



NEW JERSEY LAW REVISION COMMISSION

Tentative Report Relating to the Uniform Act on Prevention of and Remedies for Human Trafficking

February 9, 2015

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **March 31, 2015**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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This Draft Tentative Report is intended to provide guidance regarding the Uniform Act on Prevention of and Remedies for Human Trafficking and its potential applicability to New Jersey law.

Introduction

In February 10, 2014, the Commission released a Draft Final Report reviewing the potential applicability of the Uniform Act on Prevention of and Remedies for Human Trafficking (“Uniform Act”). The Draft Final Report recognized the significant and serious nature of the crime of human trafficking and lauded the New Jersey Legislature’s substantial efforts to draft, implement and enforce stringent anti-trafficking laws. In light of New Jersey’s strong commitment to enforcing its recently enhanced human trafficking laws similar to the Uniform Act, the Draft Final Report recommended suspending the project until the new laws had ample time to be more fully utilized.

Following the release of the Draft Final Report, Staff was contacted by the Rutgers School of Law – Newark’s International Human Rights Clinic (“Clinic”). Penny M. Venetis, the Director of the Clinic requested the Draft Final Report be held in abeyance until the Clinic had an opportunity to thoroughly evaluate the Uniform Act and comment more substantially.

The Commission considered the Clinic’s proposals at the October 16, 2014 Commission meeting and requested further outreach and input from knowledgeable parties. This Draft Tentative Report proposes revisions to New Jersey’s human trafficking law(s) to (1) more specifically address business entity liability for human trafficking crimes; and (2) expand New Jersey’s human trafficking laws to address forced or coerced sexually explicit performances.

Background

The crime of human trafficking has long existed in both World and U.S. history. The most modern conceptions of crimes of human servitude have been framed in the terms “prostitute/pimp.” In recent times, the popular and statutory language surrounding human servitude has adapted to better convey both the pervasive nature and varied presentation of the crime. It no longer suffices to address those selling other individuals as “pimps” or as “those promoting prostitution”; they are engaging in the trafficking of humans. Similarly, many individuals identified as prostitutes may be forced or coerced to remain participants in commercial sexual activities. These types of crimes are not limited to sexual services – many individuals are trafficked to perform manual labor or other physical tasks. The linguistic re-categorization of these offenses has opened the door to legal schemes that more accurately recognize perpetrators and victims.

The Uniform Law Commission (“ULC”) acknowledged and addressed the pernicious crime of human trafficking in its publication of the Uniform Act. In its prefatory note, the ULC noted that

“[m]illions are subjected to human trafficking every year.”¹ In 2012, the International Labour Organization issued a comprehensive and sophisticated statistical analysis, finding 20.9 million people in forced labor worldwide...² In response, the ULC adopted the Uniform Act which sought to model a clear and complete set of criminal proscriptions, provide essential victim remedies and protections, and encouraged state coordination.³

New Jersey has similarly recognized the scourge of human trafficking and has taken an aggressive approach to combating this crime. In 2013, the NJ Legislature updated its human trafficking laws by passing the Human Trafficking Prevention, Protection and Treatment Act (“NJ Act”)⁴, which amended and supplemented various portions of existing law. The NJ Act was widely applauded for its expansive and tough stance on human trafficking.⁵

Analysis

1. Business entity liability for human trafficking crimes

The Clinic strongly recommended that New Jersey adopt more comprehensive business entity liability for human trafficking crimes. According to the International Labour Organization: “[o]f the total number of 20.9 million forced labourers, 18.7 million (90%) are exploited in the private economy, by individuals or enterprises.”⁶ The United Nations Office on Drugs and Crime has identified several industries in which trafficked labor is most common: “agriculture or horticulture, construction, garments and textiles under sweatshop conditions, catering and restaurants, domestic work, entertainment and the sex industry.”⁷

Enterprises in the above-mentioned industries may use cheap and trafficked labor to maximize their profits, sometimes inadvertently.⁸ Often, complex supply chains reduce a business’s awareness of the working conditions in the production of goods.⁹ The use of subcontractors or partners who use

¹ Uniform Law Commission, *Uniform Act on Prevention of and Remedies for Human Trafficking*, Prefatory Note (July 2013).

² *Id.*

³ *Id.*

⁴ Human Trafficking, Prevention, Protection and Treatment Act, Pub. L. 2013, c.51 (2013).

⁵ See e.g. Statement by Kate Keisel, Director of Polaris Project New Jersey, <http://www.polarisproject.org/media-center/news-and-press/press-releases/793-comprehensive-anti-trafficking-legislation-signed-into-law-in-new-jersey> ; See also NJ Coalition Against Human Trafficking Applauds Governor Christie for Making Tough Anti-Trafficking Legislation in NJ, http://jfedgmw.org/local_includes/downloads/62981.pdf

⁶ ILO Special Action Programme to combat Forced Labour, *2012 Global Estimate of Forced Labour Executive Summary* (Jun. 1, 2012), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf.

⁷ United Nations Office on Drugs and Crime, *Human Trafficking FAQs*, http://www.unodc.org/unodc/en/human-trafficking/faqs.html#What_types_of_industries_are_involved_with_human_trafficking .

⁸ Memorandum, *supra* note 5, at 11.

⁹ UN.GIFT, *Human Trafficking, Everybody’s Business* (Oct. 2009), available at http://www.ungift.org/docs/ungift/pdf/Human_Trafficking_-_Everybody's_Business.pdf.

trafficked labor to supply materials, produce a good, or provide a service creates a system of reliance on trafficking by otherwise legal business entities.¹⁰

In the Uniform Act, the Uniform Law Commission similarly recognized the need for a comprehensive business liability statute that would “[a]ddress the demand for trafficking, including questions of corporate liability and demand-reduction strategies for sex trafficking.”¹¹ Section 8 of the Uniform Act holds liable a business that “knowingly engages in conduct that constitutes human trafficking.”¹² Additionally, Section 8 holds business entities accountable when an employee or agent commits the act of human trafficking for the benefit of the entity when the business entity knew it was occurring and failed to take effective action to stop it.¹³

Other States expressly identify the potential for corporate liability for the crime of human trafficking. Four States enacting business entity liability for human trafficking crimes prior to the promulgation of the UAPRHT contain specific provisions regarding when and under what circumstances a business entity may be held liable for human trafficking crimes.¹⁴ In drafting the Uniform Act, the ULC

¹⁰ *Id.* at 1.

¹¹ ABA Center for Human Rights, *Uniform Law Commission Project Proposal Uniform Human Trafficking Law* (July 2010), available at <http://www.law.washington.edu/AsianLaw/HumanTrafficking/ULC-ProjectProposal.pdf>.

¹² *Uniform Act*, *supra* note 1, at §8.

¹³ *Id.*

¹⁴ ALA. CODE § 13A-6-152 provides that “[a] corporation, or any other legal entity other than an individual, may be prosecuted for human trafficking in the first degree for an act or omission only if an agent of the corporation or entity performs the conduct which is an element of the crime while acting within the scope of his or her office or employment and on behalf of the corporation or entity, and the commission of the crime was either authorized, requested, commanded, performed, or within the scope of the person’s employment on behalf of the corporation or entity or constituted a pattern of conduct that an agent of the corporation or entity knew or should have known was occurring.”

GA. CODE ANN. § 16-5-46 provides that “[a] corporation may be prosecuted under this Code section for an act or omission constituting a crime under this Code section only if an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his or her office or employment and on behalf of the corporation and the commission of the crime was either authorized, requested, commanded, performed, or within the scope of his or her employment on behalf of the corporation or constituted a pattern of illegal activity that an agent of the company knew or should have known was occurring.”

MISS. CODE ANN. § 97-3-54.1 provides that [a]n enterprise may be prosecuted for an offense under this chapter if:

(a) An agent of the enterprise knowingly engages in conduct that constitutes an offense under this chapter while acting within the scope of employment and for the benefit of the entity.

(b) An employee of the enterprise engages in conduct that constitutes an offense under this chapter and the commission of the offense was part of a pattern of illegal activity for the benefit of the enterprise, which an agent of the enterprise either knew was occurring or recklessly disregarded, and the agent failed to take effective action to stop the illegal activity.

(c) It is an affirmative defense to a prosecution of an enterprise that the enterprise had in place adequate procedures, including an effective complaint procedure, designed to prevent persons associated with the enterprise from engaging in the unlawful conduct and to promptly correct any violations of this chapter.

(d) The court may consider the severity of the enterprise’s offense and order penalties, including: (i) a fine of not more than One Million Dollars (\$1,000,000.00); (ii) disgorgement of profit; and (iii) debarment from government contracts. Additionally, the court may order any of the relief provided in Section 97-3-54.7.

TENN. CODE ANN. § 39-13-311 (West) provides that “[a] corporation may be prosecuted for a violation of §§ 39-13-308 and 39-13-309 for an act or omission constituting a crime under this part only if an agent of the corporation performs the conduct that is an element of the crime while acting within the scope of the agent’s office or employment and on behalf of the corporation and the commission of the crime was either authorized, requested,

sought to capture the essence of these statutes by “(1) describing the specific criteria for when a business entity may be found liable (as distinguished from individual criminal liability); (2) imposing additional penalties for business convicted of human trafficking; and, (3) specifying that both individuals and business can commit these offenses.”¹⁵ Four states have adopted the Uniform Act, and both Delaware and Pennsylvania have incorporated provisions relating to business entity liability.¹⁶

New Jersey has grappled with the issue of entity liability in its various human trafficking laws and revisions. N.J.S. § 2C:13-8(2) states that a “person commits the crime of human trafficking if he: receives anything of value from participation as an organizer, supervisor, financier, or manager in a scheme or course of conduct which violates this paragraph.” Currently pending NJ Assembly Bill 2420 would add language holding those who “benefit financially” from human trafficking liable under this same provision. However, while the proposed more expansive language is an improvement, the comments to the bill reference expansion to “**individuals** who receive a financial benefit from participating in human trafficking without necessarily being an ‘organizer, supervisor, financier or manager’ of the enterprise or scheme, **such as drivers or hotel employees** (emphasis added).¹⁷ Thus, in terms of legislative intent, this modification seems primarily concerned with individuals rather than corporate or business entities.

Pursuant to New Jersey law, a person includes “corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals, unless restricted by the context to an individual as distinguished from a corporate entity.”¹⁸ Accordingly, a business entity could be charged with human trafficking to the extent it “receives anything of value as participation as an organizer, supervisor or manager in a scheme or course of conduct violating” § 2C:13-8. Yet, this narrow language seemingly requires a business entity to have active involvement in human trafficking.

As a safeguard to avoid corporate malfeasance, New Jersey provides circumstances under which a corporation may be held liable for criminal violations.¹⁹ Specifically, N.J.S. § 2C:2-7 imposes liability when “[t]he conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.” A corporation convicted to the commission of an offense is subject to the additional penalties set forth in N.J.S. 2C:43-4, including additional fines, potential dissolution of the corporation, or revocation of its certificate to conduct business in New Jersey.

New Jersey law as presently written conflates individual and business entity liability while the language of the Uniform Act and other jurisdictions more clearly articulates the circumstances under which a business entity could be held liable for human trafficking violations. Staff has proposed modifications to the NJ law for the Commission’s consideration that more clearly delineate when a

commanded, performed or within the scope of the agent's employment on behalf of the corporation or constituted a pattern of illegal activity that an agent of the company knew or should have known was occurring.”

¹⁵ *Uniform Act*, *supra* note 1, at § 8, Comment.

¹⁶ DEL. CODE ANN. tit. 11, § 787 (West); 18 PA. CONS. STAT. ANN. § 3017 (West)

¹⁷ Comments to NJ Assembly Bill No. 2420.

¹⁸ N.J.S. § 1:1-2 (2014); *see also Bankers Trust Co. v. New York Women’s League for Animals*, 23 N.J. Super, 170 (App. Div. 1953).

¹⁹ N.J.S. § 2C:2-7

business entity could be held liable by referencing New Jersey's existing law on criminal corporate liability and the penalties further described.

A specific reference to New Jersey's existing standard of corporate liability²⁰ may be beneficial in ensuring that New Jersey business entities implement adequate training and compliance programs regarding human trafficking. Staff will conduct outreach with various stakeholders regarding this proposed statutory language to determine whether it is sufficient to cross reference New Jersey's existing corporate liability law or whether it would be more appropriate to craft statutory language specific to human trafficking, including adding additional statutory penalties.

2. Expanding New Jersey's human trafficking law to include sexually explicit performances

While definitive figures remain elusive, it is widely recognized that the adult entertainment is multi-billion dollar industry.²¹ Unfortunately, this industry may also serve as an environment in which human trafficking perpetrators may victimize the vulnerable. TurnAround, Inc., a center that provides counseling and services to victims of sexual abuse, maintains "human trafficking cases often have links to adult entertainment, from pornography to prostitution."²² In a similar vein, a report commissioned by the U.S. State Department concluded that "strip clubs are attractive to some criminals because they assume that since stripping is legal they will be less likely to be caught trafficking women into these markets."²³

Nevertheless, legitimate businesses should not be assumed complicit in the crime of human trafficking. Recognizing that their enterprises are fertile ground for human trafficking perpetrators, increasing numbers of sexually oriented businesses are partnering with law enforcement in combatting this crime.²⁴ The organization Club Owners Against Sex Trafficking is embracing the opportunity to educate club owners nationwide on the perils of human trafficking and urging members to recognize the signs associated with victimization.

²⁰ This mirrors the approach taken by the Delaware Legislature which specifically referenced its criminal corporate liability statute within its human trafficking law. See DEL. CODE ANN. tit. 11, § 787 (West).

²¹ A New York Times article maintains the adult entertainment industry generates between \$10-\$14 billion annually. Frank Rich, *Naked Capitalists: There's No Business Like Porn Business*, N.Y. TIMES, May 20, 2001, available at <http://www.nytimes.com/2001/05/20/magazine/20PORN.html?pagewanted>. In contrast, Forbes magazine maintains that the adult entertainment industry generates approximately \$4 billion per year. Dan Ackman, *How Big is Porn?*, FORBES, May 21, 2001, available at <http://www.forbes.com/2001/05/25/0524porn.html>.

²² Peter Hermann, *Women from Baltimore Escape Alleged Prostitution Ring*, THE BALTIMORE SUN, November 5, 2011, available at http://articles.baltimoresun.com/2011-11-05/news/bs-md-ci-prostitution-ring-20111103_1_prostitution-ring-human-trafficking-adult-entertainment.

²³ Donna Hughes, *THE DEMAND FOR VICTIMS OF SEX TRAFFICKING* 22 (2005) (citation omitted).

²⁴ See Annie Sweeney, *Feds, Strip Clubs Fighting Human Trafficking*, CHICAGO TRIBUNE, April 5, 2014, available at http://articles.chicagotribune.com/2014-04-05/news/ct-strip-club-trafficking-training-met-20140406_1_strip-clubs-human-trafficking-federal-agents; see also *How Strip Clubs are Helping to Fight Sex Trafficking*, LOS ANGELES DAILY NEWS, January 16, 2014, available at http://www.huffingtonpost.com/2014/01/16/strip-clubs-sex-trafficking_n_4609906.html.

The Uniform Law acknowledges the significance of sexually explicit performances in human trafficking by including it within its definition of sexual activity.²⁵ Numerous States have similarly drafted human trafficking laws criminalizing forced or compelled sexually explicit performances.²⁶ These States have generally taken three distinct statutory approaches:

- Expressly prohibiting the behavior by enumerating it in the main body of the statute;
- Prohibiting the behavior by nesting sexually explicit performances (and often, the production of sexually explicit material) into statutory definitions of “services”; or
- Prohibiting the behavior by cross-referencing to definitions such as “sexual conduct” contained in the State’s applicable child exploitation statute (even though the human trafficking statute applies to both minors and adults).

The NJ Act addresses human trafficking involving “sexual activity”²⁷ and “labor or services” but does not explicitly criminalize forced or coerced sexually explicit performances. The NJ Act also lacks a definition of “services” with respect to human trafficking crimes. While minors are protected from this type of sexual exposure pursuant to N.J.S. 2C:24-4, which prohibits broader degrees of sexual exploitation, it may prove beneficial to clarify New Jersey’s law to expressly prohibit forced or coerced sexually explicit performances for all individuals.

The proposed addition of language in N.J.S. 2C:13-8(a)(1) to address forced sexually explicit performances is the most straightforward and least invasive method of addressing this potential venue of human trafficking. However, an alternative approach taken by some State legislatures is to define the term “services” as “sexual activity, sexually explicit performances or the production of sexually explicit materials.” This alternative approach further expands protection to those individuals forced or compelled to produce pornographic material. Either method would effectively address ambiguity existing in New Jersey’s current law to a degree.

²⁵ *Uniform Act, supra* note 1, at § 2 (11).

²⁶ See ALA. CODE § 13-6-151 (2010); ARIZ. REV. STAT. ANN. § 13-13-07 (2010); ARK. CODE ANN. § 5-18-102 (West 2013); COLO. REV. STAT. ANN. § 18-3-502 (West 2014); DEL. CODE ANN. tit. 11 § 787 (West 2014); FLA. STAT. ANN. § 787.06 (West 2014); GA. CODE ANN. § 16-5-46 (West 2011); 720 ILL. COMP. STAT. ANN. 5/10-9 (West 2015); IND. CODE ANN. § 35-42-3.5-1 (West 2014); IOWA CODE 710A.1. (2012); KY REV. STAT. ANN. § 529.010 (West 2013); MASS. GEN. LAWS ANN. ch. 265 § 50 (West 2012); MICH. COMP. LAWS ANN. § 750.462a (West 2014); MISS. CODE ANN. § 97-3-54.4 (West 2013); MONT. CODE ANN. § 45-5-305 (West 2013); NEB. REV. STAT. ANN. § 28-830 (West 2013); N.H. REV. STAT. ANN. § 633:7 (2014); N.M. STAT. ANN. § 30-52-1 (West 2008); OHIO REV. CODE ANN. § 2905.32 (West 2014); OKLA. STAT. tit. 21 § 748 (2014); UTAH CODE ANN. § 76-5-308 (West 2013); VT. STAT. ANN. tit. 13 § 2651 (3) (West 2011); WASH. REV. CODE ANN. § 9A.40.100 (West 2014); WIS. STAT. ANN. § 940.302 (West 2014).

²⁷ “Sexual activity” is defined in N.J.S. § 2C:34-1: “Sexual activity includes, but is not limited to, sexual intercourse, including genital-genital, oral-genital, anal-genital, and oral-anal contact, whether between persons of the same or opposite sex; masturbation; touching of the genitals, buttocks, or female breasts; sadistic or masochistic abuse and other deviate sexual relations.”

Appendix

2C:13-8. Human trafficking

a. A person commits the crime of human trafficking if he:

(1) knowingly holds, recruits, lures, entices, harbors, transports, provides or obtains, by any means, another, to engage in sexual activity as defined in paragraph (2) of subsection a. of N.J.S.2C:34-1, **to engage in a sexually explicit performance**, or to provide any other labor or services:

(a) by causing or threatening to cause serious bodily harm or physical restraint against the person or any other person;

(b) by means of any scheme, plan, or pattern intended to cause the person to believe that the person or any other person would suffer serious bodily harm or physical restraint;

(c) by committing a violation of N.J.S.2C:13-5 against the person;

(d) by destroying, concealing, removing, confiscating, or possessing any passport, immigration-related document as defined in section 1 of P.L.1997, c. 1 (C.2C:21-31), or other document issued by a governmental agency to any person which could be used as a means of verifying the person's identity or age or any other personal identifying information;

(e) by means of the abuse or threatened abuse of the law or legal process;

(f) by means of fraud, deceit, or misrepresentation against the person; or

(g) by facilitating access to a controlled dangerous substance or controlled substance analog as set forth in chapter 35 of Title 2C of the New Jersey Statutes;¹ or

(2) receives anything of value from participation as an organizer, supervisor, financier or manager in a scheme or course of conduct which violates paragraph (1) of this subsection; or

(3) knowingly holds, recruits, lures, entices, harbors, transports, provides or obtains, by any means, a child under 18 years of age, to engage in sexual activity as defined in paragraph (2) of subsection a. of N.J.S.2C:34-1, whether or not the actor mistakenly believed that the child was 18 years of age or older, even if that mistaken belief was reasonable.

b. An organization may be prosecuted for an offense under this section pursuant to N.J.S.2C:2-7 and shall be subject to the additional penalties set forth in N.J.S.2C:43-4.

cb. An offense under this section constitutes a crime of the first degree.

de. It is an affirmative defense to prosecution for a violation of this section that, during the time of the alleged commission of the offense of human trafficking created by this section, the defendant was a victim of human trafficking.

ed. Notwithstanding the provisions of N.J.S.2C:43-6, the term of imprisonment imposed for a crime of the first degree under paragraph (2) or (3) of subsection a. of this section shall be either a term of 20 years during which the actor shall not be eligible for parole, or a specific term between 20 years and life imprisonment, of which the actor shall serve 20 years before being eligible for parole. Notwithstanding the provisions of N.J.S.2C:43-3, the sentence for a conviction for a crime of the first degree under this section shall include a fine in an amount of not less than \$25,000, which shall be collected as provided for the collection of fines and restitutions in section 3 of P.L.1979, c. 396 (C.2C:46-4) and forwarded to the Department of the Treasury to be deposited in the “Human Trafficking Survivor’s Assistance Fund” established by section 2 of P.L.2013, c. 51 (C.52:17B-238).

fe. In addition to any other disposition authorized by law, any person who violates the provisions of this section shall be ordered to make restitution to any victim. The court shall award to the victim restitution which is the greater of:

- (1) the gross income or value to the defendant of the victim's labor or services; or
- (2) the value of the victim's labor or services as determined by the “New Jersey Prevailing Wage Act,” P.L.1963, c. 150 (C.34:11-56.25 et seq.), the “New Jersey State Wage and Hour Law,” P.L.1966, c. 113 (C.34:11-56a et seq.), the Seasonal Farm Labor Act, P.L.1945, c. 71 (C.34:9A-1 et seq.), the laws concerning the regulation of child labor in chapter 2 of Title 34 of the Revised Statutes, or any other applicable State law, and the “Fair Labor Standards Act of 1938,” 29 U.S.C. s.201 et seq., or any other applicable federal law.