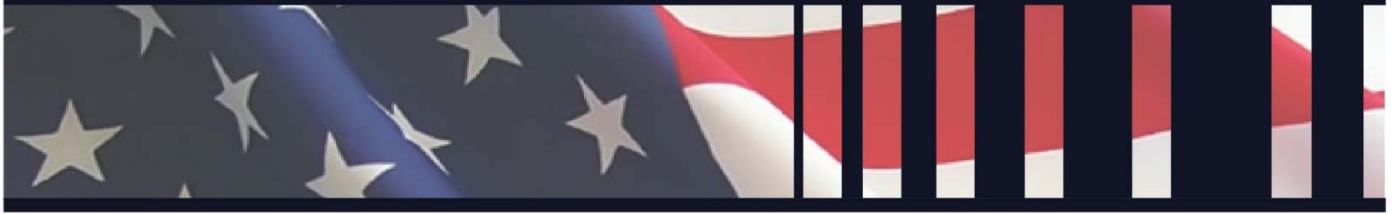


PROTECTED INNOCENCE INITIATIVE

Creating A Uniform Standard Across States to Combat Domestic Minor Sex Trafficking



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 offense from non-commercial sex offenses.*
- 1.3 *CSEC statutes refer to the human trafficking statute in order to clarify the status of the victim 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.*

N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) states that knowingly “recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity”² is a human trafficking violation. The law does not require proof of force, fraud, or coercion to induce the minor’s involvement in the commercial sex act.

In contrast, the provision applicable to facilitators, N.M. Stat. Ann. § 30-52-1(A)(3), does require proof of force, fraud, or coercion, regardless of the victim’s age, and states that knowingly “benefiting, financially

¹ Unless otherwise specified, all references to statutes were taken from New Mexico Statutes Annotated (LEXIS through 1st Sess. of 50th Leg.) and all federal statutes were taken from United States Code (LEXIS current through PL 112-30, approved 9/16/2011).

² “Commercial sexual activity” is defined as “any sexual act or sexually explicit exhibition for which anything of value is given, promised to or received by any person.” N.M. Stat. Ann. § 30-52-1(G)(2).

or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services, or commercial sexual activity” is human trafficking.

If the victim is 16–17, a conviction under N.M. Stat. Ann. § 30-52-1(A)(2) or (3), is punishable as a third degree felony by 3 years’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9). If the victim is 13–15, the offense increases to a second degree felony punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000, and if the victim is under 13, the offense further increases to a first degree felony punishable by 18 years’ imprisonment and a possible fine not to exceed \$15,000.³ N.M. Stat. Ann. §§ 30-52-1(C)(1)–(2), 31-18-15(A)(3), (A)(6), (E)(3), (E)(6).

1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate offense from non-commercial sex offenses.*

The following statutes treat CSEC as distinct crimes:

1. N.M. Stat. Ann. § 30-6A-4 (Sexual exploitation of children by prostitution) criminalizes a wide range of conduct related to the commercial sexual exploitation of a child.

Under N.M. Stat. Ann. § 30-6A-4(A), “Any person knowingly receiving any pecuniary profit as a result of a child under the age of sixteen engaging in a prohibited sexual act⁴ with another is guilty of a second degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a first degree felony.” A second degree felony is punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. § 31-18-15(A)(6), (E)(6). A first degree felony is punishable by 18 years’ imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §31-18-15(A)(3), (E)(3).

N.M. Stat. Ann. § 30-6A-4(B) states that “hiring or offering to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act” is punishable as a second degree felony by 9 years’ imprisonment and a fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15(A)(6), (E)(6).

Lastly, N.M. Stat. Ann. § 30-6A-4(C) states,

Any parent, legal guardian or person having custody or control of a child under sixteen years of age who knowingly permits that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print

³ N.M. Stat. Ann. § 31-18-15 varies the punishment level for second and third degree felonies based on whether the offense is a “sexual offense against a child.” Unless the statute expressly states the offense is a “sexual offense against a child,” this report assumes that the offense is not a “sexual offense against a child.” This offense does not expressly state that it is a “sexual offense against a child.” However, if it were considered a sexual offense against a child, a second degree felony sexual offense against a child is punishable by 15 years’ imprisonment and a possible fine not to exceed \$12,500, and a third degree felony sexual offense against a child is punishable by 6 years’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(5), (A)(8), (E)(5), (E)(8). In this report, unless the statute clearly states that it is a “sexual offense against a child,” we will assume that it is not.

⁴“Prohibited sexual act” is defined as “(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadomasochistic abuse for the purpose of sexual stimulation; or (5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation.” N.M. Stat. Ann. § 30-6A-2(A).

medium⁵ depicting such an act is guilty of a third degree felony.

A third degree felony is punishable by 3 years' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §31-18-15(A)(9), (E)(9).

2. N.M. Stat. Ann. § 30-6A-3(C) (Sexual exploitation of children) states that it is illegal to “intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly.”⁶ A conviction under N.M. Stat. Ann. § 30-6A-3(C) is punishable as a third degree felony by 3 years' imprisonment and a possible fine not to exceed \$5,000; however, if the victim is under 13, the crime is a second degree felony punishable by 9 years' imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-3(C), 31-18-15(A)(6), (A)(9), (E)(6), (E)(9).
3. Pursuant to N.M. Stat. Ann. § 30-9-1 (Enticement of child),

Enticement of child consists of:

- A. enticing, persuading or attempting to persuade a child under the age of sixteen years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [30-9-1 to 30-9-9 NMSA 1978]⁷ of the Criminal Code; or
- B. having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.

Whoever commits enticement of child is guilty of a misdemeanor.

4. A misdemeanor is punishable by a definite term of less than 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. § 31-19-1(A).
5. N.M. Stat. Ann. §30-37-3.2(A) (Child solicitation by electronic communication device) states,

Child solicitation by electronic communication device⁸ consists of a person knowingly⁹ and

⁵ N.M. Stat. Ann. 30-6A-2(B) defines “visual or print medium” as,

- (1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or
- (2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery.

⁶ N.M. Stat. Ann. 30-6A-2(C) defines “performed publically” as an action “performed in a place that is open to or used by the public.”

⁷ Article 9 (Sexual offenses) includes, among others, N.M. Stat. Ann. § 30-9-1 (Enticement of child), § 30-9-2 (Prostitution), § 30-9-3 (Patronizing prostitutes), § 30-9-4 (Promoting prostitution), § 30-9-4.1 (Accepting earnings of a prostitute), § 30-9-8 (House of prostitution; public nuisance), § 30-9-11 (Criminal sexual penetration), § 30-9-12 (Criminal sexual contact), and § 30-9-13 (Criminal sexual contact of a minor).

⁸ N.M. Stat. Ann. 30-37-3.2(F) defines “electronic communication device” as “a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.”

⁹ N.M. Stat. Ann. 30-37-1(G) defines “knowingly” as,

[H]aving general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or both, of:

intentionally soliciting a child under sixteen years of age, by means of an electronic communication device, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct¹⁰ when the perpetrator is at least four years older than the child.

Where the victim is 13–15 years old, a conviction under N.M. Stat. Ann. § 30-37-3.2(A) is punishable as a fourth degree felony by 18 months’ imprisonment and a fine not to exceed \$5,000. If, however, the defendant “attends or is present at a meeting that the person arranged pursuant to the solicitation,” the crime is punishable as a third degree felony by 3 years’ imprisonment and a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(1), (C)(1), 31-18-15(A)(9), (A)(10), (E)(9). Where the victim is under 13, a conviction under N.M. Stat. Ann. §30-37-3.2(A) is punishable as a third degree felony by 3 years’ imprisonment and a fine not to exceed \$5,000, except that when the defendant “attends or is present at a meeting that the person arranged pursuant to the solicitation,” the crime is punishable as a second degree felony by 9 years’ imprisonment and a fine not to exceed \$10,000. N.M. Stat. Ann. §§30-37-3.2(B)(2), (C)(2), 31-18-15(A)(6),(A)(9), E(6),(E)(9).

Although not specifically commercial, the following sexual offense laws could apply to CSEC in New Mexico:

1. N.M. Stat. Ann. § 30-9-11(A) (Criminal sexual penetration) defines “criminal sexual penetration,” as “the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.”

A person is guilty of criminal sexual penetration in the first degree if the victim is under 13 or the defendant, regardless of the victim’s age, uses “force or coercion that results in great bodily harm or great mental anguish to the victim.” N.M. Stat. Ann. § 30-9-11(D). A conviction under N.M. Stat. Ann. § 30-9-11(D) is punishable as a first degree felony by 18 years’ imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-9-11(D), 31-18-15(A)(3), (E)(3).

A person is guilty of criminal sexual penetration in the second degree if the act involves, among other things, “the use of force or coercion¹¹ on a child thirteen to eighteen years of age.” N.M. Stat. Ann. § 30-9-11(E)(1). A violation of N.M. Stat. Ann. § 30-9-11(E), as a second degree felony for a sexual offense against a child, is punishable by 15 years’ imprisonment, with a mandatory minimum term of 3 years that may not be “suspended or deferred,” and a possible fine not to exceed \$12,500. N.M. Stat. Ann. §§ 30-9-11(E), 31-18-15(A)(5), (E)(5).

(1) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant;

(2) the age of the minor.

¹⁰ N.M. Stat. Ann. § 30-37-1(C) defines “sexual conduct” as an “act of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast[.]”

¹¹ N.M. Stat. Ann. § 30-9-10(A) (Definitions) defines “force or coercion” for purposes of Sections 30-9-10–30-9-16, in part as

(1) the use of physical force or physical violence;

(2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;

(3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;

....

Criminal sexual penetration is a fourth degree felony when, among other things, it is “perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child” and criminal sexual penetration in the first through third degrees does not apply. N.M. Stat. Ann. § 30-9-11(G). A conviction under N.M. Stat. Ann. § 30-9-11(G) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-9-11(G), 31-18-15 (A)(10), (E)(9).

2. N.M. Stat. Ann. § 30-9-13(A) (Criminal sexual contact of a minor) defines “Criminal sexual contact of a minor” as “the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts.”¹² If the victim is 13–18 years old and certain aggravating conditions are present¹³ or anytime the victim is under 13, a violation is punishable as a third degree felony for a sexual offense against a child. N.M. Stat. Ann. § 30-9-13(C). However, if the minor’s “intimate parts” are unclothed, the violation is punishable as a second degree felony for a sexual offense against a child. N.M. Stat. Ann. § 30-9-13(B). A violation of N.M. Stat. Ann. § 30-9-13(B) is punishable by 15 years’ imprisonment, with a mandatory minimum term of 3 years that may not be “suspended or deferred,” and a possible fine not to exceed \$12,500. N.M. Stat. Ann. §§ 30-9-13(B), 31-18-15(A)(5), (E)(5). A violation of N.M. Stat. Ann. § 30-9-13(C) is punishable by 6 years’ imprisonment and possible a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-9-13(C), 31-18-15(A)(8), (E)(8).
3. Lastly, criminal sexual contact is a fourth degree felony if, among other things, force or coercion was used on a 13–18 year old victim and none of the specifications listed in N.M. Stat. Ann. § 30-9-13(B), (C) apply. N.M. Stat. Ann. § 30-9-13(D). A violation of N.M. Stat. Ann. § 30-9-13(D) is punishable by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(10), (E)(9).

1.3 CSEC statutes reference the human trafficking statute in order to clarify the status of the victim as a trafficking victim.

New Mexico’s CSEC statutes do not refer to N.M. Stat. Ann. § 30-52-1 (Human trafficking).

- 1.3.1 Recommendation: Amend N.M. Stat. Ann. § 30-6A-3 (Sexual exploitation of children), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-9-1 (Enticement of child) to refer to N.M. Stat. Ann. § 30-52-1 (Human trafficking) to ensure that CSEC victims are properly identified as trafficking victims.

¹² “[I]ntimate parts’ means the primary genital area, groin, buttocks, anus or breast.” N.M. Stat. Ann. § 30-9-13(A).

¹³ The conditions listed in N.M. Stat. Ann. § 30-9-13(C)(2) include when

- (a) the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit;
- (b) the perpetrator uses force or coercion that results in personal injury to the child;
- (c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or
- (d) the perpetrator is armed with a deadly weapon.

FRAMEWORK ISSUE 2: CRIMINAL PROVISIONS FOR DEMAND

Legal Components:

- 2.1 *The state human trafficking law can be applied to the buyers of sex from a victim of domestic minor sex trafficking.*
- 2.2 *CSEC laws and/or sexual offense laws include the crime of buying sex with a minor and/or refer to the human trafficking statute.*
- 2.3 *Solicitation laws differentiate buying sex with adults from buying sex with a minor.*
- 2.4 *Penalties for buyers of commercial sex with minors are as high as those for federal trafficking offenders of domestic minor sex trafficking.*
- 2.5 *Use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor is a separate crime and/or results in an enhanced penalty for buyers.*
- 2.6 *No age mistake defense is permitted for a buyer of commercial sex with any minor under 18.*
- 2.7 *Penalties for buying sex with a minor are sufficiently high for all minors under 18 and not reduced for older minors.*
- 2.8 *Significant financial penalties are in place for buyers of sex with minors.*
- 2.9 *Buying and possessing child pornography carries penalties as high as those for sex trafficking of a minor and commercial sex abuse of a minor, as well as similar federal offenses.*
- 2.10 *Convicted buyers of sex with minors are required to register as sex offenders.*

Legal Analysis:

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

N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) prohibits a person from “recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity.” N.M. Stat. Ann. § 30-52-1(A)(2) might apply to buyers of sex from victims of domestic minor sex trafficking through the term “obtain.” Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),¹⁴ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”¹⁵ a person under 18 to engage in commercial sex.¹⁶ It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in New Mexico’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under N.M. Stat. Ann. § 30-52-1(A)(2).

In addition, the term “soliciting” in N.M. Stat. Ann. § 30-52-1(A)(2) may also be used to apply the statute to buyers of sex from a victim of domestic minor sex trafficking.

¹⁴ 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.).

¹⁵ 18 U.S.C. 1591(a).

¹⁶ See, e.g., Indictment at 1, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

2.1.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1(A)(2) to clearly apply to buyers of commercial sex with minors.

2.2 *CSEC laws and/or sexual offense laws include the crime of buying sex with a minor and/or refer to the human trafficking statute.*¹⁷

N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) states that “hiring or offering to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act”¹⁸ is a second degree felony, punishable by a sentence of 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-5(A)(6), (E)(6).

N.M. Stat. Ann. § 30-9-1(B) (Enticement of child) may be used to prosecute buyers “having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [Sexual offenses] of the Criminal Code.”¹⁹ A conviction under N.M. Stat. Ann. § 30-9-1 is punishable as a misdemeanor by a definite term of less than 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A).

Several sexual offenses could be used to prosecute certain buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child and do not refer to the human trafficking statute to bring these criminal offenses within the ambit of human trafficking under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking).²⁰

2.2.1 Recommendation: Amend N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) and § 30-9-1 (Enticement of child) to refer to N.M. Stat. Ann. § 30-52-1 (Human trafficking) in order to prosecute a buyer of commercial sex with a minor for trafficking.

2.3 *Solicitation laws differentiate buying sex with adults from buying sex with a minor.*

New Mexico differentiates between buying sex with an adult and buying sex with minors who are 14 or 15 by making each a separate crime. Under N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution), buying sex with a minor age 14–15 years old is a second degree felony punishable by a sentence of 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-5(A)(6), (E)(6). Although no statute expressly prohibits patronizing a prostituted child under the age of 14, it is likely that N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor) would be used to prosecute such cases.

In contrast, hiring a person 16 or older to perform an act of prostitution under N.M. Stat. Ann. § 30-9-3 (Patronizing prostitutes) is a petty misdemeanor punishable by up to 6 months in county jail, a fine not to exceed \$500, or both, unless the buyer has a prior conviction, in which case it is a misdemeanor punishable by less than 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-3, 31-19-1(A), (B).

2.3.1 Recommendation: Close the gap between N.M. Stat. Ann. § 30-6A-4(B) and § 30-9-11(D)(1) and § 30-9-13(B)(1) that leaves 13 year olds unprotected, except when there is force or

¹⁷ See discussion of the relevant text of the statutes listed in this section *supra* Section 1.2.

¹⁸ See *supra* note 4 for the definition of “prohibited sexual act.”

¹⁹ See *supra* note **Error! Bookmark not defined.** for a list of offenses included in Article 9.

²⁰ See discussion of relevant provisions *supra*, Section 1.2 for a full description of the sexual offense laws that may apply to certain buyers.

coercion under certain provisions in § 30-9-13 and § 30-9-11 that apply to minors aged 13-18.

2.4 *Penalties for buyers of commercial sex with minors are as high as those for federal trafficking offenders of domestic minor sex trafficking.*²¹

If applicable to buyers, a conviction under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) if the victim is 16–17, is punishable as a third degree felony by 3 years’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9). If the victim is 13–15 years old, human trafficking is punishable as a second degree felony by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(6), (E)(6). If the victim is under 13, the violation further increases to a first degree felony punishable by 18 years’ imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) is a second degree felony punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15 (A)(6), (E)(6). N.M. Stat. Ann. § 30-6A-3(A) (Sexual exploitation of children) is a fourth degree felony punishable by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(10), (E)(9). N.M. Stat. Ann. § 30-9-1 (Enticement of child) is a misdemeanor punishable by a definite term of less than 1 year in county jail, a possible fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A). In contrast, a buyer convicted of N.M. Stat. Ann. § 30-9-3 (Patronizing prostitutes), a petty misdemeanor, may be punished for a first offense by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. §§ 30-9-3, 31-19-1(B).

A buyer who habitually commits any of the above stated noncapital felonies faces enhanced penalties pursuant to N.M. Stat. Ann. § 31-18-17 (Habitual offenders; alteration of basic sentence). A defendant’s sentence is increased 1 year if he has 1 prior felony conviction,²² 4 years if he has 2 prior felony convictions, and 8 years if he has 3 prior felony convictions. N.M. Stat. Ann. § 31-18-17(A)–(C). In all three cases, the prior felonies had to be “parts of separate transactions or occurrences.” N.M. Stat. Ann. § 31-18-17(A)-(C). The 1 year enhancement can be suspended or deferred if “the court makes a specific finding that the prior felony conviction and the instant felony conviction are both for nonviolent felony offenses²³ and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling reasons, stated on the record, for departing from the sentence

²¹ See discussion of the relevant text of the statutes listed in this section *supra* Section 1.2.

²² N.M. Stat. Ann. § 31-18-17(D) defines “prior felony conviction” as

(1) a conviction, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for a prior felony committed within New Mexico whether within the Criminal Code [30-1-1 NMSA 1978] or not, but not including a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978; or

(2) a prior felony, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for which the person was convicted other than an offense triable by court martial if:

(a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;

(b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or

(c) the offense would have been classified as a felony in this state at the time of conviction.

²³ “As used in this section, ‘nonviolent felony offense’ means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense.” N.M. Stat. Ann. § 31-18-17(E).

imposed pursuant to this subsection.” N.M. Stat. Ann. § 31-18-17(A). The other two enhancements “shall not be suspended or deferred.” N.M. Stat. Ann. § 31-18-17(B), (C).

Additionally, the base sentences discussed throughout this report will be increased to life imprisonment subject to parole “[w]hen a defendant is convicted of a second violent sexual offense,²⁴ and each violent sexual offense conviction is part of a separate transaction or occurrence, and at least the second violent sexual offense conviction is in New Mexico.” N.M. Stat. Ann. § 31-18-25(A). If the victim of both offenses was under 13 at the time of the offense, the enhanced punishment is “life imprisonment without the possibility of parole.” N.M. Stat. Ann. § 31-18-25(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 offense²⁵ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,²⁶ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²⁷

2.5 *Use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor is a separate crime and/or results in an enhanced penalty for buyers.*

Although not limited in application to commercial sex acts, the use of the Internet to solicit sexual contact with a child under 16 years of age is illegal under N.M. Stat. Ann. § 30-37-3.2(A) (Child solicitation by electronic communication device), which states that it is a crime to “knowingly and intentionally solicit[] a child under sixteen years of age, by means of an electronic communication device,²⁸ to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.”

²⁴ “Violent sexual offense” is defined in N.M. Stat. Ann. § 31-18-25(F) as “(1) criminal sexual penetration in the first degree, as provided in Subsection C [D] of Section 30-9-11 NMSA 1978; or (2) criminal sexual penetration in the second degree, as provided in Subsection D [E] of Section 30-9-11 NMSA 1978.”

²⁵ 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).

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

²⁷ 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (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.); *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).

²⁸ “Electronic communication device” is defined in N.M. Stat. Ann. § 30-37-3.2(F) as “a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.”

If the victim is 13–15, a conviction under N.M. Stat. Ann. § 30-37-3.2(B)(1) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(1), 31-18-15(A)(10), (E)(9). If the victim is under 13, a violation of N.M. Stat. Ann. § 30-72-3.2(B)(2) increases to a third degree felony punishable by 3 years’ imprisonment and a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(2), 31-18-15(A)(9), (E)(9). However, if the buyer “also appears for, attends or is present at a meeting that the person arranged pursuant to the solicitation,” a violation of N.M. Stat. Ann. § 30-37-3.2(C)(1) where the victim is 13–15 years old increases to a third degree felony punishable by 3 years’ imprisonment and a possible fine not to exceed \$5,000, and where the victim is under 13, a violation of N.M. Stat. Ann. § 30-37-3.2(C)(2) increases to a second degree felony punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-37-3.2(C), 31-18-15(A)(6), (A)(9), (E)(6), (E)(9).

2.5.1 Recommendation: Amend N.M. Stat. Ann. § 30-37-3.2 to apply to the electronic solicitation of all minors under 18.

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

Nothing in N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), § 30-6A-4(B) (Sexual exploitation of children by prostitution), § 30-6A-3(A) (Sexual exploitation of children), or § 30-9-1 (Enticement of child), expressly prohibits a defendant from using the defense of mistake of age.

2.6.1 Recommendation: Amend N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution), § 30-6A-3(A) (Sexual exploitation of children), § 30-9-1 (Enticement of child), and § 30-52-1(A)(2) (Human trafficking) to expressly prohibit the use of the defense of mistake of age.

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

If N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) may be used to prosecute buyers, the applicable penalties vary based on the age of the minor victim. When the minor is 16–17 years old, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a third degree felony punishable by 3 years’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15 (A)(9), (E)(9). When the minor is 13–15 years old, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a second degree felony punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15 (A)(6), (E)(6). When the minor is under 13, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a first degree felony punishable by 18 years’ imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

CSEC (other than N.M. Stat. Ann. § 30-6A-3(A) (Sexual exploitation of children)) statutes do not criminalize purchasing a commercial sex act with a minor over 16. Specifically, N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) only applies when the victim is 14–15 years old, and a violation of N.M. Stat. § 30-6A-4(B) is punishable as a second degree felony by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(6), (E)(6). Similarly, N.M. Stat. Ann. § 30-9-1 (Enticement of child) only applies if the victim is under 16, and a violation is a misdemeanor punishable by up to 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A).

Also, N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration), in the absence of force or coercion or the involvement of a school employee or volunteer, does not apply to 16–18 year old victims. In the absence of such factors, a violation against a minor under 13 is a first degree felony punishable by 18 years’



imprisonment and a possible fine not to exceed \$15,000, and a violation against a 13–16 year old minor is a fourth degree felony punishable by 18 months’ imprisonment and a possible fine not to exceed \$5,000, if the perpetrator is over 18, four years older than the victim, and not married to the victim. N.M. Stat. Ann. §§ 30-9-11(D)(1), (G)(1), 31-18-15(A)(3), (A)(10), (E)(3), (E)(9).

Finally, in the absence of aggravating conditions such as force, authority, or deadly weapons, N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor) does not apply to victims over the age of 13. Criminal sexual contact of the unclothed intimate parts of a minor under 13 is a second degree felony for a sexual offense against a child punishable by 15 years’ imprisonment, 3 years of which “shall not be suspended or deferred,” and a possible fine not to exceed \$12,500. N.M. Stat. Ann. §§ 30-9-13(B)(1), 31-18-15(A)(5), (E)(5).

The statute that could be used to prosecute buyers of commercial sex from children 16–17 years old would likely be N.M. Stat. Ann. § 30-9-3 (Patronizing Prostitutes). A first violation of N.M. Stat. Ann. § 30-9-3 is generally punishable as a petty misdemeanor by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. § 31-19-1(A), (B).

- 2.7.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1(C) (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-9-1 (Enticement of child) to apply consistent penalties for all violations against minors under the age of 18.

2.8 Significant financial penalties are in place for buyers of sex with minors.

Buyers convicted under N.M. Stat. Ann. § 30-52-1(A) (Human trafficking), New Mexico’s CSEC laws and sexual offense laws may be required to pay fines ranging from \$500–\$15,000. To the extent that a buyer may be convicted under N.M. Stat. Ann. § 30-52-1(C) (Human trafficking), the buyer may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the age of the victim. N.M. Stat. Ann. § 30-52-1(C), 13-18-15(E)(3),(6),(9). A buyer convicted of violating N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) may be required to pay a fine of \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15(E) (6). A buyer convicted of violating N.M. Stat. Ann. § 30-9-1 (Enticement of child) may be required to pay a fine of \$1,000. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A), 31-18-15(E)(9). In the absence of force or other listed circumstances, a buyer convicted of violating N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) may be required to pay a fine not to exceed \$5,000 if the minor is 13–16 or \$15,000 if the minor is under 13. N.M. Stat. Ann. §§ 30-9-11(D)(1), (G)(1), 31-18-15(E)(3), (E)(9). Also in the absence of force or other listed circumstances, a buyer convicted of violating N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor) may be required to pay a fine not to exceed \$12,500 if the minor is under 13 and unclothed. N.M. Stat. Ann. §§ 30-9-13(B)(1), 31-18-15(E)(5).

To the extent that a buyer may be convicted under N.M. Stat. Ann. § 30-52-1(A), the buyer will be required “to make restitution²⁹ to the victim³⁰ for the gross income or value of the victim’s labor or services and any other actual damages³¹ in accordance with Section 31-17-1 NMSA 1978 [Victim restitution].” N.M. Stat. Ann. § 30-52-1(F).

²⁹ “Restitution” is defined in N.M. Stat. Ann. § 31-17-1(4) as “full or partial payment of actual damages to a victim.”

³⁰ “Victim” is defined in N.M. Stat. Ann. § 31-17-1(1) as “any person who has suffered actual damages as a result of the defendant’s criminal activities.”

³¹ “Actual damages” is defined in N.M. Stat. Ann. § 31-17-1(2) as “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or events, except punitive damages and damages for pain, suffering, mental anguish and loss of consortium. Without limitation, ‘actual damages’ includes damages for wrongful death.”

Forfeiture, however, is not likely applicable to buyers since N.M. Stat. Ann. § 30-6A-4(B), § 30-6A-3(A), and § 30-9-1 lack express provisions requiring forfeiture.

Lastly, buyers convicted under N.M. Stat. Ann. § 30-6A-4(B), § 30-6A-3(A), § 30-9-11, or § 30-9-13 may be liable to the victim for civil damages for “personal injury caused by childhood sexual abuse.” N.M. Stat. Ann. § 37-1-30.

2.8.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1 (Human trafficking), § 30-6A-3 (Sexual exploitation of children), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-9-1 (Enticement of child) to include a forfeiture provision in order to subject all buyers to New Mexico’s Forfeiture Act.

2.9 *Buying and possessing child pornography carries penalties as high as those for sex trafficking of a minor and commercial sex abuse of a minor, as well as similar federal offenses.*

N.M. Stat. Ann. § 30-6A-3(A) (Sexual exploitation of children) criminalizes the possession of child pornography, stating,

It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.

...

A violation of N.M. Stat. Ann. § 30-6A-3(A) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(10), (E)(9).

In contrast, a federal conviction for possession of child pornography³² is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³³ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³⁴

2.9.1 Recommendation: Amend N.M. Stat. Ann. § 30-6A-3(A) to criminalize the buying of child pornography and raise the penalty for both crimes to parallel the federal penalties.

³² 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).

³³ 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).

³⁴ 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).

2.10 *Convicted buyers of sex with minors are required to register as sex offenders.*

Pursuant to N.M. Stat. Ann. § 29-11A-4(A) (Registration of sex offenders; information required; criminal penalty for noncompliance), “A sex offender residing in this state shall register with the county sheriff for the county in which the sex offender resides.” N.M. Stat. Ann. § 29-11A-3(D) defines “sex offender” to include certain persons who have been convicted of a “sex offense.” N.M. Stat. Ann. § 29-11A-3(E) (Definitions) defines “sex offense” to include the following crimes:

- (1) aggravated criminal sexual penetration or criminal sexual penetration in the first, second, third or fourth degree, as provided in Section 30-9-11 NMSA 1978;
...
- (3) criminal sexual contact of a minor in the second, third or fourth degree, as provided in Section 30-9-13 NMSA 1978;
- (4) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;
- (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;
...
- (9) enticement of child, as provided in Section 30-9-1 NMSA 1978;
...
- (11) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978; or
- (12) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (10) of this subsection, as provided in Section 30-28-1 NMSA 1978.³⁵

N.M. Stat. Ann. § 29-11A-3(E) does not, however, include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking) or § 30-37-3.2 (Child solicitation by electronic communication device) in its definition of “sex offense.”

- 2.10.1 Recommendation: Amend N.M. Stat. Ann. § 29-11A-3(E) to include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking) and § 30-37-3.2 (Child solicitation by electronic communication device) in its definition of “sex offense.”

³⁵ N.M. Stat. § 30-28-1 (Attempt to commit a felony) states in part, “Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.”

Legal Components:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as for federal trafficking offenders.*
- 3.2 *Creating and distributing child pornography carries penalties as high as those for sex trafficking of a minor and commercial sexual exploitation of a child, as well as similar federal offenses.*
- 3.3 *Use of the Internet to lure, entice, recruit or purchase commercial sex acts with a minor is a separate crime and/or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers are sufficiently high to expose the crime and reach assets for forfeiture and vehicles for impound.*
- 3.5 *Sex offender registry laws include domestic minor sex trafficking as an offense for which the perpetrator must register.*
- 3.6 *Laws relating to termination of parental rights for certain violent offenses include the offense of domestic minor sex trafficking in order to remove the children of traffickers from their control.*

Legal Analysis:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as for federal trafficking offenders.*³⁶

Traffickers convicted under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), if the victim is 16–17 years old, may be convicted of a third degree felony punishable by 3 years' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9). If the victim is 13–15, the penalty increases to a second degree felony punishable by 9 years' imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(6), (E)(6). If the victim is under 13, the penalty further increases to a first degree felony punishable by 18 years' imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Traffickers may also be prosecuted under N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution). If the minor is 13–15, a violation of N.M. Stat. Ann. § 30-6A-4(A) is punishable as a second degree felony by 9 years' imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(6), (E)(6). However, if the child is under 13, the penalty increases to a first degree felony punishable by 18 years' imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(3), (E)(3).

N.M. Stat. Ann. § 30-9-1 (Enticement of a child) could also be used to prosecute traffickers. A violation of N.M. Stat. Ann. § 30-9-1 is a misdemeanor punishable by a definite term of less than 1 year in county jail, a possible fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A).

Traffickers may face prosecution under N.M. Stat. Ann. § 30-42-4 (Prohibited activities; penalties), New Mexico's racketeering statute, which provides in part,

A. It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use

³⁶ See discussion of the relevant text of the statutes listed in this section *supra* Section 1.2.

thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

B. It is unlawful for any person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, any interest in or control of any enterprise. . . .

C. It is unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs by engaging in a pattern of racketeering activity. . . .

. . . .

N.M. Stat. Ann. § 30-42-3(D) defines “pattern of racketeering activity” as,

[E]ngaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of the incidents occurred after February 28, 1980 and the last incident occurred within five years after the commission of a prior incident of racketeering.

N.M. Stat. Ann. § 30-42-3(A)(15) defines “racketeering” as “any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving,” certain listed offenses, including a violation of N.M. Stat. Ann. § 30-9-4 (Promoting prostitution), which does not expressly address prostituted minors.

A violation of N.M. Stat. Ann. § 30-42-4(A)–(C) is punishable as a second degree felony by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-42-4(D), 31-18-15(A)(6), (E)(6). Additionally, a trafficker who violates N.M. Stat. Ann. § 30-42-4(A)–(D)³⁷ will be required to forfeit under N.M. Stat. Ann. § 30-42-4(E).

(1) any interest acquired or maintained in violation of the Racketeering Act [30-42-1 NMSA 1978]; and

(2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise that he has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act [30-42-1 NMSA 1978].

In contrast, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)³⁸ 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 trafficker has a prior conviction for a federal sex offense³⁹ against a minor.

³⁷ N.M. Stat. Ann. § 30-42-4(D) states, “It is unlawful for any person to conspire to violate any of the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony.”

³⁸ 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.).

³⁹ 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).

3.1.1 Recommendation: Amend the definition of “racketeering” in N.M. Stat. Ann. § 30-42-3(A) to include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking of a minor), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-37-3.2 (Child solicitation by electronic communication device), and § 30-6A-3 (Sexual exploitation of children).

3.2 *Creating and distributing child pornography carries penalties as high as those for sex trafficking of a minor and commercial sexual exploitation of a child, as well as similar federal offenses.*

N.M. Stat. Ann. § 30-6A-3(C)–(E) (Sexual exploitation of children) criminalize the creation and manufacturing of child pornography. N.M. Stat. Ann. § 30-6A-3(C) states,

It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly. A person who violates the provisions of this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony.

N.M. Stat. Ann. § 30-6A-3(D) states,

It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a second degree felony.

Second degree felonies are punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. § 31-18-15(A)(6), (E)(6). A third degree felony is punishable by 3 years’ imprisonment and a possible fine not to exceed of \$5,000. N.M. Stat. Ann. §31-18-15(A)(9), (E)(9).

N.M. Stat. Ann. § 30-6A-3(E) states,

It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. . . .

A violation of N.M. Stat. Ann. § 30-6A-3(E) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(E), 31-18-15(A)(10), (E)(9).

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 trafficker has a prior conviction for a federal sex offense⁴⁰ against a minor. Additionally, a federal conviction for distribution of child pornography⁴¹

⁴⁰ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁴² Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁴³

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

While not limited to commercial sex acts, the use of the Internet to solicit sexual contact with a child under 16 is illegal under N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device). N.M. Stat. Ann. § 30-37-3.2(A) applies to the act of “knowingly and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device,⁴⁴ to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.”

3.4 *Financial penalties for traffickers are sufficiently high to expose the crime and reach assets for forfeiture and vehicles for impound.*

Traffickers convicted of committing an offense related to their involvement in domestic minor sex trafficking face a number of financial penalties, including fines, restitution, forfeiture and civil damages.

Traffickers convicted under N.M. Stat. Ann. § 30-52-1 (Human trafficking) and New Mexico’s CSEC laws may be required to pay fines ranging from \$1,000–\$15,000. Specifically, a trafficker convicted under N.M. Stat. Ann. § 30-52-1(C) may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-52-1(C), 13-18-15(E)(3), (E)(6), (E)(9). A trafficker convicted of violating N.M. Stat. Ann. § 30-6A-4 (Sexual exploitation of children by prostitution) may be required to pay a fine of \$10,000–\$15,000 depending on the age of the victim. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(E)(3),(6). A trafficker convicted of N.M. Stat. Ann. § 30-9-1 (Enticement of child) may be required to pay a fine not to exceed \$1,000. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A), 31-18-15(E)(9).

A trafficker who violates New Mexico’s racketeering provisions under N.M. Stat. Ann. § 30-42-4(A)–(C) (Prohibited activities; penalties) commits second degree felonies and may be required to pay a fine not to

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).

⁴¹ 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).

⁴² 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).

⁴³ 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).

⁴⁴ *See supra* note 8 for the definition of “electronic communication device.”

exceed \$10,000. N.M. Stat. Ann. §§ 30-42-4(A)–(C), 31-18-15(E)(5). A trafficker who violates N.M. Stat. Ann. § 30-42-4 may be liable to “[a] person who sustains injury to his person, business or property” for three times the actual damages. N.M. Stat. Ann. § 30-42-6(A).

Traffickers may also be required “to make restitution⁴⁵ to the victim⁴⁶ for the gross income or value of the victim’s labor or services and any other actual damages⁴⁷ in accordance with Section 31-17-1 NMSA 1978 [Victim restitution].” N.M. Stat. Ann. § 30-52-1(F). Traffickers who violate N.M. Stat. Ann. § 30-6A-4 or § 30-6A-3 may be liable to the victim for civil damages for “personal injury caused by childhood sexual abuse.” N.M. Stat. Ann. § 37-1-30.

Also, traffickers who violate N.M. Stat. Ann. § 30-42-4(E), New Mexico’s racketeering statute, may be required to forfeit to the state

- (1) any interest acquired or maintained in violation of the Racketeering Act [30-42-1 NMSA 1978]; and
- (2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise that he has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act [30-42-1 NMSA 1978].

Other forfeiture, however, is not likely applicable to traffickers since the relevant CSEC laws lack express provisions requiring forfeiture.

- 3.4.1. Recommendation: Amend N.M. Stat. Ann. § 30-52-1 to mandate asset forfeiture. Also, add N.M. Stat. Ann. § 30-52-1 (Human trafficking) to the list of racketeering offenses for which violators are subject to asset forfeiture.

3.5 *Sex offender registry laws include domestic minor sex trafficking as an offense for which the perpetrator must register.*

Pursuant to N.M. Stat. Ann. § 29-11A-4(A) (Registration of sex offenders; information required; criminal penalty for noncompliance), “A sex offender residing in this state shall register with the county sheriff for the county in which the sex offender resides.” N.M. Stat. Ann. § 29-11A-3(D) defines “sex offender” to include certain persons who have been convicted of a “sex offense.” Pursuant to N.M. Stat. Ann. § 29-11A-3(E) (Definitions), the definition of “sex offense” includes the following crimes:

- (4) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;
- (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;
- (6) kidnapping, as provided in Section 30-4-1 NMSA 1978, when the victim is less than eighteen years of age and the offender is not a parent of the victim;
- (7) false imprisonment, as provided in Section 30-4-3 NMSA 1978, when the victim is less than eighteen years of age and the offender is not a parent of the victim;
- ...
- (9) enticement of child, as provided in Section 30-9-1 NMSA 1978;
- ...
- (11) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978; or

⁴⁵ See the definition of “restitution” *supra* note 29.

⁴⁶ See definition of “victim” *supra* note 30.

⁴⁷ See definition of “actual damages” *supra* note 31.

(12) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (10) of this subsection, as provided in Section 30-28-1 NMSA 1978.

N.M. Stat. Ann. § 29-11A-3(E) does not, however, include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking) or § 30-37-3.2 (Child solicitation by electronic communication device) in its definition of “sex offense.”

3.5.1 Recommendation: Amend N.M. Stat. Ann. § 29-11A-3(E) to include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking) and § 30-37-3.2 (Child solicitation by electronic communication device), when the victim is a minor, in its definition of “sex offense” for purposes of requiring registration as a sex offender.

3.6 *Laws relating to termination of parental rights for certain violent offenses include the offense of domestic minor sex trafficking in order to remove the children of traffickers from their control.*

A violation of N.M. Stat. Ann. § 30-52-1 (Human Trafficking) is not explicitly included as grounds under N.M. Stat. Ann. § 32A-4-28(B) (Termination of parental rights; adoption decree) for authorizing the termination of parental rights, although it appears to fall under the definition of “abused child.” Pursuant to N.M. Stat. Ann. § 32A-4-28(B),⁴⁸

The court shall terminate parental rights with respect to a child when:

- (1) there has been an abandonment of the child by his parents;
- (2) the child has been a neglected or abused⁴⁹ child as defined in the Abuse and Neglect Act [32A-4-1 NMSA 1978] and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. The court may find in some cases that efforts by the department or another agency are unnecessary, when:
 - (a) there is a clear showing that the efforts would be futile; or
 - (b) the parent has subjected the child to aggravated circumstances;⁵⁰ or . . .

. . . .

⁴⁸ N.M. Stat. Ann. § 32A-4-28(A) states, “In proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated.”

⁴⁹ An “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B) as including one “who has suffered sexual abuse or sexual exploitation inflicted by the child’s parent, guardian or custodian.” “Sexual abuse” includes, but is not limited to criminal sexual contact, incest or criminal sexual penetration, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(G). “Sexual exploitation” is defined as including “(1) allowing, permitting or encouraging a child to engage in prostitution; (2) allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or (3) filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(H).

⁵⁰ N.M. Stat. Ann. § 32A-4-2(C) defines “aggravated circumstances” as,

[T]hose circumstances in which the parent, guardian or custodian has:

- (1) attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child’s sibling;
- (2) attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;
- (3) attempted, conspired to subject or has subjected the child to torture, chronic abuse or sexual abuse; or
- (4) had parental rights over a sibling of the child terminated involuntarily.

- 3.6.1 Recommendation: Amend N.M. Stat. Ann. § 32A-4-28(B) to explicitly provide that a violation of N.M. Stat. Ann. § 30-52-1 (Human trafficking) or a violation of the other CSEC statutes constitutes grounds for the termination of parental rights.

FRAMEWORK ISSUE 4: CRIMINAL PROVISIONS FOR FACILITATORS

Legal Components:

- 4.1 *The act of assisting, enabling, and/or financially benefitting from domestic minor sex trafficking is included in the state human trafficking law.*
- 4.2 *Asset forfeiture laws are in place for those who benefit financially from domestic minor sex trafficking.*
- 4.3 *Promoting and/or selling child sex tourism is illegal.*
- 4.4 *Promoting and/or selling child pornography (images of child sexual abuse) is illegal.*

Legal Analysis:

- 4.1 *The act of assisting, enabling, and/or financially benefitting from domestic minor sex trafficking is included in the state human trafficking law.*

Although it is not limited to minor victims, N.M. Stat. Ann. § 30-52-1(A)(3) (Human trafficking) forbids “benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services or commercial sexual activity.”⁵¹ Facilitators convicted under N.M. Stat. Ann. § 30-52-1(A)(3), if the victim is 16 or older, will be guilty of a third degree felony punishable by 3 years’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9). If the victim is 13–15 the penalty increases to a second degree felony punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(6), (E)(6). If the victim is under 13, the penalty further increases to a first degree felony punishable by 18 years’ imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Facilitators may also be prosecuted under N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution).⁵² If the minor is 13–15 years old, a violation of N. M. Stat. Ann. §30-6A-4(A) is punishable as a second degree felony by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A),31-18-15(A)(6), (E)(6). However, if the child is under 13, the violation increases to first degree felony punishable by 18 years’ imprisonment and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(3), (E)(3).

Lastly, facilitators may face prosecution under N.M. Stat. Ann. § 30-42-4 (Prohibited activities; penalties), New Mexico’s racketeering statute,⁵³ for engaging in repeated acts of promoting prostitution. A violation is a second degree felony punishable by 9 years’ imprisonment and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-42-4(A), 31-18-15(A)(6), (E)(6). N.M. Stat. Ann. § 30-42-4(D) also makes it a crime “for any person to conspire to violate any of the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony,” punishable

⁵¹ See definition of “commercial sexual activity” *supra* note 2.

⁵² See discussion of N.M. Stat. Ann. § 30-6A-4 *supra* Section 1.2.

⁵³ See discussion of N.M. Stat. Ann. § 30-42-4 *supra* Section 3.1.

by 3 years' imprisonment and a possible fines of \$5,000. N.M. Stat. Ann. §§ 30-42-4(D), 31-18-15(A)(9), (E)(9).

- 4.1.1 Recommendation: Amend the definition of “racketeering” in N.M. Stat. Ann. § 30-42-3(A) to include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking of a minor), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-37-3.2 (Child solicitation by electronic communication device), and § 30-6A-3 (Sexual exploitation of children).

4.2 *Asset forfeiture laws are in place for those who benefit financially from domestic minor sex trafficking.*

Facilitators convicted of an offense related to their involvement in domestic minor sex trafficking face a number of financial penalties, including fines, restitution, forfeiture and civil damages.

Facilitators convicted under N.M. Stat. Ann. § 30-52-1 (Human trafficking) and New Mexico’s CSEC laws may be required to pay fines ranging from \$1,000–\$15,000. Specifically, a facilitator convicted under N.M. Stat. Ann. § 30-52-1(C) may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-52-1(C), 13-18-15(E)(3), (E)(6), (E)(9). A facilitator convicted of violating N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution) may be required to pay a fine not to exceed \$10,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(E)(3), (E)(6).

A facilitator who violates the racketeering law under N.M. Stat. Ann. § 30-42-4(A)–(C) (Prohibited activities; penalties) may have to pay a fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-42-4(A)–(C), 31-18-15(E)(6). A facilitator who conspires “to violate any of the provisions of Subsections A through C of this section . . . is guilty of a third degree felony,” punishable by a possible fine of \$5,000. N.M. Stat. Ann. §§ 30-42-4(D), 31-18-15(A)(9), (E)(9).

A facilitator convicted of violating N.M. Stat. Ann. § 30-52-1(A)(3) will also be required “to make restitution⁵⁴ to the victim⁵⁵ for the gross income or value of the victim’s labor or services and any other actual damages⁵⁶ in accordance with Section 31-17-1 NMSA 1978 [Victim restitution].” N.M. Stat. Ann. § 30-52-1(F).

Additionally, a facilitator who violates N.M. Stat. Ann. § 30-42-4(A)–(D)⁵⁷ will be required to forfeit, pursuant to subsection (E),

- (1) any interest acquired or maintained in violation of the Racketeering Act [30-42-1 NMSA 1978]; and
- (2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise that he has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act [30-42-1 NMSA 1978].

Additionally, N.M. Stat. Ann. § 30-42-6(A) allows any person who sustains injury to his “person, business, or property” as a result of a “racketeering activity” to file an action to receive three times the amount of his or her actual damages that resulted from the racketeering activity.

⁵⁴ See the definition of “restitution” *supra* note 29.

⁵⁵ See definition of “victim” *supra* note 30.

⁵⁶ See definition of “actual damages” *supra* note 31.

⁵⁷ N.M. Stat. Ann. § 30-42-4(D) states, “It is unlawful for any person to conspire to violate any of the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony.”

Other forfeiture, however, is not likely applicable to facilitators since N.M. Stat. Ann. § 30-6A-4(B), § 30-6A-3(A), or § 30-9-1 lack express provisions requiring forfeiture.

Lastly, a facilitator who violates N.M. Stat. Ann. § 30-6A-4 or § 30-6A-3 may be liable to the victim for civil damages for “personal injury caused by childhood sexual abuse.” N.M. Stat. Ann. § 37-1-30.

4.2.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1 (Human trafficking) to include mandatory asset forfeiture.

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

There is no specific provision in the New Mexico code prohibiting 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 offer, sale, or travel occurs in New Mexico.

4.4 *Promoting and/or selling child pornography (images of child sexual abuse) is illegal.*

N.M. Stat. Ann. § 30-6A-3(B) and (F) criminalize the distribution of child pornography. N.M. Stat. Ann. § 30-6A-3(B) states in part,

It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.

Similarly, N.M. Stat. Ann. § 30-6A-3(F) states,

It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. . . .

A violation of either N.M. Stat. Ann. § 30-6A-3(B) or (F) is a third degree felony punishable by 3 years’ imprisonment and a possible fine of \$5,000. N.M. Stat. Ann. §§ 30-6A-3(B), (F), 31-18-15(A)(9), (E)(9).

Legal Components:

- 5.1 *A commercially sexually exploited child is defined as a victim.*
- 5.2 *Consent of the minor to the commercial sex act is immaterial to the crime of commercial sexual exploitation or sex trafficking and cannot be a defense for the perpetrator.*
- 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 regardless of their cooperation with law enforcement.*
- 5.5 *The definition of “caregiver” in the child welfare statutes is broad enough to cover situations in which a trafficker (pimp) is in custody or control of a child in order to bring a trafficked child into protection of Child Protective Services.*
- 5.6 *Commercial sexual exploitation is identified as a type of abuse and neglect within child protection statutes.*
- 5.7 *Crime victims’ compensation is specifically available to a prostituted child without regard to ineligibility factors.*
- 5.8 *Victim-friendly criminal justice procedures and protections are provided in the court system process.*
- 5.9 *Expungement of criminal records resulting from arrests for offenses perpetrated as a result of, or in the course of, the commercial sexual exploitation of a minor is available and preferably automatic upon application by the minor at age 18.*
- 5.10 *Restitution and civil remedies are statutorily authorized for minors victimized through prostitution, pornography or sexual performance.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking offenses are eliminated.*

Legal Analysis:

- 5.1 *A commercially sexually exploited child is defined as a victim.*

N.M. Stat. Ann. § 30-52-2(B) (Human trafficking; benefits and services for human trafficking victims) defines a human trafficking victim as “a person subjected to human trafficking by a person charged in New Mexico with the crime of human trafficking.” Since the crime of human trafficking includes “recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity,” a child subjected to this action would be considered a victim for purposes of N.M. Stat. Ann. § 30-52-2. N.M. Stat. Ann. § 30-52-1(A)(2). N.M. Stat. Ann. § 30-52-2(A) also recognizes the victim status of trafficking victims by stating,

Human trafficking victims found in the state shall be eligible for benefits and services from the state until the victim qualifies for benefits and services authorized by the federal Victims of Trafficking and Violence Protection Act of 2000 [Pub. L. No. 106-386, § 2002]; provided that the victim cooperates in the investigation or prosecution of the person charged with the crime of human trafficking. Benefits and services shall be provided to eligible human trafficking victims regardless of immigration status and may include:

- (1) case management;
- (2) emergency temporary housing;
- (3) health care;

- (4) mental health counseling;
- (5) drug addiction screening and treatment;
- (6) language interpretation, translation services and English language instruction;
- (7) job training, job placement assistance and post-employment services for job retention;
- (8) services to assist the victim and the victim's family members; or
- (9) other general assistance services and benefits as determined by the children, youth and families department.

Additionally, N.M. Stat. Ann. § 31-17-1(A)(1) (Victim restitution) defines “victim” as “any person who has suffered actual damages⁵⁸ as a result of the defendant’s criminal activities.” “Criminal activities” includes “any crime for which there is a plea of guilty or verdict of guilty, upon which a judgment may be rendered and any other crime committed after July 1, 1977 which is admitted or not contested by the defendant.” N.M. Stat. Ann. § 31-17-1(A)(3).

For purposes of Chapter 31, Article 22 (Crime Victims Reparations), a “victim” is defined in part in N.M. Stat. Ann. § 31-22-3(I) as

- (1) a person in New Mexico who is injured⁵⁹ or killed by any act or omission of any other person that is a crime enumerated in Section 31-22-8 NMSA 1978; [or]
- (2) a resident of New Mexico who is injured or killed by such a crime occurring in a state other than New Mexico if that state does not have an eligible crime victims compensation program; . . .
-

Among the crimes enumerated in N.M. Stat. Ann. § 31-22-8 are violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor). N.M. Stat. Ann. § 31-22-8(A)(10), (11). However, the requirement of a showing of injury or death may preclude some victims of these crimes from obtaining reparations.

Lastly, for the purposes of New Mexico’s Victims of Crime Act, in New Mexico’s criminal procedure chapter, a “victim” is defined in part as “an individual against whom a criminal offense is committed.” N.M. Stat. Ann. § 31-26-3(F). The definition of “criminal offense” includes violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor). N.M. Stat. Ann. § 31-26-3(B)(11), (12).

5.2 *Consent of the minor to the commercial sex act is immaterial to the crime of commercial sexual exploitation or sex trafficking and cannot be a defense for the perpetrator.*

Many of the trafficking and CSEC statutes neither expressly state that consent is a defense nor do they expressly prohibit raising such a defense. These statutes include N.M. Stat. Ann. § 30-52-1 (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-6A-3 (Sexual exploitation of children),

- 5.2.1. Recommendation: Amend N.M. Stat. Ann. § 30-52-1, § 30-6A-4, and § 30-6A-3, to expressly provide that a minor’s consent to a commercial sex act is no defense to the crime.

⁵⁸ See *supra*, note 31 for the definition of “actual damages.”

⁵⁹ “Injury” is defined in N.M. Stat. Ann. § 31-22-3(F) as “actual bodily harm or disfigurement and includes pregnancy and extreme mental distress.” Also, the same section defines “extreme mental distress” as “a substantial personal disorder of emotional processes, thought or cognition that impairs judgment, behavior or ability to cope with the ordinary demands of life.”



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

N.M. Stat. Ann. § 30-9-2 (Prostitution) is age-neutral, stating, “Whoever commits prostitution is guilty of a petty misdemeanor.” N.M. Stat. Ann. § 30-9-2 further states that “[p]rostitution consists of knowingly engaging in or offering to engage in a sexual act for hire.” A minor charged with the petty misdemeanor of prostitution may be punished by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. §§ 30-9-2, 31-19-1(B). Moreover, if the minor has a prior conviction, a violation would be a misdemeanor punishable by a definite term of up to 1 year in county jail, a fine of \$1,000, or both. N.M. Stat. Ann. §§ 30-9-2, 31-19-1(A).

5.3.1 Recommendation: Amend N.M. Stat. Ann. § 30-9-2 to make minors expressly immune from prosecution for prostitution and identify all minors engaged in prostitution as victims of human trafficking under N.M. Stat. Ann. § 30-52-1 (Human trafficking).

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 regardless of their cooperation with law enforcement.*

Domestic minor sex trafficking victims may be taken into custody through either the juvenile justice system or through the child protection system.

A child protection response may be provided to domestic minor sex trafficking victims who are considered abused or neglected. As used in Chapter 32A, Article 4 (Child Abuse and Neglect), an “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B) as a child

- (1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child’s parent, guardian or custodian;
- (2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child’s parent, guardian or custodian;
- (3) who has suffered sexual abuse⁶⁰ or sexual exploitation⁶¹ inflicted by the child’s parent, guardian or custodian;
- (4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child’s life or health; or
- (5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

N.M. Stat. Ann. § 32A-4-2(E) defines “neglected child” in part, as “a child . . . (3) who has been physically or sexually abused, when the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;”

Under N.M. Stat. Ann. § 32A-4-6(A) (Taking into custody; penalty),

A child may be held or taken into custody:

- (1) by a law enforcement officer when the officer has evidence giving rise to reasonable grounds to believe that the child is abused or neglected and that there is an immediate threat to the child’s safety; provided that the law enforcement officer contacts the department to enable the department to conduct an on-site safety assessment to determine whether it is appropriate to take the child into immediate custody, except that a child may be taken into

⁶⁰ See *supra* note 49.

⁶¹ See *supra* note 49.

custody by a law enforcement officer without a protective services assessment being conducted if:

- (a) the child's parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child's sibling;
- (b) the child's parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;
- (c) the child has been abandoned;
- (d) the child is in need of emergency medical care;
- . . . ; or
- (f) the child is in imminent risk of abuse.

N.M. Stat. Ann § 32A-4-7(A) (Release or delivery from custody) requires that a child taken into custody be released to his or her "parent, guardian or custodian" and given a "verbal counsel or warning as may be appropriate" or delivered "to the department" or a medical facility if the child needs treatment. Under N.M. Stat. Ann § 32A-4-7(B), "When an alleged neglected or abused child is delivered to the department, a department caseworker shall review the need for placing the child in custody and shall release the child from custody unless custody is appropriate or has been ordered by the court."

N.M. Stat. Ann. § 32A-4-8 (Place of temporary custody) states,

Unless a child alleged to be neglected or abused is also alleged or adjudicated delinquent, the child shall not be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children, but may be placed in the following community-based shelter-care facilities:

- A. with a relative of the child who is willing to guarantee to the court that the child will not be returned to the alleged abusive or neglectful parent, guardian or custodian without the prior approval of the court;
- B. a licensed foster home or any home authorized under the law for the provision of foster care, group care or use as a protective residence;
- C. a facility operated by a licensed child welfare services agency; or
- D. a facility provided for in the Children's Shelter Care Act [32A-9-1 N.M. Stat. Ann. 1978].

A custody hearing must be held within 10 days of the filing of a petition for temporary custody, and the child must be returned to his or her parents or guardian unless, among other things, "the child is in immediate danger from the child's surroundings, and removal from those surroundings is necessary for the child's safety or well-being" or "the child will be subject to injury by others if not placed in the custody of the department." N.M. Stat. Ann. § 32A-4-18(A), (C)(2)–(3).

In making its disposition judgment, if the court finds the child to be abused or neglected, pursuant to N.M. Stat. Ann. § 32A-4-22(B), the court may

- (1) permit the child to remain with the child's parent, guardian or custodian, subject to those conditions and limitations the court may prescribe;
- (2) place the child under protective supervision of the department; or
- (3) transfer legal custody of the child to any of the following:
 - (a) the noncustodial parent, if it is found to be in the child's best interest;
 - (b) an agency responsible for the care of neglected or abused children; or
 - (c) a child-placement agency willing and able to assume responsibility for the education, care and maintenance of the child and licensed or otherwise authorized by law to receive and

provide care for the child.

N.M. Stat. Ann. § 32A-4-22(F) further specifies that “[u]nless a child found to be neglected or abused is also found to be delinquent, the child shall not be confined in an institution established for the long-term care and rehabilitation of delinquent children.”

Domestic minor sex trafficking victims who are truant from school or who have run away from home also may receive a protective responses under the provisions of New Mexico’s Family in Need of Court-Ordered Services Act, N.M. Stat. Ann. § 32A-3B et. seq. Specifically, N.M. Stat. Ann. § 32A-3B-3(A) (Protective custody; interference with protective custody; penalty) provides,

A child may be taken into protective custody by a law enforcement officer without court order when the officer has reasonable grounds to believe that:

- (1) the child has run away from the child’s parent, guardian or custodian;
- (2) the child without parental supervision is suffering from illness or injury;
- (3) the child has been abandoned; or
- (4) the child is endangered by his surroundings and removal from those surroundings is necessary to ensure the child’s safety.

Once taken into custody pursuant to N.M. Stat. Ann. § 32A-3B-3(A) (Protective custody; interference with protective custody; penalty), pursuant to N.M. Stat. Ann. § 32A-3B-6 (Place of custody),

Unless a child from a family in need of services who has been placed in department custody is also alleged or adjudicated delinquent, the child shall not be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children, but may be placed in the following community-based shelter-care facilities:

- A. a licensed foster-care home or any home authorized under the law for the provision of foster care, group care or use as a protective residence;
- B. a facility operated by a licensed child welfare services agency;
- C. a facility provided for in the Children’s Shelter Care Act [32A-9-1 NMSA 1978]; or
- D. in a home of a relative of the child, when the relative provides the court with a sworn statement that the relative will not return the child to the dangerous surroundings that prompted protective custody for the child.

Domestic minor sex trafficking victims may also be treated as delinquent children. N.M. Stat. Ann. § 32A-2-3(B) defines a “delinquent child” as “a child who has committed a delinquent act.” A “delinquent act” is defined in part as “an act committed by a child that would be designated as a crime under the law if committed by an adult . . .” N.M. Stat. Ann. § 32A-2-3(A).

Under N.M. Stat. Ann. § 32A-2-9 (Taking into custody), “[a] child may be taken into custody,” among other ways, “pursuant to the laws of arrest for commission of a delinquent act.” Once a delinquent child is taken into custody, N.M. Stat. Ann. § 32A-2-10(A) (Release or delivery from custody) states that the person who took the child into custody must “with all reasonable speed” release the child to his or her parents or a guardian with a verbal warning if appropriate or a written promise by the parents to bring the child to court, or take the child to a detention facility, a medical facility, an evaluation facility, or another center or organization.

Pursuant to N.M. Stat. Ann. § 32A-2-10(C), “A child under the age of eleven shall not be held in



detention.” Additionally, pursuant to N.M. Stat. Ann. § 32A-2-10(B), when a child is

delivered to a place of detention or organization recognized as an alternative to secure detention, as provided in Section 32A-2-12 NMSA 1978, only a department employee or a trained county detention professional designated by the department may place the child in detention or with a center or organization recognized as an alternative to secure detention in accordance with the criteria for detention set forth in Section 32A-2-11 NMSA 1978. If the criteria for detention of an alleged delinquent child are not met, the child shall be released from custody.

Pursuant to N.M. Stat. Ann. § 32A-2-11(A) (Criteria for detention of children),

Unless ordered by the court pursuant to the provisions of the Delinquency Act, a child taken into custody for an alleged delinquent act shall not be placed in detention unless a detention risk assessment instrument is completed and a determination is made that the child:

- (1) poses a substantial risk of harm to himself;
- (2) poses a substantial risk of harm to others; or
- (3) has demonstrated that he may leave the jurisdiction of the court.

Pursuant to N.M. Stat. Ann. § 32A-2-12(A) (Placement or detention), a child alleged to be delinquent may also “be placed or detained” in

- (1) a licensed foster home or a home otherwise authorized under the law to provide foster or group care;
- (2) a facility operated by a licensed child welfare services agency;
- (3) a shelter-care facility provided for in the Children’s Shelter Care Act [32A-9-1 NMSA 1978] that is in compliance with all standards, conditions and regulatory requirements and that shall be considered a temporary placement subject to judicial review within thirty days of placement;
- (4) a detention facility certified by the department for children alleged to be delinquent children;
- (5) any other suitable place, other than a facility for the long-term care and rehabilitation of delinquent children to which children adjudicated as delinquent may be confined pursuant to Section 32A-2-19 NMSA 1978, designated by the court and that meets the standards for detention facilities pursuant to the Children’s Code [32A-1-1 NMSA 1978] and federal law; or
- (6) the child’s home or place of residence, under conditions and restrictions approved by the court.

When a child taken into custody is not released, “a judicial determination of probable cause” must be made within 48 hours, unless the child was arrested “pursuant to the Children’s Court Rules,” and a petition must be filed within 24 hours, and a detention hearing must occur within 24 hours after filing. N.M. Stat. Ann. § 32A-2-13(A). Pursuant to N.M. Stat. Ann. § 32A-2-13(F), “If the judge or special master finds that detention of the child is not appropriate under the criteria established by the Children’s Code,” the child shall be released and possibly subjected to certain conditions; specifically, the judge or special master may

- (1) place the child in the custody of a parent, guardian or custodian or under the supervision of an agency agreeing to supervise the child;
- (2) place restrictions on the child’s travel, association with other persons or place of abode during the period of the child’s release; or
- (3) impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children established by the Children’s Code [32A-1-1 NMSA 1978], including a

condition requiring that the child return to custody as required.

Under N.M. Stat. Ann. § 32A-2-19(B) (Disposition of an adjudicated delinquent offender), for a child found to be delinquent, in its dispositional order, the court may order any of the following:

(1) transfer legal custody to the department, an agency responsible for the care and rehabilitation of delinquent children, which shall receive the child at a facility designated by the secretary of the department as a juvenile reception facility. The department shall thereafter determine the appropriate placement, supervision and rehabilitation program for the child. The judge may include recommendations for placement of the child. Commitments are subject to limitations and modifications set forth in Section 32A-2-23 NMSA 1978 [Limitations on dispositional judgments; modification; termination or extension of court orders]. The types of commitments include:

(a) a short-term commitment of one year in a facility for the care and rehabilitation of adjudicated delinquent children. No more than nine months shall be served at the facility and no less than ninety days shall be served on supervised release, unless: 1) a petition to extend the commitment has been filed prior to the commencement of supervised release; 2) the commitment has been extended pursuant to Section 32A-2-23 NMSA 1978; or 3) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978 [Parole revocation; procedures];

(b) a long-term commitment for no more than two years in a facility for the care and rehabilitation of adjudicated delinquent children. No more than twenty-one months shall be served at the facility and no less than ninety days shall be served on supervised release, unless: 1) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978; or 2) the commitment is extended pursuant to Section 32A-2-23 NMSA 1978;

...

(2) place the child on probation under those conditions and limitations as the court may prescribe;

(3) place the child in a local detention facility that has been certified in accordance with the provisions of Section 32A-2-4 NMSA 1978 [Detention facilities; standards; reports; appeals] for a period not to exceed fifteen days within a three hundred sixty-five day time period; . . .

....

N.M. Stat. Ann. § 32A-2-19(D) further specifies that “[a] child found to be delinquent shall not be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.”

Under New Mexico’s Children’s Shelter Care Act, N.M. Stat. Ann. § 32A-9 et. seq., an alleged or actual child in need of supervision⁶² or an alleged delinquent child when “there is no probable cause to believe that the child will injure others or himself, run away or be taken away so as to be unavailable for proceedings of the court or its officers” may “be placed in a community-based shelter-care facility.” N.M. Stat. Ann. § 32A-9-6.

5.4.1 Recommendation: Enact a law to direct child victims of sex trafficking and commercial sexual exploitation directly into a protective response system.

⁶² N.M. Stat. Ann. § 32A-9-3(C) defines a “child in need of supervision” as

[A] child found by the children’s court or family court division of the district court to:

- (1) have committed an offense applicable only to children or not classified as criminal; and
- (2) be in need of care or rehabilitation.

5.5 *The definition of “caregiver” in the child welfare statutes is broad enough to cover situations in which a trafficker (pimp) is in custody or control of a child in order to bring a trafficked child into protection of Child Protective Services.*

N.M. Stat. Ann. § 32A-1-4(E) (Definitions) defines a “custodian” as “an adult with whom the child lives who is not a parent or guardian⁶³ of the child.” The definition of “custodian” in N.M. Stat. Ann. § 32A-1-4(E) could be broad enough to cover situations in which a trafficker is in possession of a child for purposes of New Mexico’s Children’s Code.

5.6 *Commercial sexual exploitation is identified as a type of abuse and neglect within child protection statutes.*

Sexual exploitation is covered by the definitions of an abused child and a neglected child as used in New Mexico’s Children’s Code. As used in Chapter 32A, Article 4 (Child Abuse and Neglect), an “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B) as a child

- (1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child’s parent, guardian or custodian;
- (2) who has suffered physical abuse, emotional abuse, or psychological abuse inflicted or caused by the child’s parent, guardian or custodian;
- (3) who has suffered sexual abuse⁶⁴ or sexual exploitation⁶⁵ inflicted by the child’s parent, guardian or custodian;
- (4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child’s life or health; or
- (5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

Similarly, N.M. Stat. Ann. § 32A-4-2(E) defines a “neglected child” in part, as a child “(3) who has been physically or sexually abused, when the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;”

5.7 *Crime victims’ compensation is specifically available to a prostituted child without regard to ineligibility factors.*

Human trafficking and CSEC crimes are not specifically listed as offenses for which victims are eligible to receive awards pursuant to New Mexico’s Crime Reparation Act. Only victims of certain enumerated crimes, including N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor), who have been “injured⁶⁶ or killed by any act or omission of any other person coming within the criminal jurisdiction of the state” may receive reparations. N.M. Stat. Ann. §§ 31-22-7(A), 31-22-8(A)(10)–(11).

Therefore, to the extent domestic minor sex trafficking victims are also victims of N.M. Stat. Ann. § 30-9-11 or § 30-9-13, they may be eligible for compensation; however, several other factors could present difficulties for victims of domestic minor sex trafficking. Specifically, in determining whether to award

⁶³ N.M. Stat. Ann. § 32A-1-4(I) defines “guardian” as “a person appointed as a guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law.”

⁶⁴ See *supra* note 49 for the definition of “sexual abuse.”

⁶⁵ See *supra* note 49 for the definition of “sexual exploitation.”

⁶⁶ See *supra* note 59.

reparations, “The commission shall consider the behavior of the victim and whether, because of provocation or otherwise, the victim bears responsibility for the crime that caused his injury . . . and shall reduce the amount of reparation in accordance with its assessment of the degree of responsibility attributable to the victim.” N.M. Stat. Ann. § 31-22-7(C).

No award may be made to a victim “unless the commission finds that . . . the claimant or victim fully cooperated with the appropriate law enforcement agencies.” N.M. Stat. Ann. § 31-22-7(D)(3).

Additionally, to be eligible for a reparation award, a victim must file an application for an award within 2 years of the date the injury occurs and must report the crime to law enforcement within 30 days after the occurrence of the crime, unless the crime is sexual assault, in which case the victim has 180 days, or if the crime is N.M. Stat. Ann. § 30-9-11(Criminal sexual penetration) or N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor), in which case victims have 2 years from the earlier of the date they turn 18 or the date the crime is reported to law enforcement. N.M. Stat. Ann. § 31-22-14(A), (F)(1). Nothing expressly exempts domestic minor sex trafficking victims from any of these requirements.

5.7.1 Recommendation: Amend the list of crimes in N.M. Stat. Ann. § 31-22-8 (Crimes enumerated) to include N.M. Stat. Ann. § 30-52-1 (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-6A-3 (Sexual exploitation of children), § 30-9-1 (Enticement of child), and § 30-37-3.2 (Child solicitation by electronic communication device).

5.7.2 Recommendation: Amend N.M. Stat. Ann. § 31-22-7 (Eligibility for reparation) and § 31-22-14 (Limitations on award; collateral recovery; preliminary award) to provide exceptions from the ineligibility factors discussed above for victims of domestic minor sex trafficking.

5.8 *Victim-friendly criminal justice procedures and protections are provided in the court system process.*

Several victim-friendly criminal justice procedures and protections are afforded to minor victims of commercial sexual exploitation or related offenses.

New Mexico law provides special protections for victims of sexual offenses. For example, N.M. Stat. Ann. § 30-9-16 (Testimony; limitations; in camera hearing) establishes limitations on the type of evidence that can be admitted in court. Specifically, in prosecutions for certain offenses, including N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor), “evidence of the victim’s past sexual conduct, opinion evidence of the victim’s past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.” N.M. Stat. Ann. § 30-9-16(A).⁶⁷

Additionally, pursuant to N.M. Stat. Ann. § 30-9-17(A), in a prosecution for N.M. Stat. Ann. § 30-9-11 or § 30-9-13, where the victim is under 16,

⁶⁷ N.M. Stat. Ann. § 30-9-16(C) states,

C. If the evidence referred to in Subsection A or B of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

[T]he district court may, for a good cause show, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence [Rule 11-611 NMRA]. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

Pursuant to N.M. Dist. Ct. R. Cr. P. § 5-504 (Videotaped depositions; testimony of certain minors who are victims of sexual offenses), such videotape testimony may be taken “upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm.” Under subsections (B) and (C),

B. At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to Paragraph A of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

- (1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- (2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and
- (3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. Additional use at trial. In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph N of Rule 5-503 NMRA.

However, prostituted children may receive less protection when they or their offender are charged with violations of N.M. Stat. Ann. § 30-9-2 (Prostitution), § 30-9-3 (Patronizing prostitutes), or § 30-9-4 (Promoting prostitution). Pursuant to N.M. Stat. Ann. § 30-9-6 (Testimony of witnesses to prostitution and lewdness), in any hearing or trial dealing with a violation of the aforementioned offenses,

[N]o person shall be excused from giving testimony or producing documentary or other evidence material to such investigation, proceeding, preliminary hearing or trial on the ground that the testimony or evidence required of him is incriminating evidence; provided that, any person who is so subpoenaed and ordered to testify or produce evidence concerning such crimes shall be immune to prosecution or conviction for any violation of such crimes about which he may testify.

- 5.8.1 Recommendation: Amend N.M. Stat. Ann. § 30-9-16 and § 30-9-17 to include N.M. Stat. Ann. § 30-52-1 (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-37-3.2 (Child solicitation by electronic communication device), § 30-6A-3 (Sexual exploitation of children), and § 30-9-1 (Enticement of child), as offenses for which minor victims may receive victim-friendly criminal justice procedures.

- 5.9 *Expungement of criminal records resulting from arrests for offenses perpetrated as a result of, or in the course of, the commercial sexual exploitation of a minor is available and preferably automatic upon application by the*



minor at age 18.

New Mexico law allows for the expungement of juvenile records, as long as certain conditions are met. N.M. Stat. Ann. § 32A-3B-21(A) (Expungement of records) provides,

On motion by or on behalf of an individual who has been the subject of a petition filed under the Children’s Code [32A-1-1 NMSA 1978], or on the court’s own motion, the court shall vacate its findings, orders and judgments on the petition, and order the legal and social files and records of the court, the department and any other agency in the case expunged . . . if the court finds that:

- (1) two years have elapsed since the final release of the individual from legal custody and supervision or two years have elapsed since the entry of any other judgment not involving legal custody or supervision; and
- (2) the individual has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or found delinquent by a court, and no proceeding is pending seeking such a conviction or finding.

5.10 Restitution and civil remedies are statutorily authorized for minors victimized through prostitution, pornography or sexual performance.

N.M. Stat. Ann. § 30-52-1 (Human trafficking) expressly authorizes human trafficking victims to receive restitution from their offenders. Specifically, N.M. Stat. Ann. § 30-52-1(F) provides, “A person convicted of human trafficking shall, in addition to any other punishment, be ordered to make restitution to the victim for the gross income or value of the victim’s labor or services and any other actual damages in accordance with Section 31-17-1 NMSA 1978 [Victim Restitution].”

Minor victims of other CSEC crimes also may be eligible to receive restitution, pursuant to N.M. Stat. Ann. § 31-17-1(B), which states,

If the trial court exercises either of the sentencing options under Section 31-20-6 NMSA 1978 [Conditions of order deferring or suspending sentence], the court shall require as a condition of probation or parole that the defendant, in cooperation with the probation or parole officer assigned to the defendant, promptly prepare a plan of restitution, including a specific amount of restitution to each victim and a schedule of restitution payments. . . .

Pursuant to N.M. Stat. Ann. § 31-26-4(H) (Victim’s rights), victims of violations of N.M. Stat. Ann. § 30-9-11 and § 30-9-13 are expressly afforded the right to receive restitution. However, a victim may only exercise this right if the victim reports the crime to law enforcement within 5 days of the occurrence or discovery of the offense, “unless the district attorney determines that the victim had a reasonable excuse for failing to do so,” and the victim cooperates completely with the “reasonable requests made by law enforcement agencies and the district attorneys.” N.M. Stat. Ann. § 31-26-5(A), (C).⁶⁸

Civil remedies are available to victims of childhood sexual abuse⁶⁹ for “personal injury caused by childhood sexual abuse.” N.M. Stat. Ann. § 37-1-30. Additionally, victims whose offenders are

⁶⁸ For the purposes of Chapter 31, Article 26 (Victims of Crime), a “victim” is defined in part as “an individual against whom a criminal offense is committed.” N.M. Stat. Ann. § 31-26-3(F). The definition of “criminal offense” includes violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor). N.M. Stat. Ann. § 31-26-3(B)(11), (12).

⁶⁹ “Childhood sexual abuse” is defined in N.M. Stat. Ann. § 37-1-30(B) as including violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration), § 30-9-13 (Criminal sexual contact of a minor), § 30-6A-3 (Sexual exploitation of children), and § 30-6A-4 (Sexual exploitation of children by prostitution).

convicted of violating New Mexico’s racketeering statute, N.M. Stat. Ann. § 30-42-4 (Prohibited activities; penalties) may have a civil cause of action for treble damages. N.M. Stat. Ann. § 30-42-6(A) (Racketeering; civil remedies) provides, “A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three times the actual damages proved and the costs of the suit, including reasonable attorney’s fees.”

5.10.1 Recommendation: Amend N.M. Stat. Ann. § 37-1-30 (Action for damages due to childhood sexual abuse; limitation on actions) to include N.M. Stat. Ann. § 30-52-1(2) (Human trafficking) as one of the offenses for which damages are available to minor victims.

5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking offenses are eliminated.*

No statute of limitations applies to a “first degree violent felony.” N.M. Stat. Ann. § 30-1-8(I). Generally, a 6-year statute applies to second degree felonies, a 5-year statute applies to third or fourth degree felonies, a 2-year statute applies to misdemeanors, a 1-year statute applies to petty misdemeanors, and a 3-year limitation applies to crimes not included in the Criminal Code or where a limitation is not provided. N.M. Stat. Ann. § 30-1-8(A)–(D), (H).

For minor victims of N.M. Stat. Ann §30-6-1 (Abandonment or abuse of a child), N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration), and N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor), however, the statute of limitations for criminal actions tolls “until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first.” N.M. Stat. Ann. § 30-1-9.1

A victim seeking civil damages for childhood sexual abuse is subject to the statute of limitations provided in N.M. Stat. Ann. § 37-1-30(A) (Action for damages due to childhood sexual abuse; limitation on actions), which states,

An action for damages based on personal injury caused by childhood sexual abuse⁷⁰ shall be commenced by a person before the latest of the following dates:

- (1) the first instant of the person’s twenty-fourth birthday; or
- (2) three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person, as established by competent medical or psychological testimony.

Civil actions for the other trafficking and CSEC offenses listed in this report are not expressly limited by statute in Chapter 37, Article 1 (Limitations of actions). Nevertheless, N.M. Stat. Ann. § 37-1-10 (Minors; incapacitated persons) generally tolls the applicable statute of limitation for minors until “one year from and after the termination of such incapacity.”

FRAMEWORK ISSUE 6: CRIMINAL JUSTICE TOOLS FOR INVESTIGATION AND PROSECUTIONS

⁷⁰ See *supra* note 69.

Legal Components:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is required*
 - 6.2 *Single-party consent to audio-taping is permitted.*
 - 6.3 *Domestic minor sex trafficking investigations may utilize wiretapping.*
 - 6.4 *Use of a decoy by law enforcement in the investigation of prostitution or sex trafficking is no defense to the purchase of sex with a minor.*
 - 6.5 *Use of the Internet to investigate buyers and traffickers is a permissible investigative technique.*
 - 6.6 *Reporting of missing children and rescued domestic minor sex trafficking victims is mandated.*
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Legal Analysis:

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

N.M. Stat. Ann. § 30-52-3 (Temporary provision; task force to combat human trafficking; membership; duties (Effective until July 1, 2016)) expressly establishes a task force to combat trafficking and directs the task force to, among other things, “develop and conduct training for law enforcement personnel and victims services providers to identify victims of human trafficking.” N.M. Stat. Ann. § 30-52-3(B)(4). However, the task force is not permanent and will terminate on July 1, 2016. N.M. Stat. Ann. § 30-52-3(F). In addition, N.M. Stat. Ann. § 29-11-5(A) (Sexual crimes prosecution and treatment program) provides for the development of:

[A] statewide comprehensive plan to train law enforcement officers and criminal justice and medical personnel in the ability to deal with sexual crimes; to develop strategies for prevention of such crimes; to provide assistance in the assembly of evidence for the facilitation of prosecution of such crimes; and to provide medical and psychological treatment to victims of such crimes.

This plan shall include, but not be limited to:

- (1) education and training of law enforcement officers and criminal justice and medical personnel;
- (2) collection, processing and analysis of evidence which facilitates prosecution of suspects of sexual crimes; and
- (3) medical and psychological treatment of victims of such crimes.

Separate from the requirements of N.M. Stat. Ann. § 30-52-3, N.M. Stat. Ann. § 29-7-6.1(A) (County sheriffs; training requirement) requires that “[e]very county sheriff, except sheriffs who have previously been awarded a certificate attesting to completion of a basic law enforcement training program, shall participate in and complete an administrative law enforcement training program no later than twelve months after the date he assumes office as a county sheriff.” Additionally, law enforcement officers are subject to continuing in-service training requirements. Specifically, law enforcement officers must complete bi-annually “at least forty hours of academic instruction, approved by the [New Mexico law enforcement academy] board.” N.M. Stat. Ann. § 29-7-7.1(A). The Board’s power, pursuant to N.M. Stat. Ann. § 29-7-4(C)(1) (Powers and duties of board), to “prescribe courses of instruction for: (1) basic law enforcement training and in-service law enforcement training” could be used to mandate that law enforcement officers in New Mexico complete training regarding human trafficking and domestic minor sex trafficking.

6.1.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-3 to remove the task force’s termination date, making it permanent.

6.1.2 Recommendation: Require all law enforcement officers to complete training on human trafficking and domestic minor sex trafficking.

6.2 *Single-party consent to audio-taping is permitted.*

Single-party consent to audio-taping is permitted in New Mexico. N.M. Stat. Ann. § 30-12-1(C) (Interference with communications; exception) permits single-party consent to audio-taping by stating, “[i]nterference with communications consists of knowingly and without lawful authority: . . . (C) reading, interrupting, taking or copying any message, communication or report intended for another by telegraph or telephone without the consent of a sender or intended recipient thereof .” No interference with communications occurs where the interference is done “by a person acting under color of law in the investigation of a crime, where such person is a party to the communication, or one of the parties to the communication has given prior consent to such interception, monitoring or recording of such communication.” N.M. Stat. Ann. 30-12-1(E)(3).

6.3 *Domestic minor sex trafficking investigations may utilize wiretapping and resulting evidence.*

Under N.M. Stat. Ann. § 30-12-2(A) (Grounds for order of interception), the attorney general and the district attorney have express authority to seek an order for wiretapping in investigations related to N.M. Stat. Ann. § 30-9-11(A) (Criminal sexual penetration). Pursuant to N.M. Stat. Ann. § 30-12-2,

An ex parte order for wiretapping, eavesdropping or the interception of any wire or oral communication may be issued by any judge of a district court upon application of the attorney general or a district attorney, stating that there is probable cause to believe that:

A. evidence may be obtained of the commission of:

(1) the crime of murder, kidnapping, extortion, robbery, trafficking or distribution of controlled substances or bribery of a witness;

(2) the crime of burglary, aggravated burglary, criminal sexual penetration, arson, mayhem, receiving stolen property or commercial gambling, if punishable by imprisonment for more than [1] year; or

. . . .

(B) the communication, conversation or discussion is itself an element of any of the above specified crimes.

N.M. Stat. Ann. § 30-12-8(A) (Use of contents as evidence; disclosure; motion to suppress) allows the use of wiretapping and resulting evidence in court only where,

[E]ach party, not less than ten days before the trial, hearing or proceeding has been furnished with a copy of the court order and accompanying application, under which interception was authorized or approved. This ten-day period may be waived by the court if it finds that it was not possible to furnish the party with such information ten days before the trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving such information.

6.4 *Use of a decoy by law enforcement in the investigation of prostitution or sex trafficking is no defense to the purchase of sex with a minor.*

New Mexico’s human trafficking law and CSEC laws do not contain language indicating the availability of decoys as an investigative technique or prohibiting a defense to prosecution based on the person not in fact being a minor. However, N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device) allows law enforcement officers to use a police officer as a decoy. N.M. Stat. Ann. § 30-37-3.2(D) states that “[i]n a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age.” Additionally, N.M. Stat. Ann. § 30-9-3 (Patronizing prostitutes) does state in part that “[p]atronizing prostitutes consists of . . . knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another,” implying that if the buyer believes a law enforcement decoy to be a prostitute the buyer would still violate the provision. However, this limits law enforcement to charging this crime even when the person believed to be a prostitute is a minor.

- 6.4.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-6A-3(C) (Sexual exploitation of children), and § 30-9-1 (Enticement of child) to provide that the minor may be “believed to be a minor” thereby allowing for a decoy investigation and prevent a defense based on the minor not in fact being a minor.

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

N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device) allows law enforcement officers to conduct investigations through use of the Internet. N.M. Stat. Ann. § 30-37-3.2(D) states that “[i]n a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age.”

6.6 *Reporting of missing children and rescued domestic minor sex trafficking victims is mandated.*

N.M. Stat. Ann. § 29-15-7(A) (Law enforcement requirements; missing person reports; unidentified human remains) states,

A law enforcement agency shall accept without delay and without exception for any reason any report of a missing person and, no later than two hours after receiving a missing person report or additional or supplemental information for the report, shall:

- (1) start an appropriate investigation to determine the present location of the missing person and to determine whether the missing person is an endangered person;
- (2) provide to the clearinghouse all information the law enforcement agency has relating to an investigation regarding or the location or identification of a missing person;
- (3) enter the name of the missing person into the clearinghouse and the national crime information center missing person file; and
- (4) if the missing person is determined to be an endangered person, notify the department of public safety in accordance with procedures prescribed by the department.

Additionally, under N.M. Stat. Ann. § 29-15-7.1 (Missing child reports; law enforcement agencies; duties; registrar),



Upon receiving a report of a child believed to be missing, a law enforcement agency shall:

- (1) no later than two hours after receiving the report, enter identifying and descriptive information about the child into the national crime information center computer. . . . ; and
- (2) notify the state registrar within twenty-four hours, by telephone, facsimile or electronic transmission, of the missing child. Within three days of this initial notification, the law enforcement agency shall make a written notification in a manner and form prescribed by the state registrar.

B. Immediately after a missing child is located, the law enforcement agency that located or returned the missing child shall notify the law enforcement agency having jurisdiction over the investigation, and the originating agency shall clear the entry from the national crime information center computer and shall, within twenty-four hours, notify the state registrar in writing that the missing child has been located.

NOTE: ENACTED LEGISLATION AS OF 8/1/11