

TOP 15 PROBLEM AREAS IN STATE BILLS ON TRAFFICKING IN PERSONS

Polaris Project has thoroughly analyzed the Federal Trafficking Victims Protection Act (TVPA) of 2000, its reauthorization, the existing State laws, the U.S. Department of Justice (DOJ) model law, and the recently introduced State bills. After reviewing the seventeen States with trafficking bills currently under consideration, the following “top 15” list highlights problematic language that prevented the bills from being comprehensive or consistent with the existing Federal framework, the DOJ model law, or Elements of Comprehensive Model Legislation. The “top 15” list is divided into four broad sections: Purpose of Exploitation, Means of Control, Remedies, and Scope of Application.

PURPOSE OF EXPLOITATION

- 1) ***Avoid limiting the purpose of the offense to the notion of “transport”*** – Although the connotation of the word “trafficking” implies movement, transportation is not a required element of the crime under Federal statutory code and the TVPA of 2000. In the DOJ model law commentary, it is stated, “The heart of the concept of “trafficking in persons” is the denial of the liberty of another. Accordingly, the transportation of a person is a secondary inquiry, the apparent meaning of ‘trafficking’ aside. Thus, the definitions section and the criminal provisions focus on the coercive nature of the service, rather than the movement of the victim or the type of underlying service.”

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>“Traffic means to <u>transport another person</u> or to entice, recruit, harbor, provide, or otherwise obtain another person <u>for transport</u> by deception, coercion, or force.”</p>	<p>“(1) TRAFFICKING IN PERSONS. Whoever knowingly (A) recruits, entices, harbors, transports, provides, or obtains, or so attempts, another person <u>for the purposes of:</u> (i) <u>Commercial sex acts or sexually-explicit performance, or</u> (ii) <u>Labor or services...</u>”</p>
<p>COMMENTARY</p>	
<p>In the suggested revision, the purpose of the crime is not transport but the denial of liberty and compulsion of labor and/or commercial sex, bringing the language into conformity with the existing Federal framework.</p>	

- 2) ***Ensure bills address all forms of trafficking*** – In recent proposed State-level legislation, there have been instances of bills focusing on only one form of trafficking, such as bills that include mention of only sex trafficking or bills that focus only on the sex trafficking of a minor. While this type of bill is often better than no proposed legislation at all, it is important that State-level anti-trafficking legislation be comprehensive in scope and cover the broadest spectrum of victims. This comprehensive approach is consistent with the existing Federal framework that addresses all forms of trafficking in persons.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
A Bill for Sex Trafficking and Tourism	<p>“(1) TRAFFICKING IN PERSONS. Whoever knowingly</p> <p>(A) recruits, entices, harbors, transports, provides, or obtains, or so attempts, another person for the purposes of:</p> <p>(i) <u>Commercial sex acts or sexually-explicit performance, or</u></p> <p>(ii) <u>Labor or services...</u>”</p>
COMMENTARY	
The suggested revision addresses all forms of trafficking in persons.	

- 3) ***Avoid referring to sex trafficking as “services” and instead explicitly reference “commercial sexual acts or sexually-explicit performance”*** - When legislation only uses the word “services,” it increases the training demands on law enforcement because prosecutors and police officers may not understand how to interpret the definition of “services.” As a consequence, law enforcement may fail to correctly apply the statute to sex trafficking situations. Statutory language should contain explicit and prominent references to commercial sex or sex trafficking.

If ultimately the bill only refers to “labor or services,” it is critical to define “services” and explicitly reference commercial sex acts as a type of “service.” Absent clear definitions, the word “services” is vague and open to misinterpretation.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
“...for the purposes of causing or compelling another to engage in labor or <u>services...</u> ”	<p>“(1) TRAFFICKING IN PERSONS. Whoever knowingly</p> <p>(A) recruits, entices, harbors, transports, provides, or obtains, or so attempts, another person for the purposes of:</p> <p>(i) <u>Commercial sex acts or sexually-explicit performance, or</u></p> <p>(ii) <u>Labor or services...</u>”</p> <hr/> <p>SERVICES - The term “services” means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor.</p>
COMMENTARY	
Although section (A)(ii) of the revision mentions “labor or services,” the suggested revision includes an additional section (A)(i) that directly references “commercial sexual acts or sexually-explicit performance.” A definition of “services” is also provided.	

- 4) **Broaden the definition of “sex trafficking” to include “sexually-explicit performance”** – Early versions of trafficking legislation failed to include stripping or “sexually-explicit performance” as a commercial sex act or in the definition of sex trafficking. However, recent Federal cases have included examples of persons trafficked to engage in “exotic dancing” (e.g., U.S. v. Virchenko). “Sexually-explicit performance” clauses expand the definitions of the crime to cover a broader range of commercial sexual acts, including activity that may be legal in the absence of coercion or the involvement of minors.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>“The term “sex trafficking” means the recruitment, harboring, transportation, or obtaining of a person for the <u>purpose of a commercial sex act.</u>”</p>	<p>“(1) TRAFFICKING IN PERSONS. Whoever knowingly (A) recruits, entices, harbors, transports, provides, or obtains, or so attempts, another person for the purposes of: (i) <u>Commercial sex acts or sexually-explicit performance,</u> or (ii) Labor or services...”</p>
<p>COMMENTARY</p>	
<p>The suggested revision includes this important clause and broadens the problematic definition.</p>	

- 5) **Revise language that refers to a state of prostitution to instead focus on acts of commercial sex** – State laws addressing prostitution often do not include definitions of commercial sex acts as broad as the current Federal trafficking legislation. The existing Federal statutes and the DOJ model law do not refer to a state of “prostitution” but instead isolate the specific “commercial sex act” to broaden the scope of the definition.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>A person shall not knowingly traffic another person with the intent that the person being trafficked is to be used in forced labor or <u>prostitution.</u></p>	<p>“(1) TRAFFICKING IN PERSONS. Whoever knowingly (A) recruits, entices, harbors, transports, provides, or obtains, or so attempts, another person for the purposes of: (i) <u>Commercial sex acts or sexually-explicit performance,</u> or (ii) Labor or services...”</p>
<p>COMMENTARY</p>	
<p>The suggested revision makes no mention of prostitution and instead isolates the criminal behavior to causing or compelling another to engage in a specific commercial sex act or sexually-explicit performance. This revision in no way legitimizes or legalizes prostitution.</p>	

MEANS OF CONTROL

- 1) ***Broaden the means addressed by the criminal statute beyond narrow definitions of force or coercion*** – Previous legislation on servitude limited prosecutions to cases involving cruder methods of force or coercion, such as bodily harm or threats of bodily harm. The current Federal trafficking statutes and the DOJ model law enumerate multiple means of control, in recognition of the fact that a wide variety of behaviors and threats have a resulting coercive effect. These broadened definitions of means address the more sophisticated techniques used by traffickers today to control their victims. Related to this point, the DOJ model law also uses the term “serious harm” instead of “bodily harm” to further broaden the means of force or coercion.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>Defining coercion as only “causing or threatening to cause bodily harm to another.”</p>	<p>(1) TRAFFICKING IN PERSONS. Whoever knowingly</p> <p>(A) recruits, entices, harbors, transports, provides, or obtains, or so attempts, another person for the purposes of:</p> <p>(i) Commercial sex acts or sexually explicit performance, or</p> <p>(ii) Labor or services</p> <p>through use of any of the following means:</p> <p>(a) causing or threatening to cause serious harm to any person,</p> <p>(b) physically restraining or threatening to physically restrain another person,</p> <p>(c) abusing or threatening to abuse the law or legal process,</p> <p>(d) knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person,</p> <p>(e) blackmail,</p> <p>(f) causing or threatening to cause financial harm to any person, or,</p> <p>(g) facilitating or controlling a victim's access to an addictive controlled substance...”</p>
<p>COMMENTARY</p>	
<p>The suggested revision includes broadened means that encompass earlier definitions (see (a)) but also address the more sophisticated techniques of control used by traffickers today.</p>	

- 2) ***Include a provision related to sex trafficking of minors that does not require coercion or force*** – As noted in the DOJ Model Law commentary, sexual activities are “conceptually different when minors are involved.” State laws must include a section, often entitled Sexual Servitude of a Minor, that covers those activities that involve minors but are not the result of force or coercion. The concepts underlying this legislative provision are similar to Statutory Rape laws, which do not require the proof of coercion when a victim is under the age of legal consent. This provision also references sexually-explicit performance and child pornography, as well as sexual acts.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>State- level legislation that does not include a specific section that addresses the unique aspects of the Sexual Servitude of a Minor</p>	<p>(2) SEXUAL SERVITUDE OF A MINOR. Whoever knowingly</p> <p>(A) recruits, entices, transports, provides, obtains, or harbors, or so attempts, any person under 18 years of age for the purposes of commercial sex acts or sexually explicit performance <u>through any means</u>; or</p> <p>(B) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described subsection (A);</p> <p>commits a felony in the first degree.</p> <p><i>Note: Please note the reference to “any means”</i></p>
<p>COMMENTARY</p>	
<p>The suggested revision includes a specific section on the Sexual Servitude of a Minor, which recognizes that the offense can occur through “any means” and does not require force, fraud, or coercion.</p>	

REMEDIES

- 1) ***Include provisions for prevention and victim protection in addition to criminal code revisions*** – As the U.S. Department of Justice states in their model law commentary, “Federal experience has shown that prosecution without victim protection is unworkable.” An effective law addresses the necessary elements of prevention and victim protection in order to ensure successful prosecution and victim recovery. In Polaris’ model legislation, provisions are included for public awareness activities, victim protection and services, and training for law enforcement and non-governmental organizations (NGOs), as well as the creation of a statewide task force to address trafficking in persons. A statewide task force is an effective mechanism to address the coordination required between governmental and non-governmental agencies in the prosecutorial and service response to a trafficking case.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
Bills that address only the criminal code and do not include provisions for prevention and victim protection	Please see Section 2 and Section 3 of the Polaris Comprehensive Model State Law.
COMMENTARY	
The Comprehensive Model State Law provides elements for prevention and victim protection that can be incorporated into State bills. These elements include public awareness activities, training, and the creation of a statewide task force.	

- 2) ***Avoid low penalties and ensure that the severity of the punishment is commensurate with the severity of the crime*** – Trafficking is a crime in which traffickers profit from the sale and exploitation of other human beings. As this crime is the modern manifestation of slavery, effective anti-trafficking statutes should require sentences and fines appropriate to the severe nature of such an offense, consistent with the existing Federal framework. Factors that should be considered as potential sentencing enhancements may include large numbers of victims, forcing captivity for long lengths of time, the use of a dangerous weapon, or if a death results from the crime.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
Classifying the crime as a Class C or Class D felony with low maximum sentences	<p>(1) TRAFFICKING IN PERSONS. Whoever knowingly</p> <p>(A) recruits, entices, harbors, transports, provides, or obtains, or so attempts, another person for the purposes of:</p> <p>(i) Commercial sex acts or sexually explicit performance, or</p> <p>(ii) Labor or services</p> <p>through use of any of the following means:</p> <p>(a) causing or threatening to cause serious harm to any person,</p>

	<p>(b) physically restraining or threatening to physically restrain another person,</p> <p>(c) abusing or threatening to abuse the law or legal process,</p> <p>(d) knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person,</p> <p>(e) blackmail,</p> <p>(f) causing or threatening to cause financial harm to any person, or,</p> <p>(h) facilitating or controlling a victim's access to an addictive controlled substance; or</p> <p>(B) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described subsection (A),</p> <p><u>commits a felony in the second degree.</u></p> <p>(2) SEXUAL SERVITUDE OF A MINOR. Whoever knowingly (A) recruits, entices, transports, provides, obtains, or harbors, or so attempts, any person under 18 years of age for the purposes of commercial sex acts or sexually explicit performance through any means; or (B) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described subsection (A);</p> <p><u>commits a felony in the first degree.</u></p>
COMMENTARY	
<p>In the suggested revision, the felony classes are increased, leading to stronger penalties and bringing State legislation into accordance with the existing Federal framework.</p>	

- 3) ***Include legislative provisions addressing restitution for victims and asset forfeiture*** - If existing restitution and forfeiture provisions will not be applicable to new trafficking statutes, new comprehensive trafficking bills should specifically include these remedies. Trafficking victims, once removed from their situation, often have little to no financial resources of their own because the trafficker has deprived them of the compensation to which the victim is entitled. Asset forfeiture seizes any profits from criminal activity of the trafficker, and restitution provides a means to

compensate the victim. These are important legislative provisions that help victims to rebuild their lives and appropriately punish the trafficker for their exploitative behavior.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>Legislation that does not include any mention of restitution or asset forfeiture.</p>	<p><u>RESTITUTION.</u></p> <p>(a) A person convicted of violations of this Title shall be ordered to pay restitution to the victim as provided in paragraph (b).</p> <p>(b) Restitution shall compensate the victim for:</p> <ol style="list-style-type: none"> (1) costs of medical and psychological treatment; (2) costs of physical and occupational therapy and rehabilitation; (3) costs of necessary transportation, temporary housing, and child care; (4) lost income; (5) attorney’s fees and other costs such as victim advocate fees; (6) gross income or value to the defendant of the victim’s services or labor; (7) compensation for emotional distress, pain, and suffering; and (8) any other losses suffered by the victim. <p>(c) Restitution shall be paid to the victim promptly upon the conviction of the defendant, with the proceeds from property forfeited under this Title applied first to payment of restitution. The return of the victim to her or his home country or other absence of the victim from the jurisdiction shall not prejudice the victim’s right to receive restitution.</p> <p><u>FORFEITURE</u></p> <p>(a) All property, including but not limited to money, valuables, real property and vehicles, of persons convicted of a violation of this Title that was used or intended to be used, or was obtained in the course of the crime, or benefits gained from the proceeds of the crime, shall be forfeited to the State. Overseas assets of persons convicted of trafficking in persons shall also be subject to forfeiture to the extent they can be retrieved by government. Any assets seized shall first be used to pay restitution to trafficking victims, as well as any punitive damages awarded to victims in the civil action.</p>
<p>COMMENTARY</p>	
<p>The suggested revision includes legislative provisions for restitution and forfeiture.</p>	

- 4) ***Include language that addresses the support structure of business entities that facilitate the process of trafficking in persons*** – Trafficking networks cannot operate without a support structure of legal business entities that also profit from their criminal activities. To address business entities that knowingly facilitate the operation of these criminal networks, it is important for State laws to include provisions that hold the support structure criminally liable for its behavior. As legal persons, any business entity can be rightfully held liable for violations of criminal and civil statutes.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
State laws that include no mention of any criminal liability of business entities.	<p><u>CRIMINAL LIABILITY OF BUSINESS ENTITIES</u></p> <p>(a) Any business entity that knowingly aids or participates in the trafficking of persons shall be criminally liable for the offense and shall be subject to a fine or loss of business license in the state, or both.</p>
COMMENTARY	
The suggested revision includes a specific section that addresses business entities and the support structure of a trafficking operation.	

SCOPE OF APPLICATION

- 1) ***Avoid requiring transport across State lines*** – Related to the above issue, movement across State lines or international borders is not a required element of the crime under Federal statutory code and the TVPA of 2000. Domestic trafficking within a country or trafficking within a particular State are equally addressed in the Federal criminal statutes.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
“Any persons who <u>import persons into this State or who exports persons from this State</u> , for the purposes of prostitution, or any person who induces, entices, or procures such activity shall be guilty...”	<i>See above Suggested Revision</i>
COMMENTARY	
All references to interstate transportation are removed.	

- 2) ***Avoid limiting victims of the crime to foreign nationals*** – While most media attention on human trafficking focuses on victims who are foreign nationals, the Federal criminal statutes make no distinction between foreign national or U.S. national victims. Ambassador John Miller, the Director of the Department of State’s Office to Combat and Monitor Trafficking in Persons, has emphasized that both U.S. and foreign nationals are victims of human trafficking and states that current statistics of the number of trafficking victims in the United States *do not include* those victims trafficked domestically. State bills consistent with the Federal framework on trafficking in persons similarly will ensure equal treatment of U.S. and foreign nationals.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
“...for victims which are trafficked <u>across international borders</u> and into this State.”	“VICTIM OF TRAFFICKING IN PERSONS.—The term “victim of trafficking in persons” means <u>any person, whether a U.S. citizen or foreign national</u> , who has been subject to the crime of trafficking in persons or sexual servitude of a minor.”
COMMENTARY	
The suggested revision emphasizes equal treatment of U.S. and foreign nationals, clarifying a common misconception regarding victims of the crime.	

- 3) ***Avoid restricting the definition of an offender to a “parent, guardian or custodian” in Sexual Servitude of a Minor*** – Pimps and traffickers, in many cases, are not parents, guardians, or custodians, and therefore, legislative language should not make these restrictions in order to be applicable in as many cases of victim exploitation as possible. If this language were used, cases of trafficking by a pimp, family friend, or another family member would not be covered by this legislation.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>“A <u>parent, guardian, or custodian</u> of a minor who knowingly or intentionally sells or transfers custody of a minor for the purpose of prostitution commits sexual trafficking of a minor, a Class A felony.”</p>	<p>SEXUAL SERVITUDE OF A MINOR. <u>Whoever</u> knowingly (A) recruits, entices, transports, provides, obtains, or harbors, or so attempts, any person under 18 years of age for the purposes of commercial sex acts, sexually-explicit performance, or production of pornography through any means; or</p> <p>(B) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described subsection (A);</p>
<p>COMMENTARY</p>	
<p>The suggested revision does not restrict the definition of an offender to a “parent, guardian, or custodian.”</p>	

- 4) ***Avoid restricting the elements of the crime to giving or receiving “money” and include the “promise” clause*** – In recognition that commercial sex may be procured for non-monetary compensation (e.g., housing, food, clothes, other goods), the DOJ model law defines a commercial sex act to occur when “anything of value is given or received by any person.” Specific references to “money” or a “fee” are removed. In addition, experience in numerous Federal cases over the past few years demonstrates that traffickers and/or users of commercial sex often use the “promise” of something of value as a coercive mechanism for a commercial sex act, although they may never provide the actual item of value. When legislative language dictates that a commercial sex act depends on the actual “giving or receiving” of something of value, this legislation does not cover the many instances where a commercial sex act occurs based on the “promise” of something of value.

EXAMPLE OF PROBLEMATIC LANGUAGE	SUGGESTED REVISION
<p>"Prostitution" means the engaging, agreeing to engage, or offering to engage in sexual acts or contacts with another person <u>in return for a fee</u>.</p> <p>COMMERCIAL SEX ACT.—The term "commercial sex act" means any sex act on account of which anything of value is <u>given or received</u> by any person.</p>	<p>COMMERCIAL SEX ACT.—The term "commercial sex act" means any sex act on account of which <u>anything of value is given, promised to, or received, directly or indirectly by any person</u>.</p>
<p>COMMENTARY</p>	
<p>In this example, the suggested revision corrects the non-comprehensive elements in both instances of problematic language.</p>	