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**REPORT ON LEGISLATION BY
THE COMMITTEE ON SEX AND LAW**

**A.7670
S.4429**

**M. of A. Gottfried
Senator Duane**

AN ACT to amend the criminal procedure law, in relation to victims of sex trafficking convicted of prostitution offenses.

THIS BILL IS APPROVED WITH COMMENTS

This Bill would amend New York State Criminal Procedure Law in relation to victims of sex trafficking convicted of prostitution offenses. The purpose of this Bill is to enable certain persons to vacate their convictions for prostitution-related offenses that resulted from their coerced involvement in the sex trades or some other form of trafficking in persons.

The Bill was introduced in identical form in the New York State Assembly on April 20, 2009 by Assembly Member Richard Gottfried, and in the New York State Senate on April 23, 2009 by Senator Thomas Duane. The bill passed by unanimous vote in the Assembly on March 8, 2010 and has not yet been voted upon in the Senate.

The Sex and Law Committee has analyzed the proposed legislation and believes that it provides important relief to victims of sex trafficking.

SUMMARY OF THE BILL

This Bill would amend New York Criminal Procedure Law § 440.10 to allow for the vacatur of convictions for prostitution (N.Y. Pen. Law § 230.00) and loitering for the purpose of engaging in a prostitution offense (N.Y. Pen. Law § 240.37) where the defendant committed the offending acts because she or he was a victim of sex trafficking or trafficking in persons. Convictions taking place before and after the Bill takes effect would be eligible for vacatur.¹

The Bill would apply to victims of sex trafficking under federal or state law.² The federal Trafficking Victims Protection Act of 2000 (“TVPA”) broadly defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” 22 U.S.C.A. § 7102 (9) (2008). Further, federal law defines “severe forms of trafficking in persons” as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18

¹ Vacatur Bill (proposing N.Y. Crim. Proc. L. § 440.10 (7) (renumbered from § 440.10 (6) by the Bill)).

² *Id.* (proposing N.Y. Crim. Proc. L. § 440.10 (1)(i)).

years of age.” *Id.* § (8). Under New York state law, a person is guilty of sex trafficking if they “intentionally advance[] or profit[] from prostitution by” engaging in any one of five types of intentional conduct, including (i) providing illegal drugs to a trafficked person; (ii) inducing the trafficked person to engage in prostitution by “making material false statements, misstatements, or omissions”; (iii) “withholding, destroying, or confiscating any actual or purported passport, immigration document, or any other actual or purported government identification document of another person with intent to impair said person’s freedom of movement”; (iv) requiring the trafficked person to engage in prostitution to repay a real or purported debt; or (v) otherwise coercing or inducing the trafficked person to engage in prostitution through fear tactics.³

The Sex and Law Committee supports the Bill’s application to those who qualify as victims under either the federal or the New York State anti-trafficking law. Because the definition of sex trafficking is broader under the TVPA than the state law, as set forth above, victims of acts that would not be prosecuted under the New York State anti-trafficking law would nevertheless be eligible for the remedies that the Bill provides.

Due diligence. The Bill would require individuals to make a motion “with due diligence” after they have “ceased to be a victim of trafficking or ha[ve] sought services for victims of such trafficking,” but allows that “reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking that may be jeopardized by the bringing of such motion” or other such reasons may be justification for a delay.⁴

Official documentation. An individual bringing such a motion with “[o]fficial documentation of [their] status as a victim of sex trafficking or trafficking in persons at the time of the offense from a federal, state or local government agency,” will benefit from a presumption that the movant’s involvement in the offense resulted from having been a victim of sex trafficking or trafficking in persons.⁵

Limited relaxation of vacatur requirements. The Bill also would relax somewhat the limitations that New York Criminal Procedure Law § 440.10 places on individuals seeking to vacate prior convictions. Typically, courts *must* deny a motion under § 440.10 where there is sufficient factual material on the record with respect to the grounds for vacatur such that adequate appellate review is possible.⁶ In addition, courts have *discretion* to deny a motion under § 440.10 where the defendant failed to place facts on the record that would allow an adequate basis for appellate review.⁷ The Bill provides that these automatic and discretionary grounds for denial do not apply to a motion to vacate under proposed § 440.10(1)(i).⁸ It also

³ N.Y. Pen. Law § 230.34.

⁴ Vacatur Bill (proposing N.Y. Crim. Proc. L. § 440.10(1)(i)). The Committee strongly recommends the broad interpretation and application of the due diligence requirement. It is concerned that, even if an individual has “ceased to be a victim of trafficking,” and has achieved safety, she or he may lack financial and other resources necessary to access social or legal services that may provide information about the remedies under the proposed Bill (in the absence of a notice requirement thereunder) or assist with the filing of a vacatur motion under § 440. Thus, it could be months or even years until the victim “has sought services for victims of such trafficking,” and, consequently, as long until the victim makes a motion under § 440. For these reasons, the Committee strongly recommends that the due diligence requirement be applied as broadly as possible so as not to preclude the granting of otherwise meritorious applications under the Bill.

⁵ *Id.* (proposing N.Y. Crim. Proc. L. § 440.10(1)(i)(II)).

⁶ N.Y. Crim. Proc. L. § 440.10(2)(b)

⁷ *Id.* § 440.10(3)(a).

⁸ *Id.* (proposing N.Y. Crim. Proc. L. § 440.10(1)(i)).

makes inapplicable to motions granted on grounds of sex trafficking the provision that allows the court to order a new trial.⁹

IMPORTANCE OF THE BILL

In 2007, the New York legislature recognized the crime of sex trafficking through the enactment of New York Penal Law § 230.34. This measure was part of the more comprehensive New York State Anti-Trafficking Law, which also amended the New York Social Services Law to facilitate the provision of services to trafficked persons.¹⁰ Despite these much-needed and applauded measures, serious gaps remain in the law with respect to the relief afforded victims of sex trafficking. One such gap is that there is no specific provision allowing victims to vacate prior convictions for conduct in which they were involuntarily engaged as a part of a trafficking scheme. Thus, while the New York State Anti-Trafficking Law provided that victims of sex trafficking would receive assistance and social services to facilitate their reintegration into society, it failed to provide an avenue for such victims to address the single issue that could most seriously impact that process.

The need for the proposed Bill is illustrated by the story of S.M., a survivor of sex trafficking.¹¹ S.M., an immigrant to the United States, was coerced to engage in sex work over a period of several years, during which time her trafficker physically and psychologically brutalized her. With no family or other support, she was only able to escape her trafficker when he fled the United States due to warrants issued for his arrest. By that time, however, S.M. had been arrested eleven times for prostitution and related offenses, and had been convicted on eight charges of prostitution or loitering. Hoping the police would help her, S.M. would not attempt to run away when they conducted raids of the areas in which she worked, but she was never identified or treated as a victim of sex trafficking. Now that she is safe, she is interested in applying for a job as a security guard, but is concerned that she would be ineligible for employment due to her arrest history. Although she applied for and received a T-Visa after being granted a waiver for those arrests, and her application for permanent residency is currently pending, S.M.'s prospects for employment are limited so long as her convictions remain on her record.

Unfortunately, S.M.'s precarious situation is quite common for individuals who are trafficked into prostitution. In New York, as elsewhere, in addition to enduring unspoken abuses, victims of sex trafficking are often arrested and convicted of prostitution-related offenses – without the police or courts recognizing their need for help.¹² Those convictions are not without consequences. A record of prostitution-related offenses limits employment opportunities.¹³ It may limit housing opportunities, both public and private.¹⁴ For immigrants, a

⁹ *Id.* (proposing N.Y. Crim. Proc. L. § 440.10(6)).

¹⁰ *See* N.Y. Soc. Servs. L. § 483-bb(a) *et seq.*

¹¹ The story of S.M. (an alias) is based on the experiences of a client of the New York City Bar Association's Immigrant Women & Children's Project.

¹² *See, e.g., Kicking Down the Door: The Use of Raids to Fight Trafficking in Persons*, available at <http://www.urbanjustice.org/ujc/publications/sex.html> (interviewing sex trafficking victims and finding that trafficked women reported being repeatedly arrested, in some cases up to ten times, in police raids on brothels and other sex work venues, convicted of prostitution, and even sentenced to jail, without ever being identified as trafficked persons).

¹³ While it is unlawful in New York for an employer to discriminate against an applicant on the basis of a past criminal record unless the conviction was for an offense directly related to the job (N.Y.S. Corr. L. Art. 23-A), a

record of prostitution can be fatal to an application for residency or citizenship.¹⁵ Barred from obtaining decent jobs, finding adequate housing, and obtaining legal immigration status, these individuals are left in a no-win situation. But victims of sex trafficking need gainful employment, stable housing, and legal immigration status in order to successfully reintegrate into society. Otherwise, the heinous acts that victimized them in the first place also ensure that they are permanently denied a life within mainstream society. Worse, in a vicious cycle, with legal housing, employment, and status out of reach, vulnerable individuals may again fall prey to trafficking. Confirmed trafficking victims should not be punished for crimes that are the direct result of being trafficked.

RECOMMENDATION

Given the significance of the measures outlined by the Bill, as described above, the Sex and Law Committee urges that the “official documentation” requirement be interpreted as broadly as possible so that the relief contemplated by the Bill is widely available to victims. While the Committee takes some comfort in the Bill’s provision that the lack of official documentation will not *preclude* the granting of a motion for relief (since official documentation merely creates a presumption of trafficking victim status), it nevertheless is concerned that many individuals who seek to submit a strongly supported motion for vacatur without official documentation would be denied relief. Sex trafficking victims may face a host of obstacles, from administrative hurdles to real risks to their safety, in obtaining official documentation of their status. The Committee recommends that these considerations be taken into account in interpreting the Bill’s “official documentation” requirement.

CONCLUSION

The Bill, which appears to be the first of its kind in the nation, would give victims of human trafficking the fresh start they deserve. As stated by the State Department of the United States in its June 2007 Trafficking in Persons Report, which endorsed the victim-centered approach exemplified by this Bill, “[c]onfirmed trafficking victims should not be punished for crimes that are a direct result of being trafficked—such as not holding proper immigration documents or violation of prostitution, labor, or begging statutes. Trafficking victims should not be detained in criminal detention facilities, except in extreme circumstances. They should be treated as victims.”¹⁶ The Sex and Law Committee urges the swift passage of the Bill.

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conviction may still have consequences. A criminal record may foreclose jobs in certain fields, such as home health care or banking. *See The Consequences of Criminal Charges: A People’s Guide*, The Bronx Defenders, 21 (2008). *See also Do You Have A Criminal Conviction History*, NYC Bar Assn. (2009), available at http://www.nycbar.org/pdf/report/Labor_reentry_pamphlet_employees09.pdf.

¹⁴ In New York, there is no law that prohibits private landlords from discriminating against prospective tenants on the basis of their past criminal records. In addition, convictions can affect an individual’s right to federally-subsidized housing. *Id.* at 14.

¹⁵ *Id.* at 19.

¹⁶ The State Department June 2007 Trafficking in Persons Report is available at www.state.gov/documents/organization/82902.pdf.