
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 1735 **Hearing Date:** June 18, 2019
Author: Bauer-Kahan
Version: June 3, 2019
Urgency: No **Fiscal:** No
Consultant: SJ

Subject: *Evidence: Privileges: Human Trafficking Caseworker-Victim Privilege*

HISTORY

Source: Coalition to Abolish Slavery & Trafficking

Prior Legislation: AB 22 (Lieber), Ch. 240, Stats. 2005

Support: Child Abuse Prevention Center; Peace Officers' Research Association of California

Opposition: None known

Assembly Floor Vote: 75 - 0

PURPOSE

The purpose of this bill is to modify various provisions of law, including definitions, pertaining to the human trafficking caseworker-victim privilege.

Existing federal law establishes 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. §§ 1201, 1581-1595.)

Existing federal law establishes, under the 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. § 7101 et seq.)

Existing law provides 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. (Pen. Code, § 236.1, subs. (a) & (b).)

Existing law 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, except as otherwise provided. (Evid. Code, § 912, subd. (a).)

Existing law provides that where two or more persons are joint holders of a privilege provided by statute, including the human trafficking caseworker-victim privilege, a waiver of the right of a

particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. (Evid. Code, § 912, subd. (b).)

Existing law establishes the human trafficking caseworker-victim privilege, 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, if the privilege is claimed by any of the following persons:

- 1) The holder of the privilege.
- 2) A person who is authorized to claim the privilege by the holder of the privilege.
- 3) The person who was the human trafficking caseworker at the time of the confidential communication. Provides that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. Requires the human trafficking caseworker who received or made a communication subject to the privilege granted to claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege. (Evid. Code, § 1038, subd. (a).)

Existing law provides that the court may compel disclosure of information received by a human trafficking caseworker that constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim and that is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services. Provides that the court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator. (Evid. Code, § 1038.1, subd. (a).)

Existing law provides that “victim” means any person who is a “trafficking victim” as defined in Penal Code section 236.1. (Evid. Code, § 1038.2, subd. (a).)

Existing law defines “human trafficking caseworker” to mean any of the following:

- 1) A person who is employed by any organization that provides domestic violence shelter-based programs, 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:
 - a) 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.
 - b) Has at least 40 hours of training, as specified, and that is supervised by an individual who qualifies as a counselor, or is a psychotherapist.
- 2) A person who is employed by any public or private nonprofit agency that assists victims and witnesses, whether financially compensated or not, for the purpose of counseling and assisting human trafficking victims, and who meets one of the following requirements:
 - a) Is a psychotherapist, 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.

- b) Has the minimum training for human trafficking counseling required by guidelines established by the employing agency, as specified, that is supervised by an individual who qualifies as a counselor. Requires the training to be supervised by a counselor or psychotherapist and to cover specified topics. (Evid. Code, § 1038.2, subd. (b).)

Existing law requires funds appropriated from the state's Victim-Witness Assistance Fund to 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." (Pen. Code, §13835.2, subd. (a).)

Existing law 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. (Pen. Code, §13837, subd. (a).)

This bill allows a human trafficking victim's current caseworker to claim the privilege, even if that caseworker was not the victim's caseworker at the time the confidential communication was made.

This bill removes a provision in existing law that authorizes a court to compel disclosure of privileged information by the caseworker if the victim is either dead or is not the complaining witness in a criminal action against the perpetrator.

This bill defines "confidential communication" as all information, including but not limited to written and oral communication, transmitted between the victim and the human trafficking caseworker in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the human trafficking caseworker is consulted and made with the victim's knowledge and consent.

This bill defines "holder of the privilege" to mean:

- 1) The victim if the victim has no guardian or conservator.
- 2) A guardian or conservator of the victim if the victim has a guardian or conservator.
- 3) The personal representative of the victim if the victim is deceased.

This bill defines "human trafficking caseworker" as a person who is employed by a human trafficking victim services organization, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of human trafficking, who meets the following:

- 1) Has an advanced degree or license, such as a master's degree in counseling, social work, or a related field, and at least one year of experience in a caseworker role working directly with victims of human trafficking.
- 2) Has at least 40 hours of training and is to be supervised by a person who qualifies as a human trafficking caseworker. Requires the training to include, but is not limited to the following areas:

- a) History of human trafficking.
- b) Civil and criminal law relating to human trafficking.
- c) Systems of oppression.
- d) Peer counseling techniques.
- e) Resources available to victims of human trafficking.
- f) Crisis intervention and counseling techniques.
- g) Role playing.
- h) Intersections of human trafficking and other crimes.
- i) Client and system advocacy.
- j) Referral services.
- k) Connecting to local, regional, and national human trafficking coalitions.
- l) Explaining privileged communications.

This bill requires, if the caseworker has been employed by a human trafficking service organization for a period of less than six months, that caseworker is supervised by another human trafficking caseworker who has at least one year of experience working with human trafficking victims.

This bill defines “human trafficking victim service organization” as 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:

- 1) Employs staff that meet the requirements of a human trafficking caseworker set forth in this bill.
- 2) Operates a telephone hotline, advertised to the public, for survivor crisis calls.
- 3) Offers psychological support and peer counseling provided in accordance with this bill.
- 4) Makes staff available during normal business hours to assist victims of human trafficking who need shelter, programs, or other support services.

This bill defines “victim” as 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.

This bill clarifies that nothing in the bill limits any obligation for any person to report child abuse, as required by law.

This bill makes other technical and conforming changes.

COMMENTS

1. Need for This Bill

According to the author:

In 2005, AB 22 was enacted and established the human trafficking victim-caseworker privilege. (Evid. Code, §§ 1038 et seq.) The privilege is designed to benefit survivors by establishing a qualified privilege that ensures information exchanged between a survivor and their caseworker is protected from disclosure to third parties or the court, absent the survivor’s informed consent, a court ruling compelling disclosure, or certain circumstances unique to criminal proceedings.

(See § 1038.1.) That privilege is central to a survivor's ability to obtain help in escaping their trafficker and re-establishing themselves as a free and autonomous

individual. Survivors have to be able to count on their caseworkers to protect the information they share. It is only with that protection that survivors can be honest and open about their situations and understand what options may be open to them, without the fear of reprisal from their traffickers for sharing the truth about what they have endured.

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Today, nearly 15 years later, professionals in the human trafficking field have come to learn more about the importance of the privilege and how it actually works inside and outside of courtrooms across California. Human trafficking service providers are unique in not only the services that they offer, but also in the way that they are structured. They can vary from larger, more resourced organizations that work with a variety of crime victims, to smaller and more grassroots anti-trafficking groups, all working closely with trafficking survivors. In order to better ensure that no matter where a survivor turns for help, the personal information about their lives and experiences must be protected. Therefore, this bill proposes amendments that clarify who can claim the privilege, and the organizational requirements for those who offer survivors this protection.

While the courts have respected and upheld this critical safety provision, as currently written, human trafficking services providers have met difficulties in ensuring that caseworkers who serve this population meet the requirements to claim privilege. Organizations have come together to address gaps in the current law that function to subject victims' confidential information to disclosure in court proceedings, contrary to the stated legislative intent.

2. Difficulty Prosecuting Human Trafficking

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, or intimidation. In addition, victims without documentation of lawful presence in the U.S. may fear deportation and may be reluctant to seek help from law enforcement. Even after victims have initially cooperated with law enforcement or the prosecutor, they often recant their testimony out of fear or dependency on their trafficker and mistrust of the police. (Northeastern University Institute on Race and Justice, School of Criminology and Criminal Justice/Urban Institute Justice Policy Center, *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, (April 2012), p. 15 <<https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf>> [as of Jun. 11, 2019].).

One way to support victims of human trafficking 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 necessary to facilitate open communication and ultimately trust in the criminal justice system.

3. Human Trafficking Caseworker-Victim Privilege

Generally, no person has a privilege to refuse to be a witness, to refuse to disclose any matter or to refuse to produce any writing, object, or other thing, or to prevent another person from testifying, disclosing a matter, or producing a writing, unless otherwise provided by statute. (Evid. Code, § 911.) A privilege may be an exemption from the duty to take the stand and testify, or an exemption from the duty to answer certain questions because of the privileged nature of the underlying subject. A privilege is personal to the holder. It must be claimed and if not claimed, it may be waived.

The human trafficking caseworker-victim privilege was created by AB 22 (Lieber), Chapter 240, Statutes of 2005, which among other things, established civil and criminal penalties for the trafficking of human beings and allowed for the forfeiture of assets derived from human trafficking. Other than minor technical amendments in 2014, Evidence Code sections 1038, 1038.1, and 1038.2—the sections enacting the privilege—have not been amended since 2005. The sponsor of this bill asserts that the statutory language, including the existing definition of human trafficking victim caseworker, does not accurately or appropriately reflect changes in the field that have occurred since the privilege was codified. This bill seeks to amend the relevant code sections to reflect such changes.

4. What This Bill Does

This bill makes a number of changes to the human trafficking caseworker-victim privilege. Among other things, the bill would amend existing law to do the following:

- 1) Allow a human trafficking victim's current caseworker to claim the privilege, even if that caseworker was not the victim's caseworker at the time the confidential communication was made.
- 2) Remove a provision in existing law that authorizes a court to compel disclosure of privileged information by the caseworker if the victim is either dead or is not the complaining witness in a criminal action against the perpetrator.
- 3) Modify the definition of "confidential communication" to specify that both oral and written communications are included within the definition, as well as all information about the children of the victim and the relationship of the victim to the human trafficker.
- 4) Modify the definition of "holder of the privilege" to include the personal representative of the victim if the victim is deceased.
- 5) Modify 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 specified experience, education, and training working with victims of human trafficking.
- 6) Modify the training, education, and experience requirements to qualify as a human trafficking caseworker to make them both more flexible (i.e., requiring an advanced degree in a field similar to, rather than limited to, a master's degree in counseling) and more specific (i.e., requiring the training for caseworkers to cover topics, including peer counseling techniques and the intersection of human trafficking and other crimes, among others).
- 7) Define the term "human trafficking victim services organization" as a nongovernmental organization or entity that provides shelter, program, or other support services to victims of human trafficking and their children and meets a number of specified criteria in terms of staffing and support services (e.g., a 24 hour telephone hotline, psychological support and peer counseling, etc.).

- 8) Modify 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.
- 9) Clarify that nothing in the bill limits or affects any obligation under current law to report child abuse to law enforcement.

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