

# PROTECTED INNOCENCE INITIATIVE

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



## ANALYSIS AND RECOMMENDATIONS NEW YORK

### FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

#### *Legal Components:*

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

#### *Legal Analysis<sup>1</sup>:*

- 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.*

New York's sex trafficking statute requires force, fraud, or coercion for all cases of sex trafficking, even when the victim is under 18. Pursuant to N.Y. Penal Law § 230.34 (Sex trafficking),

A person is guilty of sex trafficking if he or she intentionally advances or profits from prostitution by:

1. unlawfully providing to a person who is patronized, with intent to impair said person's judgment: (a) a narcotic drug or a narcotic preparation; (b) concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of the public health law; (c) methadone; or (d) gamma-hydroxybutyrate (GHB) or flunitrazepam, also known as Rohypnol;
2. making material false statements, misstatements, or omissions to induce or maintain the person being patronized to engage in or continue to engage in prostitution activity;

<sup>1</sup> Unless otherwise specified, all references to New York statutes were taken from New York Consolidated Law Service (LEXIS through 2011 released chapters 1-54, 57-596) and all federal statutes were taken from United States Code (LEXIS through PL 112-54, approved 11/12/11).

3. withholding, destroying, or confiscating any actual or purported passport, immigration document, or any other actual or purported government identification document of another person with intent to impair said person's freedom of movement; . . .
4. requiring that prostitution be performed to retire, repay, or service a real or purported debt;
5. using force or engaging in any scheme, plan or pattern to compel or induce the person being patronized to engage in or continue to engage in prostitution activity by means of instilling a fear in the person being patronized that, if the demand is not complied with, the actor or another will do one or more of the following:
  - (a) cause physical injury, serious physical injury, or death to a person; or
  - (b) cause damage to property, other than the property of the actor; or
  - (c) engage in other conduct constituting a felony or unlawful imprisonment in the second degree in violation of section 135.05 [Sex offenses; lack of consent] of this chapter; or
  - (d) accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against some person; . . . or
  - (e) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
  - (f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
  - (g) use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
  - (h) perform any other act which would not in itself materially benefit the actor but which is calculated to harm the person who is patronized materially with respect to his or her health, safety, or immigration status.

. . . .

A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain<sup>2</sup> from the commission of the crime.” N.Y. Penal Law §§ 230.34, 70.00(2)(b), (3)(b), 80.00(1).

- 1.1.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking) to eliminate the requirement to prove a form of force, fraud, or coercion in sex trafficking of minor cases or enact a stand-alone sex trafficking of a child statute that eliminates the requirement to prove force, fraud, or coercion.<sup>3</sup>

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

The following laws make CSEC a crime in New York:

1. Under N.Y. Penal Law § 230.05 (Patronizing a prostitute in the second degree), “A person is guilty of patronizing a prostitute in the second degree when, being over eighteen years of age, he patronizes a prostitute<sup>4</sup> and the person patronized<sup>5</sup> is less than fourteen years of age.” A conviction is punishable

<sup>2</sup> N.Y. Penal Law § 80.00(2) defines “gain” as “the amount of money or the value of property derived from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed.”

<sup>3</sup> Subsequent recommendations in this report are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

<sup>4</sup> Under N.Y. Penal Law § 230.02(1) (Patronizing a prostitute; definitions),

A person patronizes a prostitute when:

- (a) Pursuant to a prior understanding, he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or

as a Class E felony, punishable by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.05, 70.00(2)(e), (3)(b), (4), 80.00(1).

2. N.Y. Penal Law § 230.06 (Patronizing a prostitute in the first degree) states, “A person is guilty of patronizing a prostitute in the first degree when he patronizes a prostitute and the person patronized is less than eleven years of age.” A conviction is punishable as a Class D felony sex offense<sup>6</sup> by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.”<sup>7</sup> N.Y. Penal Law §§ 230.06, 70.80(1)(a), (4)(a)(iii),<sup>8</sup> 80.00(1).
3. N.Y. Penal Law § 230.25(2) (Promoting prostitution in the third degree) states, “A person is guilty of promoting prostitution in the third degree when he knowingly: . . . 2. Advances<sup>9</sup> or profits<sup>10</sup> from prostitution of a person less than nineteen years old.” A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1).
4. Pursuant to N.Y. Penal Law § 230.30(2) (Promoting prostitution in the second degree), “A person is guilty of promoting prostitution in the second degree if he knowingly: . . . 2. Advances or profits from prostitution of a person less than sixteen years old.” A conviction is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.30, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or “double

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(b) He pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him; or

(c) He solicits or requests another person to engage in sexual conduct with him in return for a fee.

<sup>5</sup> “Person who is patronized” is defined in N.Y. Penal Law § 230.02(2) as “the person with whom the defendant engaged in sexual conduct or was to have engaged in sexual conduct pursuant to the understanding, or the person who was solicited or requested by the defendant to engage in sexual conduct.”

<sup>6</sup> “Felony sex offense” is defined in N.Y. Penal Law § 70.80(1)(a) as “a conviction of any felony defined in article one hundred thirty of this chapter, including a sexually motivated felony, or patronizing a prostitute in the first degree as defined in section 230.06 of this chapter, incest in the second degree as defined in section 255.26 of this chapter, or incest in the first degree as defined in section 255.27 of this chapter, or a felony attempt or conspiracy to commit any of the above.”

<sup>7</sup> Pursuant to N.Y. Penal Law § 70.80(4)(c), “If the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose a determinate sentence upon a person convicted of a class D or class E felony sex offense, the court may impose a definite sentence of imprisonment and fix a term of one year or less.”

<sup>8</sup> A “predicate felony sex offender” faces certain penalty enhancements under N.Y. Penal Law § 70.80(5). Subsection (5)(a) clarifies that the penalty enhancements “apply to a predicate felony sex offender who stands convicted of a non-violent felony sex offense and who was previously convicted of one or more felonies.” See *supra* note 6 for the definition of “felony sex offense.” N.Y. Penal Law § 70.80(5). Subsection (8) states, “Whenever a juvenile offender stands convicted of a felony sex offense, he or she must be sentenced pursuant to the provisions of sections 60.10 [Authorized disposition; juvenile offender] and 70.05 [Sentence of imprisonment for juvenile offender] of this chapter.” N.Y. Penal Law § 70.80(8).

<sup>9</sup> Someone “advances prostitution,” pursuant to N.Y. Penal Law § 230.15(1) (Promoting prostitution; definitions of terms), “when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.”

<sup>10</sup> Someone “profits from prostitution,” pursuant to N.Y. Penal Law § 230.15(2), “when, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.”

the amount of the defendant's gain from the commission of the crime." N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii), 80.00(1).

5. Pursuant to N.Y. Penal Law § 230.32 (Promoting prostitution in the first degree), "A person is guilty of promoting prostitution in the first degree when he knowingly advances or profits from prostitution of a person less than eleven years old." A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or "double the amount of the defendant's gain from the commission of the crime." N.Y. Penal Law §§ 230.32, 70.00(2)(b), (3)(b), 80.00(1). If the offender commits this crime "for the purpose, in whole or substantial part, of his or her own direct sexual gratification," then the offense is sexually motivated, and a conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or "double the amount of the defendant's gain from the commission of the crime." N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(i), 80.00(1).
6. Pursuant to N.Y. Penal Law § 230.33 (Compelling prostitution), "A person is guilty of compelling prostitution when, being twenty-one years of age or older, he or she knowingly advances prostitution by compelling a person less than sixteen years old, by force or intimidation, to engage in prostitution." A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or "double the amount of the defendant's gain from the commission of the crime." N.Y. Penal Law §§ 230.33, 70.00(2)(b), (3)(b), 80.00(1). If the offender commits this crime "for the purpose, in whole or substantial part, of his or her own direct sexual gratification," then the offense is sexually motivated, and a conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or "double the amount of the defendant's gain from the commission of the crime." N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(i), 80.00(1).
7. Pursuant to N.Y. Penal Law § 263.05 (Use of a child in a sexual performance),

A person is guilty of the use of a child in a sexual performance<sup>11</sup> if knowing the character and content thereof he employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

A conviction is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or "double the amount of the defendant's gain from the commission of the crime." N.Y. Penal Law §§ 263.05, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits this crime "for the purpose, in whole or substantial part, of his or her own direct sexual gratification," then the offense is sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or "double the amount of the defendant's gain from the commission of the crime." N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii), 80.00(1).

8. Pursuant to N.Y. Penal Law § 120.70 (Luring a child), "A person is guilty of luring a child when he or she lures a child<sup>12</sup> into a motor vehicle, aircraft, watercraft, isolated area, building, or part thereof, for the purpose of committing against such child" any violation of, among other things, N.Y. Penal Law § 230.30 (Promoting prostitution in the second degree), § 230.33 (Compelling prostitution), § 230.34 (Sex

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<sup>11</sup> "Sexual performance" is defined in N.Y. Penal Law § 263.00(1) (Definitions) as "any performance or part thereof which, for purposes of section 263.16 [Possessing a sexual performance by a child] of this article, includes sexual conduct by a child less than sixteen years of age or, for purposes of section 263.05 or 263.15 [Promoting a sexual performance by a child] of this article, includes sexual conduct by a child less than seventeen years of age." "Sexual conduct" is defined in N.Y. Penal Law § 263.00(3) as "actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." Finally, "performance" is defined in N.Y. Penal Law § 263.00(4) as "any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience."

<sup>12</sup> "Child" is defined in N.Y. Penal Law § 120.70(1) as "a person less than seventeen years of age."

trafficking), § 263.05 (Use of a child in a sexual performance), § 263.10 (Promoting an obscene sexual performance by a child), § 263.15 (Promoting a sexual performance by a child), or any of the sexual offense laws that are felonies listed in Article 130. A conviction, when the underlying offense would have been a Class A or B felony, is punishable as a Class C or D felony by either imprisonment of 1–15 years or imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 120.70(2), 70.00(2)(c), (d), (3)(b), (4), 80.00(1). Otherwise, a conviction is punishable as a Class E felony by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 120.70(2), 70.00(2)(e), (3)(b), (4), 80.00(1).

The following sexual offenses could also apply to cases of commercial sexual exploitation:

1. Pursuant to N.Y. Penal Law § 130.25(2) (Rape in the third degree), “A person is guilty of rape in the third degree when: . . . 2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old.” A conviction is punishable as a Class E felony sex offense<sup>13</sup> by imprisonment of 1.5–4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.25, 70.80(1)(a), (4)(iv), 80.00(1).
2. Under N.Y. Penal Law § 130.30(1) (Rape in the second degree), “A person is guilty of rape in the second degree when: . . . being eighteen years old or more, he or she engages in sexual intercourse with another person less than fifteen years old,” but it is an affirmative defense if the offender was less than four years older than the victim. A conviction is punishable as a Class D felony sex offense<sup>14</sup> by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.30, 70.80(1)(a), (4)(a)(iii), 80.00(1).
3. Pursuant to N.Y. Penal Law § 130.35(3), (4) (Rape in the first degree), “A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person: . . . 3. Who is less than eleven years old; or 4. Who is less than thirteen years old and the actor is eighteen years old or more.” A conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.35, 70.80(1)(a), (4)(a)(i), 80.00(1).
4. Pursuant to N.Y. Penal Law § 130.40(2) (Criminal sexual act in the third degree), “A person is guilty of criminal sexual act in the third degree when: . . . 2. Being twenty-one years old or more, he or she engages in oral sexual conduct or anal sexual conduct with a person less than seventeen years old.” A conviction is punishable as a Class E felony sex offense<sup>15</sup> by imprisonment of 1.5–4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.40, 70.80(1)(a), (4)(a)(iv), 80.00(1).
5. Pursuant to N.Y. Penal Law § 130.45(1) (Criminal sexual act in the second degree), “A person is guilty of criminal sexual act in the second degree when: 1. being eighteen years old or more, he or she engages in oral sexual conduct or anal sexual conduct with another person less than fifteen years old,” but it is an affirmative defense if the offender was less than four years older than the victim. A conviction is punishable as a Class D felony sex offense<sup>16</sup> by imprisonment of 2–7 years and a

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<sup>13</sup> See *supra* note 6.

<sup>14</sup> See *supra* note 6.

<sup>15</sup> See *supra* note 6.

<sup>16</sup> See *supra* note 6.

possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.45, 70.80(1)(a), (4)(a)(iii), 80.00(1).

6. Pursuant to N.Y. Penal Law § 130.50 (Criminal sexual act in the first degree),

A person is guilty of criminal sexual act in the first degree when he or she engages in oral sexual conduct or anal sexual conduct with another person:

...

3. Who is less than eleven years old; or
4. Who is less than thirteen years old and the actor is eighteen years old or more.

A conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.50, 70.80(1)(a), (4)(a)(i), 80.00(1).

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

New York’s CSEC statutes do not refer to the sex trafficking statute.

- 1.3.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking), the prostitution offenses in Article 230 in which the victim is a minor, and N.Y. Penal Law § 120.70 (Luring a child) to clarify the status of a sexually exploited minor as a victim of sex trafficking.

**Legal Components:**

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

**Legal Analysis:**

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

N.Y. Penal Law § 230.34 (Sex trafficking) does not apply to buyers. N.Y. Penal Law § 230.34 only applies to one who “intentionally advances or profits from prostitution.”

- 2.1.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking) to make the statute clearly applicable to buyers of commercial sex acts induced through trafficking.

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

New York’s solicitation statutes do distinguish between buying sex with an adult and buying sex with minors under 14. N.Y. Penal Law § 230.05 (Patronizing a prostitute in the second degree) states in part, “A person is guilty of patronizing a prostitute in the second degree when, being over eighteen years of age, he patronizes a prostitute and the person patronized is less than fourteen years of age.” Similarly, N.Y. Penal Law § 230.06 (Patronizing a prostitute in the first degree) states in part, “A person is guilty of patronizing a prostitute in the first degree when he patronizes a prostitute and the person patronized is less than eleven years of age.”

However, N.Y. Penal Law § 230.05 and § 230.06 do not apply to minors aged 14–18. Therefore, buyers of sex with these minors could only be prosecuted under N.Y. Penal Law § 230.04 (Patronizing a prostitute in the third degree), which states in part, “A person is guilty of patronizing a prostitute in the third degree when he or she patronizes a prostitute.”

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

New York's solicitation laws differentiate between buying sex with an adult and buying sex with a minor under the age of 14. A conviction for patronizing a prostitute is generally punishable as a Class A misdemeanor by imprisonment up to 1 year and a possible fine not to exceed \$1,000. N.Y. Penal Law §§ 230.04, 70.15(1), 80.05(1). If the offender is older than 18 years of age and the victim is a minor under the age of 14, however, patronizing a prostitute is punishable as a Class E felony by imprisonment up to 4 years, and if the victim is under the age of 11, it is punishable as a Class D felony sex offense by imprisonment for 2–7 years, both with a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.”<sup>17</sup> N.Y. Penal Law §§ 230.05, 230.06, 70.80(1)(a), (4)(a)(iii), 70.00(2)(e), (3)(b), (4), 80.00(1). New York’s solicitation laws do not, however, differentiate between buying sex with minors aged 14 or older and adults.

- 2.3.1 Recommendation: Amend N.Y. Penal Law § 230.05 (Patronizing a prostitute in the second degree) to raise the age from under 14 to under 18, making the crime of buying sex with any minor victim distinct from the crime of buying sex with an adult.

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

A conviction under N.Y. Penal Law § 230.06 (Patronizing a prostitute in the first degree), which applies when the victim is under 11, is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.”<sup>18</sup> N.Y. Penal Law §§ 230.06, 70.80(1)(a), (4)(a)(iii), 80.00(1). A conviction under N.Y. Penal Law § 230.05 (Patronizing a prostitute in the second degree), which applies when the offender is over 18 and the victim is under 14, is punishable as a Class E felony punishable by imprisonment up to 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.05, 70.00(2)(e), (3)(b), (4), 80.00(1). A convicted offender of patronizing a prostitute in the first or second degree is also subject to a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain for commission of the felony from the commission of the crime.” N.Y. Penal Law §§ 230.05, 230.06, 80.00(1).

A conviction under N.Y. Penal Law § 230.04 (Patronizing a prostitute in the third degree), which applies when the victim is 14 or older, is punishable as a Class A misdemeanor by up to 1 year imprisonment and a possible fine not to exceed \$1,000. N.Y. Penal Law §§ 230.04, 70.15(1), 80.05(1).

Several sexual offense laws could also be used to prosecute certain buyers of commercial sex acts with minors, but they do not specifically criminalize the commercial sexual exploitation of a child, nor do they refer to N.Y. Penal Law § 230.34 (Sex trafficking).<sup>19</sup>

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>20</sup> 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 offense<sup>21</sup> against a minor. 18

<sup>17</sup> See *supra* note 6.

<sup>18</sup> See *supra* note 6.

<sup>19</sup> See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

<sup>20</sup> 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.).

<sup>21</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>22</sup> 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.<sup>23</sup>

2.4.1 Recommendation: Amend the definition of felony sex offense in N.Y. Penal Law § 70.80 (Sentences of imprisonment for conviction of a felony sex offense) to include all CSEC crimes so that all buyers are subjected to heightened penalties.

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

New York does not have a separate crime or enhanced penalties for using the Internet to lure, entice, recruit, or purchase commercial sex. However, buyers using the Internet to purchase commercial sex acts with minors may be prosecuted under N.Y. Penal Law § 235.22 (Disseminating indecent material to minors in the first degree), which is violated when a person

1. knowing the character and content of the communication which, in whole or in part, depicts or describes, either in words or images actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, . . . intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
2. by means of such communication . . . importunes, invites or induces a minor to engage in sexual intercourse, oral sexual conduct or anal sexual conduct, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 235.22, 70.00(2)(d), (3)(b), (4), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(iii), 80.00(1).

2.5.1 Recommendation: Create a new law to address the computer-facilitated luring, enticing, recruiting, or purchasing of commercial sex acts with a minor and to refer to New York’s sex trafficking and patronizing a prostitute statutes, including N.Y. Penal Law § 230.34 (Sex trafficking), § 230.05 (Patronizing a prostitute in the second degree), and § 230.06 (Patronizing a prostitute in the first degree).

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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).

<sup>22</sup> 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).

<sup>23</sup> 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).

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

New York permits a mistake of age defense for two of its prostitution statutes. Pursuant to N.Y. Penal Law § 230.07 (Patronizing a prostitute; defense), “In any prosecution for patronizing a prostitute in the first or second degrees, it is a defense that the defendant did not have reasonable grounds to believe that the person was less than the age specified.”

2.6.1 Recommendation: Eliminate the age mistake defense allowed in N.Y. Penal Law § 230.07 (Patronizing a prostitute; defense) and expressly prohibit such a defense in all cases involving minors in § 230.05 (Patronizing a prostitute in the second degree) and § 230.06 (Patronizing a prostitute in the first degree).

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

Penalties for convictions under New York’s solicitation laws, including N.Y. Penal Law § 230.04 (Patronizing a prostitute in the third degree), § 230.05 (Patronizing a prostitute in the second degree), and § 230.06 (Patronizing a prostitute in the first degree), vary based on the age of the victim. A conviction under N.Y. Penal Law § 230.06, which applies when the victim is under 11, is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime amount.”<sup>24</sup> N.Y. Penal Law §§ 230.06, 70.80(1)(a), (4)(a)(iii), 80.00(1). A conviction under N.Y. Penal Law § 230.05, which applies when the offender is over 18 and the minor is under 14, is punishable as a Class E felony by imprisonment up to 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime amount.” N.Y. Penal Law §§ 230.05, 70.00(2)(e), (3)(b), (4), 80.00(1). However, the laws do not differentiate between buying sex with 14–17 year-old minors and adults, and under N.Y. Penal Law § 230.04, a conviction when the victim is 14 or older is punishable as a Class A misdemeanor by up to 1 year imprisonment and a possible fine not to exceed \$1,000. N.Y. Penal Law §§ 230.04, 70.15(1), 80.05(1).

2.7.1 Recommendation: Raise the penalty of N.Y. Penal Law § 230.06 (Patronizing a prostitute in the first degree) and § 230.05 (Patronizing a prostitute in the second degree) when the victim is under 18 years of age to parallel federal penalties.

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

Buyers of commercial sex with minors are subject to various fines and possible restitution; however, no asset forfeiture laws apply to buyers. When the victim is under 14, a conviction under either N.Y. Penal Law § 230.06 (Patronizing a prostitute in the first degree) or § 230.05 (Patronizing a prostitute in the second degree) is punishable as a felony by a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain for commission of the felony from the commission of the crime,” which seems unlikely to apply in cases of buyers. N.Y. Penal Law §§ 230.05, 230.06, 80.00(1). A conviction under N.Y. Penal Law § 230.04 (Patronizing a prostitute in the third degree), which applies when the minor is 14 or older, is punishable as a Class A misdemeanor by a possible fine not to exceed \$1,000. N.Y. Penal Law §§ 230.04, 80.05(1).

Additionally, pursuant to N.Y. Penal Law § 60.27(1) (Restitution and reparation),

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<sup>24</sup> See *supra* note 6.

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense,<sup>25</sup> and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby . . . .

2.8.1 Recommendation: Enact a law requiring defendants to forfeit all assets used in connection with the commission of a commercial sexual exploitation of a child crime.

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

Under N.Y. Penal Law § 263.11 (Possessing an obscene sexual performance by a child), “A person is guilty of possessing an obscene sexual performance<sup>26</sup> by a child when, knowing the character and content thereof, he knowingly has in his possession or control any obscene performance which includes sexual conduct by a child less than sixteen years of age.”

Pursuant to N.Y. Penal Law § 263.16 (Possessing a sexual performance by a child), “A person is guilty of possessing a sexual performance<sup>27</sup> by a child when, knowing the character and content thereof, he knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age.”

A conviction under either N.Y. Penal Law § 263.11 or § 263.16 is punishable as a Class E felony by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” NY Penal Law §§ 263.11, 263.16, 70.00(2)(e), (3)(b), (4), 80.00(1).

In comparison, a federal conviction for possession of child pornography<sup>28</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>29</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>30</sup>

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<sup>25</sup> “Offense” is defined in N.Y. Penal Law § 60.27(4)(a) as “the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense.”

<sup>26</sup> “Obscene sexual performance” is defined in N.Y. Penal Law § 263.00(2) as “any performance which . . . includes sexual conduct by a child less than sixteen years of age.”

<sup>27</sup> See *supra* note 11 for the definition of “sexual performance.”

<sup>28</sup> 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).

<sup>29</sup> 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).

<sup>30</sup> 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 commercial sex acts with minors and child pornography are required to register as sex offenders.*

Pursuant to N.Y. Correct. Law § 168-f(1) (Duty to register and to verify), “Any sex offender shall, (a) at least ten calendar days prior to discharge, parole, release . . . or, (b) at the time sentence is imposed for any sex offender released on probation or discharged . . . , register with the division on a form prepared by the division.” N.Y. Correct. Law § 168-a(1) (Definitions) defines “sex offender” as “any person who is convicted of any of the offenses set forth in subdivision two or three of this section,” which includes sex offenses and sexually violent offenses.

Pursuant to N.Y. Correct. Law § 168-a(2), sex offenses relevant to buyers include convictions under N.Y. Penal Law § 120.70 (Luring a child), § 130.25 (Rape in the third degree), § 130.30 (Rape in the second degree), § 130.40 (Criminal sexual act in the third degree), § 130.45 (Criminal sexual act in the second degree) § 263.11 (Possessing an obscene sexual performance by a child), § 263.16 (Possessing a sexual performance by a child), § 230.04 (Patronizing a prostitute in the third degree, where the minor is under 17), § 230.05 (Patronizing a prostitute in the third degree), § 230.06 (Patronizing a prostitute in the first degree), § 235.22 (Disseminating indecent material to minors in the first degree), and § 130.55 (Sexual abuse in the third degree, where the minor is under 18). Pursuant to N.Y. Correct. Law § 168-a(2)(d)(iii), a sex offense also includes a conviction under

any of the provisions of 18 U.S.C. 2251 [Sexual exploitation of children], 18 U.S.C. 2251A [Selling or buying of children], 18 U.S.C. 2252 [Certain activities relating to material involving the sexual exploitation of minors], 18 U.S.C. 2252A [Certain activities relating to material constituting or containing child pornography], 18 U.S.C. 2260 [Production of sexually explicit depictions of a minor for importation into the United States], 18 U.S.C. 2422(b) [Sexual abuse], 18 U.S.C. 2423 [Sexual abuse of a minor or ward], or 18 U.S.C. 2425 [Offenses resulting in death], provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect.

- 2.10.1 Recommendation: Amend N.Y. Correct. Law § 168-a(2) (Definitions) to include a conviction under N.Y. Penal Law § 230.04 (Patronizing a prostitute in the third degree), where the person patronized is under 18, as a “sexual offense” for which registration is required.

**Legal Components:**

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

**Legal Analysis:**

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

Convictions under N.Y. Penal Law § 230.34 (Sex trafficking), § 230.33 (Compelling prostitution), and § 230.32 (Promoting prostitution in the first degree) are all punishable as Class B felonies by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.34, 230.33, 230.32, 70.00(2)(b), (3)(b), 80.00(1). If the offender committed the offense “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” a conviction under either N.Y. Penal Law § 230.33 or § 230.32 is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(i), 80.00(1).

A conviction under either N.Y. Penal Law § 230.30(2) (Promoting prostitution in the second degree) or § 263.05 (Use of a child in a sexual performance) is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.30, 263.05, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits either of these offenses “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii), .

A conviction under N.Y. Penal Law § 230.25(2) (Promoting prostitution in the third degree) is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1).

A trafficker may also violate N.Y. Penal Law § 460.20 (Enterprise corruption), which states in part,

- 1. A person is guilty of enterprise<sup>31</sup> corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:

<sup>31</sup> “Enterprise” is defined in N.Y. Penal Law § 460.10(2) as “either an enterprise as defined in subdivision one of section 175.00 of this chapter or criminal enterprise as defined in subdivision three of this section.” “Criminal enterprise” is defined in N.Y. Penal Law § 460.10(3) as “a group of persons sharing a common purpose of engaging in criminal conduct, associated in an

- (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or
- (b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or
- (c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.

2. For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise, he engages in conduct constituting, or, is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts<sup>32</sup> included in the pattern, provided that:

- (a) Two of his acts are felonies other than conspiracy;
- (b) Two of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and
- (c) Each of his acts occurred within three years of a prior act.

“Pattern of criminal activity” is defined in N.Y. Penal Law § 460.10(4) as

conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts that:

- (a) were committed within ten years of the commencement of the criminal action;
- (b) are neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a criminal offense or criminal transaction, as those terms are defined in section 40.10 of the criminal procedure law; and
- (c) are either: (i) related to one another through a common scheme or plan or (ii) were committed, solicited, requested, importuned or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise.

A conviction under N.Y. Penal Law § 460.20 is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 460.20, 70.00(2)(b), (3)(b), 80.00(1).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>33</sup> 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 offense<sup>34</sup> against a minor.

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

New York has multiple statutes dealing with creating and distributing child pornography. Pursuant to N.Y. Penal Law § 263.05 (Use of a child in a sexual performance),

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ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents.”

<sup>32</sup> “Criminal act” is defined in N.Y. Penal Law § 460.10(1) as “conduct constituting . . . or conspiracy or attempt to commit” violations of, among other things, N.Y. Penal Law § 230.25 (Promoting prostitution in the third degree), § 230.30 (Promoting prostitution in the second degree), § 230.32 (Promoting prostitution in the first degree), § 230.34 (Sex trafficking), § 263.10 (Promoting an obscene sexual performance by a child), or § 263.15 (Promoting a sexual performance by a child).

<sup>33</sup> See *supra* note 20.

<sup>34</sup> See *supra* note 21 for the definition of “federal sex offense.”

A person is guilty of the use of a child in a sexual performance<sup>35</sup> if knowing the character and content thereof he employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

....

A conviction is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.05, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” the offense is sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii), 80.00(1).

Similarly, promoting child pornography is a crime under N.Y. Penal Law § 263.10 (Promoting an obscene sexual performance by a child) and § 263.15 (Promoting a sexual performance by a child). Pursuant to N.Y. Penal Law § 263.10, “A person is guilty of promoting<sup>36</sup> an obscene sexual performance<sup>37</sup> by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct<sup>38</sup> by a child less than seventeen years of age.”

Under N.Y. Penal Law § 263.15, “A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.”

A conviction under either statute is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.10, 263.15, 70.00(2)(d), (3)(b), (4), 80.00(1)

If the trafficker uses a controlled substance, penalties are heightened. Pursuant to N.Y. Penal Law § 263.30 (Facilitating a sexual performance by a child with a controlled substance or alcohol), a person is subject to heightened penalties if he knowingly administers a controlled substance<sup>39</sup> to a minor under 17 with the minor’s consent for the purpose of committing conduct defined in N.Y. Penal Law § 263.05, § 263.10, or § 263.15 if the person actually commits the conduct or attempts to do so. A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.30, 70.00(2)(b), (3)(b), 80.00(1).

In comparison, 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 offense<sup>40</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>41</sup>

<sup>35</sup> See *supra* note 11 for the definition of “sexual performance.”

<sup>36</sup> N.Y. Penal Law § 263.00(5) states, “‘Promote’ means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.”

<sup>37</sup> See *supra* note 26.

<sup>38</sup> See *supra* note 11.

<sup>39</sup> “Controlled substance” is defined in N.Y. Penal Law § 263.30 as “any substance or preparation, compound, mixture, salt, or isomer of any substance defined in section thirty-three hundred six of the public health law.”

<sup>40</sup> See *supra* note 21 for the definition of “federal sex offense.”

<sup>41</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>42</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>43</sup>

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

New York does not have a separate crime or enhanced penalties for using the Internet to lure, entice, recruit, or sell commercial sex. Traffickers may, however, be prosecuted under N.Y. Penal Law § 235.22 (Disseminating indecent material to minors in the first degree), which is violated when a person

1. knowing the character and content of the communication which, in whole or in part, depicts or describes, either in words or images actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, . . . intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
2. by means of such communication . . . importunes, invites or induces a minor to engage in sexual intercourse, oral sexual conduct or anal sexual conduct, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 235.22, 70.00(2)(d), (3)(b), (4), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(iii), 80.00(1).

- 3.3.1 Recommendation: Create a new law to address computer facilitated recruiting of a minor to perform commercial sex acts.

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

All applicable felonies are subject to possible fines in an amount not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law § 80.00(1).

Traffickers may also be subject to asset forfeiture. Pursuant to N.Y. C.P.L.R. Law § 1311(1) (Forfeiture actions),

A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property<sup>44</sup> which constitutes the proceeds of a crime,<sup>45</sup> the substituted proceeds of a

<sup>42</sup> 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).

<sup>43</sup> 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).

<sup>44</sup> “Property” is defined in N.Y. C.P.L.R. § 1310(1) (Definitions) as “real property, personal property, money, negotiable instruments, securities, or any thing of value or any interest in a thing of value.”

crime,<sup>46</sup> an instrumentality of a crime<sup>47</sup> or the real property instrumentality of a crime or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.<sup>48</sup> A civil action may be commenced against a non-criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime provided, however, that a judgment of forfeiture predicated upon clause (A) of subparagraph (iv) of paragraph (b) of subdivision three hereof shall be limited to the amount of the proceeds of the crime. Any action under this article must be commenced within five years of the commission of the crime and shall be civil, remedial, and in personam in nature and shall not be deemed to be a penalty or criminal forfeiture for any purpose. . . .

Restitution is also available, pursuant to N.Y. Penal Law § 60.27(1) (Restitution and reparation), which states,

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense,<sup>49</sup> and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby . . . .

Additionally, under N.Y. Penal Law § 410.00(1) (Seizure and forfeiture of equipment used in photographing, filming, producing, manufacturing, projecting or distributing pornographic still or motion pictures),

Any peace officer, acting pursuant to his special duties, or police officer of this state may seize any equipment used in the photographing, filming, printing, producing, manufacturing or projecting of pornographic still or motion pictures and may seize any vehicle or other means of transportation, other than a vehicle or other means of transportation used by any person as a common carrier in the transaction of business as such common carrier, used in the distribution of such obscene prints and articles and such equipment or vehicle or other means of transportation shall be subject to forfeiture . . . .

Under enterprise corruption law, traffickers may be subject to additional financial penalties. Pursuant to N.Y. Penal Law § 460.30(1) (Enterprise corruption; forfeiture),

Any person convicted of enterprise corruption may be required pursuant to this section to criminally forfeit to the state:

(a) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise whose affairs he has controlled or in which he has participated in violation of subdivision one of section 460.20 [Enterprise corruption] of this article and for which he was convicted and the use of which interest, security, claim or right by him contributed directly and materially to the crime for which he was convicted unless such forfeiture is

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<sup>45</sup> “Proceeds of a crime” is defined in N.Y. C.P.L.R. Law § 1310(2) as “any property obtained through the commission of a felony crime defined in subdivisions five and six hereof, and includes any appreciation in value of such property.”

<sup>46</sup> “Substituted proceeds of a crime” is defined in N.Y. C.P.L.R. Law § 1310(3) as “any property obtained by the sale or exchange of proceeds of a crime, and any gain realized by such sale or exchange.”

<sup>47</sup> “Instrumentality of a crime” is defined in N.Y. C.P.L.R. Law § 1310(4) as “any property, other than real property and any buildings, fixtures, appurtenances, and improvements thereon, whose use contributes directly and materially to the commission of a crime defined in subdivisions five and six hereof.”

<sup>48</sup> “Real property instrumentality of a crime” is defined in N.Y. C.P.L.R. Law § 1310(4-a) as “an interest in real property the use of which contributes directly and materially to the commission of a specified felony offense.”

<sup>49</sup> “Offense” is defined in N.Y. Penal Law § 60.27(4)(a) as “the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense.”

disproportionate to the defendant’s gain from his association or employment with the enterprise, in which event the jury may recommend forfeiture of a portion thereof;  
(b) any interest, including proceeds, he has acquired or maintained in an enterprise in violation of subdivision one of section 460.20 of this article and for which he was convicted unless such forfeiture is disproportionate to the conduct he engaged in and on which the forfeiture is based, in which event the jury may recommend forfeiture of a portion thereof; or  
(c) any interest, including proceeds he has derived from an investment of proceeds in an enterprise in violation of subdivision one of section 460.20 of this article and for which he was convicted unless such forfeiture is disproportionate to the conduct he engaged in and on which the forfeiture is based, in which event the jury may recommend forfeiture of a portion thereof.

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

Pursuant to N.Y. Correct. Law § 168-f(1) (Duty to register and to verify), “Any sex offender shall, (a) at least ten calendar days prior to discharge, parole, release . . . or, (b) at the time sentence is imposed for any sex offender released on probation or discharged . . . , register with the division on a form prepared by the division.” N.Y. Correct. Law § 168-a(1) (Definitions) defines “sex offender” as “any person who is convicted of any of the offenses set forth in subdivision two or three of this section,” which includes sex offenses and sexually violent offenses.

Pursuant to N.Y. Correct. Law § 168-a(2), sex offenses relevant to traffickers include convictions under N.Y. Penal Law § 120.70 (Luring a child), § 230.34 (Sex trafficking), § 263.05–.16 (Crimes involving a sexual performance by a child), § 230.30(2) (Promoting prostitution in the second degree), § 230.32 (Promoting prostitution in the first degree), § 230.33 (Compelling prostitution), or § 235.22 (Disseminating indecent material to minors in the first degree). Pursuant to N.Y. Correct. Law § 168-a(2)(d)(iii), a sex offense also includes a conviction under

any of the provisions of 18 U.S.C. 2251 [Sexual exploitation of children], 18 U.S.C. 2251A [Selling or buying of children], 18 U.S.C. 2252 [Certain activities relating to material involving the sexual exploitation of minors], 18 U.S.C. 2252A [Certain activities relating to material constituting or containing child pornography], 18 U.S.C. 2260 [Production of sexually explicit depictions of a minor for importation into the United States], 18 U.S.C. 2422(b) [Sexual abuse], 18 U.S.C. 2423 [Sexual abuse of a minor or ward], or 18 U.S.C. 2425 [Offenses resulting in death], provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect.

3.5.1 Recommendation: Amend the definition of “sex offense” under N.Y. Correct. Law § 168-a to include a registration requirement for those convicted under N.Y. Penal Law § 230.25(2) (Promoting prostitution in the third degree), which would require sex offender registration for persons who promote the prostitution of those less than 19 years of age.

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

New York will terminate parental rights only for certain crimes and convictions. CSEC crimes are not expressly listed as grounds for termination of parental rights. However, pursuant to NY Soc. Serv. Law § 384-b(4)(e),

4. An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds:

...

(e) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, severely or repeatedly abused such child. Where a court has determined that reasonable efforts to reunite the child with his or her parent are not required, pursuant to the family court act or this chapter, a petition to terminate parental rights on the ground of severe abuse as set forth in subparagraph (iii) of paragraph (a) of subdivision eight of this section may be filed immediately upon such determination.

Under NY Soc. Serv. Law § 384-b(8)(a),

(a) For the purposes of this section a child is “severely abused” by his or her parent if

...

(ii) the child has been found to be an abused child, as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent’s acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, 130.75 and 130.80 of the penal law and, for the purposes of this section the corroboration requirements contained in the penal law shall not apply to proceedings under this section; or

(iii) (A) the parent of such child has been convicted of murder in the first degree as defined in section 125.27, murder in the second degree as defined in section 125.25, manslaughter in the first degree as defined in section 125.20, or manslaughter in the second degree as defined in section 125.15, and the victim of any such crime was another child of the parent or another child for whose care such parent is or has been legally responsible as defined in subdivision (g) of section one thousand twelve of the family court act, or another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide; or has been convicted of an attempt to commit any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent or another child for whose care such parent is or has been legally responsible as defined in subdivision (g) of section one thousand twelve of the family court act, or another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the attempted homicide;

(B) the parent of such child has been convicted of criminal solicitation as defined in article one hundred, conspiracy as defined in article one hundred five or criminal facilitation as defined in article one hundred fifteen of the penal law for conspiring, soliciting or facilitating any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent or another child for whose care such parent is or has been legally responsible;

(C) the parent of such child has been convicted of assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10 or aggravated assault upon a person less than eleven years old as defined in section 120.12 of the penal law, and the victim of any such crime was the child or another child of the parent or another child for whose care such parent is or has been legally responsible; or has been convicted of an attempt to commit any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent or another child for whose care such parent is or has been legally responsible; or

(D) the parent of such child has been convicted under the law in any other jurisdiction of an offense which includes all of the essential elements of any crime specified in clause (A), (B) or (C) of this subparagraph; and

(iv) the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future. Where a court has previously determined in accordance with this chapter or the family court act that reasonable efforts to make it possible for the child to return safely to his or

her home are not required, the agency shall not be required to demonstrate diligent efforts as set forth in this section.

Pursuant to N.Y. Fam. Ct. Act § 1012(e)(iii),

“Abused child” means a child less than eighteen years of age whose parent or other person legally responsible for his care

...  
(iii) commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law; allows, permits or encourages such child to engage in any act described in sections 230.25 [Promoting prostitution in the third degree], 230.30 [Promoting prostitution in the second degree] and 230.32 [Promoting prostitution in the first degree] of the penal law; . . . or allows such child to engage in acts or conduct described in article two hundred sixty-three [Sexual performance by a child] of the penal law provided, however, that (a) the corroboration requirements contained in the penal law and (b) the age requirement for the application of article two hundred sixty-three of such law shall not apply to proceedings under this article.

- 3.6.1 Recommendation: Amend N.Y. Soc. Serv. Law § 384-b(8) to include convictions under N.Y. Penal Law § 230.34 (Sex trafficking) when the victim is a minor as grounds for termination of parental rights.

## FRAMEWORK ISSUE 4: CRIMINAL PROVISIONS FOR FACILITATORS

### *Legal Components:*

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

### *Legal Analysis:*

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

It is unlikely that N.Y. Penal Law § 230.34 (Sex trafficking) could apply to a facilitator and only applies when one “intentionally advances<sup>50</sup> or profits<sup>51</sup> from prostitution by” various means of force, fraud, or coercion.<sup>52</sup> A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.34, 70.00(2)(b), (3)(b), 80.00(1).

A facilitator could, however, commit the offenses of promoting prostitution through advancing or profiting from prostitution. A conviction for promoting prostitution of a minor under 19, pursuant to N.Y. Penal Law

<sup>50</sup> See *supra* note 9 for the definition of “advances prostitution.”

<sup>51</sup> See *supra* note 10 for the definition of “profits from prostitution.”

<sup>52</sup> See *supra* Section 1.1.

§ 230.25(2), is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1). A conviction for promoting prostitution of a minor under 16 years of age, under N.Y. Penal Law § 230.30(2), is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.30, 70.00(2)(c), (3)(b), 80.00(1). A conviction for promoting prostitution of a minor under 11 years of age, under N.Y. Penal Law § 230.32, is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.32, 70.00(2)(b), (3)(b), 80.00(1).

A facilitator may also violate N.Y. Penal Law § 460.20(1) (Enterprise corruption), which states,

1. A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:
  - (a) intentionally conducts or participates in the affairs of an enterprise<sup>53</sup> by participating in a pattern of criminal activity;<sup>54</sup> or
  - (b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or
  - (c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.
2. For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise, he engages in conduct constituting, or is criminally liable for pursuant to section 20.00 [Criminal liability for conduct of another] of this chapter, at least three of the criminal acts included in the pattern, provided that:
  - (a) Two of his acts are felonies other than conspiracy;
  - (b) Two of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and
  - (c) Each of his acts occurred within three years of a prior act.

....

A conviction under N.Y. Penal Law § 460.20 is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 460.20, 70.00(2)(b), (3)(b), 80.00(1).

- 4.1.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking) to clearly apply to those who assist, enable, or benefit financially from domestic minor sex trafficking.

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

All applicable felonies are subject to fines in an amount not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law § 80.00(1).

Facilitators are also subject to asset forfeiture. Pursuant to N.Y. C.P.L.R. Law § 1311(1) (Forfeiture actions),

A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property<sup>55</sup> which constitutes the proceeds of a crime,<sup>56</sup> the substituted proceeds of a crime,<sup>57</sup> an

<sup>53</sup> See *supra* note 31 for the definition of “enterprise.”

<sup>54</sup> See *supra* Section 3.1 for the definition of “pattern of criminal activity.”

instrumentality of a crime<sup>58</sup> or the real property instrumentality of a crime or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.<sup>59</sup> A civil action may be commenced against a non-criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime provided, however, that a judgment of forfeiture predicated upon clause (A) of subparagraph (iv) of paragraph (b) of subdivision three hereof shall be limited to the amount of the proceeds of the crime. Any action under this article must be commenced within five years of the commission of the crime and shall be civil, remedial, and in personam in nature and shall not be deemed to be a penalty or criminal forfeiture for any purpose. . . .

Additionally, under N.Y. Penal Law § 410.00(1) (Seizure and forfeiture of equipment used in photographing, filming, producing, manufacturing, projecting or distributing pornographic still or motion pictures),

Any peace officer, acting pursuant to his special duties, or police officer of this state may seize any equipment used in the photographing, filming, printing, producing, manufacturing or projecting of pornographic still or motion pictures and may seize any vehicle or other means of transportation, other than a vehicle or other means of transportation used by any person as a common carrier in the transaction of business as such common carrier, used in the distribution of such obscene prints and articles and such equipment or vehicle or other means of transportation shall be subject to forfeiture . . . .

Under enterprise corruption law, facilitators may be subject to additional financial penalties. Pursuant to N.Y. Penal Law § 460.30 (Enterprise corruption; forfeiture),

Any person convicted of enterprise corruption may be required pursuant to this section to criminally forfeit to the state:

- (a) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise whose affairs he has controlled or in which he has participated in violation of subdivision one of section 460.20 [Enterprise corruption] of this article and for which he was convicted and the use of which interest, security, claim or right by him contributed directly and materially to the crime for which he was convicted unless such forfeiture is disproportionate to the defendant's gain from his association or employment with the enterprise, in which event the jury may recommend forfeiture of a portion thereof;
- (b) any interest, including proceeds, he has acquired or maintained in an enterprise in violation of subdivision one of section 460.20 of this article and for which he was convicted unless such forfeiture is disproportionate to the conduct he engaged in and on which the forfeiture is based, in which event the jury may recommend forfeiture of a portion thereof; or
- (c) any interest, including proceeds he has derived from an investment of proceeds in an enterprise in violation of subdivision one of section 460.20 of this article and for which he was convicted unless such forfeiture is disproportionate to the conduct he engaged in and on which the forfeiture is based, in which event the jury may recommend forfeiture of a portion thereof.

Restitution is also available, pursuant to N.Y. Penal Law § 60.27(1) (Restitution and reparation), which states,

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence

<sup>55</sup> See *supra* note 44 for the definition of “property.”

<sup>56</sup> See *supra* note 45 for the definition of “proceeds of a crime.”

<sup>57</sup> See *supra* note 45 for the definition of “substituted proceeds of a crime.”

<sup>58</sup> See *supra* note 47 for the definition of “instrumentality of a crime.”

<sup>59</sup> See *supra* note 48 for the definition of “real property instrumentality of a crime.”

imposed upon a person convicted of an offense,<sup>60</sup> and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby . . . .

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

N.Y. Penal Law § 230.25(1) (Promoting prostitution in the third degree) includes sex tourism, stating,

A person is guilty of promoting prostitution in the third degree when he knowingly:

1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes, or a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction . . . .

A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.”

N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1).

#### 4.4 *Promoting and selling child pornography is illegal.*

Promoting child pornography is a crime under N.Y. Penal Law § 263.10 (Promoting an obscene sexual performance by a child) and § 263.15 (Promoting a sexual performance by a child). Pursuant to N.Y. Penal Law § 263.10, “A person is guilty of promoting<sup>61</sup> an obscene sexual performance<sup>62</sup> by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct<sup>63</sup> by a child less than seventeen years of age.”

Under N.Y. Penal Law § 263.15, “A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.”

A conviction under either statute is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.10, 263.15, 70.00(2)(d), (3)(b), (4), 80.00(1)

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<sup>60</sup> See *supra* note 49 for the definition of “offense.”

<sup>61</sup> See *supra* note 36.

<sup>62</sup> See *supra* note 26.

<sup>63</sup> See *supra* note 11.

**Legal Components:**

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

**Legal Analysis:**

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

N.Y. Soc. Serv. Law § 447-a(1) (Definitions), part of the Safe Harbour for Exploited Children Act, states,

The term "sexually exploited child" means any person under the age of eighteen who has been subject to sexual exploitation because he or she:

- (a) is the victim of the crime of sex trafficking as defined in section 230.34 of the penal law;
- (b) engages in any act as defined in section 230.00 [Prostitution offenses] of the penal law;
- (c) is a victim of the crime of compelling prostitution as defined in section 230.33 of the penal law;
- (d) engages in acts or conduct described in article two hundred sixty-three [Sexual performance by a child] or section 240.37 [Loitering for the purpose of engaging in a prostitution offense] of the penal law.

Similarly, pursuant to N.Y. Fam. Ct. Act § 311.4(3) (Substitution of petition or finding),

3. In any proceeding under this article [Juvenile delinquency] based upon an arrest for an act of prostitution, there is a presumption that the respondent meets the criteria as a victim of a severe form of trafficking as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection Act of 2000). . . .

N.Y. Exec. Law § 621(5) states, “‘Victim’ shall mean (a) a person who suffers personal physical injury as a direct result of a crime; . . . or (5) sex trafficking as defined in section 230.34 of the penal law; or a person who has had a frivolous lawsuit filed against them.” N.Y. Penal Law § 60.27(4)(b) further states that “the term ‘victim’ shall include the victim of the offense . . . .”

Pursuant to N.Y. Soc. Serv. Law § 483-aa(a),<sup>64</sup> “‘Human trafficking victim’ means a person who is a victim of sex trafficking as defined in section 230.34 of the penal law or a victim of labor trafficking as defined in section 135.35 of the penal law.”

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

The statutory language of CSEC laws do not expressly prohibit a defense based upon consent. However, a minor under 17 will not be considered an accomplice to sex trafficking or certain other CSEC crimes.

Pursuant to N.Y. Penal Law § 230.35 (Promoting or compelling prostitution; accomplice), “In a prosecution for promoting prostitution or compelling prostitution, a person less than seventeen years of age from whose prostitution activity another person is alleged to have advanced or attempted to advance or profited or attempted to profit shall not be deemed to be an accomplice.”

Similarly, pursuant to N.Y. Penal Law § 230.36 (Sex trafficking; accomplice), “In a prosecution for sex trafficking, a person from whose prostitution activity another person is alleged to have advanced or attempted to advance or profited or attempted to profit shall not be deemed to be an accomplice.”

- 5.2.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking), § 230.05 (Patronizing a prostitute in the second degree), § 230.06 (Patronizing a prostitute in the first degree), § 230.25(2) (Promoting prostitution in the third degree), § 230.30(2) (Promoting prostitution in the second degree), § 230.32 (Promoting prostitution in the first degree), § 230.33 (Compelling prostitution), and § 263.05 (Use of a child in a sexual performance) to expressly prohibit a defense based upon the consent of the victim if the victim is a minor under 18.

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

Prostitution laws apply to both adults and minors, specifying no difference in crime based on age. Neither N.Y. Penal Law § 230.00 (Prostitution) nor § 240.37 (Loitering for the purpose of prostitution) makes minors immune from prosecution for prostitution-related offenses.

However, upon an arrest for prostitution, there is a presumption that a minor under the age of 16 is a victim, and upon first arrest for such an offense should receive services if cooperative. Pursuant to N.Y. Fam. Ct. Act § 311.4(3) (Substitution of petition or finding),

In any proceeding under this article [Juvenile delinquency] based upon an arrest for an act of prostitution, there is a presumption that the respondent meets the criteria as a victim of a severe form of trafficking as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection Act of 2000). Upon the motion of the respondent, without the consent of the presentment agency, a petition alleging that the respondent is in need of supervision shall be substituted for the delinquency petition. If, however, the respondent has been previously adjudicated as a juvenile delinquent under this article for an act which would be a crime pursuant to article two hundred thirty [Prostitution offenses] of the penal law, if the respondent was an adult, or expresses a current

<sup>64</sup> This provision is scheduled for repeal on September 1, 2013.

unwillingness to cooperate with specialized services for sexually exploited youth, continuing with the delinquency proceeding shall be within the court’s discretion. . . .

5.3.1 Recommendation: Amend N.Y. Penal Law § 230.00 (Prostitution) and § 240.37 (Loitering for the purpose of prostitution) to specify that these offenses are inapplicable to minors under 18 years of age. Alternatively, amend N.Y. Fam. Ct. Act § 311.4(3) (Substitution of petition or finding) to remove the exception for minors with a prior juvenile delinquency adjudication.

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.*

Under the “Safe Harbour for Exploited Children Act,”<sup>65</sup> New York does create some specialized services for domestic minor sex trafficking victims and sexually exploited children,<sup>66</sup> including placing such children in safe houses with specialized advocates trained to work with sexually exploited children and providing necessary services such as “housing, assessment, case management, medical care, legal, mental health and substance and alcohol abuse services,” and “[w]here appropriate . . . counseling and therapeutic services, educational services including life skills services and planning services to successfully transition residents back to the community.” N.Y. Soc. Serv. Law §§ 447-a(4), 447-b(1).

Pursuant to N.Y. Soc. Serv. Law § 447-b(1) (Services for exploited children),

1. Notwithstanding any inconsistent provision of law, pursuant to regulations of the office of children and family services, every local social services district shall as a component of the district's multi-year consolidated services child welfare services plan address the child welfare services needs of sexually exploited children and to the extent that funds are available specifically therefor ensure that a short-term safe house<sup>67</sup> or another short-term safe placement<sup>68</sup> such as an approved runaway and homeless youth program,<sup>69</sup> approved respite or crisis program providing crisis intervention or respite services or community-based program to serve sexually exploited children is available to children residing in such district. . . .

Existing youth programs may also be utilized for this purpose, so long as the staff has received training on child sexual exploitation. N.Y. Soc. Serv. Law § 447-b(1).

A child may also be taken into custody as a “person in need of supervision,” which is defined in part in N.Y. Fam. Ct. Act § 712 (Definitions) as someone “less than eighteen years of age who . . . appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of subdivision one of section four

<sup>65</sup> N.Y. Soc. Serv. Law §§ 447-a to -b.

<sup>66</sup> See *supra* Section 5.1 for the definition of “sexually exploited child.”

<sup>67</sup> “Short-term safe house” is defined in N.Y. Soc. Serv. Law § 447-a(2) as “a residential facility . . . that provides emergency shelter, services and care to sexually exploited children including food, shelter, clothing, medical care, counseling and appropriate crisis intervention services at the time they are taken into custody by law enforcement and for the duration of any legal proceeding or proceedings in which they are either the complaining witness or the subject child.”

<sup>68</sup> N.Y. Soc. Serv. Law § 447-b(5) states in part,

To the extent funds are specifically appropriated therefore, the office of children and family services shall contract with an appropriate not-for-profit agency with experience working with sexually exploited children to operate at least one long-term safe house . . . which shall provide safe and secure long term housing and specialized services for sexually exploited children throughout the state. . . .

<sup>69</sup> “Approved runaway program” is defined in N.Y. Exec. Law § 532-a(4) (Definitions) in part as a program “established and operated to provide services to runaway and homeless youth in accordance with the regulations of the office of temporary and disability assistance and the office of children and family services. Such programs may also provide non-residential crisis intervention and residential respite services . . . .” Residential facilities for homeless or runaway youth that operate as “transitional independent living support programs” are directed to provide shelter, assist in the provision of necessities, and “provide practical assistance in achieving independence.” N.Y. Exec. Law § 532-d.

hundred forty-seven-a of the social services law, but only if the child consents to the filing of a petition under this article.” A child taken into custody as a person in need of supervision, pursuant to N.Y. Fam. Ct. Act § 720 (Detention), “shall not be directed under any of the provisions of this article,” but should instead be placed in a foster care program, a family boarding home, or a non-secure detention facility. In order to be held in detention, the court shall first determine that there “is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services and that all available alternatives to detention have been exhausted,” and if the child is 16 or older, the court must demonstrate the existence of special circumstances in order to detain the child. N.Y. Fam. Ct. Act § 720(5). Pursuant to N.Y. Fam. Ct. Act § 720(5)(c), “If the respondent may be a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as defined in subdivision two of section four hundred forty-seven-a of the social services law as an alternative to detention.”

N.Y. Fam. Ct. Act § 732(a)–(b) states,

A proceeding to adjudicate a person to be in need of supervision is originated by the filing of a petition, alleging:

- (a) (i) the respondent . . . has been the victim of sexual exploitation as defined in subdivision one of section four hundred forty-seven-a of the social services law,<sup>70</sup> and specifying the acts on which the allegations are based and the time and place they allegedly occurred. . . .
- (ii) the respondent was under eighteen years of age at the time of the specified acts;
- (iii) the respondent requires supervision or treatment; and
- (iv) the petitioner has complied with the provisions of section seven hundred thirty-five of this article [Preliminary procedure; diversion services]; or
- (b) the respondent appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of subdivision one of section four hundred forty-seven-a of the social services law but only if the child consents to the filing of a petition under this article.

Pursuant to N.Y. Fam. Ct. Act § 739 (Release or detention after filing of petition and prior to order of disposition),

- (a) After the filing of a petition under section seven hundred thirty-two of this part, the court in its discretion may release the respondent or direct his or her detention. If the respondent may be a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as an alternative to detention. However, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained there is a substantial probability that the respondent will not appear in court on the return date and all available alternatives to detention have been exhausted.
- (b) Unless the respondent waives a determination that probable cause exists to believe that he is a person in need of supervision, no detention under this section may last more than three days
  - (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or
  - (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays.
- (c) Upon a finding of facts and reasons which support a detention order pursuant to subdivision (a) of this section, the court shall also determine and state in any order directing detention:
  - (i) whether continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent based upon, and limited to, the facts and circumstance

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<sup>70</sup> See *supra* Section 5.1 for relevant definition of “sexually exploited child.”

available to the court at the time of the court's determination in accordance with this section; and

(ii) where appropriate, whether reasonable efforts were made prior to the date of the court order directing detention in accordance with this section, to prevent or eliminate the need for removal of the respondent from his or her home or, if the respondent had been removed from his or her home prior to the court appearance pursuant to this section, where appropriate, whether reasonable efforts were made to make it possible for the respondent to safely return home.

If the minor is adjudicated a person in need of supervision, the minor may be discharged with a warning, have the judgment suspended, placed on probation, placed in his/her home, placed in the custody of a relative, or placed in the custody "other suitable private person or a commissioner of social services." N.Y. Fam. Ct. Act §§ 754(1), 756(a)(i). Additionally, pursuant to N.Y. Fam. Ct. Act § 756(a)(ii),

(ii) Where the child is placed with the commissioner of the local social services district, the court may direct the commissioner to place the child with an authorized agency or class of authorized agencies, including, if the court finds that the respondent is a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, an available long-term safe house. . . .

If the minor enters the juvenile justice system under the juvenile delinquency provisions several dispositions may occur. A "juvenile delinquent" is defined as "a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law." N.Y. Fam. Ct. Act § 301.2.

Pursuant to N.Y. Fam. Ct. Act § 311.4(3) (Substitution of petition or finding),

In any proceeding under this article [Juvenile delinquency] based upon an arrest for an act of prostitution, there is a presumption that the respondent meets the criteria as a victim of a severe form of trafficking as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection Act of 2000). Upon the motion of the respondent, without the consent of the presentment agency, a petition alleging that the respondent is in need of supervision shall be substituted for the delinquency petition. If, however, the respondent has been previously adjudicated as a juvenile delinquent under this article for an act which would be a crime pursuant to article two hundred thirty [Prostitution offenses] of the penal law, if the respondent was an adult, or expresses a current unwillingness to cooperate with specialized services for sexually exploited youth, continuing with the delinquency proceeding shall be within the court's discretion. . . .

Pursuant to N.Y. Fam. Ct. Act § 305.2(2), "An officer may take a child under the age of sixteen into custody without a warrant in cases in which he may arrest a person for a crime under article one hundred forty of the criminal procedure law." When an officer takes a child under 16 into custody without a warrant, he must notify the parents and subsequently take the child to his parents, to the county family court, to a place for questioning, to a juvenile detention facility, or, if the child has been taken into custody under N.Y. Fam. Ct. Act § 305.1<sup>71</sup> for committing prostitution to a short-term safe house if the child so consents. N.Y. Fam. Ct. Act § 305.2(3), (4).

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<sup>71</sup> Under N.Y. Fam. Ct. Act § 305.1,

1. A private person may take a child under the age of sixteen into custody in cases in which he may arrest an adult for a crime under section 140.30 of the criminal procedure law.
2. Before taking such child under the age of sixteen into custody, a private person must inform the child of the cause

After a criminal procedures probable cause hearing, a fact-finding hearing, and a dispositional hearing, pursuant to N.Y. Fam. Ct. Act § 352.2(2) (Order of disposition), the court must “consider the needs and best interests of the respondent as well as the need for protection of the community” and decide whether to, among other things, conditionally discharge the juvenile, place the child on probation, or continue with the proceedings and place the child as specified in N.Y. Fam. Ct. Act § 353.3 (Placement), which states,

1. In accordance with section 352.2 of this part, the court may place the respondent in his or her own home or in the custody of a suitable relative or other suitable private person or the commissioner of the local social services district or the office of children and family services . . . .
2. Where the respondent is placed with the commissioner of the local social services district, the court may direct the commissioner to place him or her with an authorized agency or class of authorized agencies, including, if the court finds that the respondent is a sexually exploited child . . . an available long-term safe house.<sup>72</sup> . . . .
3. Where the respondent is placed with the office of children and family services, the court shall, unless it directs the office to place him or her with an authorized agency or class of authorized agencies, including if the court finds that the respondent is a sexually exploited child . . . , authorize the office to do one of the following:
  - (a) place the respondent in a secure facility without a further hearing at any time or from time to time during the first sixty days of residency in office of children and family services facilities. Notwithstanding the discretion of the office to place the respondent in a secure facility at any time during the first sixty days of residency in a[n] office of children and family services facility, the respondent may be placed in a non-secure facility. In the event that the office desires to transfer a respondent to a secure facility at any time after the first sixty days of residency in office facilities, a hearing shall be held . . . ; or
  - (b) place the respondent in a limited secure facility. The respondent may be transferred by the office to a secure facility after a hearing is held . . . ; provided, however, that during the first twenty days of residency in office facilities, the respondent shall not be transferred to a secure facility unless the respondent has committed an act or acts which are exceptionally dangerous to the respondent or to others; or
  - (c) place the respondent in a non-secure facility. No respondent placed pursuant to this paragraph may be transferred by the office of children and family services to a secure facility.
4. Where the respondent is placed with the office of children and family services, the court may direct the office to place the respondent with an authorized agency or class of authorized agencies, including, if the court finds that the respondent is a sexually exploited child . . . , an

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thereof and require him to submit, except when he is taken into custody on pursuit immediately after the commission of a crime.

3. After taking such child into custody, a private person must take the child, without unnecessary delay, to the child’s home, to a family court, or to a police officer or peace officer.

<sup>72</sup> “Safe house” is defined in N.Y. Soc. Serv. Law § 447-a(4) as

a residential facility operated by an authorized agency as defined in subdivision ten of section three hundred seventy-one of this article including a residential facility operating as part of an approved runaway program as defined in subdivision four of section five hundred thirty-two-a of the executive law or a not-for-profit agency with experience in providing services to sexually exploited youth and approved in accordance with the regulations of the office of children and family services that provides shelter for sexually exploited children. A safe house serving sexually exploited children as defined in this title shall provide or assist in securing necessary services for such sexually exploited children either through direct provision of services, or through written agreements with other community and public agencies for the provision of services including but not limited to housing, assessment, case management, medical care, legal, mental health and substance and alcohol abuse services. Where appropriate such safe house in accordance with a service plan for such sexually exploited child may also provide counseling and therapeutic services, educational services including life skills services and planning services to successfully transition residents back to the community. . . .

available long-term safe house, and in the event the office is unable to so place the respondent or, discontinues the placement with the authorized agency, the respondent shall be deemed to have been placed with the office pursuant to paragraph (b) or (c) of subdivision three of this section. . . .

If the child enters the child protective proceedings as an abused child<sup>73</sup> instead of as a child in need of services or as a juvenile delinquent, the child may receive one of several different placements. Pursuant to N.Y. Fam. Ct. Act § 1052 (Disposition on adjudication), after a dispositional hearing, the court may, among other things, place the child in accordance with N.Y. Fam. Ct. Act § 1055 (Placement), which states that the court may place the child with a “relative or other suitable person,”<sup>74</sup> with the local commissioner of social services, or with a suitable authorized association or agency.

In addition to provisions focusing on sexually exploited youth, a domestic minor sex trafficking victim may receive services pursuant to N.Y. Soc. Serv. Law § 483-bb (Services for victims of human trafficking),<sup>75</sup> which states,

(a) The office of temporary and disability assistance may coordinate with and assist law enforcement agencies and district attorney’s offices to access appropriate services for human trafficking victims.<sup>76</sup>

(b) In providing such assistance, the office of temporary and disability assistance may enter into contracts with non-government organizations for providing services to pre-certified victims of human trafficking<sup>77</sup> as defined in subdivision (b) of section four hundred eighty-three-aa of this article, insofar as funds are available for that purpose. Such services may include, but are not limited to, case management, emergency temporary housing, health care, mental health counseling, drug addiction screening and treatment, language interpretation and translation services, English language instruction, job training and placement assistance, post-employment services for job retention, and services to assist the individual and any of his or her family members to establish a permanent residence in New York state or the United States. Nothing in this section shall preclude the office of temporary and disability assistance, or any local social services district, from providing human trafficking victims who are United States citizens or human trafficking victims who meet the criteria pursuant to section one hundred twenty-two of this chapter with any benefits or services for which they otherwise may be eligible.

Under N.Y. Soc. Serv. Law § 483-cc (Confirmation as a victim of human trafficking),

(a) As soon as practicable after a first encounter with a person who reasonably appears to a law enforcement agency or a district attorney’s office to be a human trafficking victim, that agency or office shall notify the office of temporary and disability assistance and the division of criminal justice services that such person may be eligible for services under this article.

(b) Upon receipt of such a notification, the division of criminal justice services, in consultation with the office of temporary and disability assistance and the referring agency or office, shall

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<sup>73</sup> See *infra* Section 5.6 for the definition of “abused child.”

<sup>74</sup> In order for a relative or other suitable person who seeks to become a foster parent to gain custody of the child, the local commissioner of social services must investigate the person’s home within 24 hours to ensure that the person is qualified. If not, the commissioner must report this to the court so that it may order alternative placement. N.Y. Fam. Ct. Act § 1055(a)(i).

<sup>75</sup> This provision is scheduled for repeal on September 1, 2013.

<sup>76</sup> “Human trafficking victim” is defined in N.Y. Soc. Serv. Law § 483-aa(a) (Definitions) as “a person who is a victim of sex trafficking as defined in section 230.34 of the penal law or a victim of labor trafficking as defined in section 135.35 of the penal law.”

<sup>77</sup> “Pre-certified victim of human trafficking” is defined in N.Y. Soc. Serv. Law § 483-aa(b) as “a person who has a pending application for federal certification as a victim of a severe form of trafficking in persons as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection) but has not yet obtained such certification, or a person who has reported a crime to law enforcement and it reasonably appears to law enforcement that the person is such a victim.”

make a preliminary assessment of whether such victim or possible victim appears to meet the criteria for certification as a victim of a severe form of trafficking in persons as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection)<sup>78</sup> or appears to be otherwise eligible for any federal, state or local benefits and services. If it is determined that the victim appears to meet such criteria, the office of temporary and disability assistance shall report the finding to the victim, and to the referring law enforcement agency or district attorney’s office, and may assist that agency or office in having such victim receive services from a case management provider who may be under contract with the office of temporary and disability assistance, or from any other available source. If the victim or possible victim is under the age of eighteen, the office of temporary and disability assistance also shall notify the local department of social services in the county where the child was found.

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

“Abused child” is defined in N.Y. Fam. Ct. Act § 1012(e) (Definitions) as

a child less than eighteen years of age whose parent or other person legally responsible for his care . . . .  
(iii) commits, or allows to be committed an offense against such child defined in article one hundred thirty [Sexual offenses] of the penal law; allows, permits or encourages such child to engage in any act described in sections 230.25 [Promoting prostitution in the third degree], 230.30 [Promoting prostitution in the second degree] and 230.32 [Promoting prostitution in the first degree] of the penal law; . . . or allows such child to engage in acts or conduct described in article two hundred sixty-three [Sexual performance by a child] of the penal law provided, however, that (a) the corroboration requirements contained in the penal law and (b) the age requirement for the application of article two hundred sixty-three of such law shall not apply to proceedings under this article.

For purposes of the section on “care and protection of children” in the Social Services Laws, a sexually exploited child is not expressly included in the definitions of abuse or neglect. “Abused child” is defined in N.Y. Soc. Serv. Law § 371(4-b)(iii) (Definitions) as “a child less than eighteen years of age whose parent or other person legally responsible for his care . . . commits, or allows to be committed, an act of sexual abuse against such child as defined in the penal law.”

- 5.5.1 Recommendation: Amend N.Y. Soc. Serv. Law § 371(4-b) (Definitions) to parallel N.Y. Fam. Ct. Act § 1012(e)(iii) by clarifying that allowing, permitting, or encouraging a child to engage in prostitution or any of the acts listed in Article 263 (Sexual performance by a child) constitutes a form of abuse.

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<sup>78</sup> However, reference to the federal definition of “severe forms of trafficking” in 22 U.S.C. § 7105, combined with the term “certification” in N.Y. Soc. Serv. Law § 483-cc could prove problematic in application of this presumption. 22 U.S.C § 7105(b)(1)(C), which applies to victims in the U.S., provides a definition of victim of a severe form of trafficking to include a person “subjected to an act or practice” defined in 22 U.S.C. § 7102(8) who is a minor or subject to certification under (E). Subsection (E) requires the person to be willing to assist in the investigation and prosecution of the trafficker and to have made an application for a T visa that has not been denied or be “a person whose continued presence in the United States the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.” Clarification that “certification” is not required by amending N.Y. Soc. Serv. Law § 483-cc to refer solely to domestic minors as victims of severe forms of trafficking is needed.

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

New York utilizes the term “person legally responsible” in the Family Court Act and defines it in N.Y. Fam. Ct. Act § 1012(g) (Definitions) as “the child’s custodian, guardian, or any other person responsible for the child’s care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.”

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

For the purposes of crime victims’ compensation, victims of N.Y. Penal Law § 230.34 (Sex trafficking) are expressly eligible for compensation and other victims may be eligible. N.Y. Exec. Law § 621(5)(b)(5). “Victim” is defined in N.Y. Exec. Law § 621(5) (Definitions) as “(a) a person who suffers personal physical injury as a direct result of a crime; (b) a person who is the victim of . . . sex trafficking as defined in section 230.34 of the penal law.”

Additionally, “child victim” is defined in N.Y. Exec. Law § 621(11) as “a person less than eighteen years of age who suffers physical, mental or emotional injury, or loss or damage, as a direct result of a crime or as a result of witnessing a crime.”

However, a domestic minor sex trafficking victim who is determined to be “criminally responsible” or “an accomplice of such person” is ineligible to receive an award. N.Y. Exec. Law § 624(2). Also, N.Y. Exec. Law § 631(1) (Awards) states, in part,

No award shall be made unless the office finds that (a) a crime was committed, (b) such crime directly resulted in personal physical injury to or the exacerbation of a preexisting disability, or condition, or death of, the victim, and (c) criminal justice agency records show that such crime was promptly reported to the proper authorities; and in no case may an award be made where the criminal justice agency<sup>79</sup> records show that such report was made more than one week after the occurrence of such crime unless the office, for good cause shown, finds the delay to have been justified; provided, however, in cases involving an alleged sex offense as contained in article one hundred thirty of the penal law or . . . sex trafficking as defined in section 230.34 of the penal law . . . , the criminal justice agency report need only be made within a reasonable time considering all the circumstances, including the victim’s physical, emotional and mental condition and family situation. . . .

Additionally, child victims receive special protections, and pursuant to N.Y. Exec. Law § 631(17),

Notwithstanding the provisions of subdivision one of this section, where a child victim has not been physically injured as a direct result of a crime, or has witnessed a crime in which no physical injury occurred, the claimant shall only be eligible for an award that includes the unreimbursed cost of repair or replacement of essential personal property of the child victim that has been lost, damaged or destroyed as a direct result of a crime, transportation expenses incurred by the claimant for necessary court appearances of the child victim in connection with the prosecution of such crimes, and, if counseling is commenced within one year from the date of the incident or its discovery, (1) the

<sup>79</sup> “Criminal justice agency” is defined in N.Y. Exec. Law § 631(1) (Awards) as including “a police department, a district attorney’s office, and any other governmental agency having responsibility for the enforcement of the criminal laws of the state provided, however, that in cases involving such sex offense a criminal justice agency shall also mean a family court, a governmental agency responsible for child and/or adult protective services . . . , and any medical facility established under the laws of the state that provides a forensic physical examination for victims of rape and sexual assault.”

unreimbursed cost of counseling provided to the child victim on account of mental or emotional stress resulting from the incident in which the crime occurred, and/or (2) the unreimbursed cost of counseling provided to the claimant eligible under paragraph (h) of subdivision one of section six hundred twenty-four of this article and resulting from the incident in which the crime occurred.

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

Children under 14 who are “vulnerable child witnesses” may be able to testify via a closed circuit television; however, this definition is limited to certain crimes. “Child witness” is defined in N.Y. Crim. Proc. Law § 65.00(1) (Definitions)<sup>80</sup> as “a person fourteen years old or less who is or will be called to testify in a criminal proceeding, other than a grand jury proceeding, concerning an offense defined in article one hundred thirty [Sex offenses] of the penal law or section 255.25, 255.26 or 255.27 [Incest in the first, second, and third degrees] of such law which is the subject of such criminal proceeding.”

Under N.Y. Crim. Proc. Law § 65.10 (Closed-circuit television; general rule; declaration of vulnerability),<sup>81</sup>

1. A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20,<sup>82</sup> determines by clear and convincing evidence that it is likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of, such harm.
2. When the court declares a child witness to be vulnerable, it shall, except as provided in subdivision four of section 65.30 [Closed-circuit television; special testimonial procedures], authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television. Under no circumstances shall the provisions of this article be construed to authorize a closed-circuit television system by which events in the courtroom are not transmitted to the testimonial room during the testimony of the vulnerable child witness.

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For the purpose of grand jury proceedings, some child witnesses are also able to testify via videotaped examination. Pursuant to N.Y. Crim. Proc. Law § 190.32(1)(a) (Videotaped examination; definitions, application, order and procedure), the definition of “child witness” is defined as “a person twelve years old or less whom the people intend to call as witness in a grand jury proceeding to give evidence concerning any crime defined in article one hundred thirty or two hundred sixty or section 255.25, 255.26 or 255.27 of the penal law of which the person was a victim.” N.Y. Crim. Proc. Law § 190.32(2) states, “In lieu of requiring a witness who is a child witness to appear in person and give evidence in a grand jury proceeding, the district attorney

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<sup>80</sup> This provision is scheduled to expire and to be repealed on September 1, 2013.

<sup>81</sup> This provision is scheduled to expire and to be repealed on September 1, 2013.

<sup>82</sup> N.Y. Crim. Proc. Law § 65.20(1)–(4) (Closed-circuit television) states,

1. Prior to the commencement of a criminal proceeding; other than a grand jury proceeding, either party may apply to the court for an order declaring that a child witness is vulnerable.
2. A child witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness would suffer serious mental or emotional harm that would substantially impair the child witness' ability to communicate with the finder of fact without the use of live, two-way closed-circuit television.
3. A motion pursuant to subdivision one of this section must be made in writing at least eight days before the commencement of trial or other criminal proceeding upon reasonable notice to the other party and with an opportunity to be heard.
4. The motion papers must state the basis for the motion and must contain sworn allegations of fact which, if true, would support a determination by the court that the child witness is vulnerable. Such allegations may be based upon the personal knowledge of the deponent or upon information and belief, provided that, in the latter event, the sources of such information and the grounds for such belief are stated.

may cause the examination of such witness to be videotaped in accordance with the provisions of subdivision five of this section.”

Pursuant to N.Y. Exec. Law § 642-a (Fair treatment of child victims as witnesses),

To the extent permitted by law, criminal justice agencies, crime victim-related agencies, social services agencies and the courts shall comply with the following guidelines in their treatment of child victims:

1. To minimize the number of times a child victim is called upon to recite the events of the case and to foster a feeling of trust and confidence in the child victim, whenever practicable and where one exists, a multi-disciplinary team as established pursuant to subdivision six of section four hundred twenty-three [Child protective service responsibilities and organization; purchase of service and reimbursement of cost; local plan] of the social services law and/or a child advocacy center shall be used for the investigation and prosecution of child abuse cases involving abuse of a child,<sup>83</sup> as described in paragraph (i), (ii) or (iii) of subdivision (e) of section one thousand twelve [Definitions] of the family court act, sexual abuse of a child or the death of a child.
2. Whenever practicable, the same prosecutor should handle all aspects of a case involving an alleged child victim.
3. To minimize the time during which a child victim must endure the stress of his involvement in the proceedings, the court should take appropriate action to ensure a speedy trial in all proceedings involving an alleged child victim. In ruling on any motion or request for a delay or continuance of a proceeding involving an alleged child victim, the court should consider and give weight to any potential adverse impact the delay or continuance may have on the well-being of the child.
4. The judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying.
- .....
6. In accordance with the provisions of section 190.32 [Videotaped examination; definitions, application, order and procedure] of the criminal procedure law, a person supportive of the “child witness” or “special witness” as defined in such section should be permitted to be present and accessible to a child witness at all times during his testimony, although the person supportive of the child witness should not be permitted to influence the child’s testimony.
7. A child witness should be permitted in the discretion of the court to use anatomically correct dolls and drawings during his testimony.

New York’s rape shield law does not expressly apply to child victims of sexual exploitation, and moreover, allows for the admission of evidence related to prostitution-related offenses. Pursuant to N.Y. Crim. Proc. Law § 60.42 (Rules of evidence; admissibility of evidence of victim’s sexual conduct in sex offense cases),

Evidence of a victim’s sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence:

1. proves or tends to prove specific instances of the victim’s prior sexual conduct with the accused; or
2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 [Prostitution] of the penal law within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people of the victim’s failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or

<sup>83</sup> See *supra* Section 5.6 for the definition of “abused child.”

5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

5.8.1 Recommendation: Amend N.Y. Crim. Proc. Law § 60.42 (Rules of evidence; admissibility of evidence of victim’s sexual conduct in sex offense cases) to apply to domestic minor sex trafficking victims under the age of 18 and to limit the ability to introduce evidence of offenses under N.Y. Penal Law Article 230 (Prostitution) in such cases.

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

Pursuant to N.Y. Fam. Ct. Act § 375.2 (Motion to seal after a finding),

1. If an action has resulted in a finding of delinquency pursuant to subdivision one of section 352.1 [Findings], other than a finding that the respondent committed a designated felony act, the court may, in the interest of justice and upon motion of the respondent, order the sealing of appropriate records pursuant to subdivision one of section 375.1 [Order upon termination of a delinquency action in favor of the respondent].
2. Such motion must be in writing and may be filed at any time subsequent to the entering of such finding. . . .
3. The court shall state on the record its reasons for granting or denying the motion.
4. If such motion is denied, it may not be renewed for a period of one year, unless the order of denial permits renewal at an earlier time.
5. The court shall not order the sealing of any record except as prescribed by this section or section 375.1.
6. Such a motion cannot be filed until the respondent’s sixteenth birthday.

N.Y. Fam. Ct. Act § 375.3 (Expungement of court records) states, “Nothing contained in this article shall preclude the court’s use of its inherent power to order the expungement of court records.”

Additionally, under N.Y. Crim. Proc. Law § 440.10(1)(i) (Motion to vacate judgment),

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:  
    . . . .  
    (i) The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or 230.00 (prostitution) of the penal law, and the defendant’s participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that  
        (i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or has sought services for victims of such trafficking, subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking that may be jeopardized by the bringing of such motion, or for other reasons consistent with the purpose of this paragraph; and  
        (ii) official documentation of the defendant’s status as a victim of sex trafficking or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant’s participation in the offense was a result of having

been a victim of sex trafficking or trafficking in persons, but shall not be required for granting a motion under this paragraph.

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

The court may authorize restitution to the victim under N.Y. Penal Law § 60.27(1) (Restitution and reparation), which states, in part,

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim<sup>84</sup> of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense,<sup>85</sup> and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby . . . . In that event, or when the victim impact statement reports that the victim seeks restitution or reparation, the court shall require, unless the interests of justice dictate otherwise, in addition to any of the dispositions authorized by this article that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss . . . . In the event that restitution or reparation are not ordered, the court shall clearly state its reasons on the record. Adverse action as used in this subdivision shall mean and include actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offense, and the consequential financial losses from such action.

Additionally, under N.Y. Exec. Law § 632-a(3) (Crime victims),

Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim, or the representative of that convicted person, within three years of the discovery of any profits from a crime<sup>86</sup> or funds of a convicted person . . . .

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

For criminal actions, pursuant to N.Y. Crim. Proc. Law § 30.10(2) (Timeliness of prosecutions; periods of limitation), a 5-year statute of limitations exists for most felony prosecutions, and a 2-year statute of limitations exists for misdemeanors. Also, for prosecutions under N.Y. Penal Law Article 130 (Sex offenses), unless the offense has a longer limitation under subsection (2)(a), or N.Y. Penal Law § 263.05 (Use of a child in a sexual performance), the statute of limitations is tolled until either the child reaches the age of 18 or the crime is reported to law enforcement or a child abuse register, whichever occurs first. N.Y. Crim. Proc. Law § 30.10(3)(f). Pursuant to N.Y. Crim. Proc. Law § 30.10(3)(f),

<sup>84</sup> See *supra* Section 5.1 for the definition of “victim.”

<sup>85</sup> See *supra* note 49 for the definition of “offense.”

<sup>86</sup> Pursuant to N.Y. Exec. Law § 632-a(1)(b),

“Profits from a crime” means (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, a crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

Notwithstanding the provisions of subdivision two, the periods of limitation for the commencement of criminal actions are extended as follows in the indicated circumstances:

....  
(f) For purposes of a prosecution involving a sexual offense as defined in article one hundred thirty of the penal law [Sex offenses], other than a sexual offense delineated in paragraph (a) of subdivision two of this section, committed against a child less than eighteen years of age . . . or use of a child in a sexual performance as defined in section 263.05 [Use of a child in a sexual performance] of the penal law, the period of limitation shall not begin to run until the child has reached the age of eighteen or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier.

For civil actions, pursuant to N.Y. C.P.L.R. Law § 213-b (Action by a victim of a criminal offense), a 7-year statute of limitations applies for actions arising under convictions for crimes in general, and a 10-year statute of limitations applies for actions arising under convictions for a “specified crime.”<sup>87</sup>

5.11.1 Recommendation: Amend N.Y. Crim. Proc. Law § 30.10(3)(f) to include N.Y. Penal Law § 230.34 (Sex trafficking) and other CSEC offenses as crimes for which the statute of limitations can be extended when the victim is under 18.

## FRAMEWORK ISSUE 6: CRIMINAL JUSTICE TOOLS FOR INVESTIGATION AND PROSECUTIONS

### *Legal Components:*

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

### *Legal Analysis:*

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

New York does not legislatively mandate training, but training is mentioned as an option for certain localities. Specifically, under N.Y. Soc. Serv. Law § 447-b(6) (Services for exploited children),

The local social services commissioner may, to the extent that funds are available, in conjunction with the division of criminal justice services and local law enforcement officials, contract with an appropriate not-for-profit agency with experience working with sexually exploited children to train law enforcement officials who are likely to encounter sexually exploited children in the course of their law enforcement duties on the provisions of this section and how to identify and obtain appropriate services for sexually exploited children. Local social services districts may work cooperatively to provide such training and such training may be provided on a regional basis. The division of criminal justice services

<sup>87</sup> “Specified crime” is defined in N.Y. Exec. Law § 632-a(1)(e) as including Class B felonies and violent felony offenses as defined in N.Y. Penal Law § 70.02(1), which includes certain sex offenses listed in Article 130.

shall assist local social services districts in obtaining any available funds for the purposes of conducting law enforcement training from the federal justice department and the office of juvenile justice and delinquency prevention.

6.1.1 Recommendation: Mandate training on domestic minor sex trafficking for law enforcement.

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

New York allows for single party consent to audiotaping. N.Y. Penal Law § 250.05 (Eavesdropping ) states, “A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.” Pursuant to N.Y. Penal Law § 250.00 (Eavesdropping; definition of terms),

1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.

2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.

. . . .

6. "Intercepting or accessing of an electronic communication" and "intentionally intercepted or accessed" mean the intentional acquiring, receiving, collecting, overhearing, or recording of an electronic communication, without the consent of the sender or intended receiver thereof, by means of any instrument, device or equipment, except when used by a telephone company in the ordinary course of its business or when necessary to protect the rights or property of such company.

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

N.Y. Penal Law § 250.05 (Eavesdropping ) states, “A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.” N.Y. Penal Law § 250.00(1) (Eavesdropping; definitions of terms) defines “wiretapping” as “the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.”

Pursuant to N.Y. Crim. Proc. Law § 700.10(1), “Under circumstances prescribed in this article, a justice may issue an eavesdropping warrant or a video surveillance warrant upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application.” “Designated offense” is defined in N.Y. Crim. Proc. Law § 700.05(8) as including § 230.34 (Sex trafficking), § 230.32 (Promoting prostitution in the first degree), or § 230.30 (Promoting prostitution in the second degree).

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

New York has not codified that the use of a law enforcement decoy is allowable. N.Y. Penal Law § 40.05 (Entrapment) further states that “it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purpose of criminal prosecution . . . .” It is important to note that the statute also states, “Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.” N.Y. Penal Law § 40.05.

6.4.1 Recommendation: Amend N.Y. Penal Law § 120.70 (Luring a child) to state that it is not a defense that the person solicited was in fact an undercover officer posing as a minor.

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

New York has also not codified the permissibility of the use of the Internet as an investigative technique for sex trafficking.

6.5.1 Recommendation: Amend N.Y. Penal Law § 235.22 (Disseminating indecent material to a minor) to state that it is not a defense that the person solicited was in fact an undercover officer posing as a minor.

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

New York has established a statewide central register for missing children. N.Y. Exec. Law § 837-e (Statewide central register for missing children) establishes “through electronic data processing and related procedures, a statewide central register for missing children<sup>88</sup> which shall be compatible with the national crime information center register maintained pursuant to the federal missing children act of nineteen hundred eighty-two . . . .”

Once a child has been reported to the register, the division is responsible for a number of things, including notifying the head of the relevant department of health and requesting that birth certificate records be flagged and notifying the child’s most recent school and requesting that the child’s schooling record be flagged. N.Y. Exec. Law § 837-e(1-a). Once a missing child is found, the relevant department of health and school shall be notified if records were flagged, and, pursuant to N.Y. Exec. Law § 837-e(6),

[T]he superintendent of state police, sheriff, chief of police, coroner or medical examiner, or other criminal justice agency shall purge and destroy identifying material contained in such records and documents with respect to such person which are made and maintained pursuant to this section and shall report to the division that the person has been found and that the identifying materials contained in such records and documents have been so purged or destroyed. . . .

Additionally, pursuant to N.Y. Exec. Law § 837-m (Reporting duties of law enforcement departments with respect to missing children),

The chief of every police department, each county sheriff and the superintendent of state police shall report, at least semi-annually, to the division with respect to specified cases of missing children that are closed. Such reports shall be in the form and manner prescribed by the division and shall contain such information as the division deems necessary including, but not limited to, information regarding recovered children who were arrested, children who were the victims of criminal activity or exploitation and children who were found deceased and information regarding the alleged abductor or killer of such children.

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<sup>88</sup> “Missing child” is defined in N.Y. Exec. Law § 837-e(1) as “any person under the age of eighteen years missing from his or her normal and ordinary place of residence and whose whereabouts cannot be determined by a person responsible for the child’s care and any child known to have been taken, enticed or concealed from the custody of his or her lawful guardian by a person who has no legal right to do so.”

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