

A REVIEW OF THE NEW YORK STATE SAFE HARBOR LAW

Written by Karen Wigle Weiss for ECPAT USA, April 2013

Safe Harbor Laws

A handful of states have enacted statutes commonly called Safe Harbor Laws. These laws address the question of how a minor who engages in prostitution or related acts will be treated when the minor comes to the attention of the authorities. But even those states that have not enacted a statute bearing the title Safe Harbor Law have laws that address this issue. The statutory schemes vary -- ranging from subsections within a more comprehensive anti-human trafficking statute to scatter-shot amendments to many existing statutes. Regardless of the statutory title or scheme, the laws address, to a greater or lesser degree, three ways of helping child sex trafficking victims.

1) Diversion -- treating trafficked individuals as victims, not criminals, and thereby protecting them from criminal prosecution, criminal records and criminal penalties. The laws provide varying approaches to deal with minors who have been arrested for prostitution in a civil or family court setting. States have attached different labels to the non-criminal proceedings, such as person in need of supervision (PINS), dependent child proceedings or abused child adjudication. Some states continue to permit adult criminal prosecution or juvenile delinquency proceedings despite the availability of non-criminal options.

2) Services -- providing safe housing and appropriate services, such as, counseling, medical treatment, education, drug treatment, and employment training; as well as legal avenues to seek monetary compensation in the form of restitution or a civil right of action; notice to victims of the available assistance and remedies; assistance to non-citizens with their immigration status.

3) Protection -- protection of the identity and personal information of the victims; and court proceeding protections such as the ability to testify via closed circuit television, limitation on cross-examination of the victim concerning past sexual behavior, and prohibition of a defense based on consent.

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New York enacted the first safe harbor law in the nation, Title 8-A Safe Harbour [sic] for Exploited Children Act, in 2008, but its effective date was postponed until April 1, 2010. The law amended and augmented two New York statutes: the Family Court Act and the Social Services Law.

This article shows that there are still serious shortcomings in New York's protection of sexually exploited children. Although New York's Safe Harbour Law designates 18 as the cut-off age for minors and allows for anyone under 18 who is suspected in engaging in prostitution to be diverted to the Family Court, the Penal Law still allows criminal prosecution of anyone 16 years old or older to be prosecuted in the criminal courts as an adult. With respect to the provision of services to victims the law's shortcoming is funding. The statute includes a laundry list of important services, but with respect to many, refrains from imposing a mandate that they be provided. Instead, the law amounts to little more than a suggestion that services be provided if funding is available.

Diversion

The statutory changes permit diversion of minors, defined as under 18 years old, suspected of engaging in prostitution, from the Criminal Courts to the Family Courts. But New York law still permits the criminal prosecution of anyone over 16 for any offense, including prostitution. The Penal Code provision defining prostitutionⁱ does not include a minimum age requirement and it designates 16 as the age of adult criminal responsibility. Thus, New York law is inconsistent in its treatment of minors detained for prostitution in that it is left to the discretion of the arresting or charging agency as to whether Criminal or Family Court proceedings will be commenced upon the detention of a 16- or 17-year-old child for prostitution.

New York's Safe Harbour Law provides that acts of prostitution committed by persons under 18 years of age may be addressed in the Family Court, instead of the Criminal Court, by the filing of a petition to have the minor declared a Person in Need of Supervisionⁱⁱ, in lieu of a criminal accusatory instrument. The definition of a person in need of supervision (PINS) includes anyone under the age of 18 who violates the prostitution lawⁱⁱⁱ or "who appears to be a sexually exploited."^{iv} A sexually exploited child is anyone under the age of 18 who has been the victim of sex trafficking^v or has engaged in an act of prostitution or has been found loitering for the purpose of prostitution, or has been the victim of the crime of compelling prostitution, or has been used in a sexual performance.^{vi}

Significantly, the Family Court PINS route may only be pursued if the child consents to the filing of a petition.^{vii} The law does not include any mechanism to override the minor's refusal to consent to substituting a PINS petition for a criminal or juvenile delinquency proceeding.

Similarly, minors under the age of 16 detained on a charge of prostitution can avoid juvenile delinquency proceedings by requesting substitution of a PINS petition for a juvenile delinquency proceeding.^{viii} In any juvenile delinquency proceeding based upon an arrest for prostitution, “there is a presumption that the respondent [juvenile] meets the criteria as a victim of a severe form of trafficking as defined in ... [the federal] Trafficking Victim Protection Act of 2000.”^{ix} Based on this presumption, the juvenile can force the substitution of a PINS proceeding, even without the consent of the agency that brought the proceeding. The statute, however, permits the continuation of the delinquency proceedings, at the court’s discretion, in two instances: 1) if the respondent has previously been adjudicated a delinquent based on a prostitution arrest or 2) if the juvenile is unwilling to cooperate with the services for sexually exploited youths. Once again, the law does not include any mechanism to overcome the juvenile’s refusal to consent or cooperate, even where that failure is the result of the influence of a trafficker.

In addition, if a parent, guardian or custodian can be identified as permitting or encouraging the detained minor to engage in prostitution, the minor can be treated as an abused child and avoid contact with the criminal or juvenile courts. The definition of an abused child was broadened to include a child under the age of 18 whose parent, guardian, custodian,^x or “any other person responsible for the child’s care” encourages or allows commission of prostitution-related crimes, or a sexual performance.^{xi}

New York law also provides a mechanism to remedy past instances of victims having been treated as criminal defendants. In 2010 the Legislature amended^{xii} the law to provide ameliorative relief to previously-convicted sex-trafficking victims. The amendment added a new ground for vacating a judgment of conviction for prostitution or loitering for the purpose of engaging in prostitution. Someone who was convicted of either of those crimes, at any time, may return to the court where the conviction was entered to vacate it on the ground that the person’s participation in the crime was as a result of being a victim of sex trafficking, as defined in New York Penal Law § 230.34 or human trafficking, as defined in 22 U.S.C. § 78.

If an arrest resulted in a juvenile delinquency adjudication, the respondent-juvenile can request the court to seal the records.^{xiii} The law permits such a motion after the respondent reaches the age of 16 and if the court finds that sealing it would promote the interest of justice.^{xiv}

Services

New York’s Safe Harbour Act broadens the definition of a sexually exploited child to include anyone under the age of 18 who has been the victim of sex trafficking,^{xv} or has been abused,^{xvi} or has engaged in prostitution^{xvii} or loitering for the purpose of prostitution,^{xviii} or is a victim of the crimes of compelling prostitution^{xix} or sexual performance by a child.^{xx} The impact of the broadened definition is increased provision of services.

The law delineates the services, such as housing, medical care, and counseling, that should be provided for sexually exploited children. The law mandates provision of certain services, but allows others services to be provided only as funding permits.^{xxi} The statute mandates social services districts to “address the child welfare services needs of sexually exploited children”^{xxii} and to include their need for such services in an annual county plan.^{xxiii} It also requires the New York State Office of Children and Family Services to contract with a not-for-profit agency with experience working with sexually exploited children to operate at least one safe house “in a geographically appropriate area” and provide “secure long term housing and specialized services for sexually exploited children.”^{xxiv} The law mandates that such a safe house be available as a placement upon final disposition of a PINS petition for a sexually exploited child.^{xxv}

Service providers are allowed to utilize pre-existing crisis intervention services and homeless youth facilities to house sex trafficking victims.^{xxvi} “To the extent that funds are available,” it tasks the service districts with establishing programs appropriate to address the “separate and distinct service needs according to gender” of sexually exploited youths.^{xxvii} The law also provides that “to the extent funds are available” the local social services commissioner should arrange for training of law enforcement on how to identify and obtain appropriate services for sexually exploited children.^{xxviii}

The New York Safe Harbour Law does not address the issue of financial compensation for victims -- either in the form of a civil cause of action or as restitution imposed on the trafficker as part of the a sentencing in a criminal proceeding. But the issue of financial compensation is covered by other provisions of New York law. The Penal Law^{xxix} provides that, upon disposition of a criminal case, courts “shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence” In so doing, “the court must make a finding as to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense.”^{xxx}

With respect to a civil action for damages, victims can proceed under the Rules of Civil Procedure and the Executive Law^{xxxi} which provides that “any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim . . . within three years of the discovery of any profits from a crime or funds of a convicted person.” A victim of a criminal offense has seven years to commence an action arising under a conviction for a crime generally, and ten years if the criminal conviction is for a class B felony, which includes sex trafficking, or a violent crime.^{xxxii}

Protections

In the event that a sexually exploited child is subjected to juvenile delinquency proceedings, the law permits the court, upon the initial court appearance, to direct that

the child be housed in a short-term safe house, rather than juvenile detention.^{xxxiii} Indeed, the law contains a strong preference for safe house accommodations. It requires Family Court Judges to place sexually exploited juveniles in safe houses unless there is an articulable basis to believe that detention is necessary to ensure that the child will appear in court.

The Act does not address issues related to court proceedings but New York laws that address the concern of protecting children and sex crime victims can, in some instances, be relied upon to protect sexually exploited children called upon to testify against their traffickers. For example, the Penal Law^{xxxiv} provides that a person less than 17 years old is incapable of consenting to any sex act defined in Article 130 of the Penal law, which includes all types of sexual contact. Notably, the incapable-of-consent rule is not expressly limited to prosecutions for crimes defined in Article 130. Instead, it is phrased in term of the sex acts mentioned in that Article. Therefore, although the crime of sex trafficking appears in Article 230, rather than 130, the incapable-of-consent rule would likely preclude a defense based on a claim that the minor consented to the acts committed. The protection provided by the inability-to-consent rule is limited because the rule is phrased to apply to only those minors who are less than 17 years old.

The issue of the permissive scope of cross-examination of a victim of sexual exploitation is similarly unaddressed. New York's Rape Shield Law^{xxxv} limits the admissibility of evidence of a victim's past sexual conduct. But, that section specifically limits the shield rule to prosecutions for offenses defined in Article 130 (Sex Crimes). Thus, the general rules of evidence would apply and such evidence could be admitted if the relevance of past sexual conduct is established. Moreover, even when an Article 130 crime is charged, the law permits admission of evidence that the victim was convicted of the crime of prostitution within the three years preceding the sex offense that is the subject of the prosecution.^{xxxvi}

Furthermore, the use of closed circuit television in lieu of in-court testimony is unavailable in a prosecution for sex trafficking because that procedure is limited to children under the age of fifteen and to prosecutions for sex crimes, defined in Article 130 and section 255 (incest) of the Penal Law.^{xxxvii} New York law does, however, contain a general provision about the treatment of child witnesses. Executive Law section 642-a (Fair Treatment of Child Victims as Witnesses) sets up guidelines for all agencies that deal with child victims, as well as for the courts. The guidelines dictate that the number of times a child is called upon to recite the events of a case should be minimized as should any delay in the proceedings that would add to the child's stress.^{xxxviii} The law directs judges to be sensitive to the psychological and emotional stress a child may suffer when testifying.^{xxxix}

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- ⁱPenal Code section 230.00,
ⁱⁱArticle 7 of the Family Court Act,
ⁱⁱⁱSection 230 of the Penal Law
^{iv}Family Court Act section 712[a].
^vPenal Law section 230.34
^{vi}Social Services Law section 447-a [1][a] through [d]
^{vii}Family Court Act section 712[a]
^{viii}Family Court Act section 311.4
^{ix}Family Court Act section 311.4[3]
^xA custodian is defined to include “any person continually or at regular intervals found in the same household as the child.”
^{xi}Family Court Act section 1012 [e][iii]
^{xii}Section 440.10 (1)of New York’s Criminal Procedure Law
^{xiii}Family Court Act section 375.2).
^{xiv}Family Court Act section 375.2 [1], [4]
^{xv}As defined in section 230.34 of the Penal Law
^{xvi}As defined in section 1012 (e)(iii) of the Family Court Act
^{xvii}Penal Law § 230.00
^{xviii}Penal Law § 230.47
^{xix}Penal Law § 230.33
^{xx}Penal Law Article 263; Social Services Law section 447-a
^{xxi}Social Services Law section 447-b.
^{xxii}Section 447-b[1]
^{xxiii}Section 447-b[3]
^{xxiv}Section 447-b[5]
^{xxv}Section 447-a[4]
^{xxvi}Section 447-b[1]
^{xxvii}Section 447-b[4]
^{xxviii}Section 447-b[6]
^{xxix}Section 60.27(1)
^{xxx}Penal Law section 60.27[2]
^{xxxi}Section 632-a (3) of the Executive Law (Crime Victims)
^{xxxii}Civil Procedure Law and Rules section 213-b
^{xxxiii}Family Court Act section 739[a]
^{xxxiv}Section 130.05(3)(a)
^{xxxv}Section 60.42 of the Criminal Procedure Law
^{xxxvi}Criminal Procedure Law section 60.42[3]
^{xxxvii}Criminal Procedure Law Article 65
^{xxxviii}Executive Law section 642-a [1], [3]