

# Memorandum

To: Members of the Drafting Committee on Prevention of and Remedies for Human Trafficking, Advisors and Observers

From: Mike Wilkins, Chair

Date: January 10, 2012

Re: SECOND DRAFT for discussion in San Antonio in February, 2012

After our meeting in New Orleans Professor Ross and her students made a number of changes to the first discussion draft reflecting many of the ideas discussed by members of the Drafting Committee and the observers at the meeting. From that initial revision, I have made additional changes to reflect the comments of Commissioners relating to form, enactability, and detail. This memorandum is to describe those changes, and the reasons for them, so committee members and others may understand the changes when we meet in February. A copy of Professor Ross' revised draft is included for reference. However, it is our intention to use the shorter draft for purposes of our discussions.

## 1. General form.

a. I have eliminated the notes and comments for purposes of our February discussions. The notes and comments require substantial revision for presentation to the Conference next summer. I am confident that the reporter will be able to accomplish that without significant committee input. The initial draft was, in my opinion, substantially easier to understand WITH the extensive Prefatory Note and comments. To me, they were very useful in getting a fix on where things are now, and why. However, for the Conference next summer, brief comments and a simple Prefatory Note will facilitate understanding without becoming the focus of the discussions.

b. I have reorganized Articles 2, 3, 4, and 5. Article 2 has been retitled from "Offenses and Penalties" to "Crimes and Remedies" and now contains both the criminal and civil provisions. Article 3 is now "Awareness and Prevention" and addresses the task force and its duties, training, and victim services. The prior Article 3 has been incorporated into Articles 2 and 3, and also substantially trimmed. The prior Article 5 is now Article 4, without other change. A fair overview of these organizational changes can be had by looking at the Table of Contents.

## 2. Article 1:

a. Section 102 "Definitions":

(4) "Business entity": dropped references to governmental entities.

(5) “Coercion”: eliminated (D) abduction. Covered in (A).

(8) “knowingly”, (11) “purposely”, and (12) “recklessly”: eliminated. Every jurisdiction already has definitions for intent requirements. New ones that may not track exactly with existing definitions are unnecessary.

(9) “Person” is a definition used by the Conference. However, it is slightly different from the “business entities” definition of (4), and could easily be reduced to “Person means an individual or a business entity.” No change is made in the draft, however.

(14) “Sexual activity”: added alternative that allows simple reference to existing definitions in state law rather than complex description.

(17) “Victim”: eliminated reference to “whether a U.S. citizen or foreign national” and to determination by third party of “reasonable belief” of victim status. Citizenship is irrelevant and a lightning rod, and reasonable belief of victimhood is unnecessary where no specific new services are mandated on that basis.

b. The old Section 103 “Prescribed Culpability Requirements” was eliminated. Every state has law on criminal intent and its application to elements of the crime. These provisions tend to be constitutionally based, and a new statutory provision is unnecessary.

### 3. Article 2:

a. Criminal provisions (Sections 201-208) have been reformatted to include a simple statement of the elements of the offense followed by a statement that “Violation of this section is a [degree of crime].” This change is to both make the provisions read with parallel language, and to leave to the state legislatures the choice of criminal penalty for each offense, as we discussed in New Orleans.

b. Sections 203 and 204, Sexual servitude and sexual servitude of a minor: Added “in anticipation or receipt of a benefit” as an element in lieu of “commercial” sexual services. “Commercial sexual services” is not defined but “benefit” is. Also, the mandatory minimum sentences described in 204 are contrary to the law of a number of states at present, and create an unnecessary point of dispute. As we discussed in New Orleans, by allowing each legislative body to specify the penalty for each crime that already exists in that jurisdiction’s sentencing scheme, the statute presents the same opportunities for consequences without the unnecessary Conference debate.

c. Accomplice, Conspiracy, Obstruction, and Attempts: These four sections were eliminated as each jurisdiction has existing criminal law on the offenses. A sentencing enhancement for “attempted” crimes is included in the sentence enhancement section.

d. “Business Liability” (new Section 209) is unchanged, anticipating recommendations and modifications from the subcommittee appointed at our last meeting.

e. “Evidence Excluded” was eliminated to avoid the opposition certain to arise in the Conference, as well as to avoid any state separation of powers issues evidentiary provisions engender.

f. “Victim Immunity and Defenses”: the burden of proof standard was eliminated, and a new subsection was included to direct juvenile law treatment for minor victims otherwise in custody as a result of illegal sexual activity as a victim. The inclusion of a victim—counselor privilege has been dropped because of inherent opposition to legislated evidentiary privileges at the state level.

g. “Motion to vacate judgment” was eliminated on potential separation of powers grounds.

h. “Restitution”: Language relating to relevant wage and hour law was simplified and consolidated to be “applicable state and federal law” rather than specifying the current federal statute. The “costs” included expanded to include “expenses” as that distinction in some jurisdictions is the difference between filing fees and everything else. Immigration status was eliminated as a consideration.

i. “Statute of Limitations for Criminal Prosecution” was simplified to “none”.

j. “Witness Confidentiality” was renamed “Victim Protection” and moved from the old services and benefits article to Article 2 as Section 216. The mandate to keep the victim’s identity confidential has been modified to require the prosecutor to take reasonable steps to protect the victim from being re-victimized.

k. “Civil Action” has been moved to Article 2 as Section 217. The cause of action is available to victims, must be brought within ten years of freedom or majority (whichever is later), and leaves to the law of the jurisdiction the other judicial remedies available.

#### 4. Article 3:

a. The committee charge from the Executive Committee limits us to issues raised in the final report of the Study Committee. “Extensions of presently available [social] services, and those that contemplate increases in funding should be deferred to another season.” Consequently, those sections of the first discussion draft that mandated or in the alternative allowed for a mandate of social services to victims, were eliminated. The majority of the original Article 3 falls into this category. Exceptions are the sections now in Article 2 on victim protection and civil actions.

b. The new Article 3 is composed of the bulk of the old Article 4. The article addresses the formation and duties of the anti-human trafficking task force or council or coordinator. The provisions have been simplified to allow the customary appointing method of each jurisdiction to apply, and to simplify the duties of the entity to information gathering, data accumulation, information disbursal, and “such other activities to combat human trafficking” as may be provided from time to time by law. I have included an alternative “as appropriate” at Sue’s request. I used as provided by law to suggest that an existing degree of authority probably exists in the agencies that are part of the task force, and that to

allow them to use their existing authority will present no immediate fiscal impact. As “appropriate” will likely generate some discussion, and I look forward to talking it through with the full committee. Sue also wishes to have the committee seriously consider the consequences of eliminating provisions relating to public awareness and protocols. We will include that in our discussions as well.

c. As we discussed in New Orleans, the training section (now Section 303) has been simplified to allow each jurisdiction to implement the requirement as it finds most useful. This approach should allow for fiscal consequences to be managed by the entities involved in the way they find most efficient.

d. A mandate to provide services and benefits to victims who are not lawfully within the United States has been revised in the new Section 305 to prohibit the denial of services and benefits on the sole basis of immigration status when that status is the direct consequence of being a victim of human trafficking. This may still create obstacles to enactment, but the smaller scale of the provision should make the battle smaller, and easier to win.

5. Article 4: The old Article 5 has been renumbered as Article 4. The provisions are ULC boilerplate. I took them out, but John Sebert made me put them back.