

PROTECTED INNOCENCE INITIATIVE

STATE ACTION. NATIONAL CHANGE.

ANALYSIS AND RECOMMENDATIONS MASSACHUSETTS

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *CSEC or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

Legal Analysis¹:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*

Massachusetts has not enacted a separate human trafficking or sex trafficking statute. As of October 12, 2011, several bills were pending that, if passed, would create separate human trafficking and sex trafficking laws.

- 1.1.1 Recommendation: Enact a human trafficking statute that addresses sex trafficking, does not require proof of the use of force, fraud, or coercion for minor sex trafficking victims and expressly identifies children under 18 who are commercially sexually exploited as domestic minor sex trafficking victims.²

* This document has not been fully reviewed and approved by ACLJ

¹ Unless otherwise specified, all references to statutes were taken from the Annotated Laws of Massachusetts (LEXIS current through Act 92 of the 2011 Legislative Session), all references to regulations were taken from the Code of Massachusetts Regulations (LEXIS current through regulations in effect as of Sept. 2, 2011), and all federal statutes were taken from United States Code (LEXIS current through PL 112-54, approved 11/12/11).

² Subsequent recommendations in this report are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against a minor.*

The following state laws create separate and specific crimes of commercial sexual exploitation of children:

1. Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) makes it illegal for

Any one [sic] who entices³ a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that he or another person will violate section 13B [Indecent assault and battery on child under fourteen], 13B 1/2 [Indecent assault and battery on child under —aggravating factors], 13B 3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . 23 [Rape and abuse of child], 23A [Rape and abuse of a child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], . . . of chapter 265, section 4A [Promoting child prostitution; mandatory sentence], . . . 28 [Matter harmful to minors—dissemination or possession with intent], . . . 29A [Child pornography—enticement, solicitation, employment of children], 29B [child pornography—dissemination], 29C [child pornography—purchase or possession], 35A [Obscene material/acts—acts with child under sixteen], 53 [Common night walkers, disorderly persons and disturbers of the peace⁴] or 53A [Engaging in sexual conduct for a fee; payors and payees; penalties] of chapter 272, or any offense that has as an element the use or attempted use of force . . .

A conviction under Mass. Gen. Laws ch. 265, § 26C(b) is punishable by imprisonment up to 5 years in the state prison⁵ or imprisonment up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000.⁶

2. Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse) provides, “Whoever fraudulently and deceitfully entices or takes away a person from the house of his parent or guardian or elsewhere, for the purpose of prostitution or for the purpose of unlawful sexual intercourse, and whoever aids and assists in such abduction for such purpose, shall be punished by imprisonment in the state prison for not more than three years or in jail

³ Mass. Gen. Laws ch. 265, § 26C(a) defines “entice” as “to lure, induce, persuade, tempt, incite, solicit, coax, or invite.”

⁴ Mass. Gen. Laws ch. 272, § 53 states,

(a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment. (b) Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than \$150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.

⁵ Mass. Ann. Laws ch. 274, § 1 (Felony and Misdemeanor) states, “A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.” In determining whether a crime is a felony or misdemeanor, “[T]he issue is how the crime itself may *potentially* be punished, not how a particular defendant before a particular court may be punished.” *United States v. Sousa*, 468 F.3d 42, 45 (1st Cir. 2006) (quoting *Commonwealth v. Smith*, 829 N.E.2d 1090, 1092 n.1 (Mass. 2005)). In other words, an offense is classified as a felony if the offense is punishable by imprisonment in a state prison and not whether the offender is actually sentenced to a term of imprisonment in state prison. Here and elsewhere in this report that a potential punishment of imprisonment in state prison is mentioned, the offense is classified as a felony.

⁶ Mass. Gen. Laws ch. 279, § 6 (Sentence to jail or house of correction) states, “Whoever is convicted of a crime punishable wholly or in part by imprisonment in jail may be sentenced to such imprisonment in the house of correction or to confinement at hard labor either in the jail or house of correction; and if convicted of a crime punishable by imprisonment in the house of correction may be sentenced to such imprisonment in a jail.” Mass. Gen. Laws ch. 126, § 8 (Houses of correction provided by county) explains that a house of correction is operated by the county. Here and elsewhere in this report that imprisonment in a jail or house of correction is mentioned, it appears that those two terms are used interchangeably.

for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment in jail.”

3. Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) makes it a crime if a person “induces a minor to become a prostitute, or . . . knowingly aids and assists in such inducement.” A conviction under Mass. Gen. Laws ch. 272, § 4A is punishable by imprisonment between 3–5 years in the state prison and a fine of \$5,000.⁷ Mass. Gen. Laws ch. 272, § 4A.
4. Mass. Gen. Laws ch. 272, § 4B (Deriving support from child prostitution; mandatory sentence), makes it a crime if a person “lives or derives support or maintenance, in whole or in part, from the earnings or proceeds of prostitution committed by a minor, knowing the same to be earnings or proceeds of prostitution, or shares in such earnings, proceeds or monies.” A conviction under Mass. Gen. Laws ch. 272, § 4B is punishable by imprisonment for at least 5 years in the state prison and a fine of \$5,000.⁸ Mass. Gen. Laws ch. 272, § 4B.
5. Mass. Gen. Laws ch. 272, § 29A (Child pornography—enticement, solicitation, employment of children) states,
 - (a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material, shall be punished
 - (b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or engage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct, shall be punished

Convictions under Mass. Gen. Laws ch. 272, § 29A are punishable by imprisonment between 10–20 years, a fine of \$10,000–\$50,000, or both imprisonment and a fine.

6. Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) makes it a crime if a person “pays, agrees to pay, or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 14, or . . . is paid, agrees to pay, or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 14.” A conviction under Mass. Gen. Laws ch. 272, § 53A(b) is punishable by imprisonment up to 10 years in the state prison, or imprisonment up to 2½ years in the house of correction. Mass. Gen. Laws ch. 272, § 53A(b).

Sexual offense laws that may apply in cases of commercial sexual exploitation of a child include the following:

1. Mass. Gen. Laws ch. 265, § 13B (Indecent assault and battery on child under fourteen) states,

⁷ The statute also specifies that the sentence “shall not be reduced to less than three years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served three years of such sentence.” Mass. Gen. Laws ch. 272, § 4A.

⁸ The statute also specifies that the sentence “shall not be reduced to less than five years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served five years of such sentence.” Mass. Gen. Laws ch. 272, § 4B.

Whoever commits an indecent assault and battery⁹ on a child under the age of 14 shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years. . . .

In a prosecution under this section, a child under the age of 14 years shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.

Mass. Gen. Laws ch. 265, § 13B 1/2 (Indecent assault and battery on child under fourteen—aggravating factors) states,

Whoever commits an indecent assault and battery on a child under the age of 14 and:

(a) the indecent assault and battery was committed during the commission or attempted commission of the following offenses: . . . (6) kidnapping as set forth in section 26 of chapter 265; . . . (11) posing or exhibiting child in state of nudity or sexual conduct as set forth in section 29A of chapter 272; or

(b) at the time of commission of said indecent assault and battery, the defendant was a mandated reporter as is defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 10 years of such sentence. . . .

2. Mass. Gen. Laws ch. 265, § 13L (Reckless endangerment of children) makes it a crime if a person “wantonly or recklessly¹⁰ engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse¹¹ to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act.” A conviction under Mass. Gen. Laws ch. 265, §13L is punishable by imprisonment up to 2½ years in the house of correction.

3. Mass. Gen. Laws ch. 265, § 23 (Rape and abuse of child) makes it a crime if a person “unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age.” A conviction under Mass. Gen. Laws ch. 265, §23 generally will “be punished by imprisonment in the state prison for life or for any term of years or, except as otherwise provided, for any term in a jail or house of correction,” except that Mass. Gen. Laws Ch. 265, §23A (Rape and abuse of child—aggravating factors) provides enhanced penalties in the following circumstances:

(a) there exists more than a 5 year age difference between the defendant and the victim and the victim is under 12 years of age;

(b) there exists more than a 10 year age difference between the defendant and the victim where the

⁹ See *infra* note 11 for the definition of “sexual abuse” under Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children), which explains that “sexual abuse” includes “an indecent assault and battery on a child under 14.”

¹⁰ Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children) states, “For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”

¹¹ Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children) defines “sexual abuse” as “an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under 14 under section 13B1/2 of said chapter 265; . . . indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; . . . rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; . . . rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; . . . and assault of a child with intent to commit rape under section 24B of said chapter 265.”

victim is between the age of 12 and 16 years of age; or
(c) at the time of such intercourse, was a mandated reporter as defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 10 years of such sentence. . . .

4. Mass. Gen. Laws ch. 265, § 24B (Assault on child under sixteen with intent to commit rape) makes it a crime if a person “assaults a child under sixteen with intent to commit a rape, as defined in [ch. 277, § 39].”¹² A conviction under Mass. Gen. Laws ch. 265, § 24B will “be punished by imprisonment in the state prison for life or for any term of years; and whoever over the age of eighteen commits a subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years but not less than five years.”
5. Mass. Gen. Laws ch. 272, § 4 (Enticing to unlawful intercourse) makes it a crime if a person “induces any person under 18 years of age of chaste life to have unlawful sexual intercourse.” A conviction under Mass. Gen. Laws ch. 272, § 4 is punishable by imprisonment up to 3 years in the state prison or imprisonment up to 2½ years in a jail or house of correction, a fine up to \$1,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 4.
6. Mass. Gen. Laws ch. 272, § 35A (Obscene material/acts—acts with child under sixteen) makes it a crime if a person “commits any unnatural and lascivious act¹³ with a child under the age of sixteen.” An offender’s first conviction under Mass. Gen. Laws ch. 272, § 35A is punishable by imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in jail or the house of correction, or a fine of \$100–\$1,000, while subsequent convictions by adult offenders (persons over the age of eighteen) are punishable by imprisonment for at least 5 years in the state prison. Mass. Gen. Laws ch. 272, § 35A.

1.3 *CSEC or prostitution statutes refer to the human trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

Massachusetts has not enacted a human trafficking statute.

- 1.3.1 Recommendation: Upon enactment of a human trafficking law, Massachusetts should amend its CSEC laws to refer to the human trafficking statute.

¹² Mass. Gen. Laws ch. 277, § 39 (Meaning of certain words and phrases) defines “rape” as “[s]exual intercourse or unnatural sexual intercourse by a person with another person who is compelled to submit by force and against his will or by threat of bodily injury, or sexual intercourse or unnatural sexual intercourse with a child under sixteen years of age.”

¹³ Mass. Gen. Laws ch. 272, § 31 (Obscene material/acts—definitions) defines, “Lascivious intent” as

a state of mind in which the sexual gratification or arousal of any person is an objective. For the purposes of prosecution under this chapter, proof of lascivious intent may include, but shall not be limited to, the following:

- (1) whether the circumstances include sexual behavior, sexual relations, infamous conduct of a lustful or obscene nature, deviation from accepted customs and manners, or sexually oriented displays;
- (2) whether the focal point of a visual depiction is the child’s genitalia, pubic area, or breast area of a female child;
- (3) whether the setting or pose of a visual depiction is generally associated with sexual activity;
- (4) whether the child is depicted in an unnatural pose or inappropriate attire, considering the child’s age;
- (5) whether the depiction denotes sexual suggestiveness or a willingness to engage in sexual activity;
- (6) whether the depiction is of a child engaging in or being engaged in sexual conduct, including, but not limited to, sexual intercourse, unnatural sexual intercourse, bestiality, masturbation, sado-masochistic behavior, or lewd exhibition of the genitals.

Legal Components:

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts from a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*
- 2.3 *Solicitation of prostitution laws differentiate between buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
- 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
- 2.7 *Base penalties for buying sex acts with a minor are sufficiently high for all minors under 18 and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*

Legal Analysis:

- 2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts from a victim of domestic minor sex trafficking*

Massachusetts has not enacted a human or sex trafficking law, and therefore, buyers of sex acts with a minor cannot be charged with domestic minor sex trafficking.

- 2.1.1 Recommendation: Enact human trafficking and sex trafficking laws that applies to buyers of commercial sex with minors.

- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*

Massachusetts has made it a crime to buy sex acts with a minor through two CSEC laws. A buyer who “pays, agrees to pay, or offers to pay” a person “to engage in sexual conduct with a child under the age of 14” may be prosecuted under Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties), which is punishable by imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction. Mass. Gen. Laws ch. 272, § 53A(b).

A buyer also may be prosecuted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) to the extent that the buyer “entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent” to engage in sexual conduct with a minor in violation of Mass. Gen. Laws ch. 272, § 35A (Obscene material/acts—acts with child under sixteen), or § 53A (Engaging in sexual conduct for fee; payors and payees; penalties). A buyer who is convicted under Mass. Gen. Laws ch. 265, § 26C will receive imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b).

A buyer might also be prosecuted under a range of general sex offenses.¹⁴

2.3 *Solicitation of prostitution laws differentiate between buying sex acts with an adult and buying sex acts with a minor under 18.*

Massachusetts's laws distinguish between buying sex with an adult and buying sex with a minor under 16 years of age. The age-neutral solicitation law, Mass. Gen. Laws ch. 272, § 8 (Soliciting), does not distinguish the offense of soliciting a minor for commercial sex acts from soliciting an adult, simply making it illegal to “solicit or receive compensation for soliciting for a prostitute,” punishable by up to 1 year imprisonment in the house of correction, a fine up to \$500, or both imprisonment or a fine. Mass. Gen. Laws ch. 272, § 8. A buyer of sex with a minor 14 and older may be prosecuted under Mass. Gen. Laws ch. 272, § 53A(a), which makes “pay[ing], agree[ing] to pay, or offer[ing] to pay another person to engage in sexual conduct” a crime punishable by imprisonment up to 1 year in the house of correction, a fine up to \$500, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 53A(a).

In contrast, where the buyer buys or offers to buy sex with a minor under 14, Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) imposes enhanced penalties where a buyer “pays, agrees to pay, or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 14.” Mass. Gen. Laws ch. 272, § 53A(b). A conviction under this statute is punishable by imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction. Mass. Gen. Laws ch. 272, § 53A(b).

In addition, a buyer who “entices”¹⁵ a child under 16 “to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent” to engage in sexual conduct with the child, in violation of Mass. Gen. Laws ch. 272, § 53A(b), may be imprisoned up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b).

- 2.3.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 53A(b) to apply to buyers of sex with all minors under 18.

2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*

Buyers convicted under Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) for paying or offering to pay to engage in sexual conduct with a child under 14 may be imprisoned up to 10 years in the state prison or imprisoned up to 2½ years in the house of correction. Mass. Gen. Laws ch. 272, § 53A(b). Buyers prosecuted and convicted under Mass. Gen. Laws ch. 272, § 53A(a) for paying or offering to pay to engage in sexual conduct with a person 14 years of age or older may be imprisoned up to 1 year in the house of correction, a fine up to \$500, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 53A(a). Lastly, buyers convicted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be imprisoned by up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b).

In contrast, if the victim is under the age of 14, a conviction under the federal Trafficking Victims Protection Act (TVPA)¹⁶ for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed

¹⁴ See *supra* Section 1.2 for discussion of sex offenses that may be applicable to certain buyers of sex acts with minors.

¹⁵ See *supra* note 3 for the definition of “entice” as used in Mass. Gen. Laws ch. 265, § 26C, which includes “solicit.”

¹⁶ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

\$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense¹⁷ against a minor. To the extent buyers can be prosecuted under other federal CSEC laws,¹⁸ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.¹⁹

2.4.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 53A(a) and (b) (Engaging in sexual conduct for fee; payors and payees; penalties) to make the heightened penalty in subsection (b) applicable to any minor under the age of 18 and to eliminate the 9-year sentence penalty difference between buying sex with a minor under 14 and those 14 and older.

2.5 *Using the Internet to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*

Massachusetts has not enacted a statute or included penalty enhancements within the CSEC laws that criminalize the use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor.

2.5.1 Recommendation: Enact a law that specifically criminalizes the use of the Internet to lure, entice, recruit, or purchase commercial sex acts with minors.

2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*

Neither Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) nor Mass. Gen. Laws ch. 265, § 26C (Enticement of children) prohibit a buyer from asserting a defense of age mistake.

2.6.1 Recommendation: Include a prohibition on asserting an age mistake defense to prosecution for human trafficking and sex trafficking.

2.7 *Base penalties for buying sex acts with a minor are sufficiently high for all minors under 18 and not reduced for older minors.*

Massachusetts' CSEC laws stagger penalties based on the age of the minor, imposing lesser penalties where the victim is an older minor. Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) applies only where the buyer "entices a child under the age of 16 to enter, exit or remain within any vehicle, dwelling, building, or

¹⁷ Pursuant to 18 U.S.C. § 3559(e)(2), "federal sex offense" is defined as

an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

¹⁸ 18 U.S.C. § 2251A(b) (Selling or buying of children); 18 U.S.C. § 2251(a) (Sexual exploitation of children); 18 U.S.C. § 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity); 18 U.S.C. § 2422(a) (Coercion and enticement); 18 U.S.C. § 2252(a)(2), (4) (Certain activities relating to material involving the sexual exploitation of minors).

¹⁹ 18 U.S.C. § 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine); 18 U.S.C. § 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine); 18 U.S.C. § 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine); 18 U.S.C. § 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both); 18 U.S.C. § 2252(a)(2), (4) (a conviction under subsection(a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection(a)(4) is punishable by imprisonment up to 10 years, a fine, or both.); *see also* 18 U.S.C. § 3559(a)(1) (classifying all of the above listed offenses as felonies); 18 U.S.C. § 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

other outdoor space with the intent” to engage in sexual conduct with the minor, leaving 16 and 17-year-old minors unprotected.

Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) only applies if a buyer “pays, agrees to pay, or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 14.” Where the minor whom the buyer pays or offers to pay to engage in sexual conduct is 14 years old or older, the buyer will be prosecuted under Mass. Gen. Laws ch. 272, § 53A(a). Buyers convicted under Mass. Gen. Laws ch. 272, § 53A(b) may receive imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction, while a conviction under Mass. Gen. Laws ch. 272, § 53A(a), where the victim is 14 years of age or older, is punishable by imprisonment up to 1 year in the house of correction and a fine of up to \$500. Mass. Gen. Laws ch. 272, § 53A(a).

2.7.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) and ch. 265, § 26C (Enticement of children) to apply to buyers of sex acts with all minors under the age of 18.

2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*

Buyers convicted of violating Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be required to pay a fine up to \$5,000, while those convicted under Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties), where the victim is 14 years of age or older, or Mass. Gen. Laws ch. 272, § 8 (Soliciting for prostitute) may be required to pay a fine up to \$500. However, buyers convicted under Mass. Gen. Laws ch. 272, § 53A(b), criminalizing the purchase of commercial sex acts with a minor 14 and older, are not expressly required to pay any fine.

Buyers also may be required to make restitution. Mass. Gen. Laws ch. 258B, § 3(o), (u) (Rights of victims and witnesses of crime) states that victims of crime have the right “to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim’s losses” and “to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.”

Buyers might be subject to asset forfeiture for certain proceeds pursuant to Mass. Gen. Laws ch. 257, § 1 (Seizure of Forfeited Property), which states, “Property which has been forfeited for an offence may, if no other provision is made, be seized by a person entitled to enforce the forfeiture or, except as otherwise provided, by a police officer or constable of the town where the forfeited property is found, and shall be safely kept by him until it is disposed of as hereinafter provided.”

2.8.1 Recommendation: In an enacted human trafficking and sex trafficking law, include provisions mandating asset forfeiture for buyer of sex acts with minors and mandatory restitution for sex trafficking victims.

2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*

The buying and possessing of child pornography is illegal under Mass. Gen. Laws ch. 272, § 29C (Child pornography—purchase or possession). Specifically, Mass. Gen. Laws ch. 272, § 29C makes it illegal when a person,

[K]nowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:

- (i) actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- (iii) actually or by simulation engaged in any act of masturbation;
- (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;
- (v) actually or by simulation engaged in any act of excretion or urination within a sexual context;
- (vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
- (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child; with knowledge of the nature or content thereof

. . . .

An offender’s first conviction under Mass. Gen. Laws ch. 272, § 29C is punishable by imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in a jail or house of correction or a fine of \$1,000–\$10,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29C. Upon conviction of a second violation, a convicted offender may receive imprisonment not less than 5 years or a fine of \$5,000–\$20,000, or both imprisonment and a fine, while any subsequent convictions are punishable by imprisonment not less than 10 years or a fine of \$10,000–\$30,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29C(vii).

In contrast, a federal conviction for possession of child pornography²⁰ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²²

2.10 Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.

Buyers convicted of Mass. Gen. Laws ch. 265, § 26C (Enticement of children) are required to register as sex offenders; however, those convicted under Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) and Mass. Gen. Laws ch. 272, § 8 (Soliciting) are not required to register. Mass. Gen. Laws ch. 6, §§ 178C, 178D. Pursuant to Mass. Gen. Laws ch. 6, § 178D (Establishment and maintenance of sex offender registry), the sex offender registry board is required to “establish and maintain a central computerized registry of all sex offenders required to register pursuant to section 178C [Definitions] to 178P [Police officer’s authority to arrest for sex offender’s failure to comply with registration requirements], inclusive, known as the sex offender registry.” Mass. Gen. Laws ch. 6, § 178C (Definitions) defines “sex

²⁰ 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

²¹ 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

²² 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).



offender” in part as “a person . . . who has been convicted of a sex offense . . .” “Sex offense” is defined in Mass. Gen. Laws ch. 6, § 178C (Definitions) in relevant part for buyers as

an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B1/2 of said chapter 265; a repeat offense under section 13B 3/4 of said chapter 265; . . . indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; . . . rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265 [Rape and abuse of child—previous youthful offender]; . . . enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; . . . dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272 [Child pornography—dissemination]; . . .²³

FRAMEWORK ISSUE 3: CRIMINAL PROVISIONS FOR TRAFFICKERS

Legal Components:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
- 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*
- 3.3 *Using the Internet to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
- 3.5 *Convicted traffickers are required to register as sex offenders.*
- 3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

Legal Analysis:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*

In the absence of a state human or sex trafficking law, traffickers may be prosecuted under several of Massachusetts’s CSEC laws. Traffickers convicted under Mass. Gen. Laws ch. 272, § 2²⁴ (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), which is punishable by imprisonment up to 3 years in the state prison or imprisonment by 1 year in jail, a fine of up to \$1,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 4A²⁵ (Promoting child prostitution; mandatory sentence) is punishable by imprisonment between 3–5 years in the state prison and a fine of \$5,000.²⁶ Mass. Gen. Laws ch. 272, § 4A.

Traffickers also may be prosecuted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) to the extent that the trafficker “entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that

²³ Mass. Gen. Laws ch. 6, § 178C (Definitions) contains a definition for “sex offense involving a child,” and the offenses listed as a “sex offense involving a child” are all also listed as “sex offenses.”

²⁴ See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 2.

²⁵ See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 4A.

²⁶ The imprisonment “shall not be reduced to less than three years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served three years of such sentence.” Mass. Gen. Laws ch. 272, § 4A.

he or another person will violate . . . [Mass. Gen. Laws ch. 272] section 4A [Promoting child prostitution; mandatory sentence] . . . 29A [Child pornography—enticement, solicitation, employment of children], 29B [Child pornography—dissemination], 29C [Child pornography—purchase or possession], 35A [Obscene material/acts—acts with child under sixteen] . . . or 53A [Engaging in sexual conduct for fee; payors and payees; penalties] of chapter 272, or any offense that has as an element the use or attempted use of force . . .” A trafficker convicted of Mass. Gen. Laws ch. 265, § 26C (Enticement of children) may be imprisoned up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000.

Mass. Gen. Laws ch. 272 § 4B²⁷ (Deriving support from child prostitution; mandatory sentence) may also be used to prosecute traffickers and a conviction is punishable by imprisonment for at least 5 years in the state prison and a fine of \$5,000.²⁸ Mass. Gen. Laws ch. 272 § 4B. Traffickers who are “paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 14” may be convicted under Mass. Gen. Laws ch. 272, § 53A(b)²⁹ (Engaging in sexual conduct for fee; payors and payees; penalties), which is punishable by imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction. Mass. Gen. Laws ch. 272, § 53A(b). Lastly, convictions under Mass. Gen. Laws ch. 272, § 29A(b)³⁰ (Child pornography—enticement, solicitation, employment of children) are punishable by imprisonment between 10–20 years in the state prison, by a fine of \$10,000–\$50,000, or by both such fine and imprisonment. Mass. Gen. Laws ch. 272, § 29A(a), (b).

In contrast, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)³¹ for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense³² against a minor.

3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*

Massachusetts law criminalizes both the creation and distribution of child pornography. The creation of child pornography is illegal under Mass. Gen. Laws ch. 272, § 29A(a), (b) (Child pornography—enticement, solicitation, employment of children), which states,

(a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses,

²⁷ See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 4B.

²⁸ The imprisonment “shall not be reduced to less than five years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served five years of such sentence.” Mass. Gen. Laws ch. 272 § 4B

²⁹ See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 53A.

³⁰ See *supra* Section 1.2 for the substantive provisions of Mass. Gen. Laws ch. 272, § 29A.

³¹ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

³² Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material

(b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or engage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct

Convictions under Gen. Laws ch. 272, § 29A(a), (b) are punishable by imprisonment between 10–20 years or a fine of \$10,000–\$50,000, or by both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29A(a), (b).

The dissemination of child pornography is illegal under Mass. Gen. Laws ch. 272, § 29B (Child pornography—dissemination), which states,

(a) Whoever, with lascivious intent, disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity involving the use of a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished

(b) Whoever with lascivious intent disseminates any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished

Convictions under Mass. Gen. Laws ch. 272, § 29B(a), (b) are punishable by imprisonment between 10–20 years or a fine the greater of \$10,000–\$50,000 or 3 times “the monetary value of any economic gain derived from said dissemination,” or by both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29B(a), (b).

In contrast, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense³³ against a minor. Additionally, a federal conviction for distribution of child pornography³⁴

³³ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

³⁴ 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³⁵ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³⁶

3.3 *Using the Internet to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*

Massachusetts has not enacted a statute or included penalty enhancements within the CSEC laws that criminalize the use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor.

3.3.1 Recommendation: Enact a law that specifically criminalizes the use of the Internet to lure, entice, recruit, or purchase commercial sex acts with minors.

3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*

Traffickers convicted of violating Mass. Gen. Laws ch. 272, § 29A (Child pornography—enticement, solicitation, employment of children) may be required to pay a fine of \$10,000–\$50,000, while those who violate Mass. Gen. Laws ch. 272, § 29B(a), (b) (Child pornography—dissemination) may be required to pay a fine of the greater of \$10,000–\$50,000 or 3 times “the monetary value of any economic gain derived from said dissemination.” Mass. Gen. Laws ch. 272, § 29A(a), (b). Traffickers who violate any of Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), or Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be required to pay up to a \$5,000 fine. Mass. Gen. Laws ch. 272, §§ 4A, 4B, ch. 265, § 26C(b). Those convicted under Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse) may be required to pay a \$1,000 fine. Mass. Gen. Laws ch. 272, § 2.

Convicted traffickers may also be required to make restitution to their victims, as Mass. Gen. Laws ch. 258B, § 3(o), (u) (Rights of victims and witnesses of crime) specifies that victims have the right “to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim’s losses” and “to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.”

Traffickers may face asset forfeiture pursuant to Mass. Gen. Laws ch. 257, § 1 (Seizure of forfeited property), which states,

Property which has been forfeited for an offence may, if no other provision is made, be seized by a person entitled to enforce the forfeiture or, except as otherwise provided, by a police officer or constable of the town where the forfeited property is found, and shall be safely kept by him until it is disposed of as hereinafter provided.

³⁵ 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

³⁶ 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

Lastly, traffickers may face civil liability for injuries sustained by minor-victims of certain CSEC offenses. Victims of “sexual abuse,” defined as including violations of Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), § 29A (Child pornography—enticement, solicitation, employment of children), may seek civil remedies from their traffickers. Mass. Gen. Laws ch. 260, § 4C.

- 3.4.1 Recommendation: In any human trafficking or commercial sex trafficking laws enacted, include provisions that impose significant financial penalties, asset forfeiture, and mandatory restitution on traffickers.

3.5 *Convicted traffickers are required to register as sex offenders.*

Traffickers convicted of violating Mass. Gen. Laws ch. 265, § 26C (Enticement of children), and ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), § 29A (Child pornography—enticement, solicitation, employment of children), and § 29B (Child pornography—dissemination) are required to register as sex offenders pursuant to Mass. Gen. Laws ch. 6, § 178D (Establishment and maintenance of sex offender registry) and Mass. Gen. Laws ch. 6, § 178C (Definitions).³⁷ Traffickers convicted of Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for a fee; payors and payees; penalties) or Mass. Gen. Laws ch. 272, § 24 (Keeping house of prostitution) are not be required to register as these offenses are not included within the definition of “sex offense” under Mass. Gen. Laws ch. 6 § 178C.

3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

Although Massachusetts law does not expressly provide that violations of state CSEC laws are grounds for terminating parental rights, parental rights may be terminated for sexual abuse or exploitation. Massachusetts handles termination through its laws on adoption and custody. Mass. Gen. Laws ch. 210, § 3 (Consent not required in certain cases) provides,

- (a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section 2, other than that of the child, shall not be required if: . . . (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child pursuant to paragraph (c).

(b)

A juvenile court or a district court shall enter a decree dispensing with the need for consent of any person named in section 2 to the adoption of a child named in a petition filed pursuant to section 24 of chapter 119 in such court upon a finding that such child is in need of care and protection pursuant to section 26 of said chapter 119 and that the best interests of the child as defined in paragraph (c) will be served by such decree. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. Facts may be set forth either in the care and protection petition filed pursuant to said section 24 of said chapter 119 or upon a motion made in the course of a care and protection proceeding, alleging that the allowance of the petition or motion is in the best interests of the child.

³⁷ See *supra* Section 2.10 for the provisions of Mass. Gen. Laws ch. 6, § 178C.

The department of children and families shall file a petition or, in the alternative, a motion to amend a petition pending pursuant to section 26 of chapter 119 to dispense with parental consent to adoption, custody, guardianship or other disposition of the child under the following circumstances: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of any assault constituting a felony which results in serious bodily injury to the child or to another child of the parent For the purposes of this paragraph, “serious bodily injury” shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

. . . .

(c)

In considering the fitness of the child’s parent or other person named in section 2, the court shall consider, without limitation, the following factors:

. . . .

(ii) the child or another member of the immediate family of the child has been abused or neglected as a result of the acts or omissions of one or both parents, the parents were offered or received services intended to correct the circumstances which led to the abuse or neglect and refused, or were unable to utilize such services on a regular and consistent basis so that a substantial danger of abuse or neglect continues to exist, or have utilized such services on a regular and consistent basis without effectuating a substantial and material or permanent change in the circumstances which led to the abuse or neglect;

. . . .

(ix) severe or repetitive conduct of a physically, emotionally or sexually abusive or neglectful nature toward the child or toward another child in the home;

. . . .

(xiii) the conviction of a parent or other person named in section 2 of a felony that the court finds is of such a nature that the child will be deprived of a stable home for a period of years. Incarceration in and of itself shall not be grounds for termination of parental rights; or

(xiv) whether or not there has been a prior pattern of parental neglect or misconduct or an assault constituting a felony which resulted in serious bodily injury to the child and a likelihood of future harm to the child based on such prior pattern or assault.

. . . .

3.6.1 Recommendation: Amend Mass. Gen. Laws ch. 210, § 3(c)(xiii) (Consent not required in certain cases) to expressly provide that conviction of a CSEC crime is grounds for termination of parental rights.

Legal Components:

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*
- 4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*
- 4.3 *Promoting and selling child sex tourism is illegal.*
- 4.4 *Promoting and selling child pornography is illegal.*

Legal Analysis:

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*

Massachusetts has not enacted a human trafficking law; however, several CSEC laws may be used to prosecute facilitators. Facilitators may be prosecuted for violating Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse)³⁸ where the facilitators “aids and assists in such abduction” for the purpose of prostitution. A conviction under Mass. Gen. Laws ch. 272, § 2 is punishable by imprisonment up to 3 years in the state prison or up to 1 year imprisonment in jail, a fine of up to \$1,000, or both imprisonment and a fine.

Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) could be used to prosecute a facilitator who “knowingly aids and assists” in inducing a minor to become a prostitute. A conviction under Mass. Gen. Laws ch. 272, § 4A is punishable by imprisonment between 3–5 years in the state prison and a fine of \$5,000.³⁹ Mass. Gen. Laws ch. 272, § 4A.

- 4.1.1 Recommendation: Include the crime of assisting, enabling, or financially benefitting from domestic minor sex trafficking in a state human trafficking and sex trafficking laws.

- 4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*

Facilitators may be subject to fines ranging from \$1,000–\$50,000 for convictions related to their activities. Mass. Gen. Laws ch. 272, §§ 2, 29B. Facilitators who violate Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) or § 4B (Living off or sharing earnings of minor prostitute) may be required to pay a fine of \$5,000, and facilitators who violate Mass. Gen. Laws ch. 272, § 2 may be required to pay a fine of \$1,000.

Facilitators may be civilly liable for injuries sustained by victims of certain CSEC offenses defined as “sexual abuse,” including Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence) and § 29A (Child pornography—enticement, solicitation, employment of children). Mass. Gen. Laws ch. 260, § 4C.

³⁸ See *supra* Section 1.2 for the provisions of Mass. Gen. Laws ch. 272, § 2.

³⁹ See *supra* note 26.

Facilitators may also be required to make restitution to their victims, as Mass. Gen. Laws ch. 258B, § 3(o), (u) (Rights of victims and witnesses of crime) specifies that victims have the rights “to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim’s losses” and “to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.”

Lastly, facilitators may be required to forfeit property. Mass. Gen. Laws ch. 257, § 1 (Seizure of forfeited property) states, “Property which has been forfeited for an offence may, if no other provision is made, be seized by a person entitled to enforce the forfeiture or, except as otherwise provided, by a police officer or constable of the town where the forfeited property is found, and shall be safely kept by him until it is disposed of as hereinafter provided.”

4.3 *Promoting and selling child sex tourism is illegal.*

No specific provision in the Massachusetts code expressly prohibits promoting or selling child sex tourism.

- 4.3.1 Recommendation: Enact a law that prohibits selling or offering to sell travel services that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor or prostitution of a minor, if the travel or sale of travel services is occurring in Massachusetts.

4.4 *Promoting and selling child pornography is illegal.*

The dissemination of child pornography is illegal in Massachusetts under Mass. Gen. Laws ch. 272, §29B (Child pornography—dissemination). Mass. Gen. Laws ch. 272, §29B(a) makes it illegal to disseminate, or possess with the intent to disseminate

with lascivious intent . . . any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity involving the use of a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof

Additionally, Mass. Gen. Laws ch. 272, §29B(b) makes it a crime if a person disseminates, or possesses with the intent to disseminate

with lascivious intent . . . any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof

Convictions under Mass. Gen. Laws ch. 272, §29B (a), (b) are punishable by imprisonment between 10–20 years in the state prison or fines of the greater of \$10,000–\$50,000 or 3 times “the monetary value of any economic gain derived from” the dissemination of the pornography, or both imprisonment and fines. Mass. Gen. Laws ch. 272, §29B (a), (b).

Legal Components:

- 5.1 A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.
- 5.2 The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.
- 5.3 Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.
- 5.4 Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.
- 5.5 Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.
- 5.6 The definition of "caregiver" (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into the protection of child protective services.
- 5.7 Crime victims' compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.
- 5.8 Victim-friendly procedures and protections are provided in the trial process for minors under 18.
- 5.9 Expungement or sealing of juvenile arrest or criminal records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.
- 5.10 Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.
- 5.11 Statutes of limitations for civil and criminal actions for child sex trafficking or CSEC offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.

Legal Analysis:

- 5.1 A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.

The Massachusetts Code does not expressly define commercially exploited children as victims. For purposes of Massachusetts' crime victims compensation laws, Mass. Gen. Laws ch. 258C, §1 (Definitions) defines a "victim" as

a person who suffers personal physical or psychological injury or death:

- (a) as a direct result of a crime⁴⁰ as defined in this section;
- (b) as a result of attempting to assist a person against whom a crime was attempted or committed; or
- (c) as a result of efforts to prevent a crime or an attempted crime from occurring in his presence or to apprehend a person who had committed a crime in his presence.

As used within Chapter 258B (Rights of victims and witnesses of crime) of the Massachusetts Code. Mass. Gen. Laws ch. 258B, §1 (Definitions) defines a "victim" as

any natural person who suffers direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of a crime or delinquency offense, as demonstrated by the issuance of a complaint or indictment, the family members of such person if the person is a minor . . .

⁴⁰ Mass. Gen. Laws ch. 258C, § 1 (Definitions) defines a "crime" in part as "an act committed by a person which, if committed by a mentally competent, criminally responsible adult who has no legal exemption or defense, would constitute a crime."

and, for relevant provisions of this chapter, a person who is the subject of a case reported to a prosecutor pursuant to . . . section fifty-one B of chapter one hundred and nineteen [Duties of Department as to Child Abuse Reports], and the family members of such person if the person is a minor

5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*

Only one of Massachusetts's CSEC laws expressly states that a minor's consent to the offenses is not a defense for the perpetrator. Mass. Gen. Laws ch. 272, § 29A(c) (Child pornography—enticement, solicitation, employment of children), states that, “[i]n a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.” None of Mass. Gen. Laws ch. 265, § 26C (Enticement of children), Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), or § 53A (Engaging in sexual conduct for a fee; payors and payees; penalties) expressly prohibit a defendant from using the consent of a minor to a commercial sex act as a defense to the crime. However, the sex offense Mass. Gen. Laws ch. 265, § 13B 1/2 (Commission of indecent assault and battery on a child under the age of 14 during commission of certain offenses or by mandated reporters) states in part, “In a prosecution under this section, a child under the age of 14 years shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.”

5.2.1 Recommendation: Amend Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children), Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 53A(b) (Engaging in sexual conduct for a fee; payors and payees; penalties) to clarify that a minor's consent is not a defense to commercial sexual exploitation.

5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*

Massachusetts's prostitution law does not exclude minors from prosecution for prostitution offenses. Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties) makes it illegal if anyone “engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee” A conviction under this statute is punishable by imprisonment up to 1 year in the house of correction or a fine up to \$500, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 53A(a).

The offense of prostitution in Mass. Gen. Laws ch. 272, § 53 (Common night walkers, disorderly persons and disturbers of the peace) also does not exclude minors from prosecution, stating only,

(a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.

(b) Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than \$150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.

Under Mass. Gen. Laws ch. 272, § 62 (Nightwalking—third conviction), a third conviction for “being a common nightwalker” is punishable by imprisonment of 2½ years in the house of correction, the reformatory for women, if the offender is female, or in the Massachusetts reformatory, if the offender is male.

5.3.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties) and § 53 (Common nightwalkers, disorderly persons and disturbers of the peace) to make the laws inapplicable to minors under 18 and refer cases of minors under 18 used in prostitution to an enacted human trafficking or sex trafficking laws for prosecution of the perpetrators.

5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

A commercially sexually exploited child may be identified and directed to child protective services through a mandatory report under Mass. Gen. Laws ch. 119, § 51A(a) (Mandated reporter—responsibilities), which requires mandated reporters⁴¹ who have “reasonable cause to believe that a child is suffering physical or emotional injury resulting from: (i) abuse inflicted upon him which causes harm or substantial risk of harm to the child’s health or welfare, including sexual abuse” to immediately report the abuse to the Department. Mass. Gen. Laws ch. 119, § 51A(a) also authorizes the mandated reporter to contact law enforcement about the suspected abuse. In addition to mandated reports of abuse or neglect, Mass. Gen. Laws ch. 119, § 51A(f) provides that “[a]ny person may file a report under this section if that person has reasonable cause to believe that a child is suffering from or has died as a result of abuse or neglect.” Mass. Gen. Laws ch. 119, § 51B(k)(3) (Investigation of report of abuse filed under Sec. 51A; removal of child; transmission and filing of written reports; notice to district attorney; disclosure of information by mandated reporter) also provides that the Department must advise the district attorney and local law enforcement of any evidence indicating “there is reasonable cause to believe that . . . (3) a child has been sexually exploited, which shall include a violation of section 4A [Promoting child prostitution; mandatory sentence], 4B [Deriving support from child prostitution; mandatory sentence] or 29A [Child pornography—enticement, solicitation, employment of children] of said chapter 272”

After receiving a 51A report⁴² of suspected child abuse or neglect, Mass. Gen. Laws ch. 119, § 51B(a) (Duties of department as to child abuse reports) requires the Department, to investigate the allegations. Mass. Gen. Laws ch. 119, § 51B further provides

(a) Upon receipt of a report filed under section 51A, the department shall investigate the suspected child abuse or neglect, provide a written evaluation of the household of the child, including the parents and home environment and make a written determination relative to the safety of and risk posed to the child and whether the suspected child abuse or neglect is substantiated.

⁴¹ Mass. Gen. Laws ch. 119, § 21 (Definitions applicable to Secs. 21 to 51H) defines a “mandated reporter” as

a person who is: (i) a physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, optometrist, osteopath, allied mental health and human services professional licensed under section 165 of chapter 112, drug and alcoholism counselor, psychiatrist or clinical social worker; (ii) a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licenser of the department of early education and care or school attendance officer; (iii) a probation officer, clerk-magistrate of a district court, parole officer, social worker, foster parent, firefighter, police officer; (iv) a priest, rabbi, clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis; (v) in charge of a medical or other public or private institution, school or facility or that person’s designated agent; or (vi) the child advocate.

⁴² Mass. Gen. Laws Ch. 119 § 21 (Definitions applicable to Secs. 21 to 51H) defines “51A report” as “a report filed with the department under section 51A that details suspected child abuse or neglect.”

....
(c) If the department has reasonable cause to believe a child's health or safety is in immediate danger from abuse or neglect, the department shall take a child into immediate temporary custody if it has reasonable cause to believe that the removal is necessary to protect the child from abuse or neglect. . . .

....
(e) Notwithstanding subsection (c), whenever the department has reasonable cause to believe that removal is necessary to protect a child from abuse or neglect, it shall take the child into immediate temporary custody. If a child is taken into immediate temporary custody, the department shall make a written report stating the reasons for such removal and shall file a care and protection petition under section 24 on the next court day.
....

In cases where the report under section 51A is made by a health care practitioner after a minor has sought treatment for injuries at a hospital, Mass. Gen. Laws ch. 119, § 51C (Custody of child pending transfer or hearing) provides,

If a parent or other person requests the release from a hospital of a child reported pursuant to section fifty-one A, the presiding judge of the juvenile court of the judicial district in which such hospital is located may, if he believes such release would be detrimental to the child's health or safety, authorize the hospital and the attending physician, by any means of communication, to keep such a child in the hospital until custody is transferred to the department or until a hearing may be held relative to the care and custody of such child.

Any other physician treating a child reported pursuant to section fifty-one A may be so authorized by the court to keep such child in his custody until such time as the custody of the child has been transferred to the department or until a hearing may be held relative to the care and custody of such child.

For the Department to maintain protective custody of a child for another 72 hours, the Department must file a care and protection petition with the juvenile court pursuant to Mass. Gen. Laws Ch. 119 § 24 (Powers and duties of divisions of juvenile court department as to custody of children), which states in part, "A person may petition under oath the juvenile court alleging on behalf of a child within its jurisdiction that the child:

- (a) is without necessary and proper physical or educational care and discipline;
- (b) is growing up under conditions or circumstances damaging to the child's sound character development;
- (c) lacks proper attention of the parent, guardian with care and custody or custodian; or
- (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care, discipline or attention.

Mass. Gen. Laws ch. 119, § 24 further provides that if, after the petitioner testifies under oath, there is

[R]easonable cause to believe that: (i) the child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect; and (ii) that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of the child for up to 72 hours to the department or to a licensed child care agency or individual described in subclause (ii) of clause (2) of subsection (b) of Section 26 ["any agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child"].

Pursuant to Mass. Gen. Laws ch. 119, § 25 (Hearing; custody of child), "The petition under section 24 may be heard on the merits when a child is taken into custody and brought before the court or may be continued to a

time fixed for hearing. Pending the hearing on the merits, the court may allow the child to be placed in the care of some suitable person or licensed agency⁴³ providing foster care for children or may commit the child to the custody of the department. If the court commits a child to the custody of the department, the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C.” When the court hears the petition on the merits, Mass. Gen. Laws ch. 119, § 26(b) (Procedure at hearing; order of commitment; petition to dispense with parental consent to adoption; reimbursement of commonwealth; petition for review) provides in part, “If the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that the child is in need of care and protection. In making such adjudication, the health and safety of the child shall be of paramount concern. If the child is adjudged to be in need of care and protection, the court may commit the child to the custody of the department until he becomes an adult or until, in the opinion of the department, the object of his commitment has been accomplished, whichever occurs first; and the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C.” The court may also make other orders as set forth in the statute.

Mass. Gen. Laws ch. 119, § 29C (Judicial certification of need to remove child from home) provides, “If a court of competent jurisdiction commits, grants custody or transfers responsibility for a child to the department or its agent, the court shall certify that the continuation of the child in his home is contrary to his best interests and shall determine whether the department or its agent, as appropriate, has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home In making any determination, the health and safety of the child shall be of paramount concern.” Pursuant to Mass. Gen. Laws Ch. 119, § 29B(d) (Determination of future status of committed children; orders; permanency hearings; appeals), “The permanency hearing for a child or young adult shall be held within 30 days of a hearing at which a court determines that reasonable efforts to preserve and reunify families are not required pursuant to section 29C. The court may, however, make such determination at the time of the permanency hearing.” Mass. Gen. Laws Ch. 119 § 32 (Certain children to be placed in private families) establishes the priorities for placement of children committed to the department. It states in part, “Children in the care or custody of the department shall be placed in private families; provided, that any child who upon examination is found to be in need of special care, treatment or education may, if it is found by the department to be in the best interest of the child, be placed in a public or private institution or school, the primary purpose of which is the special care, treatment or education of children.”

Another way for a child to enter the child protective services system is as a child in need of services pursuant to Mass. Gen. Laws ch. 119, § 39H (Arrest of child; notification of probation officer; placement of child; bail and detention), which provides,

A child may be arrested for committing the behavior described in the definition of child in need of services in section twenty-one,⁴⁴ only if such child has failed to obey a summons issued pursuant to

⁴³ Mass. Gen. Laws. Ch. 119, § 23(a)(7) (Responsibility of department to provide foster care for children; placement with relatives; funeral expenses; child profile form; extension of support of child until 22 years of age; assignment of support rights; assistance to foster care families) provides, “A temporary shelter care facility program or a group care facility, licensed under chapter 15D [repealed], may provide temporary shelter for a 72-hour period to a child without parental consent, if the child’s welfare would be endangered if such shelter were not immediately provided. At the expiration of the 72-hour period, the licensee shall: (i) secure the consent of a parent or guardian to continued custody and care; (ii) refer the child to the department for custody and care; or (iii) refuse to provide continued care and custody to the child.”

⁴⁴ Mass. Gen. Laws Ch. 119 § 21 (Definitions applicable to Secs. 21 to 51H) defines “child in need of services” as “a child between the ages of 6 and 17 who: (a) repeatedly runs away from the home of a parent or legal guardian; (b) repeatedly fails to obey the lawful and reasonable commands of a parent or legal guardian, thereby interfering with the parent’s or legal guardian’s ability to adequately care for and protect the child; (c) repeatedly fails to obey lawful and reasonable school regulations; or (d) when not otherwise excused from attendance in accordance with lawful and reasonable school regulations, willfully fails to attend school for more than 8 school days in a quarter.”

section thirty-nine E, or if the arresting law enforcement officer has probable cause to believe that such child has run away from the home of his parents or guardian and will not respond to a summons.

.....

If the court is not in session when the child is taken into custody, the law enforcement officer in charge, or an appropriate designee, shall inquire about the case and shall notify the probation officer and a department of children and families representative, if the officer has reasonable belief that an arrested child is or has been in custody of the department. Mass. Gen. Laws ch. 119, § 39H.

Mass. Gen. Laws ch. 119, § 39H further specifies,

The law enforcement officer, in consultation with the probation officer, shall then immediately make all reasonable diversion efforts so that such child is delivered to the following types of placements, and in the following order of preference:

- (i) to one of the child's parents, or to the child's guardian or other responsible person known to the child, or to the child's legal custodian including the department of children and families or the child's foster home;
- (ii) to a temporary shelter facility licensed or approved by the department of early education and care, a shelter home approved by a temporary shelter facility licensed or approved by said department of early education and care, or a family foster care home approved by a placement agency licensed or approved by said department of early education and care; provided, however, that such a placement is available and, in the view of the probation officer, appropriate for the child; provided, further, that such a placement furnish said law enforcement officer with a written statement that it will make reasonable efforts to secure the child's appearance at the next available court session and that such placement will furnish the necessary transportation to such placement and to the court, unless the law enforcement officer chooses to furnish said transportation, provided, further, that such child may not be securely detained in a police station or town lockup.

.....

Mass. Gen. Laws Ch. 119 § 39E (Petitions for determination that child is in need of services; procedures) allows juvenile court to determine whether a child is in need of services without criminal proceedings and provides in part,

A parent or legal guardian of a child having custody of such child, or a police officer may apply for a petition in one of said courts alleging that said child persistently runs away from the home of said parent or guardian or persistently refuses to obey the lawful and reasonable commands of said parent or guardian resulting in said parent's or guardian's inability to adequately care for and protect said child.

Any supervisor of attendance, duly appointed pursuant to section nineteen of chapter seventy-six may apply for a petition in said court alleging that said child persistently and wilfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.

.....

If despite these protections, a victim of domestic minor sex trafficking is taken into custody for violating a law, by-law or ordinance⁴⁵ and put through delinquency proceedings under sections 52 to 63, such "[p]roceedings against children . . . shall not be deemed criminal proceedings" pursuant to Mass. Gen. Laws ch. 119, § 53. Following arrest for a delinquent offense, Mass. Gen. Laws Ch. 119 § 67 (Notice of arrest of child to be given to probation officer and parent or guardian) states,

⁴⁵ Mass. Gen. Laws ch. 119, § 52 (Definitions) defines a "delinquent child," as "a child between seven and seventeen who violates any city ordinance or town by-law or who commits any offence against a law of the commonwealth."

Except for children in need of service arrested pursuant to section thirty-nine H, whenever a child between seven and seventeen years of age is arrested with or without a warrant, as provided by law, the officer in charge of the police station or town lockup to which the child has been taken shall immediately notify the probation officer of the district court, or of the juvenile court, if there is one, within whose judicial district such child was arrested and at least one of the child's parents, or, if there is no parent, the guardian or person with whom it is stated that such child resides, and shall inquire into the case. Pending such notice and inquiry, such child shall be detained. Upon the acceptance by the officer in charge of said police station or town lockup of the written promise of said parent, guardian or any other reputable person to be responsible for the presence of such child in court at the time and place when such child is to appear or upon the receipt of such officer in charge from said probation officer of a request for the release of such child to him, such child shall be released to said person giving such promise or to said probation officer making such request; provided, that, if the arresting officer requests in writing that a child between fourteen and seventeen years of age be detained, and if the court issuing a warrant for the arrest of a child between fourteen and seventeen years of age directs in the warrant that such child shall be held in safekeeping pending his appearance in court, or, if the probation officer shall so direct, such child shall be detained in a police station or town lockup, or place of temporary custody commonly referred to as a detention home of the department of youth services, or any other home approved by the department of youth services pending his appearance in court. In the event any such child is so detained, the officer in charge at the police station or town lockup shall notify the probation officer and parent or parents, guardian, or person with whom it is stated that such child resides of the detention of such child. . . . No child between fourteen and seventeen years of age shall be detained in a police station or town lockup unless the detention facilities for children at such police station or town lockup have received the approval in writing of the commissioner of youth services. . . . Nothing in this section shall permit a child between fourteen and seventeen years of age being detained in a jail or house of correction. A separate and distinct place shall be provided in police stations, town lockups or places of detention for such children.

After being taken into custody for a delinquent offense, a child may be held in custody pending disposition of the case. Pursuant to Mass. Gen. Laws ch. 119, § 68 (Care of children held for examination or trial),

A child who has attained the age of seven but not yet attained the age of seventeen held by the court for further examination, trial or continuance, or for indictment and trial, if unable to furnish bail, shall be committed by the court to the care of the department of youth services or to a probation officer, a parent, guardian, or other responsible person who shall provide for his safekeeping; provided, however, that the appearance of the child at such examination or trial, shall be the responsibility of the court for which he is being held in safekeeping.

The court may recommend that a child who has attained the age of fourteen and who is committed to the care of the department shall be held in a secure detention facility if the court further determines that the child (a) is a fugitive from another jurisdiction on a delinquency petition; or (b) is charged with an offense for which the commonwealth may proceed by indictment in accordance with the provisions of section fifty-four [Complaint; indictment; examination of complaint; summons; warrant]; provided, however, that such child is already detained or on conditional release in conjunction with another delinquency proceeding, or has demonstrated a recent record of willful failure to appear at juvenile court proceedings, or has demonstrated a recent record of violent conduct resulting in physical injury to others.

. . . .

The department may provide special foster homes, and places of temporary custody commonly referred to as detention homes of the department of youth services for the care, maintenance and safekeeping of such children who may be committed by the court to said department under this section; provided,

however, that no more than five such children shall be detained in any such special foster home at any one time.⁴⁶

A child between seven and seventeen years of age so committed by the court to the department to await further examination or trial by the court, shall be returned thereto within fifteen days after the date of the order of such commitment, and final disposition of the case shall thereupon be made by adjudication or otherwise, unless, in the opinion of the court, the interest of the child and the public otherwise require.

....

Mass. Gen. Laws ch. 119, § 58 (Adjudication; proceedings after adjudication; payment for support of child) states in part,

At the hearing of a complaint against a child the court shall hear the testimony of any witnesses who appear and take such evidence relative to the case as shall be produced. If the allegations against a child are proved beyond a reasonable doubt, he may be adjudged a delinquent child, or in lieu thereof, the court may continue the case without a finding and, with the consent of the child and at least one of the child's parents or guardians, place said child on probation

If a child is adjudicated a delinquent child on a complaint, the court may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services, but the probationary or commitment period shall not be for a period longer than until such child attains the age of eighteen, or nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday.

....

- 5.4.1 Recommendation: Amend Chapter 119 to require that minor victims of commercial sexual exploitation receive referrals to specialized counseling and services and to establish a diversion program that identifies and diverts victims of commercial sexual exploitation into dependency proceedings who fail to be identified as abused or in need of services and might otherwise be adjudicated delinquent.

5.5 *Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.*

Although no definition of child abuse or neglect is provided under Massachusetts's child protection statutes, 110 Mass. Code Regs. § 2.00 (Glossary) defines "abuse" as

the non-accidental commission of any act by a caretaker upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury,⁴⁷ or constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. Abuse is not dependent upon location (*i.e.*, abuse can occur while the child is in an out-of-home or in-home setting.)

⁴⁶ Mass. Gen. Laws ch. 119, § 68B (Special foster homes; detention homes) further provides, "The department of youth services may use or provide special foster homes and places of temporary custody commonly referred to as detention homes, at various places in the commonwealth which shall be completely separate from any police station, town lockup or jail, and which shall be used solely for the temporary care, custody and study of children committed to the care of the department of youth services. Nothing in this section shall prevent the department from using or providing alternative placements and employing alternative measures which, in its discretion, will reasonably assure the appearance of the children before the court."

⁴⁷ 110 Mass. Code Regs. § 2.00 defines "emotional injury" as "an impairment to or disorder of the intellectual or psychological capacity of a child as evidenced by observable and substantial reduction in the child's ability to function within a normal range of performance and behavior."

Additionally, 110 Mass. Code Regs. § 2.00 (Glossary) defines “neglect” as

failure *by a caretaker*, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition. This definition is *not* dependent upon location (*i.e.*, neglect can occur while the child is in an out-of-home or in-home setting.)

5.5.1 Recommendation: Amend Mass. Gen. Laws ch. 119, § 21 (Definitions Applicable to Sections 21 to 55H) to include definitions for the terms “abuse” and “neglect” and define those terms to expressly include commercial sexual exploitation as a form of abuse and neglect.

5.6 *The definition of “caregiver” (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into the protection of child protective services.*

Although Chapter 119 (Protection and care of children and proceedings against them) of the Massachusetts General Laws does not define the term “caretaker,” Mass. Gen. Laws ch. 119, § 1 provides in part, “The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes” Accordingly, the Commentary to 110 Mass. Code Regs. § 4.21 (Screening of Reports of Alleged Abuse or Neglect) and § 4.33 (Perpetrator/Caretaker) state, “The ‘caretaker’ distinction is an important one, for the Department’s primary duty is to protect children from abuse or neglect inflicted by their parents or parent substitutes.” Whether the Department will intervene and investigate a report of abuse made under Mass. Gen. Laws ch. 119, § 51B, depends on whether the report is “screened in” as abuse by a caretaker or “screened out” pursuant to 110 Mass. Code Regs. § 4.21.

110 Mass. Code Regs. § 2.00 (Glossary), applicable to words “used throughout 110 CMR . . . unless the context plainly requires otherwise,” defines a “caretaker” as

a child’s:

- (a) parent
- (b) stepparent
- (c) guardian
- (d) any household member entrusted with the responsibility for a child’s health or welfare
- (e) any other person entrusted with the responsibility for a child’s health or welfare whether in the child’s home, a relative’s home, a school setting, a day care setting (including babysitting), a foster home, a group care facility, or any other comparable setting. As such “caretaker” includes (but is not limited to) school teachers, babysitters, school bus drivers, camp counselors, etc. The “caretaker” definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is him/herself a child (*i.e.* a babysitter under 18 years of age).

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*

A domestic minor sex trafficking victim may be eligible to receive crime victims’ compensation if they meet all eligibility requirements, certain of which may present special difficulties for children who are sexually exploited for commercial purposes.

Pursuant to Mass. Gen. Laws ch. 258C, § 2(a) (Eligibility for compensation; assistance of counsel), victims⁴⁸ of crimes will receive compensation if the division⁴⁹ “finds that a crime was committed and that such crime directly resulted in personal physical or psychological injury to, or death of, the victim.” Mass. Gen. Laws ch. 258C, § 2(b) makes compensation available only if the claimant

[D]emonstrates that the crime was reported to the police or other law enforcement authorities or to an agency or entity obligated by law to report complaints of criminal misconduct to law enforcement authorities. Except in the case where the division finds such report to have been delayed for good cause, such report shall have been made within five days after the occurrence of such crime.

Mass. Gen. Laws ch. 258C, § 2(c) also requires the claimant to “cooperate[] with law enforcement authorities in the investigation and prosecution of the crime in which the victim was injured or killed unless the claimant demonstrates that he possesses or possessed a reasonable excuse for failing to cooperate.” Furthermore, Mass. Gen. Laws ch. 258C, § 2(e) states,

An offender or an accomplice of an offender shall not be eligible to receive compensation with respect to a crime committed by an offender. To the extent that the victim’s acts or conduct provoked or contributed to the injuries, the division shall reduce or deny an award to the claimant or claimants in accordance with regulations enacted pursuant to section four.

5.7.1 Recommendation: Include exceptions from the listed ineligibility factors for commercially sexually exploited children in Mass. Gen. Laws ch. 258C, § 2(a), (b) (Eligibility for compensation; assistance of counsel).

5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*

Victims of certain CSEC offenses (Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 29A (Child pornography—enticement, solicitation, employment of children)), as well as victims of certain sexual and prostitution-related offenses, who are under 15, will receive certain protections in the court system process.

Mass. Gen. Laws ch. 278, § 16D(b)(1) (Definitions; alternative procedure for taking testimony of child witness; order; presence of counsel and defendant; filming, videotaping, or transmitting of testimony) provides,

At any time after the issuance of a complaint or indictment alleging an offense punished by any of the statutes listed herein, the court on its own motion or on motion of the proponent of a child witness,⁵⁰

⁴⁸ See *supra* Section 5.1 for definition of “victim.”

⁴⁹ Mass. Gen. Laws ch. 258C, § 1 (Definitions) defines “division” as “the division of victim compensation and assistance within the department of the attorney general, established in section 11K of chapter 12.”

⁵⁰ Mass. Gen. Laws ch. 278, § 16D(a) defines a “child witness” as

a person who is under the age of fifteen years and who is alleged to have been a victim of, or a witness to an alleged violation of section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . thirteen H [Indecent assault and battery on person over fourteen], . . . twenty-three [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], twenty-four [Assault with intent to commit rape] or twenty-four B [Assault on child under sixteen with intent to commit rape] of chapter two hundred and sixty-five, or section two [Abduction of persons for the purpose of prostitution or unlawful sexual intercourse], . . . four [Enticing to unlawful intercourse], four A [Promoting child prostitution; mandatory sentence], four B [Deriving support from child prostitution; mandatory sentence], . . . six [Maintaining a house of prostitution], seven [Deriving support from an inmate of a house of prostitution], eight [Solicitation], twelve [Penalty for sending a person to a house of prostitution], thirteen [Detaining a person in house of

and after a hearing, may order the use of a suitable alternative procedure for taking the testimony of the child witness, in proceedings pursuant to said complaint or indictment, provided that the court finds by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in the presence of the defendant, or as a result of both testifying in open court and testifying in the presence of the defendant. If the court orders the use of a suitable alternative for taking the testimony of a child witness pursuant to this section, the court shall make and enter specific findings upon the record describing with particularity the reasons for such order.

Mass. Gen. Laws ch. 278, § 16D(b)(2) allows the child’s testimony to “be recorded on videotape or film to be shown in court at a later time or that the testimony be transmitted to the courtroom by simultaneous electronic means,” while Mass. Gen. Laws ch. 278, § 16D(b)(6) clarifies,

The film, videotape or transmission of testimony taken by an alternative procedure . . . shall be admissible as substantive evidence to the same extent as and in lieu of live testimony by the child witness in any proceeding for which the order is issued or in any related criminal proceeding against the same defendant when consistent with the interests of justice, provided that such an order is entered or re-entered based on current findings at the time when or within a reasonable time before the film, videotape or transmission is offered into evidence. . . .

As an additional protection for child victim-witnesses, Mass. Gen. Laws ch. 278, § 16D(b)(3) provides,

Testimony taken by an alternative procedure pursuant to an order issued under paragraph (1) shall be taken in the presence of the judge, the prosecutor, defense counsel and such other persons as the court may allow. The defendant shall also have the right to be present unless the court’s order under paragraph (1) is based wholly or in part upon a finding that the child witness is likely to suffer trauma as a result of testifying in the presence of the defendant. If the order is based on such a finding, the testimony of the child witness shall not be taken in the presence of the defendant except as provided in paragraph (4).

While not specifically applicable to victims of CSEC offenses, Mass. Gen. Laws ch. 278, § 16A (Public may be excluded at trials of certain crimes involving minors under age of eighteen), states, “At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.” Also, pursuant to Mass. Gen. Laws ch. 278, § 16C (Exclusion of public from trial involving crime of incest or rape), “[t]o protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testimony is to be presented; provided, that either of the parties requests that all spectators be so excluded at the trial or portions thereof; and provided further, that the defendant in such trial by a written statement waives his right to a public trial for those portions from which spectators are so excluded.”

Some additional protections are provided to children who are the victims of sex crimes. Mass. Gen. Laws ch. 278, § 16F (Expedited trials for sex crimes involving minor victims or witnesses) provides that, in criminal proceedings involving

prostitution], . . . twenty-eight [Matter harmful to minors—dissemination or possession with intent], twenty-nine [Obscene matter—dissemination or possession with intent], twenty-nine A [Child pornography—enticement, solicitation, employment of children], twenty-nine B [Child pornography—dissemination], . . . or thirty-five A [Obscene materials/acts—acts with child under sixteen] of chapter two hundred and seventy-two.



an alleged sex crime perpetrated upon a minor child, or in which a minor child is expected to testify as a witness to a sex crime, the court shall, in order to minimize stress on such child, take action to expedite trial and give precedence to the case over any other case

Additionally, Mass. Gen. Laws ch. 233, § 21B (Evidence of victim's sexual conduct) limits the admissibility of certain evidence related to prior sexual behavior, stating,

Evidence of the reputation of a victim's sexual conduct shall not be admissible in any investigation or proceeding before a grand jury or any court of the commonwealth for a violation of sections thirteen B [Indecent Assault and Battery on Child Under Fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . thirteen H [Indecent assault and battery on person over fourteen], twenty-two [Rape], twenty-two A [Rape of child], 22B [Rape of child—aggravating factors], 22C [Rape of child—previous youthful offender], twenty-three [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], twenty-four [Assault with intent to commit rape] and twenty-four B [Assault on child under sixteen with intent to commit rape] of chapter two hundred and sixty-five Evidence of specific instances of a victim's sexual conduct in such an investigation or proceeding shall not be admissible except evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim; provided, however, that such evidence shall be admissible only after an in camera hearing on a written motion for admission of same and an offer of proof. If, after said hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim, the evidence shall be admitted; otherwise not. . . .

Mass. Gen. Laws ch. 258B, § 3 (Rights of victims and witnesses of crime) also generally affords various rights and services to victims and witnesses of crime, such as the right to be informed about their rights, protective services, social services, available civil remedies, and restitution, and to be notified about when proceedings will take place.

- 5.9 *Expungement or sealing of juvenile arrest or criminal records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*

Minors with juvenile court records may have them expunged pursuant to Mass. Gen. Laws ch. 276, § 100B (Sealing of certain juvenile record files; conditions; effect), which provides,

Any person having a record of entries of a delinquency court appearance in the commonwealth on file in the office of the commissioner of probation may, on a form furnished by the commissioner, signed under the penalties of perjury, request that the commissioner seal such file. The commissioner shall comply with such request provided (1) that any court appearance or disposition including court supervision, probation, commitment or parole, the records for which are to be sealed, terminated not less than three years prior to said request; (2) that said person has not been adjudicated delinquent or found guilty of any criminal offense within the commonwealth in the three years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars nor been imprisoned under sentence or committed as a delinquent within the commonwealth within the preceding three years; and (3) said form includes a statement by the petitioner that he has not been adjudicated delinquent or found guilty of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses as aforesaid, and has not been imprisoned under sentence or committed as a delinquent in any state or county within the preceding three years.

....

Once the records are sealed, Mass. Gen. Laws ch. 276, § 100B further provides that they may not serve to

disqualify a person in any future examination, appointment or application for public service under the government of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards of commissioners, except in imposing sentence for subsequent offenses in delinquency or criminal proceedings.

....

5.10 *Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.*

Commercially sexually exploited children who are the victims of specified sexual assault or CSEC crimes, including Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 29A (Child pornography—enticement, solicitation, employment of children), may be able to bring a civil action for injuries resulting from the crimes. Mass. Gen. Laws ch. 260, § 4C. The action must “be commenced within three years of the acts alleged to have caused an injury or condition or within three years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act.” Mass. Gen. Laws ch. 260, § 4C. However, time is tolled until the victim is 18. Mass. Gen. Laws ch. 260, § 4C.

Commercially sexually exploited children also may have the right to receive restitution under Chapter 258B (Rights of victims and witnesses of crime) of the Massachusetts Code. Mass. Gen. Laws ch. 258B, § 3(o) states that victims have the g right:

[T]o request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim’s losses. If restitution is ordered as part of a case disposition, the victim has the right to receive from the probation department a copy of the schedule of restitution payments and the name and telephone number of the probation officer or other official who is responsible for supervising the defendant’s payments. If the offender seeks to modify the restitution order, the offender’s supervising probation officer shall provide notice to the victim and the victim shall have the right to be heard at any hearing relative to the proposed modification.

5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or CSEC offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Mass. Gen. Laws ch. 277, § 63 (Limitation of criminal prosecutions) sets a 6-year limitation for most CSEC crimes, unless otherwise noted in the statute. It also tolls the statute of limitations applicable to criminal prosecutions for violations of Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 29A (Child pornography—enticement, solicitation, employment of children), where the victim was under 16 at the time of the offense, until the earlier of the time the victim reaches 16 or the time the crime was reported to law enforcement.⁵¹ Mass. Gen. Laws ch. 277, § 63. Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) is subject to the 6-year statute of limitations.

⁵¹ Other offenses tolled by Mass. Gen. Laws ch. 277, § 63 include in relevant part Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), § 4 (Enticing to unlawful intercourse), § 6 (Maintaining a house of prostitution), § 7 (Deriving support from an inmate of a house of prostitution), § 8 (Soliciting), § 12 (Penalty for sending a person to a house of prostitution), § 13 (Detaining a person in house of prostitution), § 29B (Child pornography—dissemination), or § 35A (Obscene material/acts—acts with child under sixteen).



To the extent that a domestic minor sex trafficking victim has a tort claim for personal injuries resulting from their commercial sexual exploitation, Mass. Gen. Laws ch. 260, § 2A (Limitation of three years in certain cases) establishes a 3-year statute of limitations for actions of tort and contracts to recover for personal injuries. Additionally, Mass. Gen. Laws ch. 260, § 4C (Statute of limitations on civil action for assault and battery by sexual abuse of minor) imposes a 3 year statute of limitations for bringing civil claim to recover damages related to the sexual abuse⁵² of a minor. Mass. Gen. Laws ch. 260, § 4C states,

Actions for assault and battery alleging the defendant sexually abused a minor shall be commenced within three years of the acts alleged to have caused an injury or condition or within three years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act, whichever period expires later; provided, however, that the time limit for commencement of an action under this section is tolled for a child until the child reaches eighteen years of age. . . .

However, Mass. Gen. Laws ch. 260, § 7 (Disabilities) tolls any statute of limitation otherwise applicable to a civil claim if the person entitled to bring the claim was a minor at the time the injury occurred. Instead, Mass. Gen. Laws ch. 260, § 7 provides that the “the action may be commenced within the time hereinbefore limited after the disability is removed.”

⁵² Mass. Gen. Laws ch. 260, § 4C states, “For purposes of this section, ‘sexual abuse’ shall mean the commission of any act against a minor as set forth in section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], thirteen H [Indecent assault and battery on person over fourteen], twenty-two [Rape], twenty-two A [Rape of child], 22B [Rape of child—aggravating factors], 22C [Rape of child—previous youthful offender], twenty-three [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], twenty-four [Assault with intent to commit rape] or twenty-four B [Assault on child under sixteen with intent to commit rape] of chapter two hundred and sixty-five or section two [Abduction of persons for the purpose of prostitution or unlawful sexual intercourse], three [Administering drug], four [Enticing unlawful intercourse], four A [Promoting child prostitution; mandatory sentence], four B [Deriving support from child prostitution; mandatory sentence], seven [Deriving support from an inmate of a house of prostitution], eight [Soliciting], thirteen [Detaining a person in house of prostitution], seventeen [Incest], twenty-nine A [Child pornography—enticement, solicitation, employment of children], thirty-four [Obscene materials/acts—sodomy and buggery], thirty-five [Obscene material/acts—unlawful and lascivious Acts] or thirty-five A [Obscene material/acts—acts with child under sixteen] of chapter two hundred and seventy-two.”

Legal Components:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*
 - 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
 - 6.3 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*
 - 6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
 - 6.5 *Using the Internet to investigate buyers and traffickers is a permissible investigative technique.*
 - 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*
-

Legal Analysis:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*

Massachusetts has not enacted a law mandating law enforcement training on human trafficking or domestic minor sex trafficking. However, training on other special topics, including domestic violence, minors and hate crimes, is required. Mass. Gen. Laws ch. 6 § 116A (Training of law enforcement personnel in domestic violence), § 116B (Training of law enforcement personnel regarding hate crimes).

Additionally, under Mass Gen. Laws ch. 6, § 118, “[n]o municipal police training school shall be approved unless it provides for training members of the rape prevention and prosecution unit established by section ninety-seven B of chapter forty-one.” Mass. Gen. Laws ch. 41 § 97B (Rape reporting and prosecution unit; preservation of evidence) states in part that “[t]here shall be within the police department of every city and town . . . a rape reporting and prosecution unit which shall be designed to improve the quality of rape reporting, counselling, and prosecution.”

- 6.1.1 Recommendation: Enact a statute that specifically mandates training on domestic minor sex trafficking issues for law enforcement officers and requires all officers to participate in this training.

- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*

Massachusetts generally requires two-party consent to audio-tape conversations. Mass. Gen. Laws ch. 272, § 99 (C)(1) (Eavesdropping, wire tapping, and other interception of communications) makes it a crime to record any conversation, whether oral or wire, without the consent of all parties in Massachusetts. Mass. Gen. Laws ch. 272, § 99 (C)(1) states that whoever

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

....

Mass. Gen. Laws ch. 272, § 99(B)(4) defines an “interception” as

to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or

transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

Under this definition of “interception” and the provisions of Mass. Gen. Laws ch. 272, § 99(C)(1), the consent of all parties to a communication is required unless one of the parties is a law enforcement officer or has given prior authorization to a law enforcement officer to record the communication, and the recording is a part of the investigation of a “designated offense,”⁵³ which includes an investigation related to prostitution when it is part of organized crime activity. Mass. Gen. Laws ch. 272, § 99(C)(1), (B)(7).

6.2.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 99(B)(7) to include Mass. Gen. Laws ch. 265, § 26C (Enticement of children), Mass. Gen. Laws ch. 272, § 4 (Enticing to unlawful intercourse), § 4A (Promoting child prostitution; mandatory sentence), and § 29A (Child pornography—enticement, solicitation, employment of children).

6.3 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*

Massachusetts laws permits the use of wiretapping in certain circumstances. Exemptions to the prohibition on interception of wire or oral communications under Mass. Gen. Laws ch. 272, § 99(C)(1) (Eavesdropping, wiretapping, and other interception of communications)⁵⁴ are provided in Mass. Gen. Laws ch. 272, §99(D), which states,

1. Permitted interception of wire or oral communications. It shall not be a violation of this section—

....

c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

....

2. Permitted disclosure and use of intercepted wire or oral communications.

⁵³ Mass. Gen. Laws ch. 272, § 99(B)(7) defines a “designated offense” as

the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

Mass. Gen. Laws ch. 272, §99(A) (Eavesdropping, wiretapping, and other interception of communications) states,

Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living. . . .

⁵⁴ See *supra* Section 6.2 for the substantive provisions of Mass. Gen. Laws ch. 272, § 99(C)(1).

- a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.
- b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.
-
- d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.
-

A warrant authorizing an interception will be issued pursuant to Mass. Gen. Laws ch. 272, § 99(E) only for the following reasons:

- 1. Upon a sworn application in conformity with this section; and
- 2. Upon a showing by the applicant that there is probable cause to believe that a designated offense⁵⁵ has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and
- 3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

Under the provisions of Mass. Gen. Laws ch. 272, §99(D), (E), an order authorizing wiretapping may be issued in some investigations related to domestic minor sex trafficking as Mass. Gen. Laws ch. 272, §99(B)(7) includes kidnapping and prostitution within the definition “designated offense.”

- 6.3.1. Recommendation: Amend the definition of “designated offense” to expressly include Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), §4 (Enticing to unlawful intercourse), and Mass. Gen. Laws ch. 265, § 26C (Enticement of children).

6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*

No law expressly permits the use of a decoy by law enforcement in the investigation of prostitution or sex trafficking. However, Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) makes it unlawful for “[a]ny one who entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building or other outdoor space with the intent that he or another person will violate” a range of CSEC and sexual offenses, implying that a perpetrator enticing a law enforcement officer whom he believes to be a child under the age of 16 could be prosecuted under this statute. A conviction under Mass. Gen. Laws ch. 265, § 26C is punishable by imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000.

- 6.4.1 Recommendation: Enact a statute expressly prohibiting a defense to prosecution for any of the offenses involving minors in chapters 265 and 272 based on the “minor” actually being a law enforcement officer or agent of law enforcement.

⁵⁵ See *supra* note 53 for the definition of “designated offense.”

6.5 *Using the Internet to investigate buyers and traffickers is a permissible investigative technique.*

No law in the Massachusetts Code expressly permits the use of the Internet to investigate buyers and traffickers of sex acts with minors.

- 6.5.1 Recommendation: Enact a law expressly criminalizing use of the Internet to commit or attempt to commit a CSEC under chapters 265 or 272 and prohibit a defense to prosecution based on the “minor” being a law enforcement officer or other adult.

6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

Mass. Gen. Laws ch. 22A, § 2 (Establishment of statewide central register) directs the executive director of the criminal history systems board to establish a “statewide central register containing all available identifying data of any missing child,⁵⁶ including, but not limited to, fingerprints and blood types. The director may use existing data processing and data communications systems of the criminal justice information system.” Mass. Gen. Laws ch. 22A, § 4 (Reports of missing children; entry into central register; search for missing children) requires any police officer who receives a report of a missing child to immediately enter information regarding the missing child into the central register and begin looking for the missing child. Pursuant to Mass. Gen. Laws ch. 22A, § 9 (Notice by law enforcement agency to last known school of missing child; marking of child’s record; notice that child has been located), when a law enforcement agency receives a report of a missing child, it must notify the child’s last known school of the child’s disappearance. Furthermore, Mass. Gen. Laws ch. 22A, § 9, states,

Upon notification by a law enforcement authority of a child’s disappearance, each elementary and secondary school, either public or private, in which such child is currently or was previously enrolled shall mark the record of such child in such a manner that whenever a copy of or information regarding the record is requested, said school shall be alerted to the fact that the record is that of a missing child. The school shall immediately report to the appropriate law enforcement authority any request concerning such marked records or knowledge as to the whereabouts of such missing child.

Upon learning that a missing child has been located, such law enforcement authority shall notify any school previously informed of such child’s disappearance that such child has been located, and the school shall remove such mark from the record of such child.

Mass. Gen. Laws ch. 22A, § 7 (Department of children and families, youth services, public health and mental health to report missing children) requires government agencies, including the Department of Children and Families (Department), to report any children under their custody who are missing. 110 Mass. Code Regs. 7.115(5), (6) (Runaway foster children) expressly requires that the Department to notify law enforcement upon obtaining information about the possible whereabouts of the child. 110 Mass. Code Regs. 7.115(5) states in part,

Whenever the Department receives information concerning the possible or suspected current whereabouts of a child who has run away or is missing from a foster/pre-adoptive home, or from any temporary substitute care placement, the Department shall immediately notify the appropriate law enforcement agencies and provide such information to them. . . .

⁵⁶ Mass. Gen. Laws ch. 22A, § 1 (Definitions) defines “Missing child or children” as “any person under the age of eighteen years missing from his normal and ordinary place of residence and whose whereabouts cannot be determined by the person responsible for such child’s care.”

- 6.6.1 Recommendation: Add a requirement to report rescued children in each of the databases to ensure law enforcement information is accurate and current and repeat missing children can be identified and tracked.

NOTE: ENACTED LEGISLATION AS OF 8/1/11

