



To: California Department of Finance

From: **Coalition to Abolish Slavery & Human Trafficking (CAST) and Bet Tzedek**

Date: January 5, 2018

Subject: AB 900 Analysis

The Coalition to Abolish Slavery & Human Trafficking (CAST) and Bet Tzedek write to address the concerns raised in the Department of Finance (DOF) analysis of AB 900. CAST is the largest nonprofit in the United States that exclusively provides comprehensive services to survivors of human trafficking and works to put an end to modern slavery and trafficking. Bet Tzedek is a nonprofit legal aid law firm that provides a range of services to vulnerable communities in California, including being a pioneer in providing civil legal assistance to human trafficking survivors. AB 900 is currently in the Assembly Appropriations Committee. As co-sponsors of this legislation, we hope this memorandum can clarify existing law around victim compensation and provide additional information about erroneous claims made in the Department’s analysis about the potential impact of AB 900.¹

I. The policy in AB 900 does not “fundamentally change” the way the California Victim’s Compensation Board (CalVCB) compensates victims of crime.

The DOF analysis calls the policy in AB 900 a “fundamental change” to the nature of the Board’s system of compensation; however, since 2016 CAST, Bet Tzedek and others have appeared in front of the CalVCB board in support of this measure and the Board has never characterized it as a “fundamental policy change on the record.” In fact, the Controller, who serves as a Board member, is a co-sponsor of this measure.

¹ We also note that the DOF analysis was based on an earlier version of the bill, and that subsequent amendments to the bill moot some of the concerns DOF raised.

Further, recovery for lost income by crime victims is currently allowed, and the CalVCB currently provides recovery for loss of income for crime victims. The CalVCB is intended to “compensat[e] for the pecuniary losses [victims] suffer as a direct result of criminal acts.” Gov. Code § 13950(a). More specifically, the Board compensates “the loss of income or loss of support, or both, that a victim or derivative victim incurs as a direct result of the victim’s or derivative victim’s injury or the victim’s death.” Gov. Code § 13950(a)(3). Victims of human trafficking are injured by being forced into labor or sexual services for little or no compensation by their traffickers. The income loss in these cases is the direct result of the crime, which is at its core about economic exploitation, and is consistent with the legislative intent behind CalVCB compensation.

The issue that AB 900 seeks to resolve for human trafficking victims is the standard of proof required at an administrative level to qualify for lost income relief. Existing regulations require victims to prove the amount of lost income by providing a statement of disability for the time period in question from the employer or tax documents to verify the amount of the loss. See Title 2 CCR §§ 649.7(b)(2), 649.32(d). The vast majority of human trafficking victims are unable to provide this type of proof since the income loss does not occur after the crime, but instead is the crime. The lack of required paperwork to prove the exact amount of loss is common in these cases solely because of the trafficker’s form of commercial exploitation. As California take steps to better address this criminal issue through a wide range of legislative reforms and practices given the specific nature of this crime, the administrative hurdle within CalVCB, must be updated so that human trafficking survivors are not prevented from accessing aid like other crime victims, which is clearly within the statutory purview of the Board to provide.

II. Contrary to the DOF analysis, the CalVCB covers numerous losses that can also be recouped by restitution paid by a defendant and this recovery does not alter CalVCB’s status as payer of last resort.

The DOF analysis argues that the CalVCB is not meant to cover “restitution-type compensation” that could be paid by the perpetrators of crimes. However, the current existing framework on victim compensation reveals that this is in fact exactly the type of compensation that the board commonly supports for recovery of crime victims. The ability to seek restitution from criminal perpetrators **does not prevent crime victims from seeking aid from the CalVCB**. Many of the same economic losses that the CalVCB regularly reimburses crime victims for are also covered forms of restitution for which the offender can be held responsible, including the cost of medical and mental health counseling resulting from a crime and the loss of income a victim may suffer. See Penal Code § 1202.4(f)(3). Indeed, the Legislature has already explicitly addressed the issue of “double dipping” for crime victims by providing that restitution “ordered pursuant to this subdivision shall be ordered to be deposited in the Restitution Fund to the extent that the victim ... has received assistance from the California Victim Compensation and Government Claims Board pursuant to Chapter 5 (commencing with Section 13950) of Part 4 of Division 3 of Title 2 of the Government Code.” Penal Code 1202.4(f)(2). Thus, CalVCB may be reimbursed by a restitution order directed towards an offender by the courts. Regulations also

expressly prevent victims from receiving dual compensation by requiring disclosure of other forms of recovery prior to receiving benefits. See 2 C.C.R. § 649.31. The CalVCB remains the payer of last resort whether or not a victim can receive compensation or indemnity from other sources. AB 900 does nothing to change this standard; it simply expands the ability of human trafficking victims to be able to access the same benefits afforded to other victims of crime.

III. AB 900 uses a method of calculating lost income for trafficking victims that has been in California statute for more than 10 years.

The DOF analysis questions the burden of proof for a victim to demonstrate the type and nature of trafficking to which they were subject. The analysis highlights that victims would be the “sole source of information and corroboration” on this issue.² However, for more than ten years California courts have relied on victim testimony as an important element to help inform restitution awards for human trafficking. AB 22 enacted in 2005 established this standard, which had already existed for employees generally for many years.³ The methodology employed by California courts is also used by the federal government in calculating lost income for human trafficking survivors.⁴ AB 900 simply applies a standard already statutory enacted at both the state and federal level as the best way to value lost income for trafficking victims given the unique nature of these crimes. AB 900, as AB 22 allowed the courts to do, allows the Board to choose what it deems the most reliable of the following:

- (1) the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the offense occurred;
- (2) the value of the victim’s labor as guaranteed under California law; or
- (3) the actual income derived by the defendant from the victim’s labor or services or any other appropriate means to provide reparations to the victim.

The DOF analysis also expresses some concern about making a determination where a victim has been trafficked for sexual services. However, this issue was also directly addressed by AB 22 and federal statutory language which made clear that the framework above applies in both sex

² It is worth noting that eligibility for CalVCB benefits does not require successful adjudication of a crime. See <https://victims.ca.gov/victims/faq/eligibility.aspx#Who>. Therefore CalVCB has routinely placed great weight on the victim’s account to demonstrate the commission, character, and nature of the underlying crime in question, and AB 900 does nothing to change existing standards the Board employs to prove the commission of a crime.

³ See, e.g., *Hernandez v. Mendoza*, 199 Cal.App.3d 721 (1988), which states that when an employer fails to comply with California’s requirements to keep accurate written contemporaneous time and pay records, the employee’s credible testimony estimating time worked is sufficient to shift burden to the employer to disprove the testimony with specific evidence.

⁴ See 18 U.S.C. § 1593(b)(3): mandatory restitution for human trafficking “shall in addition include the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*)”

and labor trafficking cases.⁵ As the standard is well settled, this concern raised about AB 900 should be seen to hold no merit, as the victim-blaming alternative is to say that a trafficking victim who does not choose what type of labor or service they are forced to perform should not be able receive the same benefits if they were forced to perform sexual services or other illegal acts through no fault of their own. Further, the valuation methods allow a flexible framework that does not necessitate payment for specific sexual acts but for being denied the opportunity to perform other work during the time the victim was trafficked. Again, these are longstanding determinations that the Legislature has already deemed appropriate for courts to make. AB 900 simply extends that methodology to the Board in order to address an urgent need for these particular crime victims that is going unmet.

Further, the CalVCB has a great deal of discretion in determining how to apply the standard if enacted. There is ample opportunity when the Board engages in the regulatory process to determine how human trafficking survivors will apply for lost income to include additional safeguards CalVCB deems necessary. For example, to streamline its process, the Board may adopt a default regulatory standard where it may simply award the minimum guarantee for work under California law, which is the minimum wage, unless more evidence can be presented.

IV. Human Trafficking is a covered benefit under the federal Victims of Crime Act (VOCA).

The DOF analysis states that human trafficking is not a covered benefit under VOCA (federal Victims of Crime Act) and thus is not eligible for reimbursement through the grant program. However, in direct conversations with former General Counsel Wayne Stumpfer of CalVCB in 2016, CAST and Bet Tzedek, and Pro Bono Legal Counsel Gibson Dunn were told by General Counsel that this potential issue had been checked with CalVCB's Washington, DC, counterparts and that in fact if California covered lost income in this way for human trafficking victims, it could be reimbursed by federal VOCA funding. Further, in conversations in June 2017 with Dan Eddy, the Executive Director of the National Association of Crime Victim Compensation Boards, CAST also received verbal confirmation from this national expert that there would be no issue with California receiving reimbursement /matching federal funds under the established 40% State/60% Federal standard.

Further, a look at the federal guidelines for the VOCA Victim Compensation Grant Program support this conclusion. For a state to meet or maintain eligibility for a VOCA compensation grant, it must satisfy certain requirements. 66 F.R. 27161, Sec. 4(B). Among them, states must

⁵ See *U.S. v. Webster*, No. 08-30311, 2011 WL 8478276, at *3 (9th Cir. Nov. 28, 2011) (affirming restitution award for sex trafficking based on the minimum amount defendant would charge for victim's services and the amount of time trafficked); see also *In re Sealed Case*, 702 F.3d 59, 67 (D.C. Cir. 2012) (affirming District Court's restitution order to sex trafficking victims for lost income calculated based on number of days the victim was prostituted by defendant and, for example, the average daily amount earned or the minimum daily earning's quota set by defendant).

“provide compensation to victims of federal crimes occurring within the state on the same basis that the program provides compensation to victims of state crimes.” 66 F.R. 27162, Sec. 4(B)(7). Listed among the examples of federal crimes, the guidelines include “trafficking of persons.” 66 F.R. 27160, Sec. 1(B). In addition, under “compensable crimes” the guidelines explain that VOCA prioritizes coverage for victims of violent crimes but also allows states to “broaden the range of compensable crimes to include those involving threats of injury or economic crime where victims are traumatized but not physically injured.” 66 F.R. 27161, Sec. 4(B)(1)(b). CalVCB’s existing crime eligibility explicitly provides coverage for victims of human trafficking consistent with the federal guidelines requiring coverage of federal crimes and permitting coverage of nonviolent crimes involving threats of injury or economic crimes. There is no reason to expect that AB 900 compensation would not be covered by the federal grant program.

V. The DOF analysis overestimates the expected rate of recovery under AB 900.

The DOF analysis provides a range of impact to the CalVCB budget between \$6.7 million to \$22 million. The broad range is based on an estimated expected increase in the claimant rate due to the policy in AB 900. However, this range would implicate an **over 60 percent** increase in the claimant rate. The Department provides no basis for the size of this estimated increase. In fact, human trafficking victims have a low rate of seeking funds from the CalVCB (Since 2015 only x have sought CalVCB funds—this has increased only at rate of Y.) This is due to numerous reasons that have nothing to do with the change in policy proposed by AB 900, and seemingly not considered in DOF analysis. For example, victims often require assistance to access services through the CalVCB and often do not self-identify as trafficking victims for many years after these crimes, given factors such as feeling like they somehow consented to their own enslavement, the stigma around being forced to commit criminal acts or being undocumented, and a general fear of police and government agencies instilled by their traffickers.

Additionally, the fact that CalVCB claims are time-limited (generally applicants must apply within three years of the criminal activity) means that many trafficking victims who escape from their traffickers will never be able to seek CalVCB funds, because they often are not able to apply in time due to lack of access to services or because they often do not self-identify as a crime victim and seek services. AB 900 does nothing to change these well-established and documented issues for trafficking victims.

Further, given the fact that 60% of the funds will be eligible to come from federal resources as discussed above, even accepting the DOF framework would make the proposed increase in state funding only \$2.63 million to \$8.8 million, not the \$6.7 million to \$22 million asserted by DOF.

Finally, as the DOF analysis is based on a dramatic increase in applicants over the years, if CalVCB begins to gather data that does show a higher level of trafficking victims suddenly accessing CalVCB because of AB 900 benefits, the Legislature can easily act to address this issue in a timely manner before any issues occur—but only when actual data is available.

For all the above listed reasons, there is strong justification for questioning the incredible increases that DOF asserts will occur and to feel confident that the framework provided by AB 900, while creating some new state expenditures to compensate trafficking victims for the horrific crimes committed against them, will be at a workable rate given CalVCB's budget and expenditures.

Conclusion

In conclusion, CAST and Bet Tzedek believe that AB 900 proposes a modest change in existing law to allow victims of human trafficking better access CalVCB funds to which they should be entitled. We would be happy to provide additional information and materials on these issues based on our specific expertise with these programs and trafficking victims specifically. We look forward to further discussions on AB 900.