

Date of Hearing: March 26, 2019

ASSEMBLY COMMITTEE ON JUDICIARY  
Mark Stone, Chair  
AB 828 (Ting) – As Introduced February 20, 2019

PROPOSED CONSENT (As Proposed to be Amended)

**SUBJECT:** HUMAN TRAFFICKING CASEWORKER - VICTIM PRIVILEGE

**KEY ISSUE:** SHOULD A COUNSELOR AT A DOMESTIC VIOLENCE VICTIM SERVICE ORGANIZATION WHO MEETS SPECIFIED REQUIREMENTS FOR EXPERIENCE AND EDUCATION AND WHO PROVIDES SERVICES TO VICTIMS OF HUMAN TRAFFICKING BE CONSIDERED A HUMAN TRAFFICKING CASEWORKER FOR PURPOSES OF THE HUMAN TRAFFICKING CASEWORKER-VICTIM PRIVILEGE?

**SYNOPSIS**

*This bill makes a relatively modest change to the human trafficking caseworker-victim privilege that is in existing law, codified in Evidence Code Sections 1038 et seq., by adopting a definition of “human trafficking victim services program” that would allow a counselor at a domestic violence victim services organization who provides support to human trafficking victims and has the experience and qualifications to otherwise qualify as a human trafficking caseworker to be one. It also adds a definition of the term “victim” and makes a number of minor changes to existing law governing the human trafficking caseworker-victim privilege that largely conform to the language in existing law that governs and describes the domestic violence counselor-victim privilege.*

*Human trafficking is a major problem in the United States, especially in the State of California. Prosecuting human trafficking cases is particularly difficult for a number of reasons, including the hidden nature of the crime, the mobility of perpetrators and the control they exert over their victims by means of force, threats, and/or intimidation. One way to support victims so they can heal from their trauma, trust their support systems, and participate in the criminal justice process (if they choose to do so) is to ensure that they have access to trained caseworkers who are familiar with the unique challenges they face and who are required to maintain the confidentiality of their communications. The human trafficking caseworker-victim privilege is one tool to build the trust between caseworkers and victims that is so important to facilitating open communication and ultimately trust in the criminal justice system.*

*Other than a minor technical amendment enacted five years ago, the article enacting the privilege in the Evidence Code has not been amended in a substantive way in the past 15 years. Therefore, the statutory language, including the definition of “human trafficking victim caseworker”, may not have kept pace with the changes that have occurred in the field. It is unlikely that the same robust network of support services for victims of human trafficking that is in place today existed 15 years ago. This bill seeks to enact modest changes to the law to recognize such changes.*

*The author proposes to make a number of clarifying amendments to the bill. All of the above-described amendments are described in and incorporated into the analysis. This author-sponsored bill is supported by San Francisco SafeHouse and has no opposition on file.*

**SUMMARY:** Creates and modifies, for purposes of the human trafficking caseworker-victim privilege, definitions of terms that are relevant to that privilege. Specifically, **this bill:**

- 1) Modifies the definition of “human trafficking caseworker” in current law to be a person who is employed by a “human trafficking victim services organization” and has the experience, education, and training working with victims of human trafficking that is required under existing law to be a human trafficking caseworker.
- 2) Defines the term “human trafficking victim services organization” as one of the following:
  - a) A nongovernmental organization or entity that provides shelter, programs, or other support services to victims of human trafficking and their children and does all of the following:
    - i) Employs staff that meet the requirements of a human trafficking caseworker set forth in this section.
    - ii) Operates a telephone hotline, advertised to the public, for survivor crisis calls.
    - iii) Offers psychological support and peer counseling provided in accordance with this section.
    - iv) Makes staff available during normal business hours to assist victims of human trafficking who need shelter, programs, or other support services.
  - b) A domestic violence victim service organization as defined in subdivision (b) of Section 1037.1
- 3) Defines the term “victim” to mean “a person who consults a human trafficking caseworker for the purpose of securing advice or assistance concerning a mental, physical, emotional or other condition related to their experience as a victim of human trafficking.”
- 4) Makes other technical and conforming changes.

**EXISTING LAW:**

- 1) Establishes, under federal law, the crimes of kidnapping in interstate or foreign commerce, peonage, slavery and trafficking in persons, and provides for criminal and civil penalties. (18 U.S.C. Secs. 1201, 1581-1595.)
- 2) Provides, under the federal Victims of Trafficking and Violence Protection Act of 2000, the crime of human trafficking, and delineates various federal actions to combat trafficking, punish perpetrators, and provide services to victims of trafficking. (22 U.S.C. Sec. 7100 *et seq.*)
- 3) Provides, under state law, that any person who deprives or violates the personal liberty of another with the intent to effect or maintain prostitution, child pornography, extortion, or to obtain forced labor or services is guilty of human trafficking. (Penal Code Sec. 236.1.)
- 4) Provides that the right of any person to claim a privilege provided in statute is waived with respect to a communication protected by the privilege if any holder of the privilege, without

coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. (Evidence Code Section 912 (a). All further statutory references are to this code, unless otherwise indicated.)

- 5) Establishes the Human Trafficking Caseworker-Victim Privilege in law, giving a trafficking victim, whether or not a party to the action, a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a human trafficking caseworker. (Section 1038.)
- 6) Defines “human trafficking caseworker” to mean any of the following:
  - a) A person who is employed by any organization that provides programs specified in law (Section 18294 of the Welfare and Institutions Code), whether financially compensated or not, for the purpose of rendering advice or assistance to victims of human trafficking, who has received specialized training in the counseling of human trafficking victims, and who meets one of the following requirements:
    - i) Has a master’s degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in the counseling of human trafficking victims.
    - ii) Has at least 40 hours of training covering specified topics that is supervised by an individual who qualifies as a counselor under i), above, or is a licensed psychotherapist.
  - b) A person who is employed by any public or private nonprofit agency for the assistance of victims and witnesses that provides the programs specified in law (specifically Section 13835.2 of the Penal Code), whether financially compensated or not, for the purpose of counseling and assisting human trafficking victims, and who meets one of the following requirements:
    - i) Is a licensed psychotherapist who has a master’s degree in counseling or a related field, or has one year of counseling experience, at least six months of which is in rape assault counseling.
    - ii) Has the minimum training for human trafficking counseling required by guidelines established by the employing agency that is supervised by an individual who qualifies as a counselor under i), above, and the training, supervised by that person and covers specified topics. (Section 1038.2.)
- 7) Defines “domestic violence victim service organization” to mean either of the following:
  - a) A nongovernmental organization or entity that provides shelter, programs, or services to victims of domestic violence and their children, including, but not limited to, either of the following:
    - i) Domestic violence shelter-based programs.
    - ii) Other programs with the primary mission to provide services to victims of domestic violence whether or not that program exists in an agency that provides additional services.

- b) Programs on the campus of a public or private institution of higher education with the primary mission to provide support or advocacy services to victims of domestic violence. (Section 1037.1 (b).)
- 8) Provides that funds appropriated from the state's Victim-Witness Assistance Fund shall be made available through the Office of Emergency Services (OES) to any public or private nonprofit agency for the assistance of victims and witnesses that meets a number of requirements, including that it "provides comprehensive services to victims and witnesses of all types of crime." (Penal Code Section 13835.2.)
- 9) Requires the California Emergency Management Agency (Cal EMA) to provide grants to proposed and existing child sexual exploitation and child sexual abuse victim counseling centers and prevention programs, including programs for minor victims of human trafficking. (Penal Code Section 13837.)

**FISCAL EFFECT:** As currently in print this bill is keyed non-fiscal.

**COMMENTS:** This bill makes a number of relatively modest change to the human trafficking caseworker-victim privilege in existing law, codified in Evidence Code Sections 1038 *et seq.*, by adopting a definition of "human trafficking victim services program" that would allow a counselor at a domestic violence victim services organization who provides support to human trafficking victims and has the experience and qualifications to otherwise qualify as a human trafficking caseworker, to qualify as one. It also amends the definition of the term "victim" in existing law and makes a number of minor changes to the human trafficking caseworker-victim privilege to conform that privilege more closely with the domestic violence counselor-victim privilege.

***Scope of the human trafficking problem in general.*** Human trafficking is a major problem in the United States, especially in the State of California, where there were more reports of human trafficking in 2016 than in any other state of the nation. The National Human Trafficking Hotline (NHTH) reports that it received 26,727 calls about human trafficking in 2016. More than 1,400 cases of human trafficking in hotels and motels were reported to the National Human Trafficking Resource Center and an emergency texting helpline between 2007 and 2015. Nationwide, according to the NHTH, more than 7,500 human trafficking cases were reported in 2017. More than 1,300 of those reports—nearly twice the number of any other state—were from California. (<https://humantraffickinghotline.org/states>)

***Challenges to prosecution of human trafficking cases.*** Prosecuting human trafficking cases is particularly difficult for a number of reasons, including the hidden nature of the crime, the mobility of perpetrators, and the control that traffickers exert over their victims by means of force, threats, and/or intimidation. Also, victims without documentation of lawful presence in the U.S. may fear deportation, and therefore may be reluctant to seek help from law enforcement. "Despite the prioritization of human trafficking through new laws and devotion of resources to anti-trafficking efforts, the U.S. law enforcement have identified and prosecuted fewer human trafficking cases than estimates of the problem would predict." (*Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, Northeastern University Institute on Race and Justice, School of Criminology and Criminal Justice/Urban Institute Justice Policy Center (April 2012), p. 8, accessed March 15, 2019 at: <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf>.)

Even after victims have initially cooperated with the police and/or prosecutors, they have a tendency to recant their testimony out of fear or dependency on their trafficker and mistrust of the police (Clawson et al., 2008). The police interview processes necessary to secure information for the arrest or prosecution of offenders can re-traumatize trafficking victims, exacerbating their anxiety and reducing their ability to clearly remember and recount events. (*Id.*, at p. 15.)

One way to support victims so they can heal from their trauma, trust their support systems, and participate in the criminal justice process (if they choose to do so) is to ensure that they have access to trained caseworkers who are familiar with their unique challenges and are required by law to maintain the confidentiality of their communications. The human trafficking caseworker-victim privilege is an important tool to build the trust between caseworkers and victims that is so important to facilitating open communication and ultimately trust in the criminal justice system.

***The purpose of protecting the confidentiality of certain “privileged” communications.*** Unless otherwise provided by statute, no person has a privilege to do any of the following: refuse to be a witness; refuse to disclose a matter, object, or writing; or to insist that another person does not testify, disclose a matter, or produce a writing. (Section 911.) Section 911 codifies established law. (See *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 565, quoting the text of Section 911.) A privilege may be an exemption from the duty to take the stand and testify altogether (e.g., criminal defendant or spouse), or an exemption from the duty to answer certain questions because of the privileged nature of the underlying subject (the usual witness’s privilege). (See 9 Witkin Cal. Evid. Witnesses Section 60.) A privilege is personal to the holder; thus, it *must* be claimed and if not claimed, may be waived. (*Ibid.*)

***Existing privilege for communications between human trafficking victims and their caseworkers.*** The Human Trafficking Victim-Caseworker Privilege (Section 1038 *et seq.*) was created by AB 22 (Lieber), Chap. 240, Stats. 2005, comprehensive legislation that, among other things, established civil and criminal penalties for the trafficking in human beings and allowed for the forfeiture of assets derived from human trafficking. Regarding the new evidentiary privilege proposed by the bill, this Committee’s analysis of AB 22 pointed out the following:

Importantly, the privilege sought in this bill is consistent with evidentiary privilege enjoyed by the victim of sexual assault or domestic violence and their counselors. Indeed, psychotherapists who may provide counseling to human trafficking survivors, as specified in the bill, already enjoy privilege for communication between themselves and their patients. The privilege sought by the bill will extend to human trafficking victims who seek assistance confidentially from appropriately trained professionals.

Other than a minor technical amendment enacted five years ago (AB 2727 (Assembly Committee on Judiciary, Chap. 913, Stats. 2004), the article enacting the privilege has not been amended since 2004. Therefore, the statutory language, including the existing definition of human trafficking victim caseworker, may not have kept pace with all of the changes in the field that have occurred since then. It is unlikely that the same robust network of support services for victims of human trafficking that is in place now existed 15 years ago. This bill seeks to enact modest changes to the law to recognize such changes.

***Author’s Statement.*** According to the author, the main purpose of the bill is to modify the law to keep pace with changes in the way counseling services are now provided to victims of human trafficking:

Existing law allows for confidential communications between a human trafficking victim and their caseworker but falls short of protecting communications between the same human trafficking victim and a domestic violence caseworker. This loophole may prevent human trafficking victims from seeking services or compromise their safety if communications are revealed in court. AB 828 fills in this gap in by expanding privilege coverage to communications between human trafficking victims and domestic violence caseworkers.

Thus, the bill amends the definition of “human trafficking caseworker” to encompass a domestic violence counselor who meets the training and experience requirements but performs casework at a domestic violence victim services organization.

**Author’s amendments.** The author proposes to make a number of clarifying amendments to the bill in order to carry out the author’s intent to allow counselors at domestic violence victim service organizations to qualify as human trafficking caseworkers. In addition, the bill enacts a definition of the term “human trafficking victim services program” in order to clarify which support services such an organization must, at a minimum, provide to victims of human trafficking. Finally, the amendments modify the definition of “victim” in existing law. The current definition, which refers to section 236.1 of the Penal Code, defines the crime of human trafficking but does not define the victim. The new definition takes language found in Section 1035, defining sexual assault “victim” for purposes of the sexual assault counselor-victim privilege, to create a parallel definition of “victim” for purposes of the human trafficking caseworker-victim privilege. Therefore, the following amendments, in addition to minor technical corrective amendments, are proposed:

Page 2, lines 3-6: strike out the current definition of “victim”

Page 2, line 10: strike out “a domestic violence shelter-based program or”

Page 2, line 11, after “trafficking”: insert the word “victim”

Page 3, lines 38-39: strike out in their entirety and insert the following:

*(d) As used in this article, “human trafficking victim services program” means one of the following:*

- (1) A nongovernmental organization or entity that provides shelter, program, or other support services to victims of human trafficking and their children and does all of the following:
 
  - (A) Employs staff that meet the requirements of a human trafficking caseworker set forth in this section.*
  - (B) Operates a telephone hotline, advertised to the public, for survivor crisis calls.*
  - (C) Offers psychological support and peer counseling provided in accordance with this section.*
  - (D) Makes staff available during normal business hours to assist victims of human trafficking who need shelter, programs, or other support services.**
- (2) A domestic violence victim service organization as defined in subdivision (b) of Section 1037.1*

*(e) As used in this article, “victim” means a person who consults a human trafficking caseworker for the purpose of securing advice or assistance concerning a mental, physical, emotional or other condition related to their experience as a victim of human trafficking.*

**Conflicts with AB 1735.** This bill is similar to AB 1735, a more comprehensive bill that also deals with the human trafficking caseworker-victim privilege, and is scheduled to be heard in this Committee today. In order to minimize the conflicts between the bills, the authors have agreed to adopt the same definition of “victim” and have adopted definitions of “human trafficking victim services program” that are compatible and which can be reconciled in the event that both bills are signed into law.

**ARGUMENTS IN SUPPORT:** San Francisco Safehouse expresses its “enthusiastic” support for the bill. San Francisco Safehouse describes itself and the effect of the bill as follows:

[A]n 18 month program that offers a full array of support services to enable residents to reclaim their lives and move toward the goal of living a happy, healthy and independent life. San Francisco SafeHouse also offers a 40-hour human trafficking caseworker training that complies with [E]vidence [C]ode 1038.2 (b). Unfortunately, neither Safehouse nor any of the agencies we have trained qualify for the human trafficking victim casework privilege. . . This bill expands the definition of a qualified human trafficking program to include both domestic violence shelter programs and human trafficking service providers.

**Prior Related Legislation.** SB 597 (Leyva, Chap. 570, Stats. 2017) expanded the Safe at Home address confidentiality program to include victims of human trafficking, as well as “household members” of all crime victims, including victims of human trafficking, who participate in the program.

AB 2034 (Kalra, Chap. 812, Stats. 2018) required a business or other establishment that operates intercity passenger rail or light rail stations, or bus stations to train specified employees in recognizing the signs of human trafficking and how to report those signs; and requires the Department of Justice (DOJ) to develop guidelines with which such trainings would have to be consistent.

SB 970 (Atkins, Chap. 842, Stats. 2018) required hotel, motel, and bed and breakfast inn employers to provide at least 20 minutes of training and education regarding human trafficking awareness to their employees who are likely to interact or come into contact with victims of human trafficking.

AB 2727 (Assembly Committee on Judiciary, Chap. 913, Stats. 2004), this Committee’s civil omnibus bill, enacted assorted changes in various provisions of law. In order to be included in this bill, each provision is not so substantive as to be more appropriate for a stand-alone bill.

#### **REGISTERED SUPPORT / OPPOSITION:**

##### **Support**

San Francisco SafeHouse

##### **Opposition**

None on file

**Analysis Prepared by:** Alison Merrilees / JUD. / (916) 319-2334