

# Model Mitigation Statute

## Essential Elements

---

Criminal procedures, trafficking, prostitution-related criminal laws, and political environments vary widely across the United States, which means enacting effective mitigation laws will require a nuanced approach specifically tailored to each state. Thus while the Renewal Forum puts forward a model text, it is with the realization that different situations will call for variations on this theme. However, at the basic level the following elements are essential to effective legislation aimed at rescuing and reintegrating victims caught in the commercial sex industry after being trafficked as minors.

### 1. *Accurate definitions of human trafficking and commercial sexual activity*

Most of the time these terms, or analogous ones, have already been defined in other sections of the state code, and may simply be referenced and adapted to refer to a minor victim. If for some reason the state does not have an appropriate definition of these terms, the federal Trafficking Victims Protection Act of 2000 has good definitions<sup>1</sup>:

“The term ‘commercial sex act’ means any sex act on account of which anything of value is given to or received by any person.”

“The term ‘severe forms of trafficking in persons’ means—

- (A) Sex trafficking in which a commercial sex act is introduced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) The recruitment, harboring, transportation, provision, or obtaining a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude or peonage, debt bondage, or slavery.”

### 2. *Careful identification of possible predicate offenses*

Although prostitution will probably be the most common offense for which trafficking victims will be prosecuted, other commonly charged prostitution-based crimes may include loitering for prostitution, solicitation for a prostitute, keeping a house of prostitution, promotion of prostitution, disturbing the peace, disorderly conduct, and others. The offenses for which this provision is made applicable will vary depending on the state’s prostitution-related laws and prosecution practices.

Because trafficking victims are often coerced into committing other crimes beyond commercial sexual activity, such as drug trafficking or illegal possession of weapons, this provision would ideally apply to any offense that is a direct result of the defendant’s history of trafficking.

### 3. *Broad range of evidence admitted for proving trafficking history; preponderance standard*

---

<sup>1</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (pertinent definitions codified at 22 U.S.C. § 7102(3) Commercial sex act, and § 7102(8) Severe forms of trafficking in persons).

Because this provision is intended to benefit trafficking victims who have not been previously identified and rescued, it is crucial that the court be allowed to consider a wide range of evidence in making its decision. Although many trafficking victims have police and court records that show they were forced into commercial sexual activity while still a minor, others may not. Permitting courts to consider other credible evidence, such as sworn statements from medical professionals, victim service providers, and counselors helps ensure that legitimate victims do not slip through the cracks.

The level of proof needed to establish a prior trafficking history should be a preponderance of the evidence standard. This is the typical standard for establishing mitigating circumstances.<sup>2</sup>

#### 4. *Deferred/ suspended sentence + diversion program as recommended response*

Trafficking is unique among crimes due to the level of psychological and emotional trauma suffered by victims over years of abuse. Many victims begin to think that their situation is normal, that they do not deserve anything better, and that the criminal justice system is rigged against them, so they stop looking for ways out. This mindset becomes particularly entrenched when the victim is trafficked as a minor.

In order to break the cycle and successfully reintegrate these victims into society, it is essential to provide a viable alternative to fines and time behind bars. Additionally, offering to defer or suspend the defendant's sentence in exchange for completing a certified treatment program not only gives them a way out, but it also represents a very effective method of preventing recidivism.<sup>3</sup>

#### 5. *Judicial discretion*

The presumptive remedy should be a deferred or suspended sentence along with a certified treatment program but the court should also be given discretion to fashion an appropriate response as this is often the best way to implement the spirit of the law. Including the presumptive remedy in the text demonstrates the legislature's intent and provides guidance to the court, while recognizing that there will be situations that call for a personalized response. Alternatively, this section may be modified to refer to a state's preferred diversion program or treatment plan.

#### 6. *Limited eligibility (optional)*

Although not essential, a state may decide to limit the number of times a defendant may move for mitigation under the provision. This could help counteract any impression that the

---

<sup>2</sup> See 24 C.J.S. *Criminal Law* § 2121 (2012).

<sup>3</sup> See Dominique E. Roe-Sepowitz, "Adult Prostitution Recidivism: Risk Factors and Impact of a Diversion Program," *Journal of Offender Rehabilitation* 50, no. 5 (14 Jul 2011): 272-85 (noting recidivism rate of only 14.5% for diversion program graduates within a year of completion); Dee V. Nelson, Ralph Leonard, "Recidivism Among Women Charged With Prostitution Who Participated In At Least Six Months Of Residential Rehabilitation Compared To Community Controls," *The Internet Journal of Health* 11, no. 2 (2010) (finding 29% lower recidivism rate for diversion program graduates).

provision is simply a revolving door, as well as reinforce to participants the importance of sticking with the assigned diversion program and avoiding relapse.

## Conclusion

---

Mitigation laws address a gap in the coverage of existing laws designed to identify and intercept trafficking victims. Trafficked minors who have aged out of rescue provisions targeting juveniles are still worthy of being reintegrated into society. This law also recognizes the reality that many victims of trafficking age out of provisions aimed at minor victims before they are able to escape their cycle of victimization. This law would be a small but important step in realizing the damaging realities of sexual exploitation. Rather than cycling them through the criminal justice system and back onto the streets, this law would offer defendants with a history of trafficking an opportunity to break free from commercial sex industry and reenter society as valued, productive individuals.

## Example Provision

### Trafficking history as a mitigating circumstance

a) For the purposes of this section:

- (1) human trafficking is defined as . . .
- (2) commercial sexual activity is defined as . . .

b) In determining the sentence for a defendant convicted of prostitution (or loitering for prostitution, or promoting prostitution, etc., as applicable), it shall be a mitigating circumstance that the defendant initially became involved in commercial sexual activity as a result of having been the victim of human trafficking while a minor. Evidence of such may include:

- (1) certified court or law enforcement records, including sealed juvenile records when consented to by the defendant, which demonstrate that the defendant was involved in commercial sexual activity before the age of 18;
- (2) other official documentation of the defendant's status as a victim of human trafficking from a federal, state, or local government agency;
- (3) a sworn statement from a trained professional staff of a victim services organization, an attorney, a social worker, a member of the clergy, or a medical or other professional from whom the defendant has sought assistance in addressing the trauma associated with being trafficked;
- (4) any other evidence which the court deems credible and of probative value in determining whether the defendant was a minor victim of human trafficking.

c) A deferred or suspended sentence shall be the presumptive remedy if, upon review of the evidence, the court determines that the defendant first became involved in commercial sexual activity after having been the victim of human trafficking while a minor. Such sentence may be made subject to completion of an appropriate certified education, treatment, or rehabilitation program, or compliance with additional or alternative terms as the court deems appropriate.

[Optional] d) This section shall not apply if the defendant has previously had an offense mitigated under this section, or under an analogous provision in another State.