

Testimony of

**The Legal Aid Society**

at a public roundtable on

Examination of the Adequacy of Outreach and Social Services  
for Human Trafficking Victims

Presented to:

Assembly Standing Committee on Codes  
Assembly Standing Committee on Social Services  
Assembly Standing Committee on Oversight, Analysis and Investigation

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The Legal Aid Society welcomes the opportunity to comment at this roundtable to examine the adequacy of outreach and social services for victims of human trafficking. My name is Kate Mogulescu, and I am a Staff Attorney with The Legal Aid Society's Criminal Defense Practice. I run a specialized unit within that practice called the Trafficking Victims Legal Defense & Advocacy Project, dedicated to identifying and advocating for victims of sex trafficking caught in the criminal justice system.

The Legal Aid Society ("LAS") is the nation's largest and oldest provider of legal services to low-income families and individuals. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles over 300,000 cases and legal matters. Our Criminal Practice serves as the primary defender of indigent people prosecuted in the State court system. Our perspective comes from our daily contacts with clients and their families, and also from our frequent interactions with the courts, social service providers, and State and City agencies, including the New York City Police Department ("NYPD"), the Department of Probation, the Department of Corrections, and the various District Attorney's Offices. In addition to representing many thousands of people each year in trial and appellate courts, we also pursue impact litigation and other law reform initiatives on behalf of our clients.

The adequacy of current assistance options in New York State for trafficking victims is a critical question. Awareness of the issue of human trafficking has grown tremendously over the last several years, culminating with President Obama's announcement last month regarding enhanced federal efforts to combat the problem.<sup>1</sup> New York has emerged as a leader among States in the anti-trafficking movement, with a number of measures intended to address human trafficking. However, the majority of current efforts continue to focus on the investigation and

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<sup>1</sup> President Barack Obama, Remarks at the Clinton Global Initiative, New York, New York, September 25, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>

prosecution of traffickers rather than the support of survivors of trafficking. Adherence to a traditional criminal justice approach, with increased penalties for traffickers and resources directed only to law enforcement, does not solve this complicated problem alone.

At The Legal Aid Society, the continued criminalization of trafficking victims is the biggest issue we see. Through our work in the Criminal and Family Courts, we repeatedly see victims of sex trafficking arrested and prosecuted for conduct in which they are compelled to engage. Last year, nearly 3,500 people were arrested and prosecuted statewide for engaging in prostitution-related activity.<sup>2</sup> Overwhelmingly, those arrested are victims of ongoing trafficking and exploitation, and meet all of the legal criteria for sex trafficking under either New York or federal law.<sup>3</sup> This victimized group is comprised of both non-citizens and domestically trafficked people who experience extreme abuse, subjugation and exploitation.

In response, Legal Aid developed a specialized project that focuses on its representation of individuals charged with prostitution. The Trafficking Victims Legal Defense & Advocacy Project (“TVLDAP”) began in 2011 and represents the first effort by a public defender office to address the problem of systemic criminalization of victims of trafficking and exploitation. The project uses an interdisciplinary team of an attorney and a social worker to screen each case and connect clients to important services. The project further seeks to slow the pace of the criminal court process to allow time for clients to be adequately assessed, and build closer relationships

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<sup>2</sup> Source: DCJS, Computerized Criminal History Oracle file (as of 2/22/12). This number includes arrests under Penal Law § 230.00, Prostitution, and Penal Law § 240.37, Loitering for the Purpose of Engaging in a Prostitution Offense. It does not include arrests for patronizing a prostitute, promoting, compelling or permitting prostitution, or Sex Trafficking.

<sup>3</sup> See, e.g., Hon. Jonathan Lippman, *Opening Remarks, New York State’s Campaign Against Sex Trafficking: What’s Next?* October 5, 2012 (on file with author) (“Many [sex trafficking] victims end up in court as defendants charged with prostitution-related offenses, although few of their clients are arrested and even fewer of the traffickers or those who lead them into prostitution are ever charged.”).

with the project team. We work closely with several service providers in New York City, and nationwide, to ensure this marginalized client group has options for assistance and support.

In order to truly make headway in our State's effort to end human trafficking, we must find ways to end the devastating criminalization of victims that only exacerbates their danger, isolation and marginalization. In order to ensure that victims of human trafficking are identified and properly assisted, we must use our deepened understanding of the complexity of the phenomenon of trafficking to change victims' experience by creating opportunities for intervention, access to services not reliant on law enforcement, and more robust laws to support survivors and reduce the harmful impact of criminalization.<sup>4</sup> By looking at some promising practices that feature increased training across disciplines, by taking a comprehensive collaborative approach, and by examining the implementation of legislative solutions such as New York's vacatur law for trafficking survivors, we can continue to work to create solutions to human trafficking in New York State.

## **1. Training for Law Enforcement, Service Providers & First Responders**

Our clients face brutal exploitation and abuse at the hands of traffickers, and struggle with significant trauma histories, yet continue to face arrest. The devastating impact of all of this cannot be understated. Many victims struggle with lengthy criminal records as a result of their involvement with the criminal justice system. These records plague them, even after they

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<sup>4</sup> See, e.g., Stephanie Hanes, *Human Trafficking: A Misunderstood Global Scourge*, CHRISTIAN SCIENCE MONITOR, September 10, 2012 (quoting Professor Bridgette Carr, Director of the Human Trafficking Clinic at the University of Michigan Law School, "it's going to take more than that to overcome decades of criminalizing prostitutes. We're not seeing fundamental shifts in the way people who are being sold for sex are treated." Available at <http://www.csmonitor.com/World/Global-Issues/2012/0909/Human-trafficking-a-misunderstood-global-scourge>).

have escaped a trafficker, and act as a bar for many forms of housing, employment and other options. Furthermore, the experience of arrest and prosecution is itself quite traumatic.

One of the biggest contributing factors to this ongoing criminalization is a lack of mandatory training for law enforcement. For example, although the NYPD has a dedicated unit within its Major Case Squad that investigates cases of sex trafficking in New York City, the majority of prostitution arrests are not made by this unit. Instead, VICE squads, anti-crime, cabaret, and other units unfamiliar with the reality of sex trafficking make the majority of arrests for prostitution activity citywide. Because prostitution is considered a quality-of-life, or minor offense,<sup>5</sup> there is virtually no oversight or screening of prostitution arrests that could potentially lead to identification of or outreach to victims.

Arresting officers are in a position to identify a great number of trafficking victims, but the majority of officers have not received any training on sex trafficking. Indeed, an NYPD officer from the Midtown South Precinct, responsible for more than 250 prostitution arrests in his career, testified to exactly that in court recently. Despite having arrested a 17-year-old girl for prostitution, this officer, a member of the police force for 10 years, could not define sex trafficking, was unaware that New York had an anti-trafficking law, and had never been trained on the risk of commercial sexual exploitation of minors.<sup>6</sup>

Without a properly trained police force, sensitive to the risk of exploitation and trafficking that many involved in prostitution face, arrest policy in New York will continue to mistake victim for offender. However, training initiatives must also reach beyond law

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<sup>5</sup> See, e.g., Michelle McPhee, *Hooker Alert in Times Square: Cops in New Push to Rout Prostitutes and Drug Dealers*, N.Y. DAILY NEWS, May 4, 2002, at 6 (describing the NYPD's "Operation Neon Light," a "new quality-of-life initiative" unveiled to target prostitution and other low-level offenses); John Marzulli, *New War on Public Pests, Commish Focuses on Quality of Life*, N.Y. DAILY NEWS, Jan. 9, 2002, at 3 (same with "Operation Clean Sweep").

<sup>6</sup> Testimony given June 21, 2011, in New York County Criminal Court, *People v. I.G.* (Sealed).

enforcement. One important component of Legal Aid's work in this area has been to provide trainings to many criminal justice system participants, including judges, prosecutors and members of the defense bar. In the last two years, we have trained hundreds of defense attorneys and legal services practitioners to better identify victimization and exploitation among their clients, both in New York and across the country.<sup>7</sup> Indeed, many of the survivor referrals our project receives come from defense attorneys we have trained.

Finally, training must also extend outside of the criminal justice sphere altogether. First responders in all disciplines are likely to encounter victims of trafficking, but often lack the training to recognize the issue when presented. Medical and educational service providers must be trained on human trafficking and must develop best practices for engaging with victims in their various practice areas.<sup>8</sup>

## **2. Outreach to Trafficking Victims Must Occur Outside of the Context of Arrest**

### **a. Arrests Harm Trafficking Victims**

It has been argued that it is important to continue to make arrests for prostitution offenses, even though those arrested are likely victims of trafficking, because these arrests may be the only point of contact for a population that is otherwise difficult to reach. However, this analysis is flawed for two reasons: (1) victims of trafficking do, in fact, come into contact with other institutions that fail to identify them as such, and (2) once the arrest process is set in

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<sup>7</sup> Laurel Bellows, Letter to the Editor, *Victims of Human Trafficking*, N.Y. Times, October 10, 2012, available at <http://www.nytimes.com/2012/10/10/opinion/victims-of-human-trafficking.html>.

<sup>8</sup> See, e.g., Karen Schmidt, RN, *Washington Nurse Observes Teen Patients for Signs of Trafficking*, October 8, 2012, available at <http://news.nurse.com/article/20121008/CA02/110080002>; Heather Stringer, *Home-Grown Human Trafficking: Nurses on the Front Lines Help in Identifying Victims*, August 20, 2012, available at <http://news.nurse.com/article/20120820/NATIONAL01/308200028>; Patricia Leigh Brown, *In Oakland, Redefining Sex Trade Workers as Abuse Victims*, NEW YORK TIMES, May 24, 2011 at A13.

motion, it is difficult to reverse, and even more difficult to undo the overwhelming harm that can result.

Despite the increased awareness of human trafficking described above, and assertions that “prostitutes are now viewed, at least in part, as victims by law enforcement,”<sup>9</sup> this paradigm shift has been incomplete. In fact, the willingness to treat those arrested for prostitution as victims worthy of support only extends to a small percentage of arrestees. Law enforcement, and prosecutors, recognize that many arrested for prostitution are, in fact, victimized, yet only offer assistance to few of those victims. The default for those arrested for prostitution is criminalization.

Furthermore, when prosecutors encounter those who are arrested numerous times for prostitution, a population at high-risk for trafficking and exploitation, they routinely seek incarceration and do not attempt to link these defendants to services. Even where there is a specific suspicion that a criminal defendant may in fact be trafficked, prosecutors employ a heavy handed approach to attempt to compel cooperation with their investigations rather than work to connect the victim to services. Current practice places a heavy burden on victims to come forward in order to avoid criminalization and merit connection to much-needed services.

Although victim cooperation with law enforcement is one important part of a strategy to prevent and prosecute sex trafficking, this cannot be the only goal. A singular focus on cooperation with law enforcement, and an unwillingness to provide services or refrain from criminalizing unless a victim does cooperate, is irreconcilable with the reality many victims confront. Many victims face a significant safety risk if they provide information to law enforcement, a risk that is not eliminated even when a trafficker is arrested or incarcerated. Similarly, many victims have had negative experiences with law enforcement, and this presents

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<sup>9</sup> Sarah Maslin Nir, *Avenue of Vice*, NEW YORK TIMES, October 14, 2012, at MB1.

severe barriers toward building the trust necessary to cooperate in an investigation. Many victims are unaware that their experience meets the legal criteria for sex trafficking, as their only experience with law enforcement has been their own arrest for prostitution activity. Under current practice, those who are most entrenched in their trafficking situation and most in need of services face repeated criminalization.

Any analysis of this issue must take into account current arrest priorities and their consequences. Indeed, we must look at who is arrested in our State and why. An important secondary analysis must look at how the criminal justice system responds to those arrests. As discussed in more depth below, more must be done to ensure that we recognize the many victims of trafficking, exploitation and abuse that come through our court systems as criminal defendants and that our systems' responses are appropriate and just.<sup>10</sup> If we are concerned about the adequacy of our outreach efforts, we must focus these efforts in the non-arrest context so that victims can truly connect with the services they deserve.

### **3. Legislative Support for Trafficking Victims**

When considering how best to serve victims of trafficking, there are several legislative actions that, if taken, would drastically improve the provision of services to survivors and prevent the criminalization that harms survivors and challenges advocates.

- a. Access to services cannot be conditioned on identification by, or cooperation with, law enforcement.

Because victim interaction with law enforcement often results in less than ideal

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<sup>10</sup> Another example of this is in the context of victims of domestic violence charged as criminal defendants for conduct related to their victimization. An appropriate response is contained in the much-needed Domestic Violence Survivors Justice Act, (A.7874-A/S.5436), which, if passed, would allow judges the discretion to take into consideration a person's status as a domestic violence victim in the commission of a crime and, if applicable, apply a shorter or alternative sentencing option.



conditions for victims, access to services and benefits cannot be conditioned on a victim's identification by, or cooperation with, law enforcement. Currently, only a law enforcement agency or prosecutor's office can initiate a referral for the services made available for non-citizen trafficking victims under New York's Human Trafficking Law.<sup>11</sup> Thus, those victims of trafficking for whom cooperation with law enforcement is not possible, or about whom law enforcement simply may not be aware, are denied the opportunity to receive assistance, even when they are actively working with advocates or service providers.

It is imperative that New York State have additional ways of certifying victims and/or linking victims to services. Dedicated advocates working with survivors of trafficking are in the best position to identify victims and refer for services. Overreliance on law enforcement in this regard results in too many missed opportunities to connect victims to services and assist them in escaping trafficking. The Legal Aid Society supports the provision of the proposed Trafficking Victims Protection and Justice Act ("TVPIA"), A.9084, that would expand the scope of persons authorized to make such referrals to include designated established providers of social or legal services.

b. Reconcile Legislative Inconsistencies that Harm Trafficking Victims

i. Prevent the Prosecution of Sexually Exploited Children as Adults in Criminal Court

One of the most striking examples of a inconsistency in State law that continues to harm trafficking victims is the ongoing prosecution of sexually exploited minors as adults in our criminal courts throughout the state.<sup>12</sup> Despite the fact that those under 18 engaging in

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<sup>11</sup> Soc. Servs. L. § 483-cc.

<sup>12</sup> New York City Council Committee on Women's Issues, Committee Report on Res. No. 1346, June 11, 2012, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1134082&GUID=5110CD57-3F1A-4CA4-B61F-AEF8381B15EC&Options=&Search> ("[D]espite the policy shift underlying New York State's anti-

prostitution are clearly defined as victims of a severe form of sex trafficking by federal law,<sup>13</sup> and defined as “sexually exploited” children by New York law,<sup>14</sup> and despite the escalated penalties associated with trafficking or promoting prostitution of those under 18,<sup>15</sup> 64 minors under the age of 18 were arrested for prostitution activity and prosecuted as adults in criminal court in 2011.<sup>16</sup> A simple amendment to either the Penal Law or the Criminal Procedure law could easily remedy this discrepancy, and make certain that New York’s heralded anti-trafficking legislation does not continue to be undermined by inconsistent provisions. The Legal Aid Society supports the provision of the proposed TVPJA, A.9084, that would ensure that those under the age of 18 arrested for prostitution offenses are not prosecuted as adults in criminal courts throughout New York State.

ii. Affirmative Defense or Dismissal of Charges for Victims of Trafficking

New York has implemented an innovative remedy for those victims criminalized as a result of having been trafficked. The 2010 amendment to Criminal Procedure Law Article 440 creates a specific mechanism for survivors of trafficking to vacate prior prostitution convictions if the acts were committed as a result of having been trafficked.<sup>17</sup> This law was the first of its kind, although several other jurisdictions have now drafted and implemented similar provisions

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trafficking law of 2007, in practice teenaged trafficking victims are still arraigned in criminal court and largely treated as criminal defendants rather than victims of a devastating human rights abuse.”).

<sup>13</sup> 22 U.S.C. § 7101 (2006).

<sup>14</sup> Soc. Servs. L. § 447-a.

<sup>15</sup> See, e.g., P.L. §§ 230.32, 230.20 & 230.35.

<sup>16</sup> Source: DCJS, Computerized Criminal History Oracle file (as of 2/22/12).

<sup>17</sup> The law now provides, in relevant part, that a motion to vacate a judgment of conviction may be granted where: “[T]he arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or section 230.00 (prostitution) of the penal law, and the defendant’s participation in the offense was a result of having been a victim of sex trafficking under section § 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act.”

C.P.L. § 440.10(1)(i) (McKinney 2011).

to benefit survivors of trafficking.<sup>18</sup> Indeed, New York has served as a model for other States which have attempted to replicate the statute, and Legal Aid is proud of our ongoing efforts to bring this important relief to as many survivors as possible.<sup>19</sup> This legislation represents a critical step—as it acknowledges, and attempts to rectify, the fact that most survivors of sex trafficking have been arrested and criminalized as a result of having been trafficked. However, as already described, very little is being done to prevent the criminalization from occurring in the first place and eliminate the need for the post-conviction relief offered in the newly amended law.

Although C.P.L. § 440.10(1)(i) creates a post-conviction remedy for those criminalized as a result of having been trafficked, there is currently no legal bar to such a conviction occurring in the first place. Indeed, Legal Aid currently represents a trafficking victim on a pending matter in the Bronx, where she is charged with one count of Prostitution, and was seventeen years old at the time of her arrest. Despite her extensive experience at the hands of brutal pimp-traffickers, replete with violence, sexual assault, and degradation, the court denied a motion to dismiss the pending charge, because in seeking such relief, her attorneys “put the cart before the horse.”<sup>20</sup> Although a tragic outcome for this client, the court was correct in noting that “none of the laws cited by [the victim] bars prosecution of prostitution-related offenses due to sex trafficking.”<sup>21</sup>

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<sup>18</sup> Andrew Keshner, *Prostitution Conviction is Vacated Under New Law*, 245 N.Y.L.J. See, e.g., 725 ILL. COMP. STAT. ANN. 5/116-2.1 (West 2011); MD. CODE ANN. CRIM. PROC. § 8-302 (West 2012); NEV. REV. STAT. § 176.515 (West 2011).

<sup>19</sup> Erica Pearson, *New Law Lets Sex-Trafficking Victims Clear Their Convictions*, N.Y. DAILY NEWS, Sept. 9, 2012, at 18.

<sup>20</sup> Decision & Order, *People v. S.L.*, 2009BX023789 (Dawson, J.)(Bronx Co. Sup. Ct. July 27, 2012)(on file with author).

<sup>21</sup> *Id.* The court went on to note that “it would have been relatively easy for legislative authorities to draft such legislation. Rather, the State of New York chose to offer **post-conviction relief** to the victims of sex trafficking. See 440.10(1)(i).”

A statutorily-created affirmative defense of sex trafficking would close this gap. Such a defense would reinforce to criminal justice system participants the obligation to investigate cases involving prostitution to determine whether trafficking exists, and would allow victims facing criminal prosecution to avoid unjustly imposed convictions, obviating the need for a subsequent post-conviction motion to vacate. Another alternative is to provide sex trafficking victims with an explicit basis for dismissal of a pending charge. This could be a specific factor enumerated in the Criminal Procedure Law section governing dismissal in the interest of justice.<sup>22</sup> Either way, there must be a mechanism through which victims of trafficking currently facing prosecution can seek relief from a trial court prior to a judgment of conviction. Legal Aid supports the provision of the proposed TVPJA, A.9084, that would establish sex trafficking as an affirmative defense to prostitution offenses.

b. Expand Safe Housing Options for Trafficking Survivors

Finding appropriate supportive housing is one of the biggest barriers to providing services to survivors of trafficking.<sup>23</sup> Commonly, “housing of any type is often unavailable.”<sup>24</sup> This impacts survivors of all ages, and drastically limits service providers’ ability to successfully engage with survivors. Without stable housing, survivors are unable to gain safety or build independence.<sup>25</sup> Both emergency/crisis housing and dedicated long-term supportive housing must be available for survivors, and it must be available to those survivors who are

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<sup>22</sup> C.P.L. § 170.40.

<sup>23</sup> Noy Thrupkaew, *A Misguided Moral Crusade*, NEW YORK TIMES, September 23, 2012 at SR14 (“Nearly 90 percent of the minors profiled in a John Jay College study indicated they wanted to leave ‘the life’ — but cited access to stable housing as one of the biggest obstacles. In New York City alone, almost 4,000 homeless youths lack stable housing, yet there are barely more than 100 long-term shelter beds to serve them.”); *see also* Gregory Maney, Tineka Brown, et al., *Meeting the Service Needs of Human Trafficking Survivors in the New York City Metropolitan Area*, Hofstra University (2011)(available at <http://lifewaynetwork.org/wp-content/uploads/2011/11/Hofstra-University-LifeWay-Network-Report-2011.pdf>).

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.*

undocumented but beginning the process of applying for status in the United States as a result of having been trafficked.

### **Conclusion**

Although New York has emerged as a leader in the anti-trafficking movement, and developed innovative legal tools to combat human trafficking, more needs to be done to make it truly so. It is critical that we continue to look carefully at our anti-trafficking efforts, legislative and otherwise, in order to continue to refine, perfect and strengthen the safety net for those who are trafficked. We must continue to craft intelligent and pragmatic responses to the problem – to successfully reach victims of trafficking, and to prevent their unjust criminalization. New York State must provide specific training for law enforcement and other first responders, must continue to reevaluate arrest and prosecution policy, and must dedicate specific and sufficient resources, in order to prevent the re-victimization of survivors of trafficking in the criminal justice system. We look forward to continuing to work with the New York State Legislature on this important issue and we would welcome the opportunity to discuss these issues with you in further detail.