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## TESTIMONY ON 17-H 5300, RELATING TO HUMAN TRAFFICKING

February 14, 2017

The ACLU of Rhode Island appreciates the goal of this legislation in seeking to protect both adults and minors from sexual exploitation and sex trafficking. Efforts to provide criminal immunity to minors in certain circumstances, to encourage the use by trafficking victims of the crime victims' compensation fund, and to assist them in the T and U visa application process are all positive steps in addressing this important issue. However, we also have a number of concerns about the legislation's scope, the due process implications of some its provisions, and, in some instances, its potential impact on the individuals it is seeking to protect. For the reasons expressed below, we therefore urge that the legislation be revised in various ways.

More broadly, we would begin by noting that the legislation overlaps in a number of significant ways with laws already on the books addressing human trafficking, prostitution and pandering. Yet the bill does not propose to repeal those other laws. The result is a set of overlapping statutes that would raise confusing questions of proper enforcement and could be used as an improper prosecutorial tool – unnecessarily piling extraneous and duplicative charges against criminal defendants in order to coerce them to waive their right to a jury trial. If a version of this bill is to be enacted, we believe it should also repeal the current laws governing pandering, trafficking and forced labor that already address these topics in very similar ways.

In light of the complex and comprehensive nature of this legislation, the list below should not be considered exhaustive, but is an attempt to flag some of our other major concerns with specific provisions of the bill:

- The definition of victim [Page 3, lines 7-9] includes someone subjected to conduct “that would have constituted human trafficking had this chapter been in effect with the conduct occurred.” This definition raises fundamental due process problems, as it would subject individuals to prosecution for activity that was not illegal at the time it was conducted. This, we believe, would constitute *ex post facto* punishment that the Constitution does not permit.
- The bill makes a new crime of “sexual servitude” a strict liability offense. That is, it does not matter if the defendant reasonably believed the minor was an adult. Strict liability crimes are always potentially problematic, but it is especially so here in light of the bill's broad definition of “commercial sexual activity.” That term includes “sexually explicit performances,” activity that does not even involve any sexual

contact, but merely conduct that appeals to the “prurient interests” of viewers. While it might be appropriate to impose an affirmative burden on the defendant to demonstrate the reasonableness of his or her belief that the individual was a minor, we oppose barring that opportunity altogether, especially in light of the steep criminal penalties involved.

- We strongly oppose a section of the bill [Page 5, lines 1-3] that would make it a felony for any person “to patronize an adult for purposes of commercial sexual activity.” This section encompasses clearly consensual sexual activity between two adults, completely unrelated to any concerns about human trafficking. It would turn every john into a felon, with all of the damaging collateral consequences that flow from such a conviction. This hyper-criminalization of consensual sexual activity is extremely troubling and should be deleted. People who knowingly assist in trafficking of adults should be punished, but the law should not treat the participants in consensual adult sexual activity, even for a fee, in such a harshly punitive manner.
- The bill includes a provision for increased penalties when “aggravating circumstances” are involved. Such a circumstance includes defendants who “recruited, enticed, or obtained the victim of the offense from a shelter that serves individuals subjected to human trafficking, domestic violence, or sexual assault, runaway youth, foster children, or the homeless.” [Page 5, lines 21-23] While we understand the intent of this section, it is important to note that traffickers routinely send their victims in to recruit from exactly these places (often with promises that they will have to work less or not at all, or with threats if their recruiters don’t come out with someone). The effect of this provision, therefore, could likely disproportionately fall on victims themselves.
- A section of the bill providing for victim confidentiality raises basic First Amendment concerns. [Page 6, line 31 to Page 7, line 4] It would, with a few exceptions, bar the release of the name of any alleged victim, including adults, or the family of the alleged victim. Current laws protect the identity of minor victims of crimes, but it is problematic when the names of adults are also kept confidential. While many media have adopted *policies* against publicizing the names of alleged adult victims of sex offenses, it is another matter entirely for a state law to legally bar the release of such information.
- A key portion of the bill is designed to provide minors immunity from delinquency proceedings for prostitution or solicitation “if the individual was a minor at the time of the offense and committed the offense as a direct result of being a victim.” There is a virtually identical subsection immediately following that exempts minors from prosecution for offenses of “commercial sexual activity.” As important as this provision is, we do not believe it provides sufficient protection to affected minors. [Page 7, lines 13-15]

First, the immunity applies only to the specified sex offense. Children who are either victimized by traffickers or otherwise compelled to participate in the sex trade to survive may find themselves involved in any number of illicit activities not covered by this immunity, all of which are connected to their exploitation and many of which may have lasting consequences. It is no consolation to a child forced by her pimp into selling drugs to his clients that she will not be charged with prostitution; that charge alone may be the least of their concerns.

The immunity provided by the first section also applies only to prosecution or solicitation to commit a sexual act if it is a “direct result of being a victim” of human trafficking. This assumes that these minors – some of whom may have been in the sex trade for years before their arrest – are ready to acknowledge or admit the realities of their situation. Minors who fear for their lives or safety if they confess to being trafficked, or who are not yet ready to admit to themselves they have been coerced into this activity, may find themselves convicted of these offenses when they are just as in need of non-punitive assistance as a minor acknowledging their status as trafficked victims. If the intent of immunity is not to further punish victims and to connect sexually exploited children with services, then children should be immune from prosecution for all crimes related to their sexual exploitation.

Finally, we believe that immunity should be just as applicable to adult victims of human trafficking as it is to minors. For the reasons expressed above, the availability of an “affirmative defense,” allowed in the next section of the bill, may not be helpful to many victims who, for concerns about their safety, may not be in a position to comfortably raise that defense.

- We have concerns about language in the bill that minors who are immune from criminal liability or delinquency provisions are “presumed to be an abused and/or neglected child.” [Page 7, lines 19-21] This presumption does not appear to require any finding that the parents or guardians of the minor were in any way involved in the exploitation of the child. This could represent a major change from the typical understanding of an “abused or neglected child,” which by definition focuses on the harm perpetrated on them from a parent or other person responsible for their welfare. Under this language, parents who have unsuccessfully dealt with a rebellious teen who runs away from home and becomes involved in the sex trade could be treated the same as a parent who actually abused their child. Instead of focusing on helping the sexually exploited child, these families may quickly find themselves concerned they may lose other children or be forced to participate in long-term investigations that benefit nobody in the household. The presumption should exist only when there is reason to believe that the parent or guardian was directly involved in the child’s exploitation.
- The legislation commendably requires agencies to make victims aware that they may be eligible for certain unspecified benefits or services. However, we believe the legislation should specifically address a scenario that we know sometimes occurs

with efforts to “help” minor victims. Children who became involved in the sex trade after fleeing foster care or abusive homes to which they do not desire to return may find themselves being returned by the state to almost identical services that led to them running away in the first place. Rather than getting help, these children may ultimately find themselves at the Training School for defying court orders about their placement. It is critical that legislation like this address and prohibit those types of scenarios from occurring.

In making these comments, we wish to again emphasize the positive aspects of this bill in seeking to protect sexually exploited children. In some instances, however, the unintended consequences, could leave some of these children open to further victimization, not protection. More generally, some of the other provisions – such as turning johns into felons and limiting defenses to criminal charges – raise independent concerns. We hope that the legislation can be amended to address the various issues raised in this testimony.

We greatly appreciate the Committee’s consideration of our testimony.