

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 974

INTRODUCER: Senator Sobel

SUBJECT: Human Trafficking

DATE: April 3, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	<b>Favorable</b>
2.			JU	
3.			CF	
4.				
5.				
6.				

**I. Summary:**

SB 974 addresses several areas of the law with regard to victims of human trafficking. The bill does the following:

- Creates a privilege for a victim of human trafficking in the Evidence Code that provides for him or her to keep communication between the victim and a human-trafficking counselor confidential and not admissible in evidence unless the privilege is waived.
- Amends s. 772.104, F.S., to provide for punitive damages in a civil cause of action brought based upon criminal acts.
- Statutorily conveys all the rights, benefits, and compensation conveyed by law to victims of other crimes to persons who are victims of human trafficking.
- Clarifies the defense of duress or coercion specifically for victims of human trafficking who are charged with trafficking themselves.
- Relieves a human trafficking victim of criminal liability for certain sexual conduct if the acts are committed as a result of being trafficked.
- Provides for a Motion to Vacate Conviction for a human trafficking victim who is convicted of a prostitution offense where the person’s participation in the crime was the result of having been the victim of human trafficking.

This bill substantially amends sections 772.104 and 787.06 of the Florida Statutes. The bill creates sections 90.50355 and 796.095 of the Florida Statutes.

## II. Present Situation:

### Human Trafficking

In 2000, the United States enacted the Trafficking Victims Protection Act (TVPA), and the United Nations adopted the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, also known as the Palermo Protocol.<sup>1</sup>

The Palermo Protocol focused the attention of the global community on combating human trafficking. For the first time, an international instrument called for the criminalization of all acts of trafficking, including forced labor, slavery, and slavery-like practices. The Palermo Protocol also proposed a victim-centered approach to governmental response through prevention, criminal prosecution, and victim protection.<sup>2</sup> These protection efforts seek to provide appropriate services to the survivors, maximizing their opportunity for a comprehensive recovery.<sup>3</sup>

Survivors of human trafficking often face both criminalization and stigmatization long after they escape from their trafficking situations. Despite being victims, individuals who are trafficked are often arrested and convicted of prostitution and related offenses. Trafficked persons are not always recognized or treated as victims by law enforcement and prosecutors. They may plead guilty not understanding the consequences. Multiple arrests, incarceration, police violence, deportation, employment, and housing discrimination may result.<sup>4</sup>

In 2010, New York became the first state to enact legislation that allows survivors of trafficking to vacate their convictions for prostitution offenses.<sup>5,6</sup> While every state has a slightly different criminal procedure into which this type of remedy must fit, the central purpose of the law is to give survivors the ability to live their lives unhindered by a criminal record: “Even after they escape from sex trafficking, the criminal record victimizes them for life. This bill would give victims of human trafficking a desperately needed second chance they deserve.”<sup>7</sup>

The Urban Justice Center in New York, instrumental in drafting the law, recommends that a strong state law on vacating convictions should:

- Not be limited to vacating only certain prostitution offenses;

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<sup>1</sup> U.S. Department of State, *Trafficking in Persons Report 2010*, available at <http://www.state.gov/documents/organization/142980.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Department of State, *Trafficking in Persons Report 2012*, available at <http://www.state.gov/documents/organization/192587.pdf>.

<sup>4</sup> Melissa Broudo and Sienna Baskin, *Vacating Criminal Convictions For Trafficked Persons: A Legal Memorandum for Advocates and Legislators*. Urban Justice Center. The Sex Workers Project (April 3, 2012) available at <http://www.sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>.

<sup>5</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i)

<sup>6</sup> As of June 2012, Hawaii became the sixth state to implement a law to allow criminal records related to human trafficking to be vacated. The Washington Times. *Hawaii: New law allows trafficking victims to vacate prostitution convictions* (June 11, 2012) available at <http://communities.washingtontimes.com/neighborhood/rights-so-divine/2012/jul/11/hawaii-new-law-allows-trafficking-victims-expunge/>.

<sup>7</sup> Melissa Broudo and Sienna Baskin, *Vacating Criminal Convictions For Trafficked Persons: A Legal Memorandum for Advocates and Legislators*. Urban Justice Center. The Sex Workers Project (April, 2012) available at <http://www.sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>.

- Not require the survivor to present official documentation certifying them as a victim of trafficking;
- Not require the survivor to prove that he or she has left the sex industry or been “rehabilitated”;
- Offer confidentiality provisions to protect the client’s identity;
- Be the most complete remedy possible under the law;
- State that the court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements;
- Allow the court to take additional appropriate action beyond the mandate of the statute;
- Be retroactive and inclusive of victims with older convictions; and
- Ensure availability of the remedy by funding legal services attorneys.

### **Penalties for Human Trafficking in Florida Law**

The Florida Legislature established penalties for crimes involving human trafficking in 2004.<sup>8</sup> Along with establishing human trafficking as a crime in law, the Legislature introduced the concept of coercion as a critical element to the crime of human trafficking. Today, s. 787.06 (2)(a), F.S., defines coercion as:

- Using or threatening to use physical force against any person;
- Restraining, isolating, or confining or threatening to restrain, isolate, or confine any person without lawful authority and against her or his will;
- Using lending or other credit methods to establish a debt by any person when labor or services are pledged as a security for the debt, if the value of the labor or services is not applied toward the liquidation of the debt, or the length and nature of labor or services is not proportional to the debt;
- Destroying, concealing, removing, confiscating, withholding, or possessing any actual or purported passport, visa, or other immigration document, or any other actual or purported government identification document, of any person;
- Causing or threatening to cause financial harm to any person;
- Enticing or luring any person by fraud or deceit; or
- Providing a controlled substance listed in the schedule of controlled substances to any person to exploit them.

### **Privileged Communication**

Under current law, a person may not assert an evidentiary privilege or otherwise refuse to testify as a witness unless a privilege has been created by statute, Supreme Court rule, or the State or U.S. Constitutions.<sup>9</sup>

An evidentiary privilege prohibits the discovery, subpoena, or admission of what otherwise might be admissible evidence in a legal proceeding.<sup>10</sup> “Privileges are impediments to the search

<sup>8</sup> Chapter 2004-391, L.O.F.

<sup>9</sup> See s. 90.501, F.S.A. and Law Revision Council Note--1976 (stating, “This section abolishes all common-law privileges existing in Florida and makes the creation of privileges dependent upon legislative action or pursuant to the Supreme Court’s rule-making power.”).

for truth, finding their justification in the priority of societal values they serve.”<sup>11</sup> Privileges are strictly construed because they are in derogation of the common law.<sup>12</sup>

The Florida Evidence Code contains the following evidentiary privileges:

- Journalist’s privilege;<sup>13</sup>
- Lawyer-client privilege;<sup>14</sup>
- Psychotherapist-patient privilege;<sup>15</sup>
- Sexual assault counselor-victim privilege;<sup>16</sup>
- Domestic violence advocate-victim privilege;<sup>17</sup>
- Husband-wife privilege;<sup>18</sup>
- Privilege with respect to communications with clergy;<sup>19</sup>
- Accountant-client privilege;<sup>20</sup> and
- Privilege with respect to trade secrets.<sup>21</sup>

### **Civil Action for Damages**

Current law provides for civil remedies for harm experienced due to another’s criminal act. Specifically, s. 772.104, F.S., provides for victims of human trafficking to bring an action if he or she can prove injury has occurred:

<sup>10</sup> See *In re Grand Jury Proceedings*, 664 F.2d 423, 429 (5th Cir. 1981) and *The Florida Bar v. Forrester*, 818 So. 2d 477, 481-482 (Fla. 2002).

<sup>11</sup> *In re Grand Jury Proceedings*, 664 F.2d at 429 (quoting *United States v. Brown*, 605 F.2d 389, 396 (8th Cir. 1979)).

<sup>12</sup> *O’Neill v. O’Neill*, 823 So. 2d 837, 839 (Fla. 5th DCA 2002)

<sup>13</sup> Section 90.5015, F.S.

<sup>14</sup> Section 90.502, F.S.

<sup>15</sup> Under s. 90.503, F.S., a psychotherapist is defined as:

1. A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;
2. A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;
3. A person licensed or certified as a clinical social worker, marriage and family therapist, or mental health counselor under the laws of this state, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;
4. Treatment personnel of facilities licensed by the state pursuant to chapter 394, chapter 395, or chapter 397, of facilities designated by the Department of Children and Family Services pursuant to chapter 394 as treatment facilities, or of facilities defined as community mental health centers pursuant to s. 394.907(1), who are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or
5. An advanced registered nurse practitioner certified under s. 464.012, whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse, and limited only to actions performed in accordance with part I of chapter 464.

<sup>16</sup> Section 90.5035, F.S.

<sup>17</sup> Section 90.5036, F.S.

<sup>18</sup> Section 90.504, F.S.

<sup>19</sup> Section 90.505, F.S.

<sup>20</sup> Section 90.5055, F.S.

<sup>21</sup> Section 90.506, F.S.

**772.104 Civil cause of action.—**

(1) Any person who proves by clear and convincing evidence that he or she has been injured by reason of any violation of the provisions of s. 772.103 shall have a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of \$200, and reasonable attorney's fees and court costs in the trial and appellate courts.

(2) As an alternative to recovery under subsection (1), any person who proves by clear and convincing evidence that he or she has been injured by reason of any violation of the provisions of s. 772.103 due to sex trafficking or **human trafficking** shall have a cause of action for threefold the amount gained from the sex trafficking or **human trafficking** and in any such action is entitled to minimum damages in the amount of \$200 and reasonable attorney's fees and court costs in the trial and appellate courts.

(3) In no event shall punitive damages be awarded under this section. The defendant shall be entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim which was without substantial fact or legal support. In awarding attorney's fees and costs under this section, the court shall not consider the ability of the opposing party to pay such fees and costs. Nothing under this section shall be interpreted as limiting any right to recover attorney's fees or costs provided under other provisions of law.

**III. Effect of Proposed Changes:****Human-Trafficking Counselor-Victim Privilege**

The bill creates a privilege against disclosure of confidential communication between a human trafficking victim and his or her counselor. Human-trafficking counselor is defined as a psychotherapist,<sup>22</sup> one who is employed and supervised by a psychotherapist and who has received specified training, and as a trained volunteer who has received the training but is not actually employed by the psychotherapist.

Under the statutorily-created privilege, the human trafficking victim has the ability to prevent any or all of those particular individuals from disclosing communication, given or received, during the counseling process and relationship.

**Punitive Damages**

The bill allows crime victims to seek punitive damages, which are damages above and beyond monetary losses a person suffered, under s. 772.104, F.S. The remedy is not limited to human trafficking victims, but rather includes victims of sex trafficking and all of the crimes listed in s. 772.102, F.S., if those crimes can be linked to the activities set forth in s. 772.103, F.S.<sup>23</sup>

<sup>22</sup> *Supra*, note 15.

<sup>23</sup> **772.103 Prohibited activities.**—It is unlawful for any person:

(1) Who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of criminal activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the

### **Victim Status, Affirmative Defense, and Relief from Criminal Liability Created in Human Trafficking Statute**

The bill adds two subsections to s. 787.06, F.S., the human trafficking statute. New subsection (8) provides that when a defendant enters a plea and is convicted of or adjudicated delinquent for committing a violation of the human trafficking statute, the person who was “trafficked” is recognized, under the law, as a victim. With this status, the victim is entitled to the rights enjoyed by all crime victims in Florida. These rights include being kept apprised of case status by the State Attorney, being heard by the court on matters related to the case disposition, and the right to request restitution.

Also, the bill creates an affirmative defense, which may be raised at trial if the defense chooses to present evidence, where a defendant is charged with human trafficking is also a *victim* of human trafficking. The defendant/victim may present evidence and argue that he or she participated in human trafficking due to coercion or duress. It should be noted that this is a defense that can always be raised and does not necessarily need to be set forth in this statute.

The bill eliminates criminal liability for a commercial sex act or illegal sexually explicit performance where the act is related to being a victim of human trafficking. Presumably this evidence could be offered pretrial in the form of a Motion to Dismiss or as a defense at trial.

### **Motions to Vacate (Motions for Vacatur)**

The principle behind vacatur is that of a legal action being undone. Vacatur is defined as “the act of annulling or setting aside.”<sup>24</sup> If a conviction is vacated it is as if it never happened.

The advantage of the Motion to Vacate provided in Section 5 of the bill is that a victim of human trafficking who has been convicted of prostitution will not be required to go through the expunction process. The bill requires the state attorney’s approval of the Motion to Vacate the Conviction (or refusal to contest the Motion).

### **Other Potential Implications:**

The victim-counselor privilege created in Section 2 of the bill does not provide the circumstances under which the privilege does not apply as does the privilege for the patient-psychotherapist. The patient-psychotherapist is not recognized for communications:

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proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) Through a pattern of criminal activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt.

(4) To conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

<sup>24</sup> Black’s Law Dictionary (9th ed. 2009).

- relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
- made in the course of a court-ordered examination of the mental or emotional condition of the patient.
- relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

This omission may create confusion, an ethical dilemma or unnecessary litigation for psychotherapists.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

The Office of the State Courts Administrator reports that it is difficult to quantify any workload issues the courts may experience if the bill becomes law.<sup>25</sup>

#### **VI. Technical Deficiencies:**

None.

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<sup>25</sup> Office of the State Courts Administrator, Judicial Impact Statement, March 5, 2013, on file with Senate Criminal Justice Committee staff.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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