

# LAWYER'S MANUAL ON HUMAN TRAFFICKING

PURSuing JUSTICE FOR VICTIMS

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SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT • NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS

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## The Passage of the Safe Harbor Act and the Voices of Sexually Exploited Youth

by Katherine Mullen and Rachael Lloyd

I was arrested for prostitution, and put in jail. The John was released. I was sentenced and sent upstate for a year. He was sent to a special school [for a couple of evenings] and his case was dismissed. There was no school for me.

— *A youth arrested on prostitution charges  
in New York City, circa 2003*

**The Safe Harbor Act,<sup>1</sup> signed into law by New York Governor David Paterson on September 25, 2008,** is the first state law recognizing that young people who have been subjected to commercial sexual exploitation are victims — not perpetrators — of crimes. The passage of the Safe Harbor Act represented the culmination of over four years of efforts, including bill drafting, public education, and most importantly, youth advocacy. It also marked the beginning of a national movement to pass similar state laws for the protection of child victims of sexual exploitation.

### Genesis of The Safe Harbor Act

In 2003, Nicolette, a twelve year old girl, was charged with an act of prostitution. Representing her in an appeal before the First Department of New York's Appellate Division, The Legal Aid Society argued that because of her age she was legally incapable of consenting to participate in a sexual act, that Nicolette was, in fact, a victim, not a perpetrator, of child prostitution, and that, therefore, she could not be charged with committing an act of prostitution. While sympathetic to Nicolette and willing to change the dispositional order that had sent her to a juvenile detention facility upstate, the Appellate Division

declined to address the inequity within the different sections of New York law.<sup>2</sup> Sadly, Nicolette's case was not unusual. Throughout New York City, teenage and pre-teen girls were routinely arrested and charged with acts of prostitution even though they were too young to legally consent to sex.

In the fall of 2004, the Juvenile Justice Coalition of the Correctional Association of New York (Juvenile Justice Coalition), the Juvenile Rights Practice of The Legal Aid Society, and the Girls Educational Mentoring Services (GEMS) formed a working group to redress this inequity. Together these three organizations made a commitment to drafting and working to pass legislation that would establish that commercially sexually exploited youth are victims of crimes who should be provided with services, not prosecuted for committing criminal acts.

Each of these organizations was well-positioned to contribute to the project. The Juvenile Justice Coalition is a network of child advocacy groups, legal service providers, alternative sentencing programs, and community-based organizations working to make the juvenile justice system in New York more fair and effective. The Juvenile Rights Practice of The Legal Aid Society represents in Family Court many of the children who have been the victims of commercial sexual exploitation. The largest child advocacy organization in New York State, it represents children in child protective proceedings, persons in need of supervision (PINS) proceedings, and juvenile delinquency proceedings in all five boroughs of New York City. GEMS is the only non-profit organization in New York specifically designed to provide services to commercially sexually exploited girls and young women founded by a survivor of commercial sexual exploitation. GEMS is committed to developing survivor leadership and to ensuring that the voices and experiences of commercially sexually exploited youth are at the forefront of the movement against trafficking and the commercial sexual exploitation of children.

### **The Campaign for the Safe Harbor Act**

Soon after this working group was formed, meetings were arranged in Albany between legislators and youth survivors from GEMS. The girls shared their stories of abusive homes, fractured families, and institutional failures that left them vulnerable to the advances of adult men who would offer shelter, food, and the promise of love. They spoke of the high price that this "love" cost them: a life of being bought and sold night after night to adult men and repeated

violence and torture from both their pimps and the “johns.” Along with their physical trauma, the girls told how alone they felt when the police, who were supposed to protect them, arrested and incarcerated them. They spoke of the stigma and scorn that they faced from other youth and staff alike within juvenile detention facilities and how they received no support or services from these facilities, often returning to their exploiters as soon as they were released. The girls also talked about their experiences with GEMS, the importance of hearing for the first time that they were not criminals but victims, and the impact of having a place like GEMS where people understood what they had experienced and provided them with services, safety, and most importantly, real support. The girls said that they felt lucky and told legislators that their advocacy was grounded in the hope that their peers would not need luck to be treated as victims and receive much-needed services.

The meeting was a success. After listening to the young women from GEMS, NYS Senator Dale Volker and NYS Assembly Member William Scarborough offered to sponsor legislation proposed by the coalition. Following the meeting, J.R. Drexelius, Jr., Counsel to the Senate Codes Committee, wrote to the survivors whom he had heard speak and said “. . . Meeting with your group reminds me of why I enjoy what I do — I can make a difference. It may take some time but we will change the way people think about this issue and end up helping a lot of young people.” His commitment to creating “a safe harbor” in New York State for children who had been sexually exploited was the genesis of the name of the proposed law.

The initial drafting of the Safe Harbor Act was guided by two main objectives: to stop criminalizing the child victims of domestic sex trafficking by prosecuting them for acts of prostitution and to create the services desperately needed by child victims of sexual exploitation and the legal authority to provide these services. The task was difficult because the legal issues involving children who have been commercially sexually exploited are not neatly addressed by one section of New York’s laws. Rather, a web of statutes, including various sections of the Penal Law, the Family Court Act, and the Social Services Law, as well as federal laws governing the protection of trafficked persons and runaway and homeless youth, are all involved in the protection of sexually exploited youth. The Safe Harbor Act was drafted to incorporate the protections already found in federal law and make the necessary changes to existing state law.

The draft legislation helped resolve a contradiction in existing New York law. By establishing the age of consent to sexual activity at seventeen,<sup>3</sup> New York law recognizes that, because of infancy, a child under seventeen is

incapable of consenting to a sexual act. Commonly referred to as the statutory rape law, this section of the Penal Law protects children from sexual abuse, with tougher penalties for perpetrators who abuse younger victims. However, the Penal Law definition of prostitution makes no reference to age. It simply states that “[a] person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”<sup>4</sup> The only age restriction in prosecuting a child for an act of prostitution is found in Article Three of the Family Court Act, the body of law used to prosecute children accused of committing criminal acts, which requires that the subject child of any proceeding be over seven years of age.<sup>5</sup>

Thus, ironically, under New York law, the same child who under Article 130 of the Penal Law was incapable because of age to consent to a sexual act was deemed under Article 230 of the same Penal Law to have the capacity to consent to sexual conduct in return for a fee. A thirteen year old child who was considered the victim of rape in the second degree could simultaneously be prosecuted for committing an act of prostitution.<sup>6</sup> The decision to prosecute or protect a child victim of domestic trafficking remained solely in the discretion of the District Attorney’s offices and/or the Family Court prosecutorial bodies.<sup>7</sup>

The first version of the Safe Harbor Act attempted to reconcile the dichotomy between the two statutes by amending Article 230 of the Penal Law to include an age requirement, so that the law would provide that a person could only be “guilty of an act of prostitution if that person, *who is over the age of seventeen*, engaged or agreed or offered to engage in sexual conduct with another person in return for a fee.” However, this approach met with overwhelming opposition. At the time, the NYS Assembly was resisting efforts to reinstate New York’s death penalty. Reluctant to look soft on crime while taking a strong anti-death penalty position, the members of the Assembly were unwilling to consider any legislation that would lessen criminal penalties. Also, prosecutors were concerned that without the “hammer” of the threat of prosecution and incarceration they would never have victims willing to testify against pimps and johns, even though efforts to leverage testimony from victims using the threat of incarceration had proven unsuccessful. The original version of the Safe Harbor Act never progressed out of committee.

By the spring of 2006, it had become clear that a bill amending the Penal Law definition of prostitution to exclude youth under the age of eighteen would never pass the Assembly. Some opponents of the bill viewed commercially sexually exploited youth as “teen hookers” and “lolitas” who should be held criminally accountable for their actions. Others wanted to protect prostituted children but were concerned that without the ability to lock up these young people there was

no way to keep them safe. Thus, the challenge in drafting the Safe Harbor Act became changing the law without changing the Penal Law and creating a mechanism for keeping the child victims of commercial sexual exploitation safe without relying on the default “safest course” of incarceration. A version of the Safe Harbor Act was introduced that proposed amending the Family Court Act, first, to change the definition of a juvenile delinquent to exclude youth who were charged with committing acts of prostitution, and, second, to amend the Persons in Need of Supervision article to include the provision of services to commercially sexually exploited youth.

While this new version passed in the Assembly, it died in the Senate. However, the Assembly and Senate did pass legislation requiring the New York State Office of Children and Family Services to conduct a study on sexually exploited youth by December 2006. Although the methodology of the resulting survey was compromised by its brevity and the difficulty in finding what is frequently a hidden population, it did identify approximately 2,300 commercially sexually exploited youth in New York City, and 400 commercially sexually exploited youth upstate and in western New York.<sup>8</sup>

While additional drafts of the Safe Harbor Act were proposed and debated, the lobbying efforts of the youth survivors continued. The young women from GEMS continued to speak out at legislative briefings, at City Council hearings, in meetings with individual legislators, and to the press. In March of 2007, several survivors of juvenile prostitution, most of them girls who had been active advocates from the inception of the bill, spoke at a roundtable of NYS Assembly Members. One girl told about how she had been placed in juvenile detention for three years despite the fact that she had been the primary witness in the prosecution of her pimp. Another girl talked about her multiple incarcerations in Rikers Island Correctional Facility, all prior to the age of 16. In addition to sharing their stories, the young women provided recommendations about what worked for helping commercially sexually exploited youth and what did not. These young people had become confident advocates, showing considerable insight and expertise on the issue and impressing the audience with their strength and resilience.

It was clear to everyone in the room that criminalizing these girls was unfair and unjust. An article in the *Legislative Gazette* described their moving testimony before the “teary-eyed” roundtable of Assembly Members. It noted that Assembly Member Joseph Errigo had to regain his composure before thanking the girls for sharing their stories.<sup>9</sup> Within hours of this meeting, Assembly Member Errigo and dozens of other Assembly Members, both Democratic and Republican, had signed

on as sponsors of the bill. Unfortunately, the Assembly and Senate could not agree on a final version of the Safe Harbor Act.

Despite the legislative setbacks, public support for the bill continued to grow. *The New York Times*, in editorials and columns, called for the passage of the Safe Harbor Act.<sup>10</sup> In addition to the Juvenile Justice Coalition, GEMS, and The Legal Aid Society, many other organizations, including The Empire State Coalition for Youth and Family Services, Equality Now, Sanctuary for Families, NOW NYC, the Coalition Against Trafficking in Women, and ECPAT, advocated for passage of the Safe Harbor Act. But the voices of the young survivors continued to be the most powerful of all.

## The Final Legislation

In 2008 the Assembly and Senate came to an agreement on language, and the final version of the Safe Harbor Act was introduced. Under the existing Article Three of the Family Court Act, a Family Court judge, prior to a trial or plea and with the consent of a prosecutor, could convert a delinquency proceeding to “a person in need of supervision,” or PINS, proceeding.<sup>11</sup> This allowed the Court to authorize the provision of services, and, since he or she was no longer charged with committing a criminal act, the court no longer had authority to lock up the child. However, since converting the delinquency proceeding to a PINS proceeding required the consent of the prosecutor, it was rarely done — and in cases involving allegations of prostitution never done.

The version of the Safe Harbor Act on which both houses of the NYS legislature ultimately agreed creates a presumption that a child who is charged in Family Court with committing an act of prostitution is a victim of human trafficking as defined in federal law. As such, the court must convert the proceeding to a PINS proceeding, and specialized services for the child must be provided. Only if the child has previously been found to have committed an act of prostitution or declines to accept services does the court have the discretion to continue the delinquency proceeding.<sup>12</sup>

The Safe Harbor Act also recognizes that the majority of youth who are commercially sexually exploited do not get arrested yet are equally in need of services. Accordingly, the Safe Harbor Act amends the PINS provisions of the Family Court Act<sup>13</sup> and the Social Services Law<sup>14</sup> to allow the Court to authorize the provision of services to any sexually exploited youth under the age of eighteen. The law also calls for the creation of safe houses and authorizes safe

houses to accept sexually exploited youth. It further requires that a long term residential program be available to the young victims of domestic sex trafficking with a panoply of services to address their special needs. In addition, the law makes provisions for specialized law enforcement training.

### **Final Victory: Enactment of the Safe Harbor Act and Beyond**

On June 19, 2008, by unanimous vote, the Safe Harbor Act was passed by the NYS Assembly. On June 23, 2008, the NYS Senate passed the Safe Harbor Act, also with a unanimous vote. On September 25, 2008, Governor David Paterson signed the Safe Harbor Act, and it became law with an effective date of April 1, 2010.

The passage of the law sent a strong message to the rest of the nation that commercially sexually exploited youth in New York would, rightfully, be treated as victims not criminals. Since then, three other states have passed “Safe Harbor” laws<sup>15</sup> and many other states have similar legislation pending. In June of 2010, six years after the Appellate Division heard the *Nicolette* appeal that triggered interest in reforming New York’s laws, the Supreme Court of Texas, in *The Matter of B.W.*,<sup>16</sup> held that because a thirteen year old child cannot consent to sex as a matter of law, a thirteen year old could not be prosecuted for prostitution. The Texas Court concluded, “It is difficult to reconcile the Legislature’s recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involved their own sexual exploitation.”<sup>17</sup>

To a large extent, this victory belongs to a courageous group of girls and young women who shared their stories, fought for their peers, and sparked a national reform movement. For girls who had been stigmatized and marginalized because of their race, age, socio-economic status, gender, and histories of commercial sexual exploitation, it was no small victory. The young women’s determination to create change and to help other sexually exploited children throughout the country made a huge impact on their own lives. Recently, one of the young women, who at fourteen was part of the original group who went to Albany in 2004, testified before Congress on the need for nationwide Safe Harbor laws and services. When Senator Al Franken commended her for her poise, she credited her lack of nervousness to the fact that she had “grown up

advocating.” This young woman and her peers have already achieved what many said was impossible. In doing so, they have proved to themselves and to others that the voices of survivors of commercial sexual exploitation are uniquely powerful in the ongoing fight against the trafficking of children and youth in our country.

## Appendix

### Provisions of the Safe Harbor Act of 2008

The Safe Harbor Act made changes to a number of laws, including the Social Services Law, the Executive Law, and the Family Court Act.

#### **Social Services Law: Definition of “Sexually Exploited Child”**

The term “sexually exploited child” is now defined in Social Services Law § 447-a as any person under the age of eighteen who has been subject to sexual exploitation because he or she (a) is the victim of the crime of sex trafficking; (b) engages or agrees or offers to engage in sexual conduct with another person in return for a fee; (c) is a victim of the crime of compelling prostitution; or (d) engages in loitering for the purpose of prostitution.

#### **Social Services Law: Short-Term Safe Housing**

In recognition that one of the greatest needs of a sexually exploited child is supportive housing, Social Services Law § 447-a defined “short-term safe house” as a residential facility that provides emergency shelter, services, and care to sexually exploited children including food, shelter, clothing, medical care, counseling, and appropriate crisis intervention services. Significantly, short term safe housing is available to youth at the time that they are taken into custody by law enforcement or are with the commissioner of social services, residing with the local runaway and homeless youth authority, or are either the complaining witness or the subject child of a legal proceeding, for the duration of any legal proceeding or proceedings.

#### **Social Services Law: Advocate for Children in Safe Housing**

A sexually exploited youth who resides in a short-term safe house will have an advocate, which is defined in the social services law as someone who has been trained to work with, and advocate for the needs of, sexually exploited children, and who shall accompany the child to all court appearances and serve as a liaison between the short-term safe house and the court.

#### **Social Services Law: Notification to Parents, Guardians, and Custodians**

Once a sexually exploited youth arrives at a short-term safe house, Social Services law § 447-a(4) requires that an advocate or other appropriate staff shall, to the maximum extent possible, preferably within twenty-four hours but

within no more than seventy-two hours following admission other than pursuant to a court order, notify the child's parent, guardian, or custodian of his or her physical and emotional condition and the circumstances surrounding the child's presence at the program, unless there are compelling circumstances why that notification should not occur. If necessary, the advocate shall either file the appropriate petition in family court, refer the youth to the local social services district, or, when abuse or neglect is suspected, report such case pursuant article six of the social services law.

**Executive Law: Definition of a Safe House**

The term "safe house" is defined in § 532 of the Executive law as a residential program for sexually exploited children which provides necessary services including: housing; assessment; case management; medical care; legal, mental health, and substance and alcohol abuse services; and, when appropriate, counseling and therapeutic services and educational services. The safe house is available for a sexually exploited child for duration of a legal proceeding, or for a sexually exploited child who is not the subject of a proceeding.

All of the services created may, to the extent possible provided by law, be available to all sexually exploited children whether they are accessed voluntarily, as a condition of an adjournment in contemplation of dismissal issued in criminal court, through diversion services provided through a PINS proceeding, through a juvenile delinquency proceeding, a child protective proceeding, or through a referral from a local social services agency.

**Family Court Act: Authorization for Police to Take Arrested Children Directly to a Safe House**

If a youth under the age of sixteen is arrested for an act of prostitution, Family Court Act § 305.2 authorizes the arresting officer to take the child directly to an available short-term safe house instead of a detention facility.

**Family Court Act: Presumption that Sexually Exploited Children are Victims of a Severe Form of Trafficking**

Family Court Act § 311.4(3) creates a presumption that a respondent brought to Family Court for a prostitution-related offense meets the criteria as a victim of a severe form of trafficking as defined in § 7105 of title 22 of the United States Code (Trafficking Victims Protection Act of 2000).

**Family Court Act: Treating Sexually Exploited Children as PINS**

Upon the motion of the respondent, without the consent of the presentment agency, a petition alleging that the respondent is in need of supervision shall be substituted for the delinquency petition. If, however, the respondent has been previously adjudicated as a juvenile delinquent under this article for an act which would be a crime pursuant to § 230 of the Penal Law, if the respondent was an adult, or expresses a current unwillingness to cooperate with specialized services for sexually exploited youth, continuing with the delinquency proceeding shall be within the court's discretion. The necessary findings of fact to support the continuation of the delinquency proceeding shall be reduced to writing and made part of the court record. If, subsequent to issuance of a substitution order under this subdivision and prior to the conclusion of the fact finding hearing on the petition alleging that the respondent is a person in need of supervision, the respondent is not in substantial compliance with a lawful order of the court, the court may, in its discretion, substitute the original petition alleging that the respondent is a juvenile delinquent for the petition alleging that the respondent is in need of supervision.

**Family Court Act: Amending the Definition of a Person in Need of Supervision**

So that the Family Court can authorize the provision of services to all sexually exploited youth under the age of eighteen, whether they are the subject of or complainant in a criminal court proceeding, the subject of another family court proceeding, or voluntarily wish to access services, the definition of a "Person in need of supervision" was amended. It now includes a child who has violated the Penal Law § 230.00, or who appears to be a sexually exploited child as defined by the social services law, but only if the child consents to the filing of a petition under this article.

## Notes

1. L 2008, Ch. 569, amended by L 2010, Ch. 58.
2. *Matter of Nicolette*, 9 AD 3d 270 (1st Dept. 2004).
3. Penal Law § 130.05(3)(a).
4. Penal Law § 230.00.
5. Family Court Act § 301.2(1).
6. Children over the age of seven and under the age of sixteen are prosecuted in Family Court for committing criminal acts and are accused of being juvenile delinquents. Sixteen year old youth, also deemed incapable of consenting to sexual conduct by reason of infancy, are prosecuted as adults in criminal court.
7. In New York City, the Office of the Corporation Counsel prosecutes children in Family Court.
8. Frances Gragg, *et al.*, *Final Report: New York Prevalence Study of Commercially Sexually Exploited Children*, April 28, 2007.
9. Ariana Cohn, *Legislative Gazette*, March 12, 2007.
10. Opinion, "Children in Need of Safe Harbor," *The New York Times*, Sept. 15, 2007; Clyde Haberman, "Helping Girls as Victims, not Culprits," *The New York Times*, July 8, 2008; Opinion, "Safe Harbor for Exploited Children," *The New York Times*, June 5, 2007.
11. Family Court Act § 311.4.
12. Family Court Act § 311.4(3).
13. Family Court Act § 712(a) adds "or has been the victim of sexual exploitation."
14. Social Services Law § 447-a and b.
15. Connecticut (Public Act 10-115); Washington (SB 6476, passed Apr. 1, 2010); Illinois (Safe Children Act HB 6462, passed Aug. 20, 2010).
16. *In the Matter of B.W.*, 313 S.W. 3d 818 (Texas 2010).
17. *Id.* at 821-22.