

Memorandum

To: Committee on Scope and Program

From: Michael J. Wilkins, Chair
Study Committee on Prevention of and Remedies for Human Trafficking

Date: February 1, 2011

I. BACKGROUND INFORMATION

In 2010 the American Bar Association Center for Human Rights, LexisNexis, and Reed Elsevier proposed to the Committee on Scope and Program that a project be undertaken to create uniform state anti-human trafficking legislation. A copy of the Project Proposal is attached. It explained that human trafficking involves involuntary servitude for forced labor or services, and for commercial sex acts. Trafficking of American children for sex acts within the United States is estimated by The National Center for Missing and Exploited Children to be at least 100,000 children each year.

The proposal was considered favorably by the Committee on Scope and Program, and the study committee appointed in July, 2010. The communication from the Committee on Scope and Program asked that the study committee move expeditiously, noting that a final recommendation by early 2011 would be welcome.

Once appointed, the study committee met telephonically in October and December, 2010, and in January, 2011. The study committee submitted an interim report in December, 2010, a copy of which is attached. During the call in January, the committee voiced unanimous support for a project to draft a uniform law relating to the prevention of and remedies for human trafficking, and authorized this final report and recommendation.

II. DESCRIPTION OF THE PROJECT

The Study Committee on the Prevention of and Remedies for Human Trafficking was charged to consider and make recommendations concerning the need for and feasibility of drafting a uniform act that provides sanctions against those who engage in human trafficking and provides remedies for and assistance to victims of human trafficking. Consequently, the study committee examined both criminal and civil sanctions against those engaged in human trafficking, as well as the variety of existing and proposed remedies and assistance for victims.

Most jurisdictions have some form of human trafficking criminal sanctions. The scope of activity included within the definition of human trafficking varies widely, but usually includes the same core elements of coercion, illegality, deprivation of liberty, and gain to the perpetrators. The variety of illegal activity that can be accurately classified as human trafficking can be circumscribed by a definition of human trafficking that focuses on the deprivation of human liberty by means of coercive acts for gain. Human slavery, other forms of involuntary servitude, sex trafficking of both adults and children, and compulsive and involuntary donation of human organs, all fall within this framework.

A uniform act on human trafficking can unify and coordinate efforts within a state to combat human trafficking by facilitating data and information sharing between law enforcement, social service agencies, policy makers, and other interested parties. Doing so will likely increase the effectiveness of existing

resources applied to the problem, and decrease frustration and confusion engendered by varied and inconsistent policy and definitional constructs that currently exist.

More importantly, a uniform act on human trafficking will allow improved coordination between states, and between state and federal governments, of enforcement, services, and policy decisions. By its nature, human trafficking has no respect for local, state, or national boundaries. Uniform prohibitions, prosecutions, and policies will enhance the overall effort to control and decrease human trafficking activity in all states.

A drafting committee charged with creating a comprehensive approach to the control and correction of human trafficking can significantly enhance state efforts, facilitate federal assistance to states and to victims, and allow state legislatures to examine current priorities and resource allocation without mandating significant increases in state funding.

III. SPECIFIC DRAFTING ISSUES

A. Issues related to criminal sanctions

1. Definition of human trafficking

The definition of “human trafficking” varies somewhat from jurisdiction to jurisdiction. A uniform definition will permit effective coordination of efforts between jurisdictions. A review of existing statutory definitions reveals a general uniformity that may be clarified in a standard that includes elements of sex trafficking, labor trafficking, forced organ donation, and child sex trafficking.

2. Umbrella criminal prohibition statute

Many states have approached prohibitions of human trafficking by incorporating by reference existing criminal statutes addressing prostitution, pandering, kidnapping, exploitation of children, and other similar topics. A uniform umbrella criminal statute that allows states to incorporate existing criminal provisions as part of a comprehensive anti-human trafficking act will promote more expeditious adoption by states, allow for a measure of state variation without defeating the purposes of the uniform act, and also permit the anti-trafficking act to accept state changes in criminal law without the necessity of repeated modifications.

3. Sentence enhancements

The use of sentence enhancements for specific human trafficking violations may simplify the overall structure and drafting complexity of a uniform act. In particular, some jurisdictions have used sentencing enhancements as their method of dealing with child sex trafficking, allowing the definitions of sex trafficking to serve the general purpose, and incorporating existing criminal sanctions on exploitation of minors to trigger the enhancements.

4. Mandatory restitution

Many jurisdictions incorporate mandatory restitution orders as part of their criminal sanctions for human trafficking. Measured as the greater of the value received by the perpetrator or the minimum wage value of the service or labor rendered by the victim, the order of restitution is levied against the convicted defendant and directed to the victim.

5. Extension of criminal liability to consumers and others

The effort to eradicate human trafficking for profit may be enhanced dramatically by extension of criminal liability to those who directly profit from the trafficking. This may include not only the individuals who coerce the victim directly, but those who employ the perpetrators, those who finance the trafficking, and those who utilized the services, labor, or products that result. Care will be required in defining the scope of knowledge required for inclusion as a culpable defendant to comply with federal and state constitutional minimums for criminal intent and knowledge.

B. Issues related to victim protection

1. Affirmative defenses for victims

Victims of human trafficking who are compelled to commit crimes should be given a measure of protection from prosecution, in the form of an affirmative defense that takes into consideration the compulsion involved and the consequence of the criminal act.

2. Immunity

Victims who report to authorities the criminal behavior of others, or who admit to criminal behavior in the process of seeking release from involuntary servitude at the hands of human traffickers, may deserve some measure of immunity from criminal or other sanctions. Such a measure of immunity would promote reporting of human trafficking violations, simplify prosecution and other law enforcement action, and place primary responsibility on those ultimately responsible for the violations.

3. Confidentiality and Safe Reporting

A scheme designed to promote voluntary reporting of human trafficking violations must include provisions to protect the informant, and particularly if the informant is the victim. Any uniform act should include protected methods for contacting authorities, such as widely disseminated hot line contact information, which includes the assurance that perpetrators will not be able to extract retribution from victims or their loved ones.

A second area of protection for victims that should be carefully considered is inclusion of provisions relating to non-discoverability of communications between victims and counselors, health care professionals, and similar providers. A careful balance between confidentiality and a duty to report abuse will be required, particularly with respect to child victims.

5. Protection from exploiters

Measures to protect victims and their loved ones from retribution will be necessary. The common forms of coercion used by perpetrators involve threats to loved ones, or threats of exposure or harm to the victim. Human trafficking victims will require an enhanced sense of security and safety to reenter ordinary life. Care by law enforcement to prevent re-victimization and education of victims to understand their options and rights will add to this sense of security and safety.

C. Issues related to victim recovery

1. Social services

Every jurisdiction has some form of social service available to victims of human trafficking. These usually include victim advocates to assist the victim during the criminal process, pro bono legal counsel, emergency housing and support, emergency medical care, and other short term services. Federal assistance for victims of human trafficking is also available. Coordination of these already-available services, and provision for making victims aware of the available services, should be included in any uniform act.

Extensions of presently available services, and those that contemplate increases in funding should be deferred to another season.

2. Private cause of action

Victims already have common law rights against their kidnappers, exploiters, abusers, and those who take unlawful advantage of them, in most jurisdictions. In some cases, state law also provides a private right of action for the victim against those who subject them to involuntary servitude. A uniform civil private cause of action for victims of human trafficking, and potentially their families, would add to both the recovery of victims, and to the disincentives for traffickers and consumers of illicit services and products. Incentives for pro bono representation would add significantly to the likelihood of causes of this sort being brought and pursued to conclusion.

3. Incentives for private assistance

Nongovernmental organizations are active in promoting awareness of human trafficking, in proposing steps that will minimize victimization, and in compiling and reporting statistics related to human trafficking. Some individuals, including lawyers, offer free support and services to victims. Incentives for the continuation and expansion of these and other private efforts to defeat human trafficking should be encouraged. Recognition, inclusion, and legal protections that require little if any public expenditure will offer incentives to many of these organizations and individuals.

D. Issues related to public information and education

1. Data collection and reporting

Data measuring incidents of human trafficking activity, results of law enforcement efforts, utilization of services by victims, methods of discovery or reporting of human trafficking activity, and other measurable factors should be accumulated by states, and coordinated nationally. Reporting of the data, or summary reports, or both, should be produced periodically to guide and inform policy formulation and enforcement activity. Data may be collected as a routine by law enforcement or service agencies, or more formally sought by state attorneys general or legislative committees, as designated. However, some one entity or individual should be given responsibility to accumulate and publicize the data on a regular basis.

2. Oversight responsibility

An agency, state officer, legislative committee, or other public agent should be designated to review and recommend action on human trafficking issues on a regular basis. Existing agencies, officers, or public bodies would require a lesser expenditure of public resources than creating a new agency or task force to undertake the task.

3. Victim awareness efforts

A concerted effort will be necessary to create and publicize mechanisms effectively informing victims and potential victims of human trafficking of their rights, their resources, and specific steps to extract themselves from their condition as victims. Existing hot lines, public service announcements in ways and places likely to be noticed by victims, broad public education, and other active and continual efforts will be required to reduce the incidence of human trafficking, especially among children whose ability to understand and act on their circumstances is constantly evolving and maturing. Programs in public schools, efforts with media outlets, posters in public places most likely to be seen by victims and those acquainted with victims, and other outreach efforts will be useful.

E. Issues related to prevention of human trafficking

1. Policy planning projects

Any successful effort to prevent human trafficking requires a coordinated effort to form meaningful and achievable policy objectives. Much research and data is already available from governmental, international, and nongovernmental organizations. A drafting committee may wish to consider language suggesting the formation of a policy planning project of some sort, such as a task force or ongoing broadly based public committee, to consider and recommend action by the state to combat human trafficking. To enhance the prospect of wide adoption of the uniform act, care should be given to any fiscal impact such a provision may have.

2. Law enforcement training

All law enforcement agencies conduct periodic training of officers. Material relating to recognizing and effectively dealing with victims of human trafficking should be included in the curriculum. Prosecutors, health care providers, social service agencies, emergency housing agencies, and other similar public agents who are most likely to encounter victims of human trafficking should also be encouraged to include training in their ongoing programs that highlights human trafficking victims and educates on proper handling and support of victims once discovered or suspected.

IV. THE NEED FOR AND BENEFITS OF UNIFORMITY

Most states have recognized a need for legislation addressing human trafficking. Beginning with the federal Trafficking Victims Protection Act (2000), many states have considered additional criminal penalties for human trafficking activity. However, by its nature, trafficking in human beings for labor, services, prostitution, child sex, and other activities, involves crossing jurisdictional lines. Furthermore, given the divergent definitions and prohibitions of human trafficking, enforcement and prosecution varies widely. Such a variance invites confusion within the law enforcement community, complexity to the charitable NGO relief efforts, and confusion in the minds of victims regarding their circumstances and possible escapes from their captors.

A uniform state statute on human trafficking that addresses criminal consistency, civil penalties, relief mechanisms, and promotion of understanding of the problem by law enforcement, victims, and the public, would greatly enhance state efforts to address this emerging issue. A uniform act drafted by the ULC with an eye to enactability and uniformity at the state level would greatly aid state legislatures in the effort to address a difficult and complex problem, while promoting federal and state coordination of efforts and resources.

V. EXISTING LAW AND TRENDS

At last count, 46 states have adopted some form of anti-human trafficking statute. However, only 12 have adopted specific child sex trafficking laws. The range of state prohibitions on human trafficking varies from narrow anti-prostitution statutes to comprehensive anti-trafficking schemes with victim assistance, mandatory restitution awards, private civil causes of action, law enforcement training, and public education and prevention efforts. The definition of human trafficking is not consistent from state to state, but generally includes similar language and elements. What each state does with human trafficking varies more widely. Given the current economic difficulties faced by most states, the tendency is to avoid new “social programs” such as victim assistance or public outreach that does not already exist, and to curtail expenditures for such programs where they do exist.

VI. IMPACT OF FEDERAL LAW ON THE PROJECT

The Congress enacted the Federal Trafficking Victims Protection Act in 2000. The Act criminalizes, regulates, and prohibits human trafficking in the United States. It also directed the Department of Justice to promulgate a proposed model state act to further a uniform and comprehensive approach to the problem. Although the Department of Justice has prepared and circulated a proposed model state act, few states have adopted the federal proposal.

As a consequence of the federal action on the issue, no change in federal law would be required, nor would federal opposition be anticipated, to the development of a uniform state act on human trafficking.

VII. INTERESTED ORGANIZATIONS AND PERSONS

The Study Committee has developed an extensive list of organizations and individuals with significant interest and/or expertise in the topic of the project. As advised by the Committee on Scope and Program, no comment has yet been sought from these parties. However, given the uniform support for efforts to decrease human trafficking, no opposition to the project is anticipated. Efforts by the Department of Justice and others have only been criticized for inadequate scope of effort, not for the effort made. Consequently, the study committee proposes that the following interested parties, and others that may surface during the course of the project, be included as observers and contributors. The organizations that the Study Committee has identified include:

- ABA Center for Human Rights (which proposed this project)
- ABA Center on Children and the Law
- ABA Commission on Domestic Violence
- Apne Aap International
- Center for Women Policy Studies
- Chicago Police Department
- Coalition to Abolish Slavery & Trafficking
- Counsel of State Governments
- End Human Trafficking
- Institute on Race and Justice, Northeastern University
- International Association of Chiefs of Police

- Lexis/Nexis (which proposed this project)
- Martina Vandenberg, Jenner & Block
- National Association of Attorneys General
- National Association of Chiefs of Police
- National Association of Criminal Defense Lawyers
- National Conference of State Legislators
- National Criminal Justice Association
- National District Attorneys Association
- National Legal Aid and Defenders Association
- National Sherriff's Association
- National Violence Against Women Project
- Office of the Mayor City of New York
- Polaris Project
- Reed Elsevier (which proposed this project)
- Representatives of Local, State and Federal Law Enforcement Agencies
- Ruchira Gupta
- Shared Hope International
- The Somaly Mam Foundation
- U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, and Office of the Assistant Legal Adviser, Law Enforcement and Intelligence

CONCLUSION

Members of the Study Committee unanimously recommend that a drafting committee be appointed to pursue a uniform law on the prevention of and remedies for human trafficking.