so in the presence of his or her parents, other family member or guardian if it is possible that they can so appear, and if they cannot so appear, in the presence of a female representative of a social organization or a social service provider. Provided that if the parents, guardian or other family members are the perpetrator of violence against children or child sexual abuse, their presence shall not be allowed during the taking of such statement.</p>

71	<p>Rehabilitation centre:</p> <p>(1) The Government of Nepal shall establish rehabilitation centres, as required, for physical or mental treatment or social rehabilitation of the child victims of offences against the child.</p> <p>(2) An organization may, for the purposes of sub-section (1), establish a rehabilitation centre by obtaining permission from the Government of Nepal as prescribed.</p> <p>(3) The services and facilities to be made available at the rehabilitation centres and other provisions including those relating to the management, operation, monitoring of such centres shall be as prescribed.</p>
72	<p>Punishment:</p> <ul style="list-style-type: none"> - If any person, organization or body violates any of the child rights or does not fulfil any of the liabilities towards the child set, such a person or the chief of such organization or body shall be liable to a fine of up to fifty thousand rupees. - If the guardian or any family member does not fulfil his or her liabilities or if the mother, father or guardian alters the name and surname of the child with the intention of acquiring undue benefits or misappropriates the child's property, such a mother, father or family member or guardian shall be liable to a fine of up to one hundred thousand rupees. - If any one establishes or operates a children's home, child correction home, observation chamber, rehabilitation centre or temporary protection service centre without obtaining permission under this Act, the Ministry may shut down such children's home, child correction home, observation chamber, rehabilitation centre or temporary protection service centre and impose a fine of up to one hundred thousand rupees on the person and organization involved, and may proceed with other additional actions in accordance with the prevailing law.

Human Trafficking and Transportation (Control) Act

24 July 2007

Relevant Sections:

4	<p>Acts considered as Human Trafficking and Transportation:</p> <p>(1) If anyone commits any of the following acts, that shall be deemed to have committed human trafficking:</p> <ul style="list-style-type: none"> (a) To sell or purchase a person for any purpose, (b) To use someone into prostitution, with or without any benefit, (c) To extract human organ except otherwise determined by law, (d) To go for in prostitution. <p>(2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:</p> <ul style="list-style-type: none"> (a) To take a person out of the country for the purpose of buying and selling,
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	(b) To take anyone from his /her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurements, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into one's custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.
11	Act related to Rescue: Nepal government shall manage for the rescue of any Nepali citizen sold in the foreign land.
13	Rehabilitation Centre: (1) Nepal government shall establish necessary rehabilitation centres for physical and mental treatment, social rehabilitation and family reconciliation of the victim. (2) Any organization can obtain permission as prescribed to establish and run rehabilitation centre to address the objectives. Nepal government shall make (4) Center shall manage for the social rehabilitation and family reconciliation of the person stationed at the Center. (5) Centre shall manage for the medical treatment and consultation service and facility to the victims. (6) No one shall make the victim in the Centre engage in any work against his/her wish.
14	Rehabilitation Fund: Nepal government shall establish a rehabilitation fund for operation of the rehabilitation center established and receive contributions as follows: (a) Funding received from Government of Nepal, (b) Funding received from national and international organizations, and individuals, (c) Half of the amount received as fines. (3) Management and operation of the rehabilitation fund shall be as prescribed.

Child Labour (Prohibition and Regulation) Act		21 June 2000	
Relevant Sections:			
3	Child below age of 14 not to be Engaged in work as labourer		
4	No Child to be Engaged in Works Against Will: No child shall be engaged in works as a laborer against his/her will by way of persuasion, misrepresentation or by subjecting him/her to any influence or fear or threat or coercion or by any other means.		

Labour Act	4 September 2017	
Relevant Sections:		
5	5. Prohibition on employment of children	
	Employment of children in any work by any person against the prevailing laws is strictly prohibited.	

Civil Code	16 October 2017	
Relevant Sections:		
	Chapter 9	
	Provisions Relating to Inter-Country Adoption	
190	Best interests of minor to be ensured in granting permission for adoption:	
	Prior to granting permission to a foreigner for adoption, the Government of Nepal shall consider whether or not the best interests of the child will be ensured, his or her human rights will be protected and such a child will be abducted, sold, trafficked or otherwise abused.	
191	191 Child eligible to be given for adoption:	
	Any of the following children having stayed in a children home for at least six months may be given to a foreigner for adoption:	
	(a) Orphan children who, upon death of both father and mother, are not under protection of any one,	
	(b) Voluntarily abandoned children.	
	Explanation: For the purposes of this Chapter.	
	(1) "Children home" means a child welfare home and orphanage established in accordance with law, with the objective of protecting the rights and interests of children, and this term includes a children home or Balmandir established by the Government of Nepal.	
	(2) "Orphan child" means any of the following child certified as an orphan by the District Administration Office:	
	(a) A child found unclaimed by the police, and whose father or mother is not found,	
	(b) A child left unclaimed in a hospital or health institution,	
	(c) A child whose father and mother are not traced out,	
	(d) A child whose father and mother are both dead and who has no property for maintenance.	

(3) “Voluntarily abandoned children” means the following children who have been surrendered to the custody of a children home, through the District Administration Office, by the following person, upon being unable to make arrangements for their maintenance and education, by executing a deed relating thereto:

(a) In the case of a child whose father is dead or disappeared and mother has concluded another marriage, such a mother,

(b) If more than one child has born, and the mother is not financially able to afford their maintenance or education because the father is dead, disappeared or of unsound mind, in the case of such children, their mother, (c) If more than one child has born, and the father is not financially able to afford their maintenance or education because the mother is dead, disappeared or of unsound mind, in the case of such children, their father,

(d) In the case of an orphan child who has no property, his or her guardian or curator.

ANNEX THREE: MATRIX OF REGULATIONS RELEVANT TO ORPHANAGE TRAFFICKING

REGULATIONS

Tier Four: Regulations

Title	Date entered into force	Repealed / Abrogated
Human Trafficking and Transportation (Control) Rules	24 November 2008	
Relevant Sections:		
16	Rehabilitation and Family Reunion: <p>(1) The victims relieved pursuant to the Act and this Rule and the minors living with them shall be kept in the Center until their rehabilitation or family re-union.</p> <p>(2) The Center shall search for the family of the individual, pursuant to Sub-rule (1) and shall arrange a family reunion. The Center shall take necessary measures inter alia advising the family members or victim, facilitating while organizing a family reunion</p> <p>(3) Recently the victims who are kept in the Center shall not be kept for more than Six months period. Provided that, if the relived individual is a minor, he/she shall be alternatively moved to Child Center.</p>	

ANNEX FOUR: DUTY BEARERS AND RESPONSIBILITIES

NATIONAL-LEVEL DUTY BEARERS

Duty bearer	Ministry/ National Committee	Regulation establishing functions	Functions with respect to trafficking
National Committee for controlling Human Trafficking (NCCHT)	Ministry of Women, Children and Senior Citizen	Prevention of Trafficking in Persons Act	<ul style="list-style-type: none"> To formulate and submit necessary policies, plans and programs against Human Trafficking and Transportation to the Ministry. To implement or cause to be implemented the approved policies, plans and programs and to monitor the implementation thereof. To assist those stranded in foreign countries and to return them to Nepal with their consent.

			<ul style="list-style-type: none"> To assist those stranded in foreign countries and to return them to Nepal with their consent.
Nepal Police	Ministry of Women, Children and Senior Citizen, Ministry of Home Affairs	National Human Rights Action Plan	<ul style="list-style-type: none"> Control Human Trafficking and Transportation, Improvement and enhancement of capabilities of concerned institutions. Development and Improvement of institutions for ensuring rights and rescue of victims and affected people. Identification of groups and individuals at risk of trafficking and transportation. Conduct activities for the protection of social and economic aspect of the identified risk groups.
Ministry of Women, Children and Senior Citizen	Ministry of Women, Children and Senior Citizen, Ministry of Home Affairs	Rescue, Rehabilitation and Reintegration of Victim of Human Trafficking and Transportation	<ul style="list-style-type: none"> Increment in numbers of Rehabilitation Centres along with the enhancement in quality of their services Monitoring of whether the rehabilitation centres have complied with the minimum standards
	Ministry of Land Reform and Management, Ministry of Law, Justice and Parliamentary Affairs, Nepal Law Commission	Abolition of all forms of bonded labour, Reinstatement of freed bonded labourers (<i>kamaiya and haliya</i>)	Works in line with ILO Convention No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour
Anti-Human Trafficking Bureau	Nepal Police	Police Regulation, 2071	Investigate into human trafficking incidents and proceed with the lawsuit of human trafficking, rescue the survivors and investigate the incidents

National co-ordination committee on functioning of child helpline	Ministry of Women, Children and Senior Citizen through National Child Rights Council	Procedure on the Child Helpline Nepal 1098	<ul style="list-style-type: none"> • Emergency rescue, counselling, medical service, reinstatement and reintegration of affected children or the children under risk. • Ensure access to child helpline no. to all children. • Coordinate with concerned authorities to ensure that the perpetrators putting children under risk face adequate charges.
National Centre for Children at Risk (Toll Free No. 104)	Ministry of Women, Children and Senior Citizen	Procedure on Searching Children No.104	Provide recommendation to the Ministry of Women, Children and Senior Citizen regarding prevention of kidnapping, disappearance, sale, trafficking and transportation of children
National Coordination Centre for Children at Risk (NCCR)	Headquarters of Nepal Police	Procedure on Searching Children No.104	Special unit of Nepal Police designated for coordination among Ministry of Women, Children and Senior Citizen, National Child Rights Council and Nepal Police
National Child Rights Council	Ministry of Women, Children and Senior Citizen	The Act relating to Children, 2018 and The Regulation relating to Children	<ul style="list-style-type: none"> • Leads and facilitates National Center for Children at Risk (Toll free no. 104) and Child Helplines (Toll free no 1098) as well. • Advocates for improving child related legal, policy and program measures; and handing various violence cases against children. • Monitors and facilitates child care homes, and rescues children from the child care homes that are not executed under minimum standard.
National Committee on Rescue, Protection and Management of Street Children	Ministry of Women, Children and Senior Citizen	Street Children Rescue, Protection and Management Guideline	<ul style="list-style-type: none"> • Arrangements for providing education, medical services, training, employment and enhancing the capability of street children during the course of rescuing and providing protection to street children • Monitoring and Evaluation of ongoing work

SUBNATIONAL LEVEL DUTY BEARERS

Duty Bearer	Line Ministry/ Committee	Regulation establishing functions	Functions with respect to trafficking
District Committees for controlling Human Trafficking (DCCHT)	National Committee for controlling Human Trafficking (NCCHT)	Human Trafficking and Transportation (Control) Rules, 2008	<ul style="list-style-type: none"> To recommend to make such documents for concerned bodies in case the relived person have not authentic identity pursuant to this Act or Rule. To form and mobilize committees formed to control Human Trafficking and Transportation in the local level. To monitor the Rehabilitation center in the district in accordance with the direction given by the National Committee. To raise awareness against Human Trafficking and Transportation. To implement of programs remaining under the policies and plans has been formulated by the National Committee. To relive the person who are in the danger of Human Trafficking and Transportation in the district. To coordinate with the district level organizations working against Human Trafficking and Transportation.
Rehabilitation Centre	District Committees for controlling Human Trafficking (DCCHT)	Rehabilitation Center Operation Guidelines and Human Trafficking and Transportation (Control) Rules, 2008	Physical or mental treatment, social rehabilitation and family reunion of the victim.

Central Level Rehabilitation Fund	District Committees for controlling Human Trafficking (DCCHT)	Human Trafficking and Transportation (Control) Rules, 2008	Rehabilitation of victims of Human Trafficking
Hospital based One- Stop Crisis Management Centres	Ministry of Health and Population	Hospital Based One-stop Crisis Management Centre (OCMC) establishment and operational Manual 2067	Provide integrated services (such as medical, counselling and legal services) to survivors of gender-based violence (GBV) along with the victims of trafficking
Women and Children Service Centres	Ministry of Home Affairs (Nepal Police)	Police Regulation	Accommodation of victims of trafficking and safety of victims
Toll free child help hotline (1098)	Ministry of Women, Children and Senior Citizen	Procedure on the Child Helpline Nepal 1098	Handle reports of suspected trafficking cases
Nepal Police Women's Cells	Ministry of Home Affairs (Nepal Police)	Police Regulation	<ul style="list-style-type: none"> Investigate human trafficking cases, including referrals between agencies. Increase investigations, prosecutions, and convictions of trafficking offenses, including criminal investigations into labor recruiters and sub-agents who engage in labor trafficking. Nepal Police Women's Cells (NPWC) had female officers in all 77 districts to investigate crimes against women and girls, including trafficking, but not all district offices were fully operational.
Provincial co-ordination committee on functioning of child helpline	Ministry of Social Development and National Child Rights Council	Procedure on the Child Helpline Nepal 1098	<ul style="list-style-type: none"> Introduce policies regarding child helpline in provincial level. Monitoring of child helpline in provincial level.

Provincial co-ordination committee on functioning of no. 104 for searching children	Ministry of Social Development of concerned province	Procedure on Searching Children No.104	Acts as a bridge between National co-ordination committee on functioning of no. 104 for searching children and District co-ordination committee on functioning of no. 104 for searching children
District co-ordination committee on functioning of no. 104 for searching children	Provincial co-ordination committee on functioning of no. 104 for searching children	Procedure on Searching Children No.104	Coordinate with Provincial co-ordination committee on functioning of no. 104 for searching children
Provincial Coordination Centre for Children at Risk (NCCR)	Ministry of Social Development of concerned province	Procedure on Searching Children No.104	Special unit of Province Police designated for coordination among Ministry of Women, Children and Senior Citizen, National Child Rights Council and Nepal Police
Service centre for women, children and senior citizen at each district police office	Nepal Police	Procedure on Searching Children No.104	Coordinate between province, district, municipality and area police office for the purpose of effective action regarding searching of children.
Provincial and Local Child Rights Committee	Ministry of Social Development	The Act relating to Children, 2018 and The Regulation relating to Children	Some Provinces have established PCRC but Local Child Rights Committees are in process of establishment.
Provincial Committee on Rescue, Protection and Management of Street Children	Ministry of Social Development	Street Children Rescue, Protection and Management Guideline	Prepare plan and budget for arrangements of street children living in streets of provincial capital and other city areas, along with the monitoring and evaluation

Local Committee on Rescue, Protection and Management of Street Children	Ministry of Social Development	Street Children Rescue, Protection and Management Guideline	<ul style="list-style-type: none"> • Collect and keep unified record from all ward offices regarding identification, rescue and reinstatement of street children in each ward • Arrangements of placing orphan, physically weak and mentally unstable street children in service centres and child care home • Act as a bridge between civil society and concerned government authorities.
Child care home at Provincial Level	Ministry of Social Development	Procedure on Management of Childcare home	<ul style="list-style-type: none"> • Provide shelter, food, nutrition, health care, training and education to the children • Arrangement of sports and entertainment for physical, mental and intellectual development of children • Special care and assistance for the physically weak and mentally unstable children • Search the family of children and reintegration of children with family, etc.
Child care home at Local Level	Concerned Local Government	Procedure on Management of Childcare home	<ul style="list-style-type: none"> • Provide shelter, food, nutrition, health care, training and education to the children • Arrangement of sports and entertainment for physical, mental and intellectual development of children • Special care and assistance for the physically weak and mentally unstable children • Search the family of children and reintegration of children with family, etc.
Ward Council	Local Level Government	Local Government Operation Act	Act for the abolition of human trafficking and transportation along with other harmful traditional practices including kamalari, chhaupadi, and haliya.