



MEMORANDUM
The Women’s Equality Agenda
and the Trafficking Victims Protection and Justice Act

Submitted by:
NY Anti-Trafficking Network

In January 2013, Governor Andrew Cuomo introduced plans to advance a 10-Point Women’s Equality Agenda (WEA) that will advance women’s rights on several issues and break down barriers to women’s full participation in society and advance their health and well-being. One of the points of the WEA is to “Strengthen Human Trafficking Laws.” Three objectives are identified: 1) increase penalties for trafficking, 2) remove the requirements that “coercion” be proven when the victims are minors, and 3) create an affirmative defense in prostitution prosecutions where the defendant’s participation was a result of having been a sex trafficking victim. In this memorandum, we enclose our concerns and recommendations regarding the Governor’s efforts to address this human rights issue.

In early 2013, New York State Assemblymember Amy Paulin (D) introduced the Trafficking Victims Protection and Justice Act (TVPJA), A2240A, which is sponsored by Senator Andrew Lanza in the Senate (S2135A). The bill is described as strengthening state anti-trafficking laws by introducing and amending several key criminal penalties. However, while this bill contains several positive changes that will aid in the fight against human trafficking, it undermines many positive steps already taken by New York State.

Everyone in New York should have a fair chance to thrive and pursue opportunity in life. When a person is trafficked, s/he is forced, tricked, or coerced to perform work against their will. Trafficked persons are made to live in a climate of fear. Trafficked persons often experience isolation and invisibility; are subjected to abuses of power by their employers; and they have little or no access to help. It is crucial to have a thorough conversation about the potential provisions that might be included in the Women’s Equality Agenda. As the Women’s Equality Agenda (WEA) human trafficking provisions have not yet been drafted, we address the current proposals in the Trafficking Victims Protection and Justice Act (TVPJA). We hope that our concerns and recommendations will contribute to the dialogue and provide information regarding the needs of survivors of human trafficking to establish safe and stable lives.

Who We Are

The NY Anti-Trafficking Network (NYATN or the Network) is a coalition of legal and social service organizations that provide services to, and advocate for the rights of, trafficking survivors. Founded in 2002, NYATN was the first network of service providers in New York to promote the rights of survivors of human trafficking.

As a network of service providers and advocates, we believe in the effectiveness of a human rights-based approach with a focus on remedies for survivors. We seek to stabilize survivors of trafficking, provide necessary services, and assist them in accessing available options to cooperate with law enforcement. This approach yields a much higher rate of cooperation that ultimately results in more prosecutions.¹

Defining Terms

The United States is a source, transit, and destination country for men, women, and children for forced labor, debt bondage, involuntary servitude, and trafficking into commercial sex.² Accordingly, **trafficking in persons** and **human trafficking** describe activities involved when someone obtains or holds a person in compelled service through force, fraud, or coercion.³ Under federal law, **“sex trafficking”** occurs when a commercial sexual act is induced by force, fraud, or coercion, or in which the person induced to perform such an act is less than 18 years old;⁴ and **“labor trafficking”** is defined as the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjecting that person to involuntary servitude, peonage, debt bondage, or slavery.⁵

Human trafficking is often described as a modern form of slavery.⁶ Many victims are provided little to no freedom of movement, and are subject to intense physical and psychological trauma at the hands of their captors. The number of human trafficking survivors in the United States and in New York is unknown because of the difficulty of studying this underground phenomenon.⁷

Current NYS Law on Trafficking in Persons

After significant advocacy by NYATN, New York passed a very strong anti-trafficking law in 2007. The law has been seen as a model for other states. Under New York’s anti-trafficking law, **“sex trafficking”** occurs when a person intentionally advances or profits from prostitution by providing the victim with certain drugs; making material false statements; withholding or destroying government identification documents; requiring repayment of a debt; or using force or engaging in any scheme, plan, or pattern to compel or induce such person to engage in prostitution by making that person fearful of one of the eight actions or consequences against him or her.⁸ **“Labor trafficking”** occurs when a person compels or induces another person to engage in labor, or recruits, entices, harbors, or transports such other person by similar coercive means described above.⁹ Sex trafficking is a Class B felony, while labor trafficking is a class D felony. In addition, the law added a new Article to the Social Services Law, funding and empowering the New York State Office of Temporary and Disability Assistance (OTDA) and the Division of Criminal Justice Services (DCJS) with ensuring that trafficked persons obtain necessary services.¹⁰

While the New York Anti-Trafficking Law is strong, it could be improved. In contrast to federal law, the state law does not include the following:

- an independent private right of action,
- restitution for trafficking victims, or
- forfeiture of the trafficker’s assets.

While law enforcement and the district attorney's office can notify the Office of Temporary Disability Assistance (OTDA) and the Division of Criminal Justice Services (DCJS) that a victim may be eligible for necessary services,¹¹ there is no specific mechanism for non-governmental service providers to make such referrals for vital victim assistance.

Concerns about What the TVPJA Will Do

While NYATN welcomes efforts to improve upon New York's current anti-trafficking law, it is crucial that such efforts actually improve upon current law and meet the needs of trafficking survivors. Unfortunately, much of the TVPJA does not focus on human trafficking and human traffickers, but on prostitution, whether or not it involves force, fraud, or coercion. The bill creates new offenses, widens the net of those caught in existing offenses, and increases the consequences of being convicted of many offenses. Such consequences include being subject to mandatory minimum sentences, being added to the sex offender registry, facing civil commitment, and being threatened with eviction.

For example, the TVPJA, if adopted, will amend the crime of "Permitting Prostitution," making a person guilty of this crime when their vehicle is used for prostitution.¹² The TVPJA will also increase the penalties for promoting prostitution, if that promoting involves "transporting persons."¹³ **These provisions do not penalize human trafficking**, as they do not specify minors in the sex trade or commercial sex situations involving force, fraud, or coercion. Raising penalties for crimes simply because they involve prostitution will do nothing to identify or assist victims of human trafficking, and in fact it will make it more difficult for people to come forward if they suspect human trafficking.

The bill also **layers offenses** so that an individual can be charged with many crimes for the same action. For example, the bill creates new offenses entitled "aggravated patronizing a prostitute." Under these new provisions, a 21-year-old who patronizes and has sex with a prostitute who is less than 16 years old could be convicted of "aggravated patronizing a minor for prostitution" in the third degree.¹⁴ This same individual already can be convicted of "patronizing a prostitute" in the second degree and "statutory rape" in the second degree. The inclusion of such new crimes unnecessarily increases the number of offenses with which an individual can be charged.

We are also concerned with **the seriousness of penalties leveraged against individuals who are not engaged in human trafficking** under this bill. If the TVPJA language is adopted in the WEA, the prior mentioned 21-year-old could be convicted of a Class E Sex Felony,¹⁵ which carries a sentence of one-and-a-half to four years for first-time offenders.¹⁶ Anyone convicted of these new "aggravated patronizing" crimes must register as a sex offender.¹⁷ Further, perpetrators may be subject to civil commitment at a court's determination.¹⁸

Much of the TVPJA focuses on **expanding sex offender registration and civil commitment** to include a greater number of possible candidates. These can be effective tools to target a small and dangerous class of violent sex offenders,¹⁹ resting on the theory that they are likely to relapse into criminal behavior.²⁰ However, it is important to consider any expansion of these statutes, whereby New York may civilly detain people even if there is little risk of recidivism,²¹ reframing these measures as a punitive, and raising due process issues²² at a **heavy financial burden to the State**.²³ These are very serious and lifelong penalties to impose on a person who has not actually engaged in human trafficking.

Furthermore, **removing the requirement that some form of “coercion” be proven when the victims are minors is likely to have unintended consequences.** A federally-funded study on youth in the commercial sex trade in New York City revealed that young people’s situations and needs vary widely and that more than 83 percent of young people involved in commercial sex had no market facilitator, pimp, or trafficker. Most minors involved in commercial sex are involved for economic reasons - they may have run away from a difficult situation and are homeless or unable to access youth shelters and other services, or they may be trying to support their families. Many of these young people work in loose peer networks where they share clients, space, or other resources in order to stay as safe as possible. The current legal definition of “promoting prostitution” is broad enough that it could include the activities that minors do with each other to stay safe. We know of cases where roommates or friends of sex workers were arrested for “promoting prostitution” simply because prostitution occurred in their shared apartment. However, if the law were to change, these minors themselves could be found guilty of “sex trafficking,” a B violent felony. This unintended consequence is more likely under state law, where city police are arresting people for low-level prostitution offenses on a daily basis.

Recommendations for a Successful Women’s Equality Agenda

We believe that, while the New York Anti-Trafficking Law is strong, there are other changes that the Governor should consider including in the Women’s Equality Agenda. The WEA could serve as a model for a rights-based approach to combating human trafficking, if it included provisions designed to actually meet the needs of trafficking survivors, which would aid in their physical and psychological recovery while guaranteeing basic rights.

- **Protect trafficking victims from criminal prosecution**

The TVPJA proposes creating an affirmative defense in prostitution prosecutions that the defendant’s participation was a result of having been a sex trafficking victim, and we heartily support this objective.²⁴ Trafficked persons often face criminal arrest and imprisonment. Trafficking victims are arrested and convicted multiple times for crimes their traffickers have forced them to commit, including prostitution, theft, and drug sale and use. **We would support a provision that allows a trafficking victim to assert an affirmative defense to any non-violent crime if it was committed as a direct result of human trafficking.** We also support the provision in the TVPJA that raises the age under which a person will not be considered an accomplice to the person who trafficked them into prostitution.

- **Equalize the penalties for all forms of human trafficking**

Under current New York law, the crime of human trafficking is already a serious crime. Instead of enhancing penalties for crimes involving prostitution, we recommend that focus should be on human trafficking, specifically that the penalties for all forms of human trafficking should be equalized. Currently, it is bifurcated with disparate penalties; while “sex trafficking” is a B felony, “labor trafficking” is a D felony. We believe that this differential in penalties has created a sharper focus on sex trafficking cases at the expense of labor trafficking victims. Such classification is belittling to victims of labor trafficking who, like sex trafficking victims, have suffered from unspeakable trauma involving physical and psychological torture, isolation, and sexual abuse.²⁵ Labor trafficking victims often suffer longer periods of exploitation and abuse than sex trafficking victims because law enforcement fails to prioritize investigation and identification of such cases. It is estimated that for every one victim of sex trafficking, there are approximately three victims of labor trafficking.²⁶ In spite of this, over 80 percent of human

trafficking investigations focus on sex crimes, leaving the majority of human trafficking victims unprotected and their captors unprosecuted.²⁷

We support the TVPJA's provision to raise the penalties for labor trafficking to a B felony. However, it is not accurate to say that the TVPJA equalizes penalties, because it simultaneously raises "sex trafficking" to a B violent felony, which carries a higher minimum sentence and other collateral consequences. This sends a message that the State of New York would still position sex trafficking as a more egregious crime than labor trafficking. We would support both crimes carrying the penalties of a B felony.

- **Expand access to necessary services to victims of human trafficking and to minors at risk of engaging in commercial sex**

Instead of removing "coercion" as an element for sex trafficking of minors, NYATN supports **providing inclusive, accessible services for young people**. Most young people who trade sex will not benefit from removing "coercion" as an element of trafficking, and some could actually be harmed by such a provision. However, most young people who engage in commercial sex will benefit from fully funding adequate shelters for homeless and unaccompanied youth, programs that create opportunities for living wage employment, and services that treat youth with a rights-based approach that is respectful and nonjudgmental.

The TVPJA **gives social and legal service providers the power to refer human trafficking victims to OTDA, the state program that provides essential benefits to help trafficking survivors.**²⁸ **This is an absolutely essential provision to fulfill the promise of the New York State Anti-Trafficking Law.** Currently, only law enforcement agencies are authorized to make these referrals, and for many reasons, many survivors of trafficking cannot safely cooperate with law enforcement, especially at the beginning of their recovery. Allowing social and legal service providers to refer clients for these benefits will increase access, benefit survivors, and ultimately help the State have a better grasp of the scope of human trafficking.

- **Create forfeiture, restitution, and a civil right of action for trafficking victims**

We support an amendment to the N.Y. Penal Law to include a forfeiture and restitution mechanism for all trafficking victims to recover compensation from their traffickers. Currently, courts may levy state fines against sex traffickers, but there is no mechanism for victims to receive direct compensation from their traffickers for their forced sex or labor. A criminal court-imposed forfeiture and restitution provision would allow trafficking victims to recover directly from their victimizers the compensation they merit.

We also believe that the WEA should **establish a civil right of action** for all trafficking victims to pursue justice against their traffickers. Not all trafficking cases are investigated, and even less are prosecuted. A civil right of action would also expand potential recovery amounts, allowing trafficking victims to pursue compensatory, pain and suffering, and even punitive damages from their traffickers irrespective of whether they were criminally prosecuted.

Please contact NYATN steering committee member, Ivy Suriyopas at the Asian American Legal Defense and Education Fund at 212.966.5932 x235 or isuriyopas@aaldef.org, for additional information regarding this memorandum. Please visit NYATN at <http://nyatn.wordpress.com/>.

¹Hearing on Measures on Human Trafficking in the United States Before the Organization of American States' Inter-American Commission on Human Rights (March 12, 2013)(statement of Florrie Burke).

²2012 Trafficking in Persons Report, U.S. Department of State, available at <http://www.state.gov/j/tip/rls/tiprpt/2012/>

³Office to Monitor and Combat Trafficking in Persons, U.S. Dep't of State, *What is Trafficking in Persons?* (2012), available at <http://www.state.gov/j/tip/rls/fs/2012/194732.htm>

⁴Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102(8)(A) (2005) (TVPA).

⁵TVPA § 7102(8)(B).

⁶Steven Seidenberg, Steven, *Slavery Continues to Haunt the Modern World, But Efforts to Eradicate it Are Growing*, A.B.A. J., April 2013, available at http://www.abajournal.com/magazine/article/slavery_continues_to_haunt_the_modern_world/.

⁷Some organizations estimate that 50,000 individuals are brought into the U.S. for the purposes of trafficking each year. Heather J. Clawson, Mary Layne, and Kevonne Small, *Estimated Human Trafficking into the United States: Development of a Methodology*, Caliber, An ICF International Company (Dec. 2006), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/215475.pdf>. See also Seidenberg, Steven, *Slavery Continues to Haunt the Modern World, But Efforts to Eradicate it Are Growing*, ABA Journal (Apr. 1, 2013), available at: http://www.abajournal.com/magazine/article/slavery_continues_to_haunt_the_modern_world/

⁸N.Y. Penal Law § 230.34 (PL).

⁹PL § 135.35.

¹⁰N.Y. Soc. Serv. Law §483-cc (SSL).

¹¹SSL § 483-cc(a).

¹²Trafficking Victims Protection and Justice Act of 2013, A. 2240a, 236th Sess. §23 (N.Y. 2013)(TVPJA).

¹³TVPJA § 17

¹⁴TVPJA § 14

¹⁵*Id.* See TVPJA §§ 2; 4 (amending N.Y. Penal Law § 70.80(1)(a)).

¹⁶PL § 70.80(4)(a)(iv).

¹⁷TVPJA § 30 (amending N.Y. Correct. Law 168-a(2)(a)(i)).

¹⁸TVPJA § 29 (amending N.Y. Mental Hyg. Law § 10.03(p)).

¹⁹Nathan James, Kenneth R Thomas, and Cassandra Foley, Cong. Research Serv, RL34068 *Civil Commitment of Sexually Dangerous Persons* (2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/18628.pdf>.

²⁰*Id.*

²¹Bureau of Justice Statistics, U.S. Dep't of Justice, *NCJ 198281, Recidivism of Sex Offenders Released from Prison in 1994* (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp1994.pdf> (finding that 5.3% of all released sex offenders were arrested for a sex offense within three years of release, and that 3.5% of all released sex offenders were convicted of a sex crime within three years of release).

²²Alexander Tsisis, *Due Process in Civil Commitments*, 68 Wash. & Lee L. Rev. 1, (2011), available at <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1486&context=wlulr> (observing that, although civil commitment is employed to prevent future offenses, necessitating an inquiry into the criminal past of the defendant, it is not required that the defendant has committed a prior sex offense, rather the hearings to determine civil commitment are subject to highly controvertible assessments).

²³Gary Craig, *Civil Commitment of Sex Offenders Costs State \$175,000 Apiece*, Democrat and Chronicle (Dec. 24, 2012), <http://www.democratandchronicle.com/article/20101226/NEWS01/12260311/Civil-confinement-sex-offenders-costs-state-175-000-apiece>.

²⁴TVPJA §6

²⁵Global Freedom Center, *Overlooked: Sexual Violence in Labor Trafficking*, available at <http://globalfreedomcenter.org/SexualViolenceinLaborTrafficking.pdf> (demonstrating how often times, victims of labor trafficking, even in settings such as domestic servitude and agricultural labor are subject to sexual violence as a form of psychological coercion in order to compel service and submission).

²⁶ Int'l Labor Org. Special Action Programme to Combat Forced Labor, *ILO Global Estimate of Forced Labor: Results and Methodology* (2012), available at

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf.

²⁷ Duren Banks & Tracey Kyckelhahn, Bureau of Justice Statistics, U.S. Dep't of Justice, *NCJ 233732, Characteristics of Suspected Human Trafficking Incidents, 2008-2010* (2011), available at

<http://www.bjs.gov/content/pub/pdf/cshti0810.pdf>.

²⁸ TVPJA §28