

# PROTECTED INNOCENCE INITIATIVE

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



## ANALYSIS AND RECOMMENDATIONS VIRGINIA

### 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.*

Virginia does not have a law criminalizing specifically human trafficking. Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) is the operable criminal statute for prosecuting cases of domestic minor sex trafficking. Va. Code Ann. § 18.2-48 criminalizes the “[a]bduction (i) of any person with the intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, (iii) of any child under sixteen years of age for the purpose of concubinage or prostitution, (iv) of any person for the purpose of prostitution, or (v) of any minor for the purpose of manufacturing child pornography.” Va. Code Ann. § 18.2-48. Under Va. Code Ann. § 18.2-47 (Abduction and kidnapping defined; punishment),

A. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of “abduction.”

<sup>1</sup> Unless otherwise specified, all references to Virginia statutes were taken from Virginia Code Annotated (LEXIS through 2011 Reg. Sess., Acts 2011, cc. 1 to 890, and 2011 Sp. Sess. I, Acts 2011, c. 1) and all federal statutes were taken from United States Code (LEXIS through PL 112-54, approved 11/12/11).

B. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to subject him to forced labor or services shall be deemed guilty of “abduction.” For purposes of this subsection, the term “intimidation” shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.

Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) is punishable as a Class 2 felony, which carries a minimum sentence of 20 years to life and a possible fine of up to \$100,000.<sup>2</sup> Va. Code Ann. §§ 18.2-10(b), 18.2-10 (b), (g). Va. Code Ann. § 18.2-48 also specially directs that “[i]f the sentence imposed for a violation of (ii), (iii), (iv), or (v) includes a term of confinement less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life subject to revocation by the court.”

1.1.1 Recommendation: Enact a stand-alone law criminalizing domestic minor sex trafficking that removes any requirement to prove “force, intimidation or deception” when the victim is a minor under 18 and that expands the types of victimization to include live sexual performance.<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.*

Va. Code Ann. § 18.2-370(B) (Taking indecent liberties with children) states, “Any person 18 years of age or over who, with lascivious intent, knowingly and intentionally receives money, property, or any other remuneration for allowing, encouraging, or enticing any person under the age of 18 years to perform in or be a subject of sexually explicit visual material as defined in § 18.2-374.1<sup>4</sup> or who knowingly encourages such person to perform in or be a subject of sexually explicit material; shall be guilty of a Class 5 felony.” A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e). This penalty is enhanced to a Class 4 felony for second or subsequent convictions, “provided that (i) the offenses were not part of a common act, transaction or scheme; (ii) the accused was at liberty as defined in § 53.1-151 between each conviction; and (iii) it is admitted, or found by the jury or judge before whom the person is tried, that the accused was previously convicted of a violation of this section.” Va. Code Ann. § 18.2-370(C). A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed.<sup>5</sup> Va. Code Ann. § 18.2-10(d).

Va. Code Ann. § 18.2-356 (Receiving money for procuring person) states, “Any person who receives any money or other valuable thing for or on account of . . . (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography shall be

<sup>2</sup> Va. Code Ann. § 18.2-10(g) provides that “[e]xcept as specifically authorized in subdivision (e) [Class 5 felonies] or (f) [Class 6 felonies], or in Class 1 felonies for which a sentence of death is imposed, the court shall impose either a sentence of imprisonment together with a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine.”

<sup>3</sup> Subsequent recommendations in this report referring to the state human trafficking law are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

<sup>4</sup> Va. Code Ann. § 18.2-374.1(A) defines “sexually explicit visual material” as “a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer’s temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.”

<sup>5</sup> See *supra* note 2.

guilty of a Class 4 felony.” A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed.<sup>6</sup> Va. Code Ann. § 18.2-10(d).

Also, though not specific to commercial sex offenses, the following offenses may also apply to commercial sexual exploitation of children cases:

1. Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties) makes the following a Class 5 felony:

Any person 18 years of age or over, who, with lascivious intent, knowingly and intentionally commits any of the following acts with any child under the age of 15 years . . . :

- (1) Expose his or her sexual or genital parts to any child to whom such person is not legally married or propose that any such child expose his or her sexual or genital parts to such person; or
- (2) [Repealed.]
- (3) Propose that any such child feel or fondle the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child; or
- (4) Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
- (5) Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth in the preceding subdivisions of this section.

A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(e).

2. Va. Code Ann. § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.) makes it a Class 1 misdemeanor for “[a]ny person 18 years of age or older, including the parent of any child” to “willfully contribute[] to, encourage[], or cause[] any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228” or to “engage[] in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild.” Va. Code Ann. § 18.2-371. A Class 1 misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a).
3. Va. Code Ann. § 18.2-61 (Rape), among other things, classifies sex with a child under 13 as rape. Va. Code Ann. § 18.2-61(A)(iii). A mandatory minimum sentence of 25 years is required for rape of a child under 13 where the offender is “more than three years older than the victim” and “if done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment] or § 18.2-48 [Abduction with intent to extort money or for immoral purpose], (ii) § 18.2-89 [Burglary; how punished], 18.2-90 [Entering dwelling house, etc., with intent to commit murder, rape, robbery or arson; penalty] or 18.2-91 [Entering dwelling house, etc., with intent to commit larceny, assault and battery or other felony], or (iii) § 18.2-51.2 [Aggravated malicious wounding; penalty].” Va. Code Ann. § 18.2-61(B). “If the term of confinement imposed for any violation of subdivision A (iii), where the offender is more than three years older than the victim, is for a term less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life, subject to revocation by the court.” Va. Code Ann. § 18.2-61(B).
4. Va. Code Ann. § 18.2-63(A) (Carnal knowledge of child between thirteen and fifteen years of age) makes it a Class 4 felony punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 for a

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<sup>6</sup> See *supra* note 2.

person to “carnally know[], without the use of force, a child thirteen years of age or older but under fifteen years of age.”<sup>7</sup> Va. Code Ann. § 18.2-10(d), (g).<sup>8</sup> Va. Code Ann. § 18.2-63(B) also makes it a Class 6 felony for a person to “carnally know[], without the use of force, a child thirteen years of age or older but under fifteen years of age who consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused’s junior.” A Class 6 felony is punishable by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(f). This crime is reduced to a Class 4 misdemeanor when the “consenting child is less than three years the accused’s junior” punishable by a fine up to \$250. Va. Code Ann. §§ 18.2-63(B), 18.2-11(d). The provision notes that “a child under the age of thirteen years shall not be considered a consenting child.” Va. Code Ann. § 18.2-63(C).

5. Va. Code Ann. § 18.2-67.4:2 (Sexual abuse of a child under 15 years of age; penalty) states, “Any adult who, with lascivious intent, commits an act of sexual abuse, as defined in § 18.2-67.10, with any child 13 years of age or older but under 15 years of age is guilty of a Class 1 misdemeanor.”<sup>9</sup> A Class 1 misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a).
6. Va. Code Ann. § 18.2-379 (Employing or permitting minor to assist in offense under article) states, “It shall be unlawful for any person knowingly to hire, employ, use or permit any minor to do or assist in doing any act or thing constituting an offense under this article [Article 5—Obscenity and related offenses].” A first time offense is a Class 1 misdemeanor punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-380, 18.2-11(a). Subsequent offenses are punishable as Class 6 felonies by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(f). “However, if the person, firm, association or corporation convicted of such subsequent offense is the owner of the business establishment where each of the offenses occurred, a fine of not more than \$10,000 shall be imposed in addition to the penalties otherwise prescribed by this section.” Va. Code Ann. § 18.2-381.
  - 1.2.1 Recommendation: Amend Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties) to raise the age from 15 to 18 and to refer to Va. Code Ann. § 18.2-48(iii), (iv), and (v) when a minor is exploited for sexual performance or prostitution.
  - 1.2.2 Recommendation: Raise the penalty for a violation of Va. Code Ann. § 18.2-370(B) (Taking indecent liberties with children; penalties) from a Class 5 felony to a Class 2 felony to be comparable to Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) and closer to the federal penalties for child sex trafficking.

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<sup>7</sup> Va. Code Ann. § 18.2-63(C)(ii) defines “carnal knowledge” as including “acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration.”

<sup>8</sup> See *supra* note 2.

<sup>9</sup> Va. Code Ann. § 18.2-67.10(6) states,

“Sexual abuse” means an act committed with the intent to sexually molest, arouse, or gratify any person, where:

- a. The accused intentionally touches the complaining witness’s intimate parts or material directly covering such intimate parts;
- b. The accused forces the complaining witness to touch the accused’s, the witness’s own, or another person’s intimate parts or material directly covering such intimate parts;
- c. If the complaining witness is under the age of 13, the accused causes or assists the complaining witness to touch the accused’s, the witness’s own, or another person’s intimate parts or material directly covering such intimate parts; or
- d. The accused forces another person to touch the complaining witness’s intimate parts or material directly covering such intimate parts.

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

Virginia’s CSEC statute, Va. Code Ann. § 18.2-370(B) (Taking indecent liberties with children; penalties), does not refer to Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose).

- 1.3.1 Recommendation: Amend Va. Code Ann. § 18.2-370(B) to refer to Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) to ensure CSEC victims are identified as victims under the statute used to prosecute sex trafficking.

**Legal Components:**

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

**Legal Analysis:**

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

The plain language of the definition of abduction in Va. Code Ann. § 18.2-47 does not appear to apply to buyers of commercial sex with minors. Abduction is defined as the following:

- A. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of “abduction.”
- B. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to subject him to forced labor or services shall be deemed guilty of “abduction.” For purposes of this subsection, the term “intimidation” shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.

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- 2.1.1 Recommendation: Amend Va. Code Ann. § 18.2-47 (Abduction and kidnapping defined; punishment) to clarify that the law applies to buyers of sex with minors and eliminate the requirement that buyers of commercial sex with minors must “know” of the force, fraud, or coercion occurring in the trafficking situation. Alternatively, enact a standalone human trafficking law that applies to buyers of commercial sex with minors.
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*

Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties) does not include provisions making it a crime to buy sex with a minor, though it could apply to a buyer who “[p]ropose to such child the

performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 [Crimes against nature; penalties]; or . . . [e]ntice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth” in the subsection. Va. Code Ann. § 18.2-370(A)(4), (5).

Also, although not specifically commercial in nature, Va. Code Ann. § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.; penalty; abandoned infant) might apply to buyers of sex with a minor, stating, “Any person 18 years of age or older, including the parent of any child, who (i) willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228, or (ii) engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor.” Va. Code Ann. § 18.2-63(A) and (B) (Carnal knowledge of child between thirteen and fifteen years of age) might also apply to a buyer of sex with a minor, by stating, “A. If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony. B. If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age who consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused’s junior, the accused shall be guilty of a Class 6 felony. If such consenting child is less than three years the accused’s junior, the accused shall be guilty of a Class 4 misdemeanor.”

None of the CSEC or sexual offense laws relating to buyers refer to Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) to allow prosecution as a sex trafficking crime.

- 2.2.1 Recommendation: Enact a law or amend Va. Code Ann. § 18.2-370 (Taking indecent liberties with children; penalties) to criminalize soliciting and purchasing sex with a minor with an enhanced penalty to match the Class 2 felony of Va. Code Ann. § 18.2-48(iii), (iv), and (v) (Abduction with intent to extort money or for immoral purpose).

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

The offense of solicitation of prostitution does not differentiate between buying sex with an adult or a minor. Va. Code Ann. § 18.2-346(B) (Being a prostitute or prostitution) states, “Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts as enumerated above and thereafter does any substantial act in furtherance thereof shall be guilty of solicitation of prostitution and shall be guilty of a Class 1 misdemeanor.” Also Va. Code Ann. § 18.2-347 (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) states, “It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place.” “Bawdy place” is defined as “any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution.” Va. Code Ann. § 18.2-347. This offense is a Class 1 misdemeanor. Va. Code Ann. § 18.2-350.

- 2.3.1 Recommendation: Amend Va. Code Ann. § 18.2-346 and § 18.2-347 to differentiate between buying sex with an adult and buying sex with a minor by enhancing the penalty for purchasing sex with a minor to be comparable to the Class 2 felony of Va. Code Ann. § 18.2-48(iii), (iv), and (v) (Abduction with intent to extort or for immoral purpose).

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

Va. Code Ann. § 18.2-346 (Being a prostitute or prostitution) and Va. Code Ann. § 18.2-347 (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) are Class 1 misdemeanors. Va. Code Ann.

§§ 18.2-346, 18.2-350. A Class 1 misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a).<sup>10</sup>

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>11</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>12</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>13</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>14</sup>

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.*

Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) makes it a crime to use the Internet, or other communication systems, to engage in certain types of sexual interactions with a minor. It states in part,

B. It shall be unlawful for any person to use a communications system,<sup>15</sup> including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 [Taking indecent liberties with children; penalties] or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]. A violation of this subsection is a Class 6 felony.

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<sup>10</sup> Va. Code Ann. § 18.2-350 (Confinement of convicted prostitutes and persons violating §§ 18.2-347 through 18.2-349) states,

Every person convicted of being a prostitute and every person convicted of violating any of the provisions of §§ 18.2-347 through 18.2-349 shall be guilty of a Class 1 misdemeanor; provided, however, that in any case in which a city or county farm or hospital is available for the confinement of persons so convicted, confinement may be in such farm or hospital, in the discretion of the court or judge.

<sup>11</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>12</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>13</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>14</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).

<sup>15</sup> Va. Code Ann. § 18.2-374.3(A) defines “use a communications system” as “making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, the Internet, or any telecommunications, wire, computer network, or radio communications system.”



C. It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally:

1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;
2. Propose that any such child feel or fondle the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;
3. Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.

Any person who violates this subsection is guilty of a Class 5 felony. However, if the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age, the person shall be punished by a term of imprisonment of not less than five years nor more than 30 years in a state correctional facility, five years of which shall be mandatory minimum term of imprisonment. Any person who commits a second or subsequent violation of this subsection when the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age shall be punished by a term of imprisonment of not less than 10 years nor more than 40 years, 10 years of which shall be a mandatory minimum term of imprisonment.

D. Any person who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any child he knows or has reason to believe is at least 15 years of age but less than 18 years of age to knowingly and intentionally commit any of the activities listed in subsection C if the person is at least seven years older than the child is guilty of a Class 5 felony. Any person who commits a second or subsequent violation of this subsection shall be punished by a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

E. Any person 18 years of age or older who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child less than 18 years of age for (i) any activity in violation of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto] or 18.2-361 [Crimes against nature; penalty], (ii) any activity in violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], or (iii) a violation of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty] is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-376.1 (Enhanced penalties for using a computer in certain violations) states, “Any person who uses a computer in connection with a violation of §§ 18.2-374 [Production, publication, sale, possession, etc., of obscene items], 18.2-375 [Obscene exhibitions and performances], or § 18.2-376 [Advertising, etc., obscene items, exhibitions or performances] is guilty of a separate and distinct Class 1 misdemeanor, and for a second or subsequent such offense within 10 years of a prior such offense is guilty of a Class 6 felony, the penalties to be imposed in addition to any other punishment otherwise prescribed for a violation of any of those sections.”

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

No specific mistake of age defense is contained in the Virginia Code; however, there is no prohibition on the same.

2.6.1 Recommendation: Amend Va. Code Ann. § 18.2-48 (iii) and (iv) and § 18.2-370(B) (Taking indecent liberties with children; penalties) to prohibit a mistake of age defense.

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.*

Va. Code Ann. § 18.2-346(B) (Being a prostitute or prostitution), which could apply to buyers, also does not stagger penalties according to the victim's age since there is no difference between buying sex with an adult or buying sex with a minor in the statute. However, Va. Code Ann. § 18.2-374.3(C) (Use of communications systems to facilitate certain offenses involving children) makes it a crime for an individual to use electronic communications systems, including computers, to "solicit[, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally" do any of the things set forth in the statute. A violation of subsection (C) is a Class 5 felony punishable by imprisonment for 1–10 years "or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months," a fine not to exceed \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-10(e), 18.2-374.3(C). If the offender is 7 years older than "the child he knows or has reason to believe is less than 15," the crime is punishable by imprisonment for 5–30 years, with a 5 year mandatory minimum. Va. Code Ann. § 18.2-374.3(C). A conviction for a second or subsequent offense, if the offender is 7 years older, is punishable by imprisonment for 10–40 years with a 10 year mandatory minimum. Va. Code Ann. § 18.2-374.3(C). However, under subsection (D), if the offender solicits, "any child he knows or has reason to believe is at least 15 years of age but less than 18 years of age," the offense is only a Class 5 penalty if the offender is 7 years older than the victim. Va. Code Ann. § 18.2-374.3(D). A second or subsequent conviction is punishable by imprisonment for 1–20 years with a 1 year mandatory minimum. Va. Code Ann. § 18.2-374.3(D).

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.*

Sexual offenses may be used to prosecute a buyer of sex with a minor in the absence of a sex trafficking or commercial sexual exploitation of a child law. Va. Code Ann. § 18.2-63(A) (Carnal knowledge of child between thirteen and fifteen years of age) carries a fine of not more than \$100,000. Va. Code Ann. §§ 18.2-63(A), 18.2-10(d). Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties), § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.; penalty; abandoned infant), and § 18.2-67.4:2 (Sexual abuse of a child under 15 years of age; penalty) can include a fine of not more than \$2,500. Va. Code Ann. §§ 18.2-10(e), 18.2-11(a), 18.2-370(A), 18.2-371, 18.2-67.4:2.

A buyer convicted for possession of child pornography may be subject to a fine of not more than \$2,500. Va. Code Ann. §§ 18.2-10(f), 18.2-374.1:1. A person possessing child pornography may also face asset forfeiture pursuant to Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children), which states in part,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22 (§ 19.2-369 et seq.) of this title by order of the court in which a conviction under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3 is obtained. Notwithstanding the provisions of § 19.2-381 [Judgment of condemnation and sale of property; when judgment given on bond of owner

or lienor; destruction of contraband], the court shall dispose of the forfeited property as it deems proper, including awarding the property to the agency seizing such property or to a state agency for lawful purposes. If the property is disposed of by sale, the court shall provide that the proceeds be paid into the Literary Fund.

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

Va. Code Ann. § 18.2-374.1:1(A) (Possession, reproduction, distribution, and facilitation of child pornography; penalty) makes it a Class 6 felony to “knowingly possess[] child pornography,”<sup>16</sup> which is punishable by a possible term of imprisonment of 1–5 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. § 18.2-10(f). Subsequent offenses are Class 5 felonies, punishable by a possible imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-10(e), 18.2-374.1:1(B). In addition, subsection C makes it a crime to “reproduce[] by any means, including by computer, sell[], give[] away, distribute[], electronically transmit[], display[] with lascivious intent, purchase[], or possess[] with intent to sell, give away, distribute, transmit, or display child pornography with lascivious intent.” Reproduction and intent to reproduce are punishable by “not less than five years nor more than 20 years in a state correctional facility.” Va. Code Ann. § 18.2-374.1:1(C). A subsequent violation of subsection C is punishable by imprisonment for 5–20 years with a mandatory minimum of 5 years. Va. Code Ann. § 18.2-374.1:1(C).

In comparison, a federal conviction for possession of child pornography<sup>17</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>18</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>19</sup>

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

Under Va. Code Ann. § 9.1-902(A) (Offenses requiring registration), “offense for which registration is required” is defined to include, “1. Any offense listed in subsection B; . . . ; 4. A sexually violent offense; 5. Any offense similar to those listed in subdivisions 1 through 4 under the laws of any foreign country or any political subdivision thereof, the United States or any political subdivision thereof; and 6. Any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.”

<sup>16</sup> Va. Code Ann. § 18.2-374.1:1(F) states, “For purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.”

<sup>17</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4)(A) (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>18</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>19</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (b)(1), 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 (b)(1), 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).

Under subsection (B),

The offenses included under this subsection include any violation of, attempted violation of, or conspiracy to violate:

1. § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age]; unless registration is required pursuant to subdivision E 1; § 18.2-64.1 [Carnal knowledge of certain minors]; . . . subsection B or C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]; . . . or subsection B, C, or D of § 18.2-374.3; or a third or subsequent conviction of (i) § 18.2-67.4 [Sexual battery], (ii) § 18.2-67.4:2 [Sexual abuse of a child under 15 years of age; penalty], (iii) subsection C of § 18.2-67.5 [Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery] or (iv) § 18.2-386.1 [Unlawful filming, videotaping or photographing of another; penalty].

If the offense was committed on or after July 1, 2006, § 18.2-91 with the intent to commit any felony offense listed in this section; subsection A of § 18.2-374.1:1; or a felony under § 18.2-67.5:1.

2. Where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], clause (i) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-67.4, subsection C of § 18.2-67.5, § 18.2-361 [Crimes against nature; penalty], or 18.2-366.

3. § 18.2-370.6 [Penetration of mouth of child with lascivious intent; penalty].

A “sexually violent offense” is defined in subsection (E) as the following:

[A] violation of, attempted violation of, or conspiracy to violate:

1. Clause (ii) and (iii) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-61 [Rape], subsection A of § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age] where the perpetrator is more than five years older than the victim, § 18.2-67.1, § 18.2-67.2, § 18.2-67.3, § 18.2-67.4 where the perpetrator is 18 years of age or older and the victim is under the age of six, subsections A and B of § 18.2-67.5, § 18.2-370 [Taking indecent liberties with children; penalties], or § 18.2-370.1 or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]; or

2. § 18.2-63, § 18.2-64.1 [Carnal knowledge of certain minors], former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape or, where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-67.4, subsection C of § 18.2-67.5, clause (i) of § 18.2-48, § 18.2-361 [Crimes against nature; penalty], § 18.2-366 or subsection C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications; . . .

4. Chapter 117 (18 U.S.C. § 2421 et seq.) of Title 18 of the United States Code or sex trafficking (as described in § 1591 of Title 18, U.S.C.).

2.10.1 Recommendation: Amend the definition of “sexually violent offense” in Va. Code Ann. § 9.1-902(E) to include violations of Va. Code Ann. § 18.2-48(iv).

**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.*

A violation of Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) is punishable as a Class 2 felony, which carries a minimum sentence of 20 years and a maximum sentence of life imprisonment. Va. Code Ann. § 18.2-10(b). Va. Code Ann. § 18.2-48 also specially directs that “[i]f the sentence imposed for a violation of (ii), (iii), (iv), or (v) includes a term of confinement less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life subject to revocation by the court.” Va. Code Ann. § 18.2-48.

However, other crimes which might apply to the act of trafficking a minor for sexual exploitation do not carry as severe penalties. Va. Code Ann. § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.) is a Class 1 misdemeanor punished by “confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-11(a), 18.2-371. Also, Va. Code Ann. § 18.2-375 (Obscene<sup>20</sup> exhibitions and performances) is a Class 1 misdemeanor, stating in part, “It shall be unlawful for any person knowingly to: (1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; . . .” Va. Code Ann. §§ 18.2-375, 18.2-380. An offender is subject to a sentence of up to 12 months in jail, a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-11(a). A second or subsequent violation is punishable as a Class 6 felony by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine not to exceed \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-10(f), 18.2-381.<sup>21</sup>

Though not specific to trafficking a minor, several statutes related to prostitution may be used to prosecute the sex trafficker of a minor. Violations of these statutes are classified as Class 4 felonies, which carry a sentence of imprisonment for 2–10 years and a possible fine up to \$100,000. Va. Code Ann. § 18.2-10(d), (g).

<sup>20</sup> Va. Code Ann. § 18.2-372 defines “obscene” as “that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.”

<sup>21</sup> Va. Code Ann. § 18.2-381 states in full, “Any person, firm, association or corporation convicted of a second or other subsequent offense under §§ 18.2-374 through 18.2-379 shall be guilty of a Class 6 felony. However, if the person, firm, association or corporation convicted of such subsequent offense is the owner of the business establishment where each of the offenses occurred, a fine of not more than \$10,000 shall be imposed in addition to the penalties otherwise prescribed by this section.”

1. Va. Code Ann. § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto) states,

Any person who:

- (1) For purposes of prostitution or unlawful sexual intercourse, takes any person into, or persuades, encourages or causes any person to enter, a bawdy place, or takes or causes such person to be taken to any place against his or her will for such purposes; or,  
. . .
  - (3) Being parent, guardian, legal custodian or one standing in loco parentis of a person, consents to such person being taken or detained by any person for the purpose of prostitution or unlawful sexual intercourse; is guilty of pandering, and shall be guilty of a Class 4 felony.
2. Va. Code § 18.2-356 (Receiving money for procuring person) states, “Any person who receives any money or other valuable thing for or on account of (i) procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse or any act in violation of § 18.2-361 or (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography shall be guilty of a Class 4 felony.”
  3. Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute) states, “Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, punishable as a Class 4 felony.”
  4. Va. Code Ann. § 18.2-347 (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) provides, “It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place. . . . As used in this Code, ‘*bawdy place*’ shall mean any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution.”

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act<sup>22</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>23</sup> against a minor.

- 3.1.1 Recommendation: Amend the prostitution laws, including Va. Code Ann. § 18.2-347 (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto), § 18.2-356 (Receiving money for procuring person), and § 18.2-357 (Receiving money from earnings of male or female prostitute), to indicate that when the prostituted person is a minor under 18, the crime is prosecutable under Va. Code Ann. § 18.2-48 (iii) or (iv) (Abduction with intent to extort money or for immoral purpose) as a Class 2 felony.

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<sup>22</sup> See *supra* note 11.

<sup>23</sup> See *supra* note 12 for the definition of “federal sex offense.”

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

Va. Code Ann. § 18.2-374.1(B) (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability)<sup>24</sup> states,

A person shall be guilty of production of child pornography who:

1. Accosts, entices or solicits a person less than 18 years of age with intent to induce or force such person to perform in or be a subject of child pornography; or
2. Produces or makes or attempts or prepares to produce or make child pornography; or
3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or
4. Knowingly finances or attempts or prepares to finance child pornography.

Va. Code Ann. § 18.2-374.1(D) makes clear that “[f]or the purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.

A violation of Va. Code Ann. § 18.2-374.1(B) is punishable by imprisonment for 5–30 years when the subject of the child pornography is a child under 15, with a mandatory minimum of 5 years if the offender is at least 7 years older than the subject of the child pornography. A subsequent violation, where the offender is at least 7 years older than the child, is punishable by imprisonment for 15–40 years, “15 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C1). When the subject of the child pornography is at least 15 but less than 18, the sentence is 1–20 years, except if the offender is at least 7 years older than the child then the sentence is 3–30 years, with a 3-year “mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2). A subsequent violation by an offender at least 7 years older than the subject is punishable by imprisonment for 10–30 years, “10 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2).

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>25</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>26</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>27</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>28</sup>

<sup>24</sup> Va. Code Ann. § 18.2-374.1(A) defines “child pornography” for “this article and Article 4 (§ 18.2-362 et seq.) . . . [as] sexually explicit visual material which utilizes or has as a subject an identifiable minor. An identifiable minor is a person who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting or modifying the visual depiction; and who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and shall not be construed to require proof of the actual identity of the identifiable minor.” Also, the term “sexually explicit visual material” is defined in the same provision as “a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer’s temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.”

<sup>25</sup> See *supra* note 12 for the definition of “federal sex offense.”

<sup>26</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).

<sup>27</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

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.

Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) makes it a crime to use the Internet, or other communication systems, to engage in certain types of sexual interactions with a minor.<sup>29</sup> It states in part,

B. It shall be unlawful for any person to use a communications system,<sup>30</sup> including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 [Taking indecent liberties with children; penalties] or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]. A violation of this subsection is a Class 6 felony.

C. It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally:

1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;
2. Propose that any such child feel or fondle the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;
3. Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.

Any person who violates this subsection is guilty of a Class 5 felony. However, if the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age, the person shall be punished by a term of imprisonment of not less than five years nor more than 30 years in a state correctional facility, five years of which shall be mandatory minimum term of imprisonment. Any person who commits a second or subsequent violation of this subsection when the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age shall be punished by a term of imprisonment of not less than 10 years nor more than 40 years, 10 years of which shall be a mandatory minimum term of imprisonment.

D. Any person who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any child he knows or has reason to believe is at least 15 years of age but less than 18 years of age to

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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>28</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>29</sup> *Podracky v. Commonwealth*, 662 S.E.2d 81, 87 (Va. Ct. App. 2008) (stating that language of § 18.2-374.3(B) “does not require the solicitation of an actual minor, only the use of a communications system ‘for the purposes of soliciting any person he knows or has reason to believe is a minor’ for specified criminal offenses.”); *see also Grafmuller v. Commonwealth*, 698 S.E.2d 276, 279 (Va. Ct. App. 2010) (citing *Podracky*, explaining “the defendant’s solicitation of sexual behavior from a person that he believes is a child constitutes the behavior that the legislature intended to prohibit.”)

<sup>30</sup> *See supra* note 15.



knowingly and intentionally commit any of the activities listed in subsection C if the person is at least seven years older than the child is guilty of a Class 5 felony. Any person who commits a second or subsequent violation of this subsection shall be punished by a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

E. Any person 18 years of age or older who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child less than 18 years of age for (i) any activity in violation of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto] or 18.2-361 [Crimes against nature; penalty], (ii) any activity in violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], or (iii) a violation of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty] is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-376.1 (Enhanced penalties for using a computer in certain violations) states, “Any person who uses a computer in connection with a violation of §§ 18.2-374 [Production, publication, sale, possession, etc., of obscene items], 18.2-375 [Obscene exhibitions and performances], or § 18.2-376 [Advertising, etc., obscene items, exhibitions or performances] is guilty of a separate and distinct Class 1 misdemeanor, and for a second or subsequent such offense within 10 years of a prior such offense is guilty of a Class 6 felony, the penalties to be imposed in addition to any other punishment otherwise prescribed for a violation of any of those sections.”

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

A convicted trafficker under Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) is potentially subject to a fine of up to \$100,000. Va. Code Ann. § 18.2-10(b), (g).

Pursuant to Va. Code Ann. § 19.2-386.32 (Seizure and forfeiture of property used in connection with the abduction of children), a trafficker could be subject to asset forfeiture. Va. Code Ann. § 19.2-386.32 states, “All moneys and other property, real and personal, owned by a person and used to further the abduction of a child in violation of § 18.2-47, 18.2-48, or 18.2-48.1 are subject to lawful seizure by a law-enforcement officer and are subject to forfeiture to the Commonwealth pursuant to Chapter 22 (§ 19.2-369 et seq.) by order of the court in which a conviction under § 18.2-47, 18.2-48, or 18.2-48.1 is obtained.”

A trafficker arrested under Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) or Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute) may be subject to vehicle seizure and forfeiture. Va. Code Ann. § 19.2-386.16(A), (B) (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

A. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of §§ 18.2-346 [Being a prostitute or prostitution], 18.2-347 [Keeping, residing in or frequenting a bawdy place; “bawdy place” defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$ 200 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred. The officer shall take a receipt therefor.

B. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a misdemeanor violation of subsection D of Section 18.2-47 [Abduction and kidnapping defined; punishment] or a felony violation of (i) Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2 or (ii) § 18.2-357 [Receiving money from earnings of male or female prostitute] where the prostitute is a minor, shall be forfeited to the Commonwealth.

A trafficker convicted for child pornography may also be subject to asset forfeiture. Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children) states in part,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22 (§ 19.2-369 et seq.) of this title by order of the court in which a conviction under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3 is obtained. Notwithstanding the provisions of § 19.2-381 [Judgment of condemnation and sale of property; when judgment given on bond of owner or lienor; destruction of contraband], the court shall dispose of the forfeited property as it deems proper, including awarding the property to the agency seizing such property or to a state agency for lawful purposes. If the property is disposed of by sale, the court shall provide that the proceeds be paid into the Literary Fund.

Further, Va. Code Ann. § 18.2-46.3:2, provides for civil forfeiture in cases of criminal street gang activity, stating in part, “All property, both personal and real, of any kind or character used in substantial connection with, intended for use in the course of, derived from, traceable to, or realized through, including any profit or interest derived from, any conduct in violation of any provision of this article is subject to civil forfeiture to the Commonwealth. Further, all property, both personal and real, of any kind or character used or intended to be used in substantial connection with, during the course of, derived from, traceable to, or realized through, including any profit or interest derived from, criminal street gang member recruitment as prohibited under Va. Code § 18.2-46.3<sup>31</sup> is subject to civil forfeiture to the Commonwealth.” Va. Code Ann. § 18.2-46.3:2. Va. Code Ann. § 18.2-46.1 defines “criminal street gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, (i) which has as one of its primary objectives or activities the commission of one or more criminal activities; (ii) which has an identifiable name or identifying sign or symbol; and (iii) whose members individually or collectively have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more predicate criminal acts, at least one of which is an act of violence, provided such acts were not part of a common act or transaction.” Under Va. Code Ann.

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<sup>31</sup> Va. Code Ann. § 18.2-46.3 (Recruitment of persons for criminal street gang; penalty) states,

A. Any person who solicits, invites, recruits, encourages or otherwise causes or attempts to cause another to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 1 misdemeanor. Any person age 18 years or older who solicits, invites, recruits, encourages or otherwise causes or attempts to cause a juvenile to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 6 felony.

B. Any person who, in order to encourage an individual (a) to join a criminal street gang, (b) to remain as a participant in or a member of a criminal street gang, or (c) to submit to a demand made by a criminal street gang to commit a felony violation of this title, (i) uses force against the individual or a member of his family or household or (ii) threatens force against the individual or a member of his family or household, which threat would place any person in reasonable apprehension of death or bodily injury, is guilty of a Class 6 felony. The definition of “family or household member” “set forth in § 16.1-228 applies to this section.

§ 18.2-46.2(A), “Any person who actively participates in or is a member of a criminal street gang and who knowingly and willfully participates in any predicate criminal act<sup>32</sup> committed for the benefit of, at the direction of, or in association with any criminal street gang shall be guilty of a Class 5 felony. However, if such participant in or member of a criminal street gang is age eighteen years or older and knows or has reason to know that such criminal street gang also includes a juvenile member or participant, he shall be guilty of a Class 4 felony.”

Finally, Virginia’s Racketeer Influenced and Corrupt Organization (RICO) Act provides for a fine up to \$1 million and up to \$2 million for second or subsequent offenses in addition to civil asset forfeiture of “[a]ll property, real or personal, including money, used in substantial connection with, intended for use in the course of, or traceable to, conduct in violation of any provision of § 18.2-514 [Racketeering offenses].” Va. Code Ann. § 18.2-515 (Criminal penalties; forfeiture). Va. Code Ann. § 18.2-514 (Racketeering offenses) states,

- A. It shall be unlawful for an enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to receive any proceeds known to have been derived directly from racketeering activity and to use or invest an aggregate of \$ 10,000 or more of such proceeds in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise.
- B. It shall be unlawful for any enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to directly acquire or maintain any interest in or control of any enterprise or real property through racketeering activity.
- C. It shall be unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through racketeering activity.
- D. It shall be unlawful for any person to conspire to violate any of the provisions of subsection A, B, or C.
- E. Each violation of this section is a separate and distinct felony punishable in accordance with § 18.2-515.

Va. Code Ann. § 18.2-513 defines “racketeering activity,” in relevant part, as

to commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit two or more of the following offenses: Article 2.1 (§ 18.2-46.1 et seq. [Criminal street gang activity]) of Chapter 4 of this title, . . . ; a felony offense of . . . §§ 18.2-47 [Abduction and kidnapping defined; punishment], 18.2-48 [Abduction with intent to extort money or for immoral purpose], . . . 18.2-49 [Threatening, attempting or assisting in such abduction], . . . 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute], 18.2-368 [Placing or leaving wife for prostitution], . . . 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], . . . ; or any substantially similar offenses under the laws of any other state, the District of Columbia, the United States or its territories.

<sup>32</sup> Va. Code Ann. § 18.2-46.1 defines “predicate criminal act” as including “(i) an act of violence; (ii) any violation of § 18.2-42, 18.2-46.3 [Recruitment of persons for criminal street gang; penalty], . . . or (v) any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.” “Act of violence” is defined as “those felony offenses described in subsection A of § 19.2-297.1.” Va. Code Ann. § 18.2-46.1. Pursuant to Va. Code Ann. § 19.2-297.1(A)(i), the term includes “c. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.)” and “f. Except as otherwise provided in § 18.2-67.5:2 or § 18.2-67.5:3, criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.)” It also includes “(ii) conspiracy to commit any of the violations enumerated in clause (i) of this section; and (iii) violations as a principal in the second degree or accessory before the fact of the provisions enumerated in clause (i) of this section.”

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

Under Va. Code Ann. § 9.1-902(A) (Offenses requiring registration), “offense for which registration is required” is defined to include, “1. Any offense listed in subsection B; . . . ; 4. A sexually violent offense; 5. Any offense similar to those listed in subdivisions 1 through 4 under the laws of any foreign country or any political subdivision thereof, the United States or any political subdivision thereof; and 6. Any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.”

Under subsection (B),

The offenses included under this subsection include any violation of, attempted violation of, or conspiracy to violate:

1. § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age]; unless registration is required pursuant to subdivision E 1; § 18.2-64.1 [Carnal knowledge of certain minors]; . . . subsection B or C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]; . . . or subsection B, C, or D of § 18.2-374.3; or a third or subsequent conviction of (i) § 18.2-67.4 [Sexual battery], (ii) § 18.2-67.4:2 [Sexual abuse of a child under 15 years of age; penalty], (iii) subsection C of § 18.2-67.5 [Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery] or (iv) § 18.2-386.1 [Unlawful filming, videotaping or photographing of another; penalty]. If the offense was committed on or after July 1, 2006, § 18.2-91 with the intent to commit any felony offense listed in this section; subsection A of § 18.2-374.1:1; or a felony under § 18.2-67.5:1.
2. Where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], clause (i) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-67.4, subsection C of § 18.2-67.5, § 18.2-361 [Crimes against nature; penalty], or 18.2-366. § 18.2-370.6 [Penetration of mouth of child with lascivious intent; penalty].

A “sexually violent offense” is defined in subsection (E) as the following:

[A] violation of, attempted violation of, or conspiracy to violate:

1. Clause (ii) and (iii) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-61 [Rape], subsection A of § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age] where the perpetrator is more than five years older than the victim, § 18.2-67.1, § 18.2-67.2, § 18.2-67.3, § 18.2-67.4 where the perpetrator is 18 years of age or older and the victim is under the age of six, subsections A and B of § 18.2-67.5, § 18.2-370 [Taking indecent liberties with children; penalties], or § 18.2-370.1 or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]; or
2. § 18.2-63, § 18.2-64.1 [Carnal knowledge of certain minors], former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape or, where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-67.4, subsection C of § 18.2-67.5, clause (i) of § 18.2-48, § 18.2-361 [Crimes against nature; penalty], § 18.2-366 or subsection C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications; . . .
4. Chapter 117 (18 U.S.C. § 2421 et seq.) of Title 18 of the United States Code or sex trafficking (as described in § 1591 of Title 18, U.S.C.).

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.*

Va. Code Ann. § 16.1-283 (Termination of residual parental rights) does not specifically include violations of Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) as grounds for termination of parental rights.

Under Va. Code Ann. § 16.1-283, “residual parental rights” can be terminated for a number of reasons. Under subsection (B), residual parental rights of a parent of a neglected or abused child placed in foster care “as a result of (i) court commitment; (ii) an entrustment agreement entered into by the parent or parents; or (iii) other voluntary relinquishment by the parent or parents may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child” and the court also finds that

1. The neglect or abuse<sup>33</sup> suffered by such child presented a serious and substantial threat to his life, health or development; and
2. It is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child’s safe return to his parent or parents within a reasonable period of time. . . .

Proof of severe mental or emotional illness or mental deficiency, debilitating habitual abuse or addiction to drugs or alcohol without attempts to complete treatment to improve parenting ability, or failure “without good cause, [to] respond[] to or follow[] through with appropriate, available and reasonable rehabilitative efforts on the part of social, medical, mental health or other rehabilitative agencies designed to reduce, eliminate or prevent the neglect or abuse of the child” is prima facie evidence of the conditions in Va. Code Ann. § 16.1-283(B)(2).

Under subsection (E), the residual parental rights of a parent whose child “is in the custody of a local board or licensed child-placing agency” may be terminated if, by clear and convincing evidence, the court finds it is in the best interests of the child and that, among other things, “(iii) the parent has been convicted of an offense under the laws of this Commonwealth or a substantially similar law of any other state, the United States or any foreign jurisdiction that constitutes . . . felony sexual assault, if the victim of the offense was a child of the parent or a child with whom the parent resided at the time of such offense; or (iv) the parent has subjected any child to aggravated circumstances.” Va. Code Ann. § 16.1-283(E) defines “aggravated circumstances” for this section as “torture, chronic or severe abuse, or chronic or severe sexual abuse, if the victim of such conduct was a child of the parent or a child with whom the parent resided at the time such conduct occurred, including the failure to protect such a child from such conduct, which conduct or failure to protect: (i) evinces a wanton or depraved indifference to human life, or (ii) has resulted in the death of such a child or in serious bodily injury to such a child.” Furthermore, “chronic sexual abuse” is defined as “recurring acts of physical abuse which place the child’s health, safety and well-being at risk” whereas “severe sexual abuse” may include an act or omission that occurred only once, but otherwise meets the definition of ‘aggravated circumstances.’”

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<sup>33</sup> See *infra* section 5.5 for a full discussion of the definition of “abuse.”

**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.*

Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction) states, “Any person who (1) threatens, or attempts, to abduct any other person with intent to extort money, or pecuniary benefit, or (2) assists or aids in the abduction of, or threatens to abduct, any person with the intent to defile such person, or (3) assists or aids in the abduction of, or threatens to abduct, any female under sixteen years of age for the purpose of concubinage or prostitution, shall be guilty of a Class 5 felony.” This crime is punishable by imprisonment for 1–10 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(e).

Facilitators of prostitution with minors or adults may also be found guilty of Va. Code Ann. § 18.2-348 (Aiding prostitution or illicit sexual intercourse), which states, “It shall be unlawful for any person or any officer, employee or agent of any firm, association or corporation, with knowledge of, or good reason to believe, the immoral purpose of such visit, to take or transport or assist in taking or transporting, or offer to take or transport on foot or in any way, any person to a place, whether within or without any building or structure, used or to be used for the purpose of lewdness, assignation or prostitution within this Commonwealth; or procure or assist in procuring for the purpose of illicit sexual intercourse, or any act violative of § 18.2-361 [Crimes against nature; penalty], or to give any information or direction to any person with intent to enable such person to commit an act of prostitution.” Any person convicted under Va. Code Ann. 18.2-348 is guilty of a Class 1 misdemeanor, punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-350.

Also, Va. Code Ann. § 18.2-347 (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) prohibits the maintenance of a place, indoors or outdoors, in which prostitution occurs and states, “It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place. Each and every day such bawdy place shall be kept, resided in or visited, shall constitute a separate offense. In a prosecution under this section the general reputation of the place may be proved. As used in this Code, ‘*bawdy place*’ shall mean any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution.” A conviction under Va. Code Ann. § 18.2-347 is punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-350.

Va. Code Ann. § 18.2-349 (Using vehicles to promote prostitution or unlawful sexual intercourse) states, “It shall be unlawful for any owner or chauffeur of any vehicle, with knowledge or reason to believe the same is to be used for such purpose, to use the same or to allow the same to be used for the purpose of prostitution or unlawful sexual intercourse, or to aid or promote such prostitution or unlawful sexual intercourse by the use of any such vehicle.” Va. Code Ann. § 18.2-349 is a Class 1 misdemeanor punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-350. Facilitators are prosecuted for transporting minors for the purpose of sex trafficking according to the procedures in Va. Code Ann. § 18.2-359. Va. Code

Ann. § 18.2-359(A) states, “Any person transporting or attempting to transport through or across this Commonwealth, any person for the purposes of unlawful sexual intercourse or prostitution, or for the purpose of committing any crime specified in § 18.2-361[Crimes against nature; penalty] or 18.2-370 [Taking indecent liberties with children; penalties], or for the purposes of committing or attempting to commit criminal sexual assault under Article 7 (§ 18.2-61 et seq.) of Chapter 4, may be presented, indicted, tried, and convicted in any county or city in which any part of such transportation occurred.”

Va. Code Ann. § 18.2-374.1 (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability) could apply to facilitators since it makes a person guilty of production of child pornography who, among other things, “knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means” or “[k]nowingly finances or attempts or prepares to finance child pornography.” Va. Code Ann. § 18.2-374.1(B)(3), (4). A violation of this statute, when the child is under 15, is punishable by imprisonment for 5–30 years with a 5-year mandatory sentence if the offender is 7 years older than the child victim. Va. Code Ann. § 18.2-374.1(C1). A second or subsequent violation by a person seven years older than the child and involving a child under 15 is punishable by imprisonment for 15–40 years with a 15-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C1). The punishment is reduced to 1–20 years, however, if the child is between 15 and less than 18. Va. Code Ann. § 18.2-374.1(C2). However, if the offender is seven years older than the child, a violation is punishable by imprisonment for 3–30 years with a 3-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C2). A second or subsequent violation from a person at least seven years older than the child and involving a child between 15 and less than 18 is punishable by imprisonment for 10–30 years with a 10-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C2).

Facilitators of sexual performance or pornography involving a minor may be found guilty under Va. Code Ann. § 18.2-375 (Obscene exhibitions and performances). The first conviction under Va. Code Ann. § 18.2-375 is punishable as a Class 1 misdemeanor by imprisonment in jail up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-380. A second or subsequent conviction under Va. Code Ann. § 18.2-375 is punishable as a Class 6 felony by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-10(f), 18.2-381. Va. Code Ann. § 18.2-375 states,

It shall be unlawful for any person knowingly to:

- (1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre other than receiving salary and wages; or
- (2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place.

- 4.1.1 Recommendation: Enact a stand-alone law criminalizing domestic minor sex trafficking that includes the crime of assisting, enabling, or financially benefitting 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.*

A facilitator of domestic minor sex trafficking arrested under Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction) may be subject to vehicle seizure and, upon conviction, forfeiture. Va. Code Ann. § 19.2-386.16(A), (B) (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

A. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of §§ 18.2-346 [Being a prostitute or prostitution], 18.2-347 [Keeping, residing in or frequenting a bawdy place; “bawdy place” defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$ 200 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred. The officer shall take a receipt therefor.

B. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a misdemeanor violation of subsection D of 18.2-47 [Abduction and kidnapping defined; punishment] or a felony violation of (i) Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2 or (ii) § 18.2-357 [Receiving money from earnings of male or female prostitute] where the prostitute is a minor, shall be forfeited to the Commonwealth.

A facilitator convicted for publicizing or selling child pornography may also be subject to asset forfeiture. Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children) states in part,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22 (§ 19.2-369 et seq.) of this title by order of the court in which a conviction under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3 is obtained. Notwithstanding the provisions of § 19.2-381 [Judgment of condemnation and sale of property; when judgment given on bond of owner or lienor; destruction of contraband], the court shall dispose of the forfeited property as it deems proper, including awarding the property to the agency seizing such property or to a state agency for lawful purposes. If the property is disposed of by sale, the court shall provide that the proceeds be paid into the Literary Fund.

Finally, the Racketeer Influenced and Corrupt Organization (RICO) Act provides for a fine up to \$1 million and up to \$2 million for second or subsequent offenses in addition to civil asset forfeiture of “[a]ll property, real or personal, including money, used in substantial connection with, intended for use in the course of, or traceable to, conduct in violation of any provision of § 18.2-514 [Racketeering offenses].” Va. Code Ann. § 18.2-515



(Criminal penalties; forfeiture). Va. Code Ann. § 18.2-514 (Racketeering offenses) outlines the racketeering offenses as follows,

- A. It shall be unlawful for an enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to receive any proceeds known to have been derived directly from racketeering activity and to use or invest an aggregate of \$ 10,000 or more of such proceeds in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise.
- B. It shall be unlawful for any enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to directly acquire or maintain any interest in or control of any enterprise or real property through racketeering activity.
- C. It shall be unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through racketeering activity.
- D. It shall be unlawful for any person to conspire to violate any of the provisions of subsection A, B, or C.
- E. Each violation of this section is a separate and distinct felony punishable in accordance with § 18.2-515.

Under Va. Code Ann. § 18.2-513 “racketeering activity” means in relevant part,

to commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit two or more of the following offenses: Article 2.1 (§ 18.2-46.1 et seq. [Criminal street gang activity]) of Chapter 4 of this title, . . . ; a felony offense of . . . §§ 18.2-47 [Abduction and kidnapping defined; punishment], 18.2-48 [Abduction with intent to extort money or for immoral purpose], . . . 18.2-49 [Threatening, attempting or assisting in such abduction], . . . 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute], 18.2-368 [Placing or leaving wife for prostitution], . . . 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], . . . ; or any substantially similar offenses under the laws of any other state, the District of Columbia, the United States or its territories.

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

There is no law in Virginia making child sex tourism a crime.

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

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

Va. Code Ann. § 18.2-374.1 (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability)<sup>34</sup> states in subsection B,

A person shall be guilty of production of child pornography who: . . . ; or 2. Produces or makes or attempts or prepares to produce or make child pornography; or 3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or 4. Knowingly finances or attempts or prepares to finance child pornography.” Va. Code Ann. § 18.2-

<sup>34</sup> See *supra* note 24 for definition of “child pornography.”

374.1(D) makes clear that “[f]or the purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.

A violation of Va. Code Ann. § 18.2-374.1(B) is punishable by imprisonment for 5–30 years when the subject of the child pornography is a child under 15, with a mandatory minimum of 5 years if the person is at least seven years older than the subject of the child pornography. Va. Code Ann. § 18.2-374.1(C1). A subsequent violation where the offender is at least 7 years older than the child is punishable by imprisonment for 15–40 years, “15 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C1). When the subject of the child pornography is at least 15 but less than 18, the sentence is 1–20 years, except if the offender is at least 7 years older than the child then the sentence is 3–30 years, with a 3 year mandatory minimum term of imprisonment. Va. Code Ann. § 18.2-374.1(C2). Subsequent violations by an offender at least 7 years older than the subject carry a sentence of 10-30 years, “10 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2).

Also, importantly for facilitator liability, Va. Code Ann. § 18.2-374.1:1(D) (Possession, reproduction, distribution, and facilitation of child pornography; penalty) states, “Any person who intentionally operates an Internet website for the purpose of facilitating the payment for access to child pornography is guilty of a Class 4 felony.” This offense is punishable by imprisonment for 2–10 years and a potential fine of up to \$100,000. Va. Code Ann. § 18.2-10(d), (g). If the offender is a not a natural person, only a fine will be assessed for this felony. Va. Code Ann. § 18.2-10(g). Under Va. Code Ann. § 18.2-374.1:1(C), “Any person who reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography with lascivious intent shall be punished by not less than five years nor more than 20 years in a state correctional facility.” Subsequent violations are punishable by imprisonment for 5–20 years with a mandatory 5 year minimum.

**Legal Components:**

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

**Legal Analysis:**

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

The Virginia Victims' Compensation provisions define a "victim" in Va. Code Ann. § 19.2-368.2 as "a person who suffers personal physical injury or death as a direct result of a crime including a person who is injured or killed as a result of foreign terrorism or who suffers personal emotional injury as a direct result of being the subject of a violent felony offense as defined in subsection C of § 17.1-805,<sup>35</sup> or stalking as described in § 18.2-60.3, or attempted robbery or abduction." "Crime" is defined in Va. Code Ann. § 19.2-368.2 as "an act committed by any person in the Commonwealth of Virginia which would constitute a crime as defined by the Code of Virginia or at common law."

<sup>35</sup> Va. Code Ann. § 17.1-805(C) list of "violent felony offenses" includes the following trafficking-related provisions: "any Class 5 felony violation of § 18.2-47 [Abduction and kidnapping defined; punishment]; any felony violation of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], 18.2-48.1 [Abduction by prisoners; penalty] or 18.2-49 [Threatening, attempting or assisting in such abduction]; . . . any violation of subdivision (2) or (3) of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto]; . . . any violation of § 18.2-368 [Placing or leaving wife for prostitution], 18.2-370 [Taking indecent liberties with children; penalties] or 18.2-370.1 [Taking indecent liberties with child by person in custodial or supervisory relationship; penalties]; any violation of subsection A of § 18.2-371.1 [Abuse and neglect of children; penalty; abandoned infant]; . . . any violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]; any felony violation of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]; any violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children]; . . . or any conspiracy or attempt to commit any offense specified in this subsection, and any substantially similar offense under the laws of any state, the District of Columbia, the United States or its territories."

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 Virginia Code does not specifically prohibit a defendant from raising a defense that the subject minor consented to the commercial sex act. However, in the case of a minor accused of committing the sexual offense of carnal knowledge of a child 13–15 years of age pursuant to Va. Code Ann. § 18.2-63(B) proof of victim’s consent in a case where the victim is 3 or more years younger than the accused offender reduces the crime classification to either a Class 6 felony. If the consenting victim is less than 3 years younger than the accused offender the crime is classified as a Class 4 misdemeanor. Va. Code Ann. § 18.2-63(B).

5.2.1 Recommendation: Enact a provision specifically prohibiting a defense to any commercial sexual offense against a minor under 18 based on consent of the child to the sex act.

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

Va. Code Ann. § 18.2-346 (Being a prostitute or prostitution) does not only apply to adults. It states in subsection (A), “Any person who, for money or its equivalent, commits adultery, fornication or any act in violation of § 18.2-361, or offers to commit adultery, fornication or any act in violation of § 18.2-361 and thereafter does any substantial act in furtherance thereof, shall be guilty of being a prostitute, or prostitution, which shall be punishable as a Class 1 misdemeanor.”

5.3.1 Recommendation: Amend Va. Code Ann. § 18.2-346 to make the law inapplicable to minors under 18 and to refer any case of a prostituted minor to the operable sex trafficking statute, Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose).

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.*

There is no complete or specific mechanism for directing a commercially sexually exploited child to a child protection response process. Certain procedures permit immediate intervention through either CPS or the juvenile courts. Under Va. Code Ann. § 63.2-1517(A) (Authority to take child into custody), in Chapter 15 (Child abuse and neglect) of Title 63.2,

A. A physician or child-protective services worker of a local department or law-enforcement official investigating a report or complaint of abuse and neglect may take a child into custody for up to 72 hours without prior approval of parents or guardians provided:

1. The circumstances of the child are such that continuing in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the child’s care, presents an imminent danger to the child’s life or health to the extent that severe or irremediable injury would be likely to result or if evidence of abuse is perishable or subject to deterioration before a hearing can be held;
2. A court order is not immediately obtainable;
3. The court has set up procedures for placing such children;
4. Following taking the child into custody, the parents or guardians are notified as soon as practicable. Every effort shall be made to provide such notice in person;
5. A report is made to the local department; and
6. The court is notified and the person or agency taking custody of such child obtains, as soon as possible, but in no event later than 72 hours, an emergency removal order pursuant to § 16.1-251; however, if a preliminary removal order is issued after a hearing held in accordance with § 16.1-252 within 72 hours of the removal of the child, an emergency removal order shall not be necessary.

Any person or agency petitioning for an emergency removal order after four hours have elapsed following taking custody of the child shall state the reasons therefor pursuant to § 16.1-251.

Va. Code Ann. § 16.1-251 (Emergency removal order) permits a child to be brought into “immediate custody and placed in shelter care pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected.” The evidence required to support such an order must establish that “an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition.” Va. Code Ann. § 16.1-251(A)(1). Also, evidence that “[r]easonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child’s life or health pending a final hearing on the petition” is required to support an order.<sup>36</sup> Va. Code Ann. § 16.1-251(A)(2). Once an order is granted for emergency removal and a child is taken into custody, “a hearing shall be held in accordance with § 16.1-252 as soon as practicable, but in no event later than five business days after the removal of the child.” Va. Code Ann. § 16.1-251(B). The evidence required for a “preliminary order to issue or for an existing order to be continued” is nearly identical to the requirements for an emergency removal order. Va. Code Ann. §§ 16.1-252(E), 16.1-251(A). “If the preliminary removal order includes a finding of abuse or neglect and the child is removed from his home or a preliminary protective order is issued,” a dispositional hearing is to be held within 75 days. Va. Code Ann. § 16.1-252(H). At the dispositional hearing, “[i]f a child is found to be (a) abused or neglected; (b) at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in his care; or (c) abandoned by his parent or other custodian, or without parental care and guardianship because of his parent’s absence or physical or mental incapacity,” the court may order, among other things, that the child “remain with his parent, subject to such conditions and limitations as the court may order with respect to such child and his parent or other adult occupant of the same dwelling,” or, if there is “no less drastic alternative,” that legal custody be transferred to, among others, a relative or a child welfare agency. Va. Code Ann. § 16.1-278.2(A)(2), (5).

Under the juvenile justice procedures, Va. Code Ann. § 16.1-246 (When and how child may be taken into immediate custody) outlines the conditions for taking a child into immediate custody. Subsection (B) permits a child to be taken into immediate custody “[w]hen a child is alleged to be in need of services or supervision and (i) there is a clear and substantial danger to the child’s life or health or (ii) the assumption of custody is necessary to ensure the child’s appearance before the court.” Subsection (C) allows a child to be taken into immediate custody “[w]hen, in the presence of the officer who makes the arrest, a child has committed an act designated a crime under the law of this Commonwealth, or an ordinance of any city, county, town or service district, or under federal law and the officer believes that such is necessary for the protection of the public interest.” Under subsection (G), a child can be taken into immediate custody “[w]hen a law-enforcement officer has probable cause to believe that a child (i) has run away from home or (ii) is without adult supervision at such hours of the night and under such circumstances that the law-enforcement officer reasonably concludes that there is a clear and substantial danger to the child’s welfare.”

A juvenile can be detained before adjudication in secure or shelter facilities upon court order under certain conditions. Va. Code Ann. § 16.1-248.1(A) (Criteria for detention or shelter care) states in part,

A. A juvenile taken into custody whose case is considered by a judge, intake officer or magistrate pursuant to § 16.1-247 shall immediately be released, upon the ascertainment of the necessary facts, to the care, custody and control of such juvenile’s parent, guardian, custodian or other suitable person able and willing to provide supervision and care for such juvenile, either on bail or recognizance pursuant to

<sup>36</sup> “The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to § 16.1-253.” Va. Code Ann. § 16.1-251(A)(2).

Chapter 9 (§ 19.2-119 et seq.) of Title 19.2 or under such conditions as may be imposed or otherwise. However, at any time prior to an order of final disposition, a juvenile may be detained in a secure facility, pursuant to a detention order or warrant, only upon a finding by the judge, intake officer, or magistrate, that there is probable cause to believe that the juvenile committed the act alleged, and that at least one of the following conditions is met:

1. The juvenile is alleged to have (a) violated the terms of his probation or parole when the charge for which he was placed on probation or parole would have been a felony or Class 1 misdemeanor if committed by an adult; (b) committed an act that would be a felony or Class 1 misdemeanor if committed by an adult; . . . , and there is clear and convincing evidence that:
  - a. Considering the seriousness of the current offense or offenses and other pending charges, the seriousness of prior adjudicated offenses, the legal status of the juvenile and any aggravating and mitigating circumstances, the liberty of the juvenile, constitutes a clear and substantial threat to the person or property of others;
  - b. The liberty of the juvenile would present a clear and substantial threat of serious harm to such juvenile's life or health; or
  - c. The juvenile has threatened to abscond from the court's jurisdiction during the pendency of the instant proceedings or has a record of willful failure to appear at a court hearing within the immediately preceding 12 months.
2. The juvenile has absconded from a detention home or facility where he has been directed to remain by the lawful order of a judge or intake officer.
3. The juvenile is a fugitive from a jurisdiction outside the Commonwealth and subject to a verified petition or warrant, in which case such juvenile may be detained for a period not to exceed that provided for in § 16.1-323 while arrangements are made to return the juvenile to the lawful custody of a parent, guardian or other authority in another state.
4. The juvenile has failed to appear in court after having been duly served with a summons in any case in which it is alleged that the juvenile has committed a delinquent act or that the child is in need of services or is in need of supervision; however, a child alleged to be in need of services or in need of supervision may be detained for good cause pursuant to this subsection only until the next day upon which the court sits within the county or city in which the charge against the child is pending, and under no circumstances longer than 72 hours from the time he was taken into custody.  
. . .
5. The juvenile failed to adhere to the conditions imposed upon him by the court, intake officer or magistrate following his release upon a Class 1 misdemeanor charge or a felony charge.  
. . . .

A child who does not meet the conditions outlined in Va. Code Ann. § 16.1-248.1(A) for placement in a secure facility, must be released to “a parent, guardian or other person willing and able to provide supervision and care under such conditions as the judge, intake officer or magistrate may impose.” Va. Code Ann. § 16.1-248.1(B). Except, Va. Code Ann. § 16.1-248.1(B) allows a child to be placed in shelter care if

1. The juvenile is eligible for placement in a secure facility;
2. The juvenile has failed to adhere to the directions of the court, intake officer or magistrate while on conditional release;
3. The juvenile's parent, guardian or other person able to provide supervision cannot be reached within a reasonable time;
4. The juvenile does not consent to return home;
5. Neither the juvenile's parent or guardian nor any other person able to provide proper supervision can arrive to assume custody within a reasonable time; or
6. The juvenile's parent or guardian refuses to permit the juvenile to return home and no relative or other person willing and able to provide proper supervision and care can be located within a reasonable time.

If it is determined that a child should remain in detention or shelter care under Va. Code Ann. § 16.1-248.1, then Va. Code Ann. § 16.1-249(A) (Places of confinement for juveniles) provides the permissible placements as follows,

1. An approved foster home or a home otherwise authorized by law to provide such care;
2. A facility operated by a licensed child welfare agency;
3. If a juvenile is alleged to be delinquent, in a detention home or group home approved by the Department;
4. Any other suitable place designated by the court and approved by the Department;
5. To the extent permitted by federal law, a separate juvenile detention facility located upon the site of an adult regional jail facility established by any county, city or any combination thereof constructed after 1994, approved by the Department of Juvenile Justice and certified by the Board of Juvenile Justice for the holding and detention of juveniles.

Neither the definition of “Child In Need of Services” nor “Child In Need of Supervision” in Va. Code Ann. § 16.1-228 specifically includes a commercially sexually exploited child. However, under the definition of “Child in Need of Supervision,” a victim of sex trafficking of a minor could be found to be “[a] child who, without reasonable cause and without the consent of his parent, lawful custodian or placement authority, remains away from or deserts or abandons his family or lawful custodian on more than one occasion or escapes or remains away without proper authority from a residential care facility in which he has been placed by the court, and (i) such conduct presents a clear and substantial danger to the child’s life or health, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family.” Va. Code Ann. § 16.1-228.

The Department of Social Services (DSS) is directed to develop a plan to provide services to human trafficking victims through House Bill 2190, which Governor McDonnell approved on March 18, 2011. 2011 Va. Acts 258. The law states,

Such plan shall include provisions for (i) identifying victims of human trafficking in the Commonwealth; (ii) assisting victims of human trafficking with applying for federal and state benefits and services to which they may be entitled; (iii) coordinating the delivery of health, mental health, housing, education, job training, victims’ compensation, legal, and other services for victims of human trafficking; (iv) preparing and disseminating educational and training programs and materials to increase awareness of human trafficking and services available to victims of human trafficking among local departments of social services, public and private agencies and service providers, and the public; (v) developing and maintaining community-based services for victims of human trafficking; and (vi) assisting victims of human trafficking with family reunification or return to their place of origin if the person so desires. In developing its plan, the Department shall work together with such other state and federal agencies, public and private entities, and other stakeholders as the Department shall deem appropriate.

5.4.1 Recommendation: Establish a mandatory response law directing any minor involved in prostitution or who is a victim of abduction for prostitution or the manufacture of pornography away from the criminal justice system and into a protective system.

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

Under Va. Code Ann. § 63.2-100, the definition of “abused or neglected child” includes a child under the age of 18 “[w]hose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any<sup>37</sup> sexual act upon a child in violation of the law” and a child under the age of 18 “[w]hose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child alone in the same dwelling, including an apartment . . . , with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902.”

5.5.1 Recommendation: Add “a child subjected to commercial sexual exploitation” to the Va. Code Ann. § 16.1-228 and § 63.2-100 definitions of “abused or neglected child.”

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

Va. Code Ann. § 16.1-278.1 defines “parent” for purposes of Article 9 (Disposition), which contains provisions on abused and neglected children, “Children in Need of Services,” and “Children in Need of Supervision,” to include “parent, guardian, legal custodian, or other person standing in loco parentis.” Also, Va. Code Ann. § 16.1-228 (Juvenile and Domestic Relations District Courts—Definitions) and § 63.2-100 (Welfare (Social Services)—Definitions) refer to “parents or other person responsible for his care” of the child in the definition for “abused or neglected child.” These definitions may not be sufficient to include a trafficker as subject to investigation and action for abuse and neglect.

5.6.1 Recommendation: Amend Va. Code Ann. § 16.1-278.1 (Definitions), § 16.1-228 (Juvenile and Domestic Relations District Courts—Definitions) and § 63.2-100 (Welfare (Social Services)—Definitions) to ensure that “parent” includes persons who are in control or possession of a child, which would include a trafficker.

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

The Virginia Workers’ Compensation program contains ineligibility criteria that could negatively affect domestic minor sex trafficking victims’ ability to receive compensation. Va. Code Ann. § 19.2-368.4 (Persons eligible for awards) states in subsection (B) that “[a] person who is criminally responsible for the crime upon which a claim is based, or an accomplice or accessory of such person, shall not be eligible to receive an award with respect to such claim.” Va. Code Ann. § 19.2-368.6 (Assignment of claims; investigation; hearing; confidentiality of records; decisions) provides in subsection (D) that “[t]here shall be a rebuttable presumption that the claimant did not contribute to and was not responsible for the infliction of his injury,” reducing the risk that a minor victim of prostitution may be found to have contributed to the injuries sustained through her activities in prostitution. Also, a child victim of sex trafficking, who may be afraid or angry with law enforcement, may have an award denied, reduced or withdrawn if “[t]he Commission . . . find[s] that any claimant or award recipient has not fully cooperated with all law-enforcement agencies.” Va. Code Ann. § 19.2-368.10.

<sup>37</sup> The definition in Va. Code Ann. § 16.1-228, while substantially similar in quoted part to the definition in Va. Code Ann. § 63.2-100 does not include the phrase “act of sexual exploitation.”



Va. Code Ann. § 19.2-368.10 (When awards to be made; reporting crime and cooperation with law enforcement) also restricts an award to a victim where the crime was reported to the authorities later than “120 hours after the occurrence of such crime, unless the Commission, for good cause shown, finds the delay to have been justified.” An exception is outlined in Va. Code Ann. § 19.2-368.10, which states, “The provisions of this subdivision shall not apply to claims of sexual abuse that occurred while the victim was a minor.” However, “sexual abuse” is defined in Va. Code Ann. § 19.2-368.2 as “sexual abuse as defined in subdivision 6 of § 18.2-67.10<sup>38</sup> and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.”

Va. Code Ann. § 19.2-368.5(B) gives deadlines for when a claim may be filed by a victim by stating, “A claim shall be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based, or not later than one year after the death of the victim. However, (i) in cases involving claims made on behalf of a minor or a person who is incapacitated, the provisions of subsection A of § 8.01-229 shall apply to toll the one-year period; (ii) in cases involving claims made by a victim against profits of crime held in escrow pursuant to Chapter 21.2 (§ 19.2-368.19 et seq.) of this title, the claim shall be filed within five years of the date of the special order of escrow; and (iii) in cases involving claims of sexual abuse of a minor, the claim shall be filed within 10 years after the minor’s eighteenth birthday. For good cause shown, the Commission may extend the time for filing.” Va. Code Ann. § 19.2-368.8(A) also provides for reconsideration of claims of sexual abuse by stating, “The Commission, on its own motion, or upon request of the claimant, may reinvestigate or reopen a decision making or denying an award. Except for claims of sexual abuse that occurred while the victim was a minor, the Commission shall not reopen or reinvestigate a case after the expiration of two years from the date of submission of the original claim. Any claim involving the sexual abuse of a minor that has been denied before July 1, 2001, because it was not timely filed may, upon application filed with the Commission, be reconsidered provided the application for reconsideration is filed within ten years after the minor’s eighteenth birthday.”

Va. Code Ann. § 19.2-368.11:1 sets forth the limits for the amount of the award, allowing for claims including but not limited to unreimbursed medical costs, loss of earnings, and funeral expenses, after being reduced by any amounts received or to be received from another source or an emergency award, with a total cap not to exceed \$25,000. Va. Code Ann. § 19.2-368.11:1.

5.7.1 Recommendation: Amend Va. Code Ann. § 19.2-368.4 and § 19.2-368.10 to stipulate an exception to listed ineligibility factors for minor victims of commercial sexual exploitation.

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

Virginia law provides several victim-friendly provisions. Va. Code Ann. § 18.2-67.9 provides a method the court to order for the use of two-way closed circuit television testimony for certain alleged victims of abduction under Va. Code Ann. § 18.2-47 et seq. and other listed crimes upon application by the defendant or prosecutor. Va. Code Ann. § 63.2-1521(A) (Testimony by child using two-way closed-circuit television) also provides for the use of two-way closed circuit television testimony “[i]n any civil proceeding involving alleged abuse or neglect of a child” under certain specified provisions. In both laws, the provisions apply to “[a]n alleged victim who was fourteen years of age or under on the date of the alleged offense and is sixteen or under at the time of the trial” and “[a]ny child witness who is fourteen years of age or under at the time of the trial.” Va. Code Ann. § 63.2-1521(B). The statutes explain that the court has discretion to order the testimony via closed-circuit television if it finds that the child is “unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons: 1. The child’s persistent refusal to testify despite judicial requests to do so; 2. The child’s substantial inability to communicate about the offense; or 3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.” Va. Code Ann. §§ 18.2-67.9(B), 63.2-1521(C).

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<sup>38</sup> See *supra* note 9.

Also, Va. Code Ann. § 63.2-1522(A), (B) allows for out-of-court statements, in certain abuse and neglect civil proceedings, “describing any act of a sexual nature performed with or on the child by another” not otherwise admissible made “by a child the age of twelve or under at the time the statement is offered into evidence” under the following conditions:

1. The child testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:
  - a. The child’s death;
  - b. The child’s absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;
  - c. The child’s total failure of memory;
  - d. The child’s physical or mental disability;
  - e. The existence of a privilege involving the child;
  - f. The child’s incompetency, including the child’s inability to communicate about the offense because of fear or a similar reason; and
  - g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.
2. The child’s out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability

Va. Code Ann. § 18.2-67.7 (Admission of evidence) provides protection to the testifying victim of a sexual offense (commonly called “rape shield law”). It states,

A. In prosecutions under this article [Criminal sexual assault], or under clause (iii) or (iv) [involving minors] of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], 18.2-370 [Taking indecent liberties with children; penalties], 18.2-370.01 [Indecent liberties by children; penalty], or 18.2-370.1 [Taking indecent liberties with child by person in custodial or supervisory relationship; penalties], general reputation or opinion evidence of the complaining witness’s unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:

1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness’s intimate parts; or
2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness’s mental incapacity or physical helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or
3. Evidence offered to rebut evidence of the complaining witness’s prior sexual conduct introduced by the prosecution.

Subsection (B) of Va. Code Ann. § 18.2-67.7 emphasizes that nothing “shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused.” A “written notice generally describing the evidence” must be given “prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs” in order for the accused to present evidence of “past sexual conduct of the complaining witness with a person other than the accused.” Va.

Code Ann. § 18.2-67.7(B). Subsection (C) mandates that the evidence may not be admitted or referred to “until the court first determines the admissibility of that evidence at an evidentiary hearing to be held before the evidence is introduced.” Additionally, pursuant to subsection (C), “If the court initially determines that the evidence is inadmissible, but new information is discovered during the course of the preliminary hearing or trial which may make such evidence admissible, the court shall determine in an evidentiary hearing whether such evidence is admissible.”

Also, under Va. Code Ann. § 18.2-67.6, “The Commonwealth need not demonstrate that the complaining witness cried out or physically resisted the accused in order to convict the accused of an offense under this article [Criminal sexual assault], but the absence of such resistance may be considered when relevant to show that the act alleged was not against the will of the complaining witness.”

5.8.1 Recommendation: Amend Va. Code Ann. § 18.2-67.9 and § 63.2-1521 to raise the age of minors allowed to testify via two-way closed circuit television in criminal and civil trials of traffickers in recognition of the trauma bonding most victims have undergone.

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.*

Va. Code Ann. § 16.1-306(A) (Expungement of court records) directs the automatic annual destruction of records by the clerk of the Juvenile and Domestic Relations Court for any juvenile who has reached 19, if five years have passed from the date of the last hearing. However, the records are kept if the juvenile was found guilty of an offense that would have been a felony if committed by an adult. Va. Code Ann. § 16.1-306(A).<sup>39</sup>

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

Under Va. Code Ann. § 19.2-305.1(B), “[A]ny person who, on or after July 1, 1995, commits, and is convicted of, a crime in violation of any provision in Title 18.2 shall make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses or expenses directly related to funeral or burial incurred by the victim or his estate as a result of the crime, may be compelled to perform community services and, if the court so orders, shall submit a plan for doing that which appears to be feasible to the court under the circumstances.” Subsection (E1) states, “A defendant convicted of an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3 shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, ‘victim’ means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children]. The Commonwealth shall make reasonable efforts to notify victims of offenses under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.”

5.10.1 Recommendation: Amend Va. Code Ann. § 19.2-305.1(E.1) to add the offense under Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) to ensure victims of sex trafficking have access to mandatory restitution.

<sup>39</sup> Additionally, “if the juvenile was found guilty of an offense for which the clerk is required by § 46.2-383 to furnish an abstract to the Department of Motor Vehicles, the records shall be destroyed when the juvenile has attained the age of 29.” Va. Code Ann. § 16.1-306(A).

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

Va. Code Ann. § 8.01-243(A) provides a statute of limitations for personal injury of two years, unless otherwise provided. Under subsection (B), “Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.” Va. Code Ann. § 8.01-243(B). Va. Code Ann. § 8.01-243(D) provides, “Every action for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person as set forth in subdivision 6 of § 8.01-249 shall be brought within 20 years after the cause of action accrues.” Generally, under Va. Code Ann. § 8.01-230, the limitation period begins when the right of action accrues, which is “the date the injury is sustained in the case of injury to the person . . . and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under . . . §§ 8.01-249, 8.01-250 or other statute.” Va. Code Ann. § 8.01-249(6) provides some statutory relief for victims of sexual abuse, stating,

In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon removal of the disability of infancy or incapacity as provided in § 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, “sexual abuse” means sexual abuse as defined in subdivision 6 of § 18.2-67.10<sup>40</sup> and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;

With regard to criminal actions against traffickers, there is no general statute of limitations for felonies indicated in the Virginia Code.<sup>41</sup> Va. Code Ann. § 19.2-8 (Limitation of prosecutions) states, “A prosecution for a misdemeanor, or any pecuniary fine, forfeiture, penalty or amercement, shall be commenced within one year next after there was cause therefor . . . .”

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<sup>40</sup> See *supra* note 9.

<sup>41</sup> *Statute of Limitations Fact Sheet*, NATIONAL CENTER FOR VICTIMS OF CRIME, [http://corsal.org/06SOLNCVC%20Statute\\_of\\_Limitations\\_Fact\\_Sheet32%5B1%5D.pdf](http://corsal.org/06SOLNCVC%20Statute_of_Limitations_Fact_Sheet32%5B1%5D.pdf) (last visited June 30, 2011).

**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.*

Under Va. Code Ann. § 9.1-102, the Department of Criminal Justice Services, under the direction of the Criminal Justice Services Board, has the “power and duty” to in subsection (55), “In conjunction with the Office of the Attorney General, advise law-enforcement agencies and attorneys for the Commonwealth regarding the identification, investigation, and prosecution of human trafficking offenses using the common law and existing criminal statutes in the Code of Virginia.” Additionally, under subsection (36), the department has the power to “[e]stablish training standards and publish a model policy for law-enforcement personnel in the handling of family abuse, domestic violence, sexual assault and stalking cases, including standards for determining the predominant physical aggressor in accordance with Section 19.2-81.3.” Additionally, “The Department shall provide technical support and assistance to law-enforcement agencies in carrying out the requirements set forth in § 9.1-1301 [Sexual assault policies for law-enforcement agencies in the Commonwealth] and shall by December 1, 2009, submit a report on the status of implementation of these requirements to the chairmen of the House and Senate Courts of Justice Committees.” Va. Code Ann. § 9.1-102(36). Under Va. Code Ann. § 9.1-1301, “The Virginia Department of State Police and the police and sheriff’s departments of every political subdivision in the Commonwealth and every campus police department shall establish written policies and procedures regarding a law-enforcement officer’s response to an alleged criminal sexual assault in violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2. Such policies shall, at a minimum, provide guidance as to the department’s policy on (i) training; (ii) compliance with §§ 19.2-9.1 and 19.2-165.1; (iii) transportation of alleged sexual assault victims; and (iv) the provision of information on legal and community resources available to alleged victims of sexual assault.”

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

Va. Code Ann. § 19.2-62(B)(2) authorizes interception of a wire, electronic, or oral communication if one party gives consent. That section states, “It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”

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

Va. Code Ann. § 19.2-66(A) states in part, “The Attorney General or Chief Deputy Attorney General, if the Attorney General so designates in writing, in any case where the Attorney General is authorized by law to prosecute or pursuant to a request in his official capacity of an attorney for the Commonwealth in any city or county, may apply to a judge of competent jurisdiction for an order authorizing the interception of wire, electronic or oral communications by the Department of State Police, when such interception may reasonably be

expected to provide evidence” of certain felony offenses. The relevant felony offenses listed include “any felonies that are not Class 6 felonies in Article 7 (§ 18.2-61 et seq. [Criminal sexual assault]) of Chapter 4 of Title 18.2.”

Va. Code § 19.2-68(G) (Application for and issuance of order authorizing interception; contents of order; recording and retention of intercepted communications, applications and orders; notice to parties; introduction in evidence of information obtained) outlines the admissibility into evidence of intercepted communications. That section requires at least 10 days’ notice, which may be judicially waived in some circumstances. Subsection H sets forth the grounds for moving to suppress such evidence.

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.*

There is no specific statutory authority for law enforcement to use a decoy in investigating domestic minor sex trafficking, but the provisions in Va. Code Ann. § 18.2-374.3(C)–(E) use the phrase “child he knows or has reason to believe is less than 15 years of age,” when referring to the offender, indicating that decoys can be used.

6.4.1 Recommendation: Enact a law expressly permitting the use of a decoy to investigate domestic minor sex trafficking related crimes.

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

Va. Code Ann. § 18.2-374.3(C) (Use of communications systems to facilitate certain offenses involving children) uses the phrase “child he knows or has reason to believe is less than 15 years of age,” when referring to the offender, indicating that law enforcement can use the internet to pose as minors to investigate the crime.

6.5.1 Recommendation: Amend Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) to prohibit a defense to prosecution for this offense based on the “minor” being a law enforcement officer or agent of law enforcement.

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

Va. Code Ann. § 52-31 establishes the “Missing Children Information Clearinghouse.”<sup>42</sup> Also, Va. Code Ann. § 15.2-1718 (Receipt of missing child reports) requires law enforcement to promptly enter missing child information into the state and national systems in addition to this, stating,

No police or sheriff’s department shall establish or maintain any policy which requires the observance of any waiting period before accepting a missing child report as defined in § 52-32. Upon receipt of a missing child report by any police or sheriff’s department, the department shall immediately, but in all cases within two hours of receiving the report, enter identifying and descriptive data about the child into the Virginia Criminal Information Network and the National Crime Information Center Systems, forward the report to the Missing Children Information Clearinghouse within the Department of State Police, notify all other law-enforcement agencies in the area, and initiate an investigation of the case.

In addition, Va. Code Ann. § 52-31.1 instructs the Superintendent of State Police to “establish a network to implement reports of the disappearance of children by local law-enforcement agencies to local school division

<sup>42</sup> Va. Code Ann. § 52-32 defines “missing child” as “any person who is under the age of 21 years, whose temporary or permanent residence is in Virginia, or is believed to be in Virginia, whose whereabouts are unknown to any parent, guardian, legal custodian or other person standing in loco parentis of the child, and who has been reported as missing to a law-enforcement agency within the Commonwealth.”

superintendents and the State Registrar of Vital Records.” Va. Code Ann. § 22.1-288.1(B) states, “Upon notification by a local law-enforcement agency of a child’s disappearance, the principal of any school in which the child was enrolled at the time of the disappearance shall indicate, by mark, in the child’s cumulative record that the child has been reported as missing. Upon notification by law enforcement that the child is located, the principal shall remove the mark from the record.” Va. Code Ann. § 32.1-275.2 instructs the State Registrar to indicate on birth records that a child is missing when notified of the disappearance.

Va. Code Ann. § 52-34 (Notification required when missing child located) states that “[a]ny law-enforcement officer who has reported a missing child to the Clearinghouse shall notify the Clearinghouse immediately upon determining the location of the child.”

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