

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## ANALYSIS AND RECOMMENDATIONS INDIANA

### 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 *Commercial sexual exploitation of children (CSEC) or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*
- 1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

#### *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.*

Ind. Code Ann. § 35-42-3.5-1<sup>2</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) criminalizes sex trafficking of a minor under 16 years of age without requiring proof of force, fraud or coercion under two subsections: “promotion of human trafficking of a minor” in subsection (b) and “sexual trafficking of a minor” in subsection (c). However, sex trafficking of a minor aged 16 or 17 would be prosecuted under subsection (a), which requires that “force, threat of force, or fraud” was used to commit the offense.

<sup>1</sup> Unless otherwise specified, all references to Indiana statutes were taken from Burns Indiana Statutes Annotated (LEXIS through Act Pub. L. 27 of the 2012 1st Reg. Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-173, approved 8/16/12). This report includes legislation enacted before August 1, 2012.

<sup>2</sup> The text of Ind. Code Ann. § 35-42-3.5-1 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 4 during the second regular session of 117th Indiana General Assembly.

Subsection (b) provides,

A person who knowingly or intentionally recruits, harbors, or transports a child less than sixteen (16) years of age with the intent of:

- (1) engaging the child in:
  - (A) forced labor; or
  - (B) involuntary servitude; or
- (2) inducing or causing the child to:
  - (A) engage in prostitution; or
  - (B) participate in sexual conduct (as defined by IC 35-42-4-4<sup>3</sup>) commits promotion of human trafficking of a minor, a Class B felony. It is not a defense to a prosecution under this subsection that the child consented to engage in prostitution or to participate in sexual conduct.

As a Class B felony, promotion of human trafficking is punishable by an imprisonment term of 6–20 years, “with the advisory sentence being ten (10) years,” and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(a), 35-50-2-5.

Subsection (c) states, “A person who is at least eighteen (18) years of age who knowingly or intentionally sells or transfers custody of a child less than sixteen (16) years of age for the purpose of prostitution or participating in sexual conduct (as defined by IC 35-42-4-4) commits sexual trafficking of a minor, a Class A felony.” As a Class A felony, sexual trafficking of a minor is punishable by an imprisonment term of 20–50 years, “with the advisory sentence being thirty (30) years,” and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(c), 35-50-2-4.

Ind. Code Ann. § 35-42-3.5-1(d) is age neutral and provides,

A person who knowingly or intentionally pays, offers to pay, or agrees to pay money or other property to another person for an individual who the person knows has been forced into:

- (1) forced labor;
- (2) involuntary servitude; or
- (3) prostitution; commits human trafficking, a Class C felony.

As a Class C felony, a conviction is punishable by an imprisonment term of 2–8 years, “with the advisory sentence being four (4) years,” and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(d), 35-50-2-6(a).

Subsection (a), which is also age-neutral and would apply to sex trafficking of minors aged 16 or 17, states,

A person who, by force, threat of force, or fraud, knowingly or intentionally recruits, harbors, or transports another person: by force, threat of force, or fraud:

- (1) to engage the other person in:
  - (A) forced labor; or
  - (B) involuntary servitude; or
- (2) to force the other person into:
  - (A) marriage; or
  - (B) prostitution; or

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<sup>3</sup> Ind. Code Ann. § 35-42-4-4(4) defines sexual conduct as “sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse or deviate sexual conduct with an animal, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.”

(C) participating in sexual conduct (as defined by IC 35-42-4-4); commits promotion of human trafficking, a Class B felony.

1.1.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(b) and (c) to apply to all offenses involving a minor under 18 years of age.

1.1.2 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(d) to apply to offenses involving victims under 18 without requiring the use of force, fraud or coercion.<sup>4</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.*

Two laws treat CSEC separately from non-commercial sex offenses in Indiana.

1. Ind. Code Ann. § 35-45-4-4 (Promoting prostitution) states,

A person who:

- (1) Knowingly or intentionally entices or compels another person to become a prostitute;
- (2) Knowingly or intentionally procures, or offers or agrees to procure, a person for another person for the purpose of prostitution;
- (3) Having control over the use of a place, knowingly or intentionally permits another person to use the place for prostitution;
- (4) Receives money or other property from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or
- (5) Knowingly or intentionally conducts or directs another person to a place for the purpose of prostitution.

commits promoting prostitution, a Class C felony. However, the offense is a Class B felony under subdivision (1) if the person enticed or compelled is under eighteen (18) years of age.

A Class B felony is punishable by an imprisonment term of 6–20 years, with a 10 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-4-4, 35-50-2-5. All other violations are Class C felonies punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-4-4, 35-50-2-6.

2. Ind. Code Ann. § 35-42-4-4(b) (Child exploitation) states,

A person who knowingly or intentionally:

- (1) manages, produces, sponsors, presents, exhibits, photographs, films, videotapes, or creates a digitized image of any performance<sup>5</sup> or incident that includes sexual conduct<sup>6</sup> by a child under eighteen (18) years of age;

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<sup>4</sup> Subsequent recommendations in this report referring to state human trafficking laws are predicated upon the recommendations contained in section 1.1 being previously or simultaneously implemented.

<sup>5</sup> “Performance” is defined in Ind. Code Ann. § 35-42-4-4(a) by referring to Ind. Code Ann. § 35-49-1-7, which defines the term as “any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.”

<sup>6</sup> “Sexual conduct” is defined in Ind. Code Ann. § 35-42-4-4(a) as “sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse or deviate sexual conduct with an animal, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.”

- (2) disseminates,<sup>7</sup> exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter<sup>8</sup> that depicts or describes sexual conduct by a child under eighteen (18) years of age; or
  - (3) makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age;
- commits child exploitation, a Class C felony.<sup>9</sup>

A Class C felony is punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-4(b), 35-50-2-6(a).

Certain non-commercial sexual offenses may be applicable in cases involving the commercial sexual exploitation of a child. These include the following:

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<sup>7</sup> “Disseminate” is defined in Ind. Code Ann. § 35-42-4-4(a) as “to transfer possession for free or for a consideration.”

<sup>8</sup> “Matter” is defined in Ind. Code Ann. § 35-42-4-4(a) by referring to Ind. Code Ann. § 35-49-1-3, which defines the term as “(1) any book, magazine, newspaper, or other printed or written material; (2) any picture, drawing, photograph, motion picture, digitized image, or other pictorial representation; (3) any statue or other figure; (4) any recording, transcription, or mechanical, chemical, or electrical reproduction; or (5) any other articles, equipment, machines, or materials.”

<sup>9</sup> Ind. Code Ann. § 35-42-4-4 contains defenses in subsections (e) and (f), and exceptions in subsection (g) to the defense in (f). In relevant part, the defense in (f) and the exceptions in (g) state,

(f) Except as provided in subsection (g), it is a defense to a prosecution under subsections (b)(1), (b)(2), or(c) if all the following apply:

- (1) A cellular telephone, another wireless or cellular communications device, or a social networking web site was used to possess, produce, or disseminate the image.
- (2) The defendant is not more than four (4) years older or younger than the person who is depicted in the image or who received the image.
- (3) The relationship between the defendant and the person who received the image or who is depicted in the image was a dating relationship or an ongoing personal relationship. For purposes of this subdivision, the term “ongoing personal relationship” does not include a family relationship.
- (4) The crime was committed by a person less than twenty-two (22) years of age.
- (5) The person receiving the image or who is depicted in the image acquiesced in the defendant’s conduct.

(g) The defense to a prosecution described in subsection (f) does not apply if:

- (1) the person who receives the image disseminates it to a person other than the person:
  - (A) who sent the image; or
  - (B) who is depicted in the image;
- (2) the image is of a person other than the person who sent the image or received the image; or
- (3) the dissemination of the image violates:
  - (A) a protective order to prevent domestic or family violence issued under IC 34-26-5 (or, if the order involved a family or household member, under IC 34-26-2 or IC 34-4-5.1-5 before their repeal);
  - ...
  - (D) a no contact order in a dispositional decree issued under IC 31-34-20-1, IC 31-37-19-1, or IC 31-37-5-6 (or IC 31-6-4-15.4 or IC 31-6-4-15.9 before their repeal) or an order issued under IC 31-32-13 (or IC 31-6-7-14 before its repeal) that orders the person to refrain from direct or indirect contact with a child in need of services or a delinquent child;
  - ...
  - (I) a no contact order issued under IC 31-34-25 in a child in need of services proceeding or under IC 31-37-25 in a juvenile delinquency proceeding;
  - ....

1. Ind. Code Ann. § 35-42-4-6(b) (Child solicitation), which states,

A person eighteen (18) years of age or older who knowingly or intentionally solicits<sup>10</sup> a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in:

- (1) sexual intercourse;
  - (2) deviate sexual conduct; or
  - (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person;
- commits child solicitation, a Class D felony. . . .

A Class D felony<sup>11</sup> is punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000.<sup>12</sup> Ind. Code Ann. §§ 35-42-4-6(b), 35-50-2-7(a).

Similarly, Ind. Code Ann. § 35-42-4-6(c) (Child solicitation) states,

A person at least twenty-one (21) years of age who knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in:

- (1) sexual intercourse;
  - (2) deviate sexual conduct; or
  - (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person;
- commits child solicitation, a class D felony. . . .

A Class D felony is punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000.<sup>13</sup> Ind. Code Ann. §§ 35-42-4-6(c), 35-50-2-7(a).

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<sup>10</sup> “Solicit” is defined as “to command, authorize, urge, incite, request, or advise an individual: (1) in person; (2) by telephone; (3) in writing; (4) by using a computer network (as defined in IC 35-43-2-3(a)); (5) by advertisement of any kind; or (6) by any other means; to perform” any of the acts described in Ind. Code Ann. § 35-42-4-6(b) or (c). Ind. Code Ann. § 35-42-4-6(a).

<sup>11</sup> Pursuant to Ind. Code Ann. § 35-50-2-7(b),

Notwithstanding subsection (a), if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly. However, the court shall enter a judgment of conviction of a Class D felony if:

- (1) the court finds that:
  - (A) the person has committed a prior, unrelated felony for which judgment was entered as a conviction of a Class A misdemeanor; and
  - (B) the prior felony was committed less than three (3) years before the second felony was committed;
- (2) the offense is domestic battery as a Class D felony under IC 35-42-2-1.3; or
- (3) the offense is possession of child pornography ( IC 35-42-4-4(c)).

The court shall enter in the record, in detail, the reason for its action whenever it exercises the power to enter judgment of conviction of a Class A misdemeanor granted in this subsection.

<sup>12</sup> Pursuant to Ind. Code Ann. § 35-42-4-6(b) and (c), the penalties for these offenses are enhanced to a Class C felony if a computer network is used and a Class B felony “if the person commits the offense by using a computer network . . . and has a previous unrelated conviction for committing the offense by using a computer network.” “Computer network” is defined in Ind. Code Ann. § 35-42-4-6 by referring to Ind. Code Ann. § 35-43-2-3(a), which defines the term as “the interconnection of communication lines or wireless telecommunications with a computer or wireless telecommunication device through: (1) remote terminals; (2) a complex consisting of two (2) or more interconnected computers; or (3) a worldwide collection of interconnected networks operating as the Internet.”

<sup>13</sup> See *supra* note 12.

2. Ind. Code Ann. § 35-42-4-9(a)<sup>14</sup> (Sexual misconduct with a minor) states in part, “A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor . . . .” A violation generally is a Class C felony punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000.<sup>15</sup> Ind. Code Ann. §§ 35-42-4-9(a), 35-50-2-6(a).
3. Similarly, Ind. Code Ann. § 35-42-4-9(b) (Sexual misconduct with a minor) states, “A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor . . . .” A violation generally is a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000.<sup>16</sup> Ind. Code Ann. §§ 35-42-4-9(b), 35-50-2-7(a).
4. Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child) makes it illegal if a person 21 or older, other than a parent, guardian, or custodian of the child, or a person acting with the child’s parent, guardian’s, or custodian’s permission, “knowingly or intentionally communicates with an individual whom the person believes to be a child less than fourteen (14) years of age concerning sexual activity<sup>17</sup> with the intent to gratify the sexual desires of the person or the individual . . . .” A violation generally is a Class B

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<sup>14</sup> There are several defenses to Ind. Code Ann. § 35-42-4-9 set out in that section. In relevant part, they include,

- (c) It is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct. However, this subsection does not apply to an offense described in subsection (a)(2) or (b)(2).
- (d) It is a defense that the child is or has ever been married. However, this subsection does not apply to an offense described in subsection (a)(2) or (b)(2).
- (e) It is a defense to a prosecution under this section if all the following apply:
  - (1) The person is not more than four (4) years older than the victim.
  - (2) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term “ongoing personal relationship” does not include a family relationship.
  - (3) The crime:
    - (A) was not committed by a person who is at least twenty-one (21) years of age;
    - (B) was not committed by using or threatening the use of deadly force;
    - (C) was not committed while armed with a deadly weapon;
    - (D) did not result in serious bodily injury;
    - (E) was not facilitated by furnishing the victim, without the victim’s knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim’s knowledge; and
    - (F) was not committed by a person having a position of authority or substantial influence over the victim.
  - (4) The person has not committed another sex offense (as defined in IC 11-8-8-5.2) (including a delinquent act that would be a sex offense if committed by an adult) against any other person.

<sup>15</sup> The penalty for an offense in violation of Ind. Code Ann. § 35-42-4-9(a) is enhanced one degree if the offender is at least 21, and two degrees if it involves deadly force, a deadly weapon, serious bodily injury, or drugs or controlled substances being given to the victim without the victim’s knowledge.

<sup>16</sup> The penalty for an offense in violation of Ind. Code Ann. § 35-42-4-9(b) is enhanced one degree if the offender is at least 21, and two degrees if it involves deadly force, a deadly weapon, or drugs or controlled substances being given to the victim without the victim’s knowledge.

<sup>17</sup> “Sexual activity” is defined as “sexual intercourse, deviate sexual conduct, or the fondling or touching of the buttocks, genitals, or female breasts.” Ind. Code Ann. § 35-42-4-13(d).

misdemeanor with a sentence of up to 180 days' imprisonment and a possible fine up to \$1,000.<sup>18</sup> Ind. Code Ann. §§ 35-42-4-13(c), 35-50-3-3.

5. Ind. Code Ann. § 35-42-4-3(a) (Child molesting) makes it illegal if a person “performs or submits to sexual intercourse or deviate sexual conduct” if the child is under 14. Generally, a violation is a Class B felony punishable by an imprisonment term of 6–20 years, with a 10 year advisory sentence, and a possible fine up to \$10,000.<sup>19</sup> Ind. Code Ann. §§ 35-42-4-3(a), 35-50-2-5.

Similarly, Ind. Code Ann. § 35-42-4-3(b) (Child molesting) makes it illegal if a person “performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person” if the child is under 14. Generally, a violation is a Class C felony punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-3(b), 35-50-2-6(a).<sup>20</sup>

6. Under Ind. Code Ann. § 35-42-4-5(a) (Vicarious sexual gratification), “A person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to touch or fondle himself or another child under the age of sixteen (16) with intent to arouse or satisfy the sexual desires of a child or the older person commits vicarious sexual gratification . . . .” A violation is ordinarily a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000.<sup>21</sup> Ind. Code Ann. §§ 35-42-4-5(a), 35-50-2-7(a).

7. Ind. Code Ann. § 35-42-4-5(b) (Vicarious sexual gratification) states,

A person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to:

- (1) engage in sexual intercourse with another child under sixteen (16) years of age;
- (2) engage in sexual conduct with an animal other than a human being; or
- (3) engage in deviate sexual conduct with another person;

with intent to arouse or satisfy the sexual desires of a child or the older person commits vicarious sexual gratification, a Class C felony. . . .

A violation is ordinarily a Class C felony punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000.<sup>22</sup> Ind. Code Ann. §§ 35-42-4-5(b), 35-50-2-6(a).

It is also unlawful under Ind. Code Ann. § 35-42-4-5(c) (Vicarious sexual gratification) when an adult “knowingly or intentionally: (1) engages in sexual intercourse; (2) engages in deviate sexual conduct; or (3) touches or fondles the person’s own body; in the presence of a child less than fourteen (14) years of age

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<sup>18</sup> If the buyer communicates with the victim via computer network, the offense increases to a Class A misdemeanor with up to one year imprisonment and a maximum fine of \$5,000. Ind. Code Ann. §§ 35-42-4-13(c), 35-50-3-2.

<sup>19</sup> Pursuant to Ind. Code Ann. § 35-42-4-3(a), the penalty for an offense is enhanced to a Class A felony if “(1) it is committed by a person at least twenty-one (21) years of age; (2) it is committed by using or threatening the use of deadly force or while armed with a deadly weapon; (3) it results in serious bodily injury” or it involves drugs or a controlled substance being given to the victim without the victim’s knowledge.

<sup>20</sup> Pursuant to Ind. Code Ann. § 35-42-4-3(b) the offense increases to a Class A felony when conditions of deadly force, a deadly weapon, or drugs given to the victim without his or her knowledge are present. Ind. Code Ann. § 35-42-4-3(b)(1).

<sup>21</sup> Pursuant to Ind. Code Ann. § 35-42-4-5(a), the penalty for this offense is enhanced one degree if the child is under the age of 14 and two degrees if deadly force, a deadly weapon, or drugs or controlled substances given to the victim without his or her knowledge are involved. If serious bodily injury results, it is a Class A felony.

<sup>22</sup> Pursuant to Ind. Code Ann. § 35-42-4-5(b), the offense is raised one degree if the victim is less than 14 and two degrees if it committed with deadly force, a deadly weapon, results in serious bodily injury, or if drugs or controlled substances were given to the victim without his or her knowledge.

with the intent to arouse or satisfy the sexual desires of the child or the older person . . .” A violation is a Class D felony carrying an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-5(c), 35-50-2-7(a).

1.3 *Commercial sexual exploitation of children (CSEC) or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

None of the aforementioned CSEC statutes or sexual offense laws refer to Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) or otherwise clarify the status of the minor victim as a trafficking victim. Similarly, Ind. Code Ann. § 35-45-4-2 (Prostitution) does not refer to the human trafficking law when the person charged is a minor under 18.

1.3.1 Recommendation: Amend Ind. Code Ann. § 35-45-4-4 (Promoting prostitution), § 35-42-4-6 (Child solicitation), § 35-42-4-9 (Sexual misconduct with a minor), § 35-42-4-4 (Child exploitation), § 35-42-4-13 (Inappropriate communication with child), § 35-42-4-3 (Child molesting), § 35-42-4-5 (Vicarious sexual gratification) and Ind. Code Ann. § 35-45-4-2 (Prostitution), when the person charged is a minor, to refer to Ind. Code Ann. § 35-42-3.5-1 for cases of commercial sexual exploitation of a child and to clarify the status of the victim as a trafficking victim.

1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

Ind. Code Ann. § 35-45-6-2 (Corrupt business influence)<sup>23</sup> states,

“A person:

- (1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in property or to establish or to operate an enterprise;
- (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of property or an enterprise; or
- (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony.

Pursuant to Ind. Code Ann. § 35-45-6-1(e), “racketeering activity means to commit, to attempt to commit, to conspire to commit a violation of, or aiding and abetting in a violation of any of the following:

- (8) Human and sexual trafficking crimes (IC 35-42-3.5).
- (9) Child exploitation (IC 35-42-4-4)
- (24) Promoting prostitution (IC 35-45-4-4).”

A “pattern of racketeering activity” is defined in Ind. Code Ann. § 35-45-6-1(d) (Definitions [effective July 1, 2011]) as “engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents.” The definition also states, “[T]he incidents are a pattern of

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<sup>23</sup> For more information on racketeering statutes, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHI-WhitePaperFederalStateRacketeeringGangCrimeLaws.pdf>.



racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.”

Ind. Code Ann. § 35-45-6-2 (Corrupt business influence) makes it a Class C felony if a person, among other things, “knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and . . . uses or invests those proceeds or the proceeds derived from them to acquire an interest in property or to establish or to operate an enterprise.” A Class C felony is punishable by an imprisonment term of 2–8 years, “with the advisory sentence being four (4) years,” and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-6-2, 35-50-2-6(a).

Where the alleged enterprise is a criminal gang<sup>24</sup>, other statutes also apply. Ind. Code Ann. § 35-45-9-3 states, “A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity.”

“Criminal gang” is defined as “a group with at least three (3) members that specifically: (1) either: (A) promotes, sponsors, or assists in; or (B) participates in; or (2) requires as condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult . . . .” Ind. Code Ann. § 35-45-9-1. Criminal gang activity is a Class D felony, which is punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000.

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<sup>24</sup> Additionally, it is illegal to “knowingly or intentionally solicits, recruits, entices, or intimidates another to join a criminal gang” is guilty of criminal gang recruitment, a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-9-5, 35-50-2-7(a).

***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 commercial sexual exploitation of children (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 under 18 are sufficiently high 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.*

Ind. Code Ann. § 35-42-3.5-1(d)<sup>25</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) makes it a crime to purchase sex with a trafficking victim. That section states, “A person who knowingly or intentionally pays, offers to pay, or agrees to pay money or other property to another person for an individual who the person knows has been forced into: (1) forced labor; (2) involuntary servitude; or (3) prostitution; commits human trafficking, a Class C felony.”

However, Ind. Code Ann. § 35-42-3.5-1(d) does not distinguish between or provide heightened penalties for buyers of prostitution with a minor as opposed to buyers of prostitution with an adult. Moreover, subsection (d) of the human trafficking statute requires the buyer to have knowledge that the victim was forced into prostitution by restricting its application to a person who knowingly purchases sex with “an individual who the person knows has been forced into . . . prostitution.” Ind. Code Ann. § 35-42-3.5-1(d)(3). As a Class C felony, a violation is punishable by an imprisonment term of 2–8 years, a 4-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(d), 35-50-2-6(a).

- 2.1.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(d) to provide heightened penalties for the crime of buying commercial sex acts with a minor and to remove the requirement that the defendant had knowledge that the victim was forced into prostitution when the victim is a minor.

<sup>25</sup> See *supra* note 2.

2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*

Indiana's CSEC offenses do not make it a crime to purchase commercial sex acts with a minor. While not expressly commercial, Ind. Code Ann. § 35-42-4-6(b) (Child solicitation) makes it illegal if an adult "knowingly or intentionally solicits<sup>26</sup> a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in: (1) sexual intercourse; (2) deviate sexual conduct;<sup>27</sup> or (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person." Similarly, Ind. Code Ann. § 35-42-4-6(c) makes it illegal if a person 21 years of age or older "knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in: (1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person." Ind. Code Ann. § 35-42-4-6(c).

Both of the above offenses are ordinarily Class D felonies punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-6(b), (c), 35-50-2-7(a). However, if either offense is committed by using a computer network, the defendant will be charged with a Class C felony punishable by an imprisonment term of 2–8 years, with a 4-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-6(b), (c), 35-50-2-6(a). If a defendant "has a previous unrelated conviction for committing the offense by using a computer network" and has committed the immediate offense through use of a computer network, he will be charged with a Class B felony and punishable by an imprisonment term of 6–20 years, with a 10 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-6(b), (c), 35-50-2-5.

Other non-commercial sexual offense laws could also be used to prosecute buyers of sex with minors. However, most apply only to minors under the ages of 14 or 16. Specifically, buyers of sex with a younger minor may be prosecuted under Ind. Code Ann. § 35-42-4-9(a) (Sexual misconduct with a minor), § 35-42-4-9(b) (Sexual misconduct with a minor), § 35-42-4-3 (Child molesting), § 35-42-4-5(a) (Vicarious sexual gratification), and § 35-42-4-13(c) (Inappropriate communication with child). Violations of these laws range from Class B misdemeanors to Class A felonies, and penalties range from an imprisonment term of 180 days–50 years with possible fines between \$1,000 and \$10,000.<sup>28</sup>

2.2.1 Recommendation: Enact a law that separately criminalizes buying sex with a minor.

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

Ind. Code Ann. § 35-45-4-3 (Patronizing a prostitute) does not differentiate between buying sex with an adult and the buying of sex with a minor. It is a Class A misdemeanor when a person

knowingly or intentionally pays, or offers or agrees to pay, money or other property to another person:

- (1) For having engaged in, or on the understanding that the other person will engage in, sexual intercourse or deviate sexual conduct with the person or with any other person; or
- (2) For having fondled, or on the understanding that the other person will fondle, the genitals of the person or any other person. Ind. Code Ann. § 35-45-4-3.

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<sup>26</sup> See *supra* note 10.

<sup>27</sup> See *supra* note 6.

<sup>28</sup> See *supra* Section 1.2 for a full description of these offenses.

A violation is punishable by a prison sentence up to 1 year and a possible fine not to exceed \$5,000. Ind. Code Ann. §§ 35-45-4-3, 35-50-3-2. Buyers with two prior convictions will be charged with a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-50-2-7(a), 35-45-4-3. These penalties apply regardless of the prostituted person's age.

- 2.3.1 Recommendation: Amend Ind. Code Ann. § 35-45-4-3 (Patronizing a prostitute) to refer cases of patronizing a prostitute where the victim is under 18 to Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) to clarify that purchasing sex with a minor is trafficking.

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

If applicable to buyers, a violation of Ind. Code Ann. § 35-42-3.5-1(d)<sup>29</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) is a Class C felony punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(d), 35-50-2-6(a).

Several non-commercial sexual offenses may apply to buyers, including violations of Ind. Code Ann. § 35-42-4-3(a) (Child molesting), which is a Class B felony, and Ind. Code Ann. § 35-42-4-9(a) and (b) (Sexual misconduct with a minor), which are Class C and D felonies respectively. These felonies carry sentences of 6–20 years, 2–8 years, and 6 months to 3 years respectively and possible fines up to \$10,000, subject to certain penalty enhancements.<sup>30</sup> Ind. Code Ann. §§ 35-50-2-5, 35-50-2-6(a), 35-50-2-7(a).

An adult buyer convicted under Ind. Code Ann. § 35-42-4-6(b) or (c) (Child solicitation) is guilty of a Class D felony, which is punishable by a possible fine up to \$10,000 and an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and subject to certain penalty enhancements.<sup>31</sup> Ind. Code Ann. §§ 35-42-4-6(b), 35-42-4-6(c), 35-50-2-7(a).

A conviction under Ind. Code Ann. § 35-42-4-5(a) (Vicarious sexual gratification) is punishable as a Class D felony by an imprisonment term of 6 months to 3 years, with a 1½-year advisory sentence, and a possible fine up to \$10,000, and subject to certain penalty enhancements.<sup>32</sup> Ind. Code Ann. §§ 35-42-4-5(a), 35-50-2-7(a). A conviction under Ind. Code Ann. § 35-42-4-5(b) is punishable as a Class C felony by an imprisonment term of 2–8 years, with a 4-year advisory sentence, and a possible fine up to \$10,000, and certain penalty enhancements.<sup>33</sup> Ind. Code Ann. §§ 35-42-4-5(b), 35-50-2-6(a).

A conviction under Ind. Code Ann. § 35-42-4-5(c) is punishable as a Class D felony by an imprisonment term of 6 months to 3 years, with a 1½-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-5(c), 35-50-2-7(a).

Lastly, a conviction under Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child), is punishable as Class B misdemeanor by up to 180 days' imprisonment and a maximum fine of \$1,000.<sup>34</sup> Ind. Code Ann. §§ 35-42-4-13(c), 35-50-3-3.

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<sup>29</sup> See *supra* note 2.

<sup>30</sup> See *supra* notes 15, 16, and 19.

<sup>31</sup> See *supra* note 12.

<sup>32</sup> See *supra* note 21.

<sup>33</sup> See *supra* note 22.

<sup>34</sup> See *supra* note 18.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA),<sup>35</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>36</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>37</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>38</sup>

2.4.1 Recommendation: Bring all penalties for sex trafficking of a minor and CSEC up to the highest level under these statutes for the purchase of sex acts with a minor.

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.*

No Indiana law independently makes it a crime to use the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor. However, several laws include penalty enhancements for the buyers using the Internet to commit an offense.

Under Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child), the penalty is raised from a Class B misdemeanor, which carries a sentence of no more than 180 days' imprisonment and a possible fine up to \$1,000, to a Class A misdemeanor, which carries a sentence of no more than 1 year imprisonment and a possible fine up to \$5,000, if “the person commits the offense by using a computer network (as defined in IC 35-43-2-3(a)).”<sup>39</sup>

Similarly, Ind. Code Ann. § 35-42-4-6 (Child solicitation), imposes a penalty enhancement for a buyer who uses a computer network to solicit a minor under 16 to engage in sexual intercourse, making the crime a Class C felony, punishable by a possible fine up to \$10,000 and an imprisonment term of 2–8 years, “with the advisory sentence being four (4) years.” Ind. Code Ann. §§ 35-42-4-9(b)-(c), 35-50-2-6(a). A buyer who did not use a

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<sup>35</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>36</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>37</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>38</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>39</sup> *See supra* note 18.

computer network to solicit the child would only be guilty of a Class D felony, which is punishable by a possible fine up to \$10,000 and an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence. Ind. Code Ann. §§ 35-42-4-9(b)-(c), 35-50-2-7(a).

2.5.1 Recommendation: Amend Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child) and Ind. Code Ann. § 35-42-4-6 (Child solicitation) to provide heightened penalties comparable to federal penalties when the Internet is used to lure, entice, recruit, or purchase commercial sex acts with a minor.

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

Ind. Code Ann. § 35-42-3.5-1<sup>40</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) is silent on the availability of a mistake of age defense for a person prosecuted under these statutes for sex trafficking a minor under 16 and does not distinguish between offenses involving an adult victim and offenses involving a minor victim aged 16 or 17. A mistake of age defense is not provided for in Ind. Code Ann. § 35-42-4-6(a) or (b) (Child solicitation) or § 35-42-4-13(c) (Inappropriate communication with child), as these provisions apply where the buyer *believes* the victim to be under the relevant age.

Some sexual offense laws, however, do expressly provide buyers with the defense of mistake of age. For some violations of Ind. Code Ann. § 35-42-4-9(a) and (b) (Sexual misconduct with a minor) and § 35-42-4-3(a) and (b) (Child molesting), buyers who “reasonably believed” that the child was at least 16 years old at the time of the offense may assert the defense of mistake of age. Ind. Code Ann. §§ 35-42-4-9(c), 35-42-4-3(c).

In any case, Ind. Code Ann. § 35-41-3-7 (Mistake of fact) states, “It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.”

2.6.1 Recommendation: Enact a law expressly prohibiting the defense of mistake of age in any prosecution for purchasing commercial sex acts with a minor.

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

Ind. Code Ann. § 35-42-3.5-1(d) (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) does not distinguish between purchasing sex with a minor and purchasing sex with an adult. A buyer convicted of this offense faces a Class C felony punishable by an imprisonment term of 2–8 years, with a 4-year advisory sentence, and a possible fine up to \$10,000, regardless of the age of the victim. Ind. Code Ann. §§ 35-42-3.5-1(d), 35-50-2-6(a).

None of Indiana’s CSEC laws make it a crime to purchase commercial sex acts with a minor.<sup>41</sup> Therefore, buyers who purchase sex with minors over the age of 16 would be prosecuted under Ind. Code Ann. § 35-45-4-3 (Patronizing a prostitute). A conviction under Ind. Code Ann. § 35-42-4-6 is punishable as a Class D felony by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, absent any penalty enhancements, and a possible fine up to \$10,000, whereas a conviction under Ind. Code Ann. § 35-45-4-3 is punishable as a Class A misdemeanor by a sentence no greater than 1 year imprisonment and a possible fine up to \$5,000. Ind. Code Ann. §§ 35-42-4-6(b)-(c), 35-45-4-3, 35-50-2-7, 35-50-3-2.

2.7.1 Recommendation: Enact a law that makes it a crime to buy sex with minors and imposes substantial penalties for any offense involving a minor under 18.

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<sup>40</sup> See *supra* note 2.

<sup>41</sup> See *supra* Section 2.2.

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

Buyers of sex with minors convicted of Class A, B, C, or D felonies (i.e. human trafficking, third violations of patronizing a prostitute, child solicitation, sexual misconduct with a minor, child molesting, vicarious sexual gratification, and child exploitation) may be ordered to pay a possible fine not exceeding \$10,000. Ind. Code Ann. §§ 35-50-2-4 to -7. Those convicted of Class A misdemeanors (patronizing a prostitute for a first or second time and inappropriate communication with a child using a computer network) can be ordered to pay a possible fine up to \$5,000, while those convicted of Class B misdemeanors (inappropriate communication with a child without use of a computer network) can be required to pay a possible fine up to \$1,000. Ind. Code Ann. §§ 35-50-3-2, 35-50-3-3.

A court shall order a buyer convicted of violating Indiana’s human trafficking law to make restitution to the victim Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under Section 1 [IC 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking)] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3.” Ind. Code Ann. § 35-50-5-3(k) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim’s labor or services.
- (2) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage); whichever is greater.

Restitution may be ordered, at the discretion of the court, for violations of CSEC and sexual offense laws under Ind. Code Ann. § 35-50-5-3(a) (Restitution orders), which permits the court to order a defendant convicted of a felony or misdemeanor to make restitution to the victim. In determining the amount of restitution a defendant must pay, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Buyers are also subject to some limited seizure provisions, which are civil and discretionary in nature.<sup>42</sup> Vehicles used by buyers to “(A) commit, attempt to commit, or conspire to commit; (B) facilitate the commission of; or (C) escape from the commission of . . . child molesting (IC 35-42-4-3), or child exploitation (IC 35-42-4-4) [including possession of child pornography]” may be seized pursuant to Ind. Code Ann. § 34-24-1-1(a)(4) (Property which may be seized). Pursuant to Ind. Code Ann. §34-24-1-9, “The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or

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<sup>42</sup> For more information on asset forfeiture and seizure procedure, <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

forfeiture for purposes consistent with federal laws and regulations.” Seizure of forfeitable property is governed by Ind. Code Ann. § 34-24-1-9.

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

Although purchasing child pornography is not individually criminalized, possession of child pornography is unlawful under Ind. Code Ann. § 35-42-4-4(c) (Child exploitation). The provision states that it is illegal for a person to knowingly or intentionally possess pornography<sup>43</sup> “that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value.” A violation is a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a maximum fine of \$10,000. Ind. Code Ann. §§ 35-42-4-4(c), 35-50-2-7(a).

In comparison, a federal conviction for possession of child pornography<sup>44</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>45</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>46</sup>

2.9.1 Recommendation: Amend Ind. Code Ann. § 35-42-4-4(c) (Child exploitation) to apply to minors under 18 and to also separately make purchasing child pornography a crime.

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

Pursuant to Ind. Code Ann. § 11-8-8-7(a) (Persons who must register), “A sex or violent offender who resides in Indiana,” who is or intends to be employed for a certain time period in Indiana, or “who is enrolled or intends to be enrolled” as a student must register under the sex offender chapter. A “sex or violent offender” is defined to include, among others, persons convicted under Ind. Code Ann. § 35-42-4-3 (Child molesting), § 35-42-4-5 (Vicarious sexual gratification), § 35-42-4-6 (Child solicitation), § 35-42-4-9 (Sexual misconduct with a minor as a Class A, Class B, or Class C felony, except for certain persons convicted of Class C felonies who are not more than 4 years older than the victim), § 35-42-4-4(c) (Possession of child pornography), and § 35-42-3.5-1(d)(3) (Human trafficking, where the victim is under 18). Ind. Code Ann. § 11-8-8-5(a)(3), (5), (6), (8), (13),

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<sup>43</sup> Ind. Code Ann. § 35-42-4-4(c) (Child exploitation) defines “child pornography” as “(1) a picture; (2) a drawing; (3) a photograph; (4) a negative image; (5) undeveloped film; (6) a motion picture; (7) a videotape; (8) a digitized image; or (9) any pictorial representation . . . .”

<sup>44</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>45</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>46</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).



(17).<sup>47</sup> A buyer convicted of these offenses will also be deemed a “sex offender” under Ind. Code Ann. § 11-8-8-4.5(a)(3), (5), (6), (8), (13), (17).<sup>48</sup>

2.10.1 Recommendation: Amend Ind. Code Ann. § 11-8-8-5(a) (“Sex or violent offender” defined) to require a person convicted of Ind. Code Ann. § 35-45-4-3 (Patronizing a prostitute), where the victim is under 18 years old to register as a sex or violent offender pursuant to Ind. Code Ann. § 11-8-8-7 (Persons who must register).

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<sup>47</sup> The text of Ind. Code Ann. § 11-8-8-5 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 4 during the second regular session of 117th Indiana General Assembly.

<sup>48</sup> The text of Ind. Code Ann. § 11-8-8-4.5 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 4 during the second regular session of 117th Indiana General Assembly.

**Legal Components:**

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

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**Legal Analysis:**

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

A trafficker can be prosecuted under Ind. Code Ann. § 35-42-3.5-1(a)(2)(B), (C)<sup>49</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) if one “by force, threat of force, or fraud, knowingly or intentionally recruits, harbors, or transports another person. . . to force the other person into . . . prostitution; or . . . participating in sexual conduct (as defined by IC 35-42-4-4 [Child exploitation]).” Promotion of human trafficking is a Class B felony punishable by an imprisonment term of 6–20 years, with a 10 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(a), 35-50-2-5. In addition, “[a] person who knowingly or intentionally pays, offers to pay, or agrees to pay money or other property for an individual who the person knows has been forced into . . . prostitution; commits human trafficking, a Class C felony,” which is punishable by an imprisonment term of 2–8 years, with a 4-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(d), 35-50-2-6(a). If a trafficker is “at least eighteen (18) years of age” and “knowingly or intentionally sells or transfers custody of a child for the purpose of prostitution or participating in sexual conduct,” the trafficker could be convicted of “sexual trafficking of a minor, a Class A felony,” which is punishable by an imprisonment term of 20–50 years, with a 30 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(c), 35-50-2-4. Lastly, a trafficker could be convicted of promotion of human trafficking of a minor under § 35-42-3.5-1(b) for recruiting, harboring, or transporting a minor under 16 years of age “with the intent of:

- (1) engaging the child in:
  - (A) forced labor; or
  - (B) involuntary servitude; or
- (2) inducing or causing the child to:
  - (A) engage in prostitution; or
  - (B) participate in sexual conduct (as defined by IC 35-42-4-4);

Promotion of human trafficking of a minor under § 35-42-3.5-1(b) is a Class B felony punishable by an imprisonment term of 6–20 years, with a 10 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-3.5-1(b), 35-50-2-5.

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<sup>49</sup> See *supra* note 2.

Traffickers may also face prosecution under a number of other laws. A trafficker convicted under Ind. Code Ann. § 35-45-4-4 (Promoting prostitution) ordinarily faces a Class C felony. Ind. Code Ann. § 35-45-4-4. However, if the trafficker “entices or compels” a person under 18 “to become a prostitute,” the trafficker will be guilty of a Class B felony punishable by an imprisonment term of 6–20 years, with a 10 year advisory sentence and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-4-4, 35-50-2-5.

In addition, because Ind. Code Ann. § 35-42-4-6(a) (Child solicitation) defines “solicit” broadly,<sup>50</sup> subsections (b) and (c) also could apply to traffickers. A trafficker 18 or older who solicits a child under 14, or a trafficker 21 or older who solicits a child between 14–15, is guilty of a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence and a possible fine up to \$10,000, subject to penalty enhancements.<sup>51</sup> Ind. Code Ann. §§ 35-42-4-6(b)-(c), 35-50-2-7(a).

In addition, under Ind. Code Ann. § 35-45-15-5(a), a person commits money laundering if, “knowingly or intentionally,” he does any of the following:

- (1) acquires or maintains an interest in, receives, conceals, possesses, transfers, or transports the proceeds of criminal activity;
  - (2) conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity; or
  - (3) invests, expends, receives, or offers to invest, expend, or receive, the proceeds of criminal activity or funds that are the proceeds of criminal activity, and the person knows that the proceeds or funds are the result of criminal activity;
- .....

“Criminal activity” is defined as including “any offense . . . classified as a felony under Indiana or United States law,” while “proceeds” is defined as “funds acquired or derived directly or indirectly from, produced through, or realized through an act.” Ind. Code Ann. §§ 35-45-15-1, 35-45-15-4. Based on those definitions, a trafficker who receives money from domestic minor human sex trafficking could be convicted of money laundering, generally a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a fine up to \$10,000. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-7(a). The offense is also subject to penalty enhancements, including where the proceeds are at least \$50,000, which increases the offense to a Class C felony punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-6(a).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>52</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>53</sup> against a minor.

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

Traffickers who create or distribute child pornography in violation of Ind. Code Ann. § 35-42-4-4(b) (Child exploitation) can be subject to a Class C felony punishable by an imprisonment term of 2–8 years, “with the

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<sup>50</sup> See *supra* note 10.

<sup>51</sup> See *supra* note 12.

<sup>52</sup> See *supra* note 35.

<sup>53</sup> See *supra* note 36.

advisory sentence being four (4) years,” and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-4(b), 35-50-2-6(a).

Also, Ind. Code Ann. § 35-49-3-2 (Obscene performance) states, “A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance<sup>54</sup> commits a Class A misdemeanor. However, the offense is a Class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.”

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>55</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>56</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed 250,000.<sup>57</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>58</sup>

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

No Indiana law independently criminalizes the use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor, however, two laws include penalty enhancements when the Internet is used to commit the offense.

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<sup>54</sup> “‘Performance’ means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.” Ind. Code Ann. § 35-49-1-7. Additionally, pursuant to Ind. Code Ann. § 35-49-2-1 (Obscene matter or performance),

A matter or performance is obscene for purposes of this article if:

- (1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
- (2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and
- (3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

<sup>55</sup> See *supra* note 36.

<sup>56</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)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>57</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2) or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>58</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).

Ind. Code Ann. § 35-42-4-6 (Child solicitation), imposes a penalty enhancement for a trafficker who uses a computer network<sup>59</sup> to solicit a minor under 16 to engage in sexual intercourse, making the crime a Class C felony, punishable by a possible fine up to \$10,000 and an imprisonment term of 2–8 years, with a 4 year advisory sentence. Ind. Code Ann. §§ 35-42-4-9(b), (c), 35-50-2-6(a). A trafficker who did not use a computer network to solicit the child would only be guilty of a Class D felony, which is punishable by a possible fine up to \$10,000 and an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence. Ind. Code Ann. §§ 35-42-4-9(b), (c), 35-50-2-7(a).

Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child) imposes a penalty enhancement where a defendant uses a computer network. The use of a computer network enhances the crime from a Class B misdemeanor to a Class A misdemeanor, punishable by imprisonment up to 1 year and a possible fine not to exceed \$5,000. Ind. Code Ann. §§ 35-42-4-13(c), 35-50-3-2.

- 3.3.1 Recommendation: Amend Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child) and Ind. Code Ann. § 35-42-4-6 (Child solicitation) to provide heightened penalties comparable to federal penalties when the Internet is used to lure, entice or recruit commercial sex acts with a minor.

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

Traffickers convicted of crimes related to domestic minor sex trafficking under Indiana law may be ordered to pay fines, make restitution to the victim, and forfeit proceeds of the crime or property used in connection with the crime. Traffickers convicted under Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking), § 35-45-4-4 (Promoting prostitution), § 35-52-4-6 (Child solicitation), § 35-42-4-4(b) (Child exploitation), or § 35-45-15-5 (Money laundering), all felonies,<sup>60</sup> can be ordered to pay a possible fine up to \$10,000. Ind. Code Ann. §§ 35-50-2-4 to -7. Additionally, under Ind. Code Ann. § 35-50-5-2 (Fines as alternative penalty for felony or misdemeanor), “In the alternative to the provisions concerning fines in this article, a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by victims of the offense he committed.”

A court shall order a trafficker convicted of violating Indiana’s human trafficking law to make restitution to the victim of the crime. Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under section 1 [IC 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking)] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3.” Ind. Code Ann. § 35-50-5-3(k) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim’s labor or services.
- (2) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage); whichever is greater.

Restitution may be ordered, at the court’s discretion, for violations of CSEC, sexual offense laws, or criminal gang recruitment under Ind. Code Ann. § 35-50-5-3(a) (Restitution orders), which permits the court to order a defendant convicted of a felony or misdemeanor to make restitution to the victim. In determining the amount of

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<sup>59</sup> See *supra* note 12.

<sup>60</sup> See *supra* note 11.

restitution a defendant must pay, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Moreover, restitution is mandatory for criminal gang members. Pursuant to Ind. Code Ann. § 35-45-9-6, “In addition to any sentence or fine imposed on a criminal gang member for committing a felony or misdemeanor, the court shall order a criminal gang member convicted of a felony or misdemeanor to make restitution to the victim of the crime under IC 35-50-5-3.”

Several forfeiture provisions, which are civil and discretionary in nature, apply to traffickers. Ind. Code Ann. § 34-24-1-1(a)(3) (Property which may be seized) permits seizure of “[a]ny portion of real or personal property purchased with money that is traceable as a proceed of a violation of a criminal statute.” Furthermore, vehicles used by traffickers to “(A) commit, attempt to commit, or conspire to commit; (B) facilitate the commission of; or (C) escape from the commission of; . . . kidnapping (IC 35-42-3-2) . . . child molesting (IC 35-42-4-3), or child exploitation (IC 35-42-4-4)” may also be seized. Ind. Code Ann. § 34-24-1-1(a)(4). In addition, “[a]ny equipment, including computer equipment and cellular telephones, used for or intended for use in preparing, photographing, recording, videotaping, digitizing, printing, copying, or disseminating matter in violation of IC 35-42-4 [Sex crimes]” may be seized, but only if it is proven “by a preponderance of the evidence that the owner of the equipment knowingly permitted the equipment to be used to engage in conduct that subjects it to seizure under subsection (a)(10).” Ind. Code Ann. § 34-24-1-1(a)(10), (c). Pursuant to Ind. Code Ann. § 34-24-1-9, “The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or forfeiture for purposes consistent with federal laws and regulations.” Seizure of such forfeitable property is governed by Ind. Code Ann. § 34-24-1-9.

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

Pursuant to Ind. Code Ann. § 11-8-8-7(a) (Persons who must register), “A sex or violent offender who resides in Indiana,” who is or intends to be employed for a certain time period in Indiana, or “who is enrolled or intends to be enrolled” as a student must register under the sex offender chapter. A “sex or violent offender” is defined to include, among others, persons convicted under Ind. Code Ann. § 35-42-4-4(b) (Child exploitation), § 35-42-4-6 (Child solicitation), § 35-45-4-4 (Promoting prostitution when punished as a Class B felony), § 35-42-3.5-1 (Promotion of human trafficking, sexual trafficking, and human trafficking, where the victim is under 18). Ind. Code Ann. § 11-8-8-5(a)(4), (6), (14), (15), (16).<sup>61</sup> A trafficker convicted of these offenses will also be deemed a “sex offender” under Ind. Code Ann. § 11-8-8-4.5(a) (4), (6), (14), (15), (16).<sup>62</sup>

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<sup>61</sup> See *supra* note 47.

<sup>62</sup> See *supra* note 48.

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

Ind. Code Ann. § 31-35-3-1 (Applicability of chapter) states, “This chapter applies the termination of the parent-child relationship between an individual convicted of an offense listed in section 4(1) [IC 31-35-3-4(1)] of this chapter and a child described in section 4(2) [IC 31-35-3-4(2)] of this chapter.” The list of offenses in Ind. Code Ann. § 31-35-3-4(1) (Filing of a petition) does not include violations of Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking), § 35-42-4-6 (Child solicitation) or § 35-45-4-4 (Promoting prostitution). However, the list does include Ind. Code Ann. § 35-42-4-4 (Child exploitation), § 35-42-4-3 (Child molesting), and § 35-42-4-9 (Sexual misconduct with a minor).<sup>63</sup> Under Ind. Code Ann. § 31-35-3-4(2), the victim must be under 16 and the offender’s child or the offender’s spouse’s child. If the requirements of Ind. Code Ann. § 31-35-3-4 are met, “the attorney for the department, the child’s guardian ad litem, or the court appointed special advocate may file a petition with the juvenile or probate court to terminate the parent-child relationship of the individual who has committed the offense with the victim of the offense, the victim’s siblings, or any biological or adoptive child of that individual.” Ind. Code Ann. § 31-35-3-4. “If the court finds that the allegations in a petition described in section 4 [IC 31-35-3-4] of this chapter are true, the court shall terminate the parent-child relationship.” Ind. Code Ann. § 31-35-3-9(a).

In addition, chapter 2, pursuant to Ind. Code Ann. § 31-35-2-1 (Applicability of chapter), “applies to the termination of the parent-child relationship involving: (1) a delinquent child; or (2) a child in need of services.” Ind. Code Ann. § 31-34-1-3(a)(1) (Victim of sex offenses) defines a “child in need of services” as, among other things, a child who, before the age of 18, is the victim of a specified sex offense, including victims of Ind. Code Ann. § 35-42-4-3 (Child molesting), § 35-42-4-4 (Child exploitation), § 35-42-4-9 (Sexual misconduct with a minor), § 35-45-4-2 (Prostitution), or “the law of another jurisdiction . . . that is substantially equivalent to any of the offenses listed,” and who “needs care, treatment, or rehabilitation that: (A) the child is not receiving; and (B) is unlikely to be provided or accepted without the coercive intervention of the court.” A petition may be filed to terminate parental rights to a delinquent child or a child in need of services, by the department’s attorney or the child’s guardian ad litem or court appointed special advocate. Ind. Code Ann. § 31-35-2-4(a). Pursuant to Ind. Code Ann. § 31-35-2-4(b)(2) (Petition; contents), among other things,

The petition [filed for in the case of a delinquent child or a child in need of services] must allege:

(A) that one (1) of the following is true:

(i) The child has been removed from the parent for at least six (6) months under a dispositional decree.

(ii) A court has entered a finding under IC 31-34-21-5.6 [When efforts to reunify or preserve family not required] that reasonable efforts for family preservation or reunification are not required, including a description of the court’s finding, the date of the finding, and the manner in which the finding was made.

(iii) The child has been removed from the parent and has been under the supervision of a county office of family and children or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied.

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<sup>63</sup> Other crimes constituting grounds for a petition for terminating parental rights include Ind. Code Ann. § 35-42-1-1 (Murder), § 35-42-1-1 (Causing suicide), § 35-42-1-3 (Voluntary manslaughter), § 35-42-1-4 (Involuntary manslaughter), § 35-42-4-1 (Rape), § 35-42-4-2 (Criminal deviate conduct), and § 35-46-1-3 (Incest). Ind. Code Ann. § 31-35-3-4.

- (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
- (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
- (C) that termination is in the best interests of the child; and
- (D) that there is a satisfactory plan for the care and treatment of the child.

Where the court determines that the allegations in the petition, as provided under Ind. Code Ann. § 31-35-2-4, are true, and no exceptions under Ind. Code Ann. § 31-35-2-4.5(d)<sup>64</sup> exist, the court will terminate parental rights to a delinquent child or a child in need of services. Ind. Code Ann. § 31-35-2-8(a).

- 3.6.1 Recommendation: Amend Ind. Code Ann. § 31-35-3-4(1) (Filing of petition) to include violations of Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking), § 35-42-4-6 (Child solicitation), and § 35-45-4-4 (Promoting prostitution, as a Class B felony) as specified criminal offenses constituting grounds for a petition for terminating parental rights.

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<sup>64</sup> The text of Ind. Code Ann. § 31-35-2-4.5 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 286 during the second regular session of 117th Indiana General Assembly.



***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.*

Ind. Code Ann. § 35-42-3.5-1<sup>65</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) may apply to some facilitators, such as those who harbor or transport victims, but it does not include language aimed at those who knowingly benefit from trafficking. Other laws might apply to facilitators of domestic minor sex trafficking. Ind. Code Ann. § 35-45-4-4 (Promoting prostitution) could apply to a facilitator who “[h]aving control over the use of a place, knowingly or intentionally permits another person to use the place for prostitution” or “[k]nowingly or intentionally conducts or directs another person to a place for the purpose of prostitution.” Ind. Code Ann. § 35-45-4-4(3), (5). A violation is a Class C felony punishable by an imprisonment term of 2–8 years, “with the advisory sentence being four (4) years,” and a fine not to exceed \$10,000. Ind. Code Ann. §§ 35-45-4-4, 35-50-2-6(a). If a facilitator “[k]nowingly or intentionally entices or compels another person [under the age of 18] to become a prostitute,” he faces a Class B felony punishable by an imprisonment term of 6-20 years, with a 10 year advisory sentence and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-4-4(1), 35-50-2-5.

In addition, under Ind. Code Ann. § 35-45-15-5, a facilitator commits money laundering if, “knowingly or intentionally,” he does any of the following:

- (1) acquires or maintains an interest in, receives, conceals, possesses, transfers, or transports the proceeds of criminal activity;
- (2) conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity; or
- (3) invests, expends, receives, or offers to invest, expend, or receive, the proceeds of criminal activity or funds that are the proceeds of criminal activity, and the person knows that the proceeds or funds are the result of criminal activity;

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“Criminal activity” is defined as including “any offense . . . classified as a felony under Indiana or United States law,” while “proceeds” is defined as “funds acquired or derived directly or indirectly from, produced through, or realized through an act.” Ind. Code Ann. §§ 35-45-15-1, 35-45-15-4. Based on those definitions, a facilitator who receives money from promoting prostitution, sponsoring or distributing child pornography, or criminal gang activity could be convicted of money laundering, a Class D felony punishable by an imprisonment term of 6 months to 3 years, with a 1½ year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-7(a). The offense is also subject to penalty enhancements, including where the proceeds are at least \$50,000, which increases the offense to a Class C felony punishable by an imprisonment term of 2–8

<sup>65</sup> See *supra* note 2.

years, with a 4 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-6(a).

- 4.1.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(a) (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) to include those who “knowingly benefit” from trafficking to include more facilitators within the trafficking crime.

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

Facilitators convicted of Ind. Code Ann. § 35-45-4-4 (Promoting prostitution), § 35-42-4-4(b) (Child exploitation), § 35-45-9-3 (Criminal Gang Activity), § 35-45-6-2(1) (Corrupt business influence), or § 35-45-15-5 (Money laundering), all felonies, may be ordered to pay fines up to \$10,000. Ind. Code Ann. §§ 35-50-2-4 to -7. Additionally, under Ind. Code Ann. § 35-50-5-2 (Fine as alternative penalty for felony or misdemeanor), “In the alternative to the provisions concerning fines in this article, a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by victims of the offense he committed.” Ind. Code Ann. § 35-42-3.5-1<sup>66</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) applies to some facilitators, subjecting those facilitators to a possible fine not to exceed \$10,000 and the trafficking law’s mandatory restitution orders. Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under section 1 [IC 35-42-3.5-1] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3.” Ind. Code Ann. § 35-50-5-3(k) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim’s labor or services.
- (2) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage);whichever is greater.

Restitution may be ordered, at the court’s discretion, for violations of CSEC and sexual offense laws under Ind. Code Ann. § 35-50-5-3(a) (Restitution orders), which permits the court to order a defendant convicted of a felony or misdemeanor to make restitution to the victim. In determining the amount of restitution a defendant must pay, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

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<sup>66</sup> See *supra* note 2.

Moreover, restitution is mandatory for criminal gang members. Pursuant to Ind. Code Ann. § 35-45-9-6, “In addition to any sentence or fine imposed on a criminal gang member for committing a felony or misdemeanor, the court shall order a criminal gang member convicted of a felony or misdemeanor to make restitution to the victim of the crime under IC 35-50-5-3.” Also, under Ind. Code Ann. § 34-24-3-1 (Damages in civil action),

[i]f a person . . . suffers a pecuniary loss as a result of a violation of . . . IC 35-45-9 [Criminal gang control], the person may bring a civil action against the person who caused the loss for the following:

(1) An amount not to exceed three (3) times:

(A) the actual damages of the person suffering the loss, in the case of a liability that is not covered by IC 24-4.6-5,

and other listed expenses.

Additional financial penalties apply to facilitators convicted of racketeering. Ind. Code Ann. § 35-45-6-2 (Corrupt business influence) is a Class C felony is punishable by an imprisonment term of 2–8 years, “with the advisory sentence being four (4) years,” and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-6-2, 35-50-2-6(a).

Ind. Code Ann. § 34-24-1-1(a)(3) (Property which may be seized) permits civil asset forfeiture at the discretion of the court. Ind. Code Ann. §34-24-1-1- permits the seizure of “[a]ny portion of real or personal property purchased with money that is traceable as a proceed of a violation of a criminal statute. In addition, “[a]ny equipment, including computer equipment and cellular telephones, used for or intended for use in preparing, photographing, recording, videotaping, digitizing, printing, copying, or disseminating matter in violation of IC 35-42-4 [Sex crimes]” may be seized, but only if it is proven “by a preponderance of the evidence that the owner of the equipment knowingly permitted the equipment to be used to engage in conduct that subjects it to seizure under subsection (a)(10).” Ind. Code Ann. § 34-24-1-1(a)(10), (c). Pursuant to Ind. Code Ann. §34-24-1-9, “The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or forfeiture for purposes consistent with federal laws and regulations.” Seizure of such forfeitable property is governed by Ind. Code Ann. § 34-24-1-9.

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

There is no specific provision under Indiana’s laws prohibiting child sex tourism.

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

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

Sponsoring, producing, and selling child pornography is illegal under Ind. Code Ann. § 35-42-4-4(b) (Child exploitation). Ind. Code Ann. § 35-42-4-4(b) (Child exploitation) states that it is illegal when a person “knowingly or intentionally” does any of the following:

(1) manages, produces, sponsors, presents, exhibits, photographs, films, videotapes, or creates a digitized image of any performance or incident that includes sexual conduct by a child under eighteen (18) years of age;

(2) disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age; or

(3) makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age.

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A violation is a Class C felony punishable by an imprisonment term of 2–8 years, with a 4 year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-4(b), 35-50-2-6(a).

Ind. Code Ann. § 35-49-3-2 (Activities related to obscene performance) states, “A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance<sup>67</sup> commits a Class A misdemeanor. However, the offense is a Class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.” Ind. Code Ann. § 35-49-3-1 (Importation or distribution of obscene matter) states,

A person who knowingly or intentionally:

- (1) Sends or brings into Indiana obscene matter for sale or distribution; or
  - (2) Offers to distribute, distributes, or exhibits to another person obscene matter;
- commits a Class A misdemeanor. However, the offense is a Class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.

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<sup>67</sup> See *supra* note 54.

**Legal Components:**

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*
- 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 *Child victims of sex trafficking or commercial sexual exploitation 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 commercial sexual exploitation of children (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 delinquency 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 for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

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**Legal Analysis:**

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*

For the purposes of Ind. Code Ann. Title 35, Article 40 (Victim rights), a “victim” is “a person that has suffered harm as a result of a crime that was perpetrated directly against the person. The term does not include a person that has been charged with a crime arising out of the same occurrence.” Ind. Code Ann. § 35-40-4-8.

Ind. Code Ann. § 35-42-3.5-4(a) (Additional rights of victim) specifically states in part that “an alleged victim of an offense” under the human trafficking law,

- (1) may not be detained in a facility that is inappropriate to the victim’s status as a crime victim;
- (2) may not be jailed, fined, or otherwise penalized due to having been the victim of the offense; and
- (3) shall be provided protection if the victim’s safety is at risk or if there is danger of additional harm by recapture of the victim by the person who allegedly committed the offense, including:
  - (A) taking measures to protect the alleged victim and the victim’s family members from intimidation and threats of reprisals and reprisals from the person who allegedly committed the offense or the person’s agent; and

(B) ensuring that the names and identifying information of the alleged victim and the victim’s family members are not disclosed to the public.

This subsection shall be administered by law enforcement agencies and the Indiana criminal justice institute as appropriate.

For purposes of crime victim compensation, Ind. Code Ann. § 5-2-6.1-7 (Compensation for victims of violent crime). A “victim” is defined as “an individual who suffers bodily injury or death as a result of a violent crime.” Violent crimes include, with some exceptions, those felonies or Class A misdemeanors that result in bodily injury or death to the victim. Ind. Code Ann. § 5-2-6.1-8(1).<sup>68</sup> Violent crimes also include “Child Molesting [IC 35-42-4-3] and Child Seduction [IC 35-42-4-7].” Ind. Code Ann. § 5-2-6.1-8(1). “Bodily injury” is defined as: “(1) an impairment of a physical condition; (2) a visible injury; (3) physical pain; or (4) emotional trauma that stems directly from the impairment of a physical condition, a visible injury, or physical pain.” Ind. Code Ann. § 5-2-6.1-0.5.

5.1.1 Recommendation: Amend Ind. Code Ann. § 5-2-6.1-8(1) to include Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) and CSEC offenses within the definition of a violent crime, regardless of whether the victim suffers bodily injury or death as a result of the offense.

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.*

Ind. Code Ann. § 35-42-3.5-1(b)<sup>69</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) prohibits a defense to prosecution for promotion of human trafficking of a minor under subsection (b) based on the child’s consent “to engage in prostitution or to participate in sexual conduct,” but a consent defense is not expressly prohibited for prosecutions under subsection (c), suggesting availability of this defense. Subsection (a), which would apply to minors aged 16 or 17, also does not expressly prohibit a consent defense.

Similarly, no defense based on the consent of the minor to the unlawful sex act is referred to in Ind. Code Ann. § 35-45-4-4 (Promoting prostitution) or §35-42-4-4 (Child exploitation).

5.2.1 Recommendation: Amend Ind. Code Ann. § 35-45-4-4 (Promoting prostitution), §35-42-4-4 (Child exploitation) and subsections (a) and (c) of Ind. Code Ann. § 35-42-3.5-1<sup>70</sup> (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) to expressly prohibit a consent defense when the victim is a minor.

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

Ind. Code Ann. § 35-45-4-2 (Prostitution) is age neutral, stating only, “A person who knowingly or intentionally: (1) Performs, or offers or agrees to perform, sexual intercourse or deviate sexual conduct; or (2) Fondles, or offers or agrees to fondle, the genitals of another person; for money or other property commits prostitution, a Class A misdemeanor. However, the offense is a Class D felony if the person has two (2) prior convictions under this section.”

5.3.1 Recommendation: Amend Ind. Code Ann. § 35-45-4-2 (Prostitution) to make minors expressly immune from prosecution for prostitution and identify all minors engaged in prostitution as victims of human trafficking pursuant to Ind. Code Ann. § 35-42-3.5-1 (Promotion of human

<sup>68</sup> The text of Ind. Code Ann. § 5-2-6.1-8 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 286 during the second regular session of 117th Indiana General Assembly.

<sup>69</sup> See *supra* note 2.

<sup>70</sup> See *supra* note 2.

trafficking—Sexual trafficking of a minor—Human trafficking) in order to ensure a protective response.

5.4 *Child victims of sex trafficking or commercial sexual exploitation are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

If identified properly as a victim of domestic minor sex trafficking, a minor will be provided with specific protections pursuant to Ind. Code Ann. § 35-42-3.5-4(a) (Additional rights of victim). Regardless of whether these protections are properly afforded to a victim of domestic minor sex trafficking, some protective provisions are available to commercially sexually exploited children. Specifically, pursuant to Ind. Code Ann. § 31-34-2-1 (Taking a child into custody), in Article 34 (Juvenile Law: Child in Need of Services), “A child may be taken into custody by a law enforcement officer under an order of the court.” Ind. Code Ann. § 31-34-1-3 (Victims of sex offenses) explains,

- (a) A child is a child in need of services if, before the child becomes eighteen (18) years of age:
  - (1) the child is the victim of a sex offense under:
    - (A) IC 35-42-4-1 [Rape];
    - (B) IC 35-42-4-2 [Criminal deviate conduct];
    - (C) IC 35-42-4-3 [Child molesting];
    - (D) IC 35-42-4-4 [Child exploitation];
    - (E) IC 35-42-4-7 [Child seduction];
    - (F) IC 35-42-4-9 [Sexual misconduct with a minor];
    - (G) IC 35-45-4-1 [Public indecency];
    - (H) IC 35-45-4-2 [Prostitution];
    - (I) IC 35-46-1-3 [Incest]; or
    - (J) the law of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in clauses (A) through (I); and
  - (2) the child needs care, treatment, or rehabilitation that:
    - (A) the child is not receiving; and
    - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

Also, pursuant to subsection Ind. Code Ann. § 31-34-1-3(b), “A child is a child in need of services if, before the child becomes eighteen (18) years of age: (1) the child lives in the same household as another child who is the victim of a sex offense” listed above and,

- (2) the child lives in the same household as the adult who committed the sex offense under subdivision (1) and the sex offense resulted in a conviction or a judgment under IC 31-34-11-2;
- (3) the child needs care, treatment, or rehabilitation that:
  - (A) the child is not receiving; and
  - (B) is unlikely to be provided or accepted without the coercive intervention of the court; and
- (4) a caseworker assigned to provide services to the child:
  - (A) places the child in a program of informal adjustment or other family or rehabilitative services based upon the existence of the circumstances described in subdivisions (1) and (2) and the assigned caseworker subsequently determines further intervention is necessary; or
  - (B) determines that a program of informal adjustment or other family or rehabilitative services is inappropriate.

A child could also be considered in need of services if a “parent, guardian, or custodian” allows the child “to participate in an obscene performance (as defined by IC 35-49-2-2 or IC 35-49-3-2)” or “to commit a sex offense prohibited by IC 35-45-4 [Public indecency—Prostitution]” and the child needs care or treatment that he

or she is not receiving and is not likely to receive without court intervention. Ind. Code Ann. §§ 31-34-1-4, 31-34-1-5.

Law enforcement officers may bring a child in need of services into custody pursuant to Ind. Code Ann. § 31-34-2-3(a) (Protection of safety of child—Probation officer or caseworker may take child into custody—Written documentation), which states,

If a law enforcement officer's action under section 2 [IC 31-34-2-2] of this chapter will not adequately protect the safety of the child, the child may be taken into custody by a law enforcement officer, probation officer, or caseworker acting with probable cause to believe the child is a child in need of services if:

- (1) it appears that the child's physical or mental condition will be seriously impaired or seriously endangered if the child is not immediately taken into custody;
- (2) there is not a reasonable opportunity to obtain an order of the court; and
- (3) consideration for the safety of the child precludes the immediate use of family services to prevent removal of the child.

Under subsection (c), "If a person takes a child into custody under this section, the person shall make written documentation not more than twenty-four (24) hours after the child is taken into custody as provided in section 6 [IC 31-34-2-6] of this chapter." Once taken into custody, a detention hearing must be held within 48 hours, weekends and holidays excluded, or the child will be released. Ind. Code Ann. § 31-34-5-1(a). A child in need of services may be detained if the court "makes written findings of fact upon the record of probable cause to believe that the child is a child in need of services and that: (1) detention is necessary to protect the child; (2) the child is unlikely to appear before the juvenile court for subsequent proceedings; (3) the child has a reasonable basis for requesting that the child not be released; (4) the parent, guardian, or custodian: (A) cannot be located; or (B) is unable or unwilling to take custody of the child; or (5) consideration for the safety of the child precludes the use of family services to prevent removal of the child." Ind. Code Ann. § 31-34-5-3(a). An alleged child in need of services may not be placed in a secure facility or "a shelter care facility that houses persons charged with, imprisoned for, or incarcerated for crimes." Ind. Code Ann. § 31-34-6-1.

A person also may "give an intake officer written information indicating that a child is a child in need of services. If the intake officer has reason to believe that the child is a child in need of services, the intake officer shall make a preliminary inquiry to determine whether the interests of the child require further action. Whenever practicable, the preliminary inquiry should include information on the child's background, current status, and school performance." Ind. Code Ann. § 31-34-7-1. After completing the preliminary inquiry, "and upon approval by the juvenile court, the intake officer may implement a program of informal adjustment if the officer has probable cause to believe that the child is a child in need of services." Ind. Code Ann. § 31-34-8-1.

Upon a report of suspected child abuse or neglect to a law enforcement agency, Ind. Code Ann. § 31-33-7-7(a) requires the agency to "immediately communicate the report to the department, whether or not the law enforcement agency has reason to believe there exists an imminent danger to the child's health or welfare; and . . . conduct an immediate, onsite assessment of the report along with the department whenever the law enforcement agency has reason to believe that an offense has been committed."

Law enforcement officers in Indiana may take a child into custody pursuant to Ind. Code Ann. § 31-37-4-2 (Probable cause), without a court order, when they have "probable cause to believe that the child has committed a delinquent act." Under Ind. Code Ann. § 31-37-4-1 (Order of court), "A child may be taken into custody by a law enforcement officer under an order of the court." Pursuant to Ind. Code Ann. §§ 31-37-1-2, "A child commits a delinquent act if, before becoming eighteen (18) years of age, the child commits an act that would be an offense if committed by an adult, except an act committed by a person over which the juvenile court lacks



jurisdiction under IC 31-30-1.”<sup>71</sup> A child also “commits a delinquent act” if, before age 18, the child run away from home “without reasonable cause” and without parental permission. Ind. Code Ann. § 31-37-2-2.

Pursuant to Ind. Code Ann. § 31-37-2-1 (Delinquent child), a child is deemed “delinquent” if,

before becoming eighteen (18) years of age, the child:

- (1) commits a delinquent act described in this chapter; and
- (2) needs care, treatment, or rehabilitation that:
  - (A) the child is not receiving;
  - (B) the child is unlikely to accept voluntarily; and
  - (C) is unlikely to be provided or accepted without the coercive intervention of the court.

Because Ind. Code Ann. § 35-45-4-2 (Prostitution) is “an offense if committed by an adult,” a domestic minor sex trafficking victim could be charged with prostitution and be considered a delinquent child. Domestic minor sex trafficking victims also may be taken into custody, although not always detained, for curfew violations pursuant to Ind. Code Ann. §§ 31-37-3-2 to -3 (Curfew violations).

Once in custody without a court order, the child may be released to his or her “parent, guardian, or custodian upon the person’s written promise to bring the child before the juvenile court at a time specified.” Ind. Code Ann. § 31-37-5-5(a). Additionally, under Ind. Code Ann. § 31-37-5-3(a), if a law enforcement officer taking a child into custody may place the child in detention if there is a reasonable belief that

- (1) the child is unlikely to appear before the juvenile court for subsequent proceedings;
- (2) the child has committed an act that would be murder or a Class A or Class B felony if committed by an adult;
- (3) detention is essential to protect the child or the community;
- (4) the parent, guardian, or custodian:
  - (A) cannot be located; or
  - (B) is unable or unwilling to take custody of the child; or
- (5) the child has a reasonable basis for requesting that the child not be released.<sup>72</sup>

Pursuant to subsection (b), “If a child is detained for a reason specified in subsection (a)(4) or (a)(5), the child shall be detained under IC 31-37-7-1.”<sup>73</sup>

If the intake officer does not release the child, a detention hearing must be held no later than 48 hours (excluding weekends and Sundays) after the child is taken into custody, otherwise the child will be released.

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<sup>71</sup> Pursuant to Ind. Code Ann. § 31-30-1-1(1) (Juvenile court jurisdiction) “A juvenile court has exclusive original jurisdiction, except as provided in sections 9, 10, 12, and 13 [IC 31-30-1-9, IC 31-30-1-10, IC 31-30-1-12, and IC 31-30-1-13] of this chapter, in the following: (1) Proceedings in which a child, including a child of divorced parents, is alleged to be a delinquent child under IC 31-37.” The titles for the bracketed statutes are: Ind. Code Ann. § 31-30-1-9 (Felony court concurrent jurisdiction); § 31-30-1-10 (Establishment of paternity); § 31-30-1-12 (Concurrent jurisdiction with court having jurisdiction of child custody proceeding in a marriage dissolution); § 31-30-1-13 (Concurrent jurisdiction with court having jurisdiction of child custody proceeding in a paternity proceeding).

<sup>72</sup> Ind. Code Ann. § 31-37-5-3(c) states, “Unless a law enforcement officer determines that detention is essential to protect a child or the community, the law enforcement officer who detains a child for a violation of the curfew law under IC 31-37-3 shall make a good faith effort to release the child to the child’s parent, guardian, or custodian within a reasonable time after the child is detained.”

<sup>73</sup> Ind. Code Ann. § 31-37-7-1 (Places in which child may not be held) states “A child alleged to be a delinquent child under IC 31-37-2, except as provided in section 3 [IC 31-37-7-3] of this chapter, may not be held in: (1) a secure facility; or (2) a shelter care facility, a forestry camp, or a training school that houses persons charged with, imprisoned for, or incarcerated for crimes.”

Ind. Code Ann. §§ 31-37-5-6, 31-37-6-2, 31-37-6-4. At the hearing, the juvenile court may release the child to the child's parent, guardian, or custodian or detain the child based on a consideration of similar factors to those the intake officer considered under Ind. Code Ann. § 31-37-5-3(a). Ind. Code Ann. § 31-37-6-6. If the child is detained because a parent is not available or will not take the child, returning the child home would be harmful to the child or contrary to his best interests, or "the child has a reasonable basis for requesting that the child not be released," the court must not detain the child in a secure facility or certain other facilities that house persons imprisoned for crimes unless they meet the exception in Ind. Code Ann. § 31-37-7-3. Ind. Code Ann. §§ 31-37-6-6(a),(b), 31-37-7-1. Ind. Code Ann. § 31-37-7-3 (Length of confinement) permits a

child alleged to be a delinquent child because of an act under IC 31-37-2-2 [Delinquent act; leaving home without permission of parent, guardian, or custodian] may be held in a juvenile detention facility for:

- (1) not more than twenty-four (24) hours before; and
- (2) not more than twenty-four (24) hours immediately after; the initial court appearance, not including Saturdays, Sundays, and nonjudicial days.

However, a child alleged to be delinquent and detained under Ind. Code Ann. § 31-37-6-6 for reasons other than those mentioned above may be held in a secure facility for limited purposes, for up to six hours, or a juvenile detention facility. Ind. Code Ann. § 31-37-7-2. Nothing in Ind. Code Ann. § 31-37-7 (Detention of alleged delinquent child) refers to Ind. Code Ann. § 35-42-3.5-4(a) (Additional rights of victim) or states that a minor's involvement in prostitution does not constitute a delinquent act.

For a child who admits to being a delinquent child, or one found by the court to be a delinquent child, the court must enter judgment of delinquency, order a predispositional report, and schedule a dispositional hearing, at which it must consider, among other things, "[a]lternatives for the care, treatment, rehabilitation, or placement of the child." Ind. Code Ann. §§ 31-37-18-1(1), 31-37-12-9(a), 31-37-13-2(3). Pursuant to Ind. Code Ann. § 31-37-19-1(a) (Delinquent children—Decrees), if the child is found to be delinquent under Ind. Code Ann. § 31-37-2 (Delinquent children who commit certain other acts and who need care, treatment, or rehabilitation), the court may enter certain dispositional decrees, including placing the child under the supervision of the probation department, ordering outpatient treatment for the child, removing the child from his or her home and placing the child in a different home or a shelter, making the child a ward of a person or a shelter, and partially or completely emancipating the child. The juvenile court must meet several requirements under Ind. Code Ann. § 31-37-19-1(b) to remove a child from the home including approving a permanency plan, designating responsibility to the probation department for the child's care and placement, determining whether "reasonable efforts were made to prevent or eliminate the need for removal," and whether the child's best interests, health, and welfare will benefit from removal from the home.

Ind. Code Ann. § 31-37-19-6 provides the placement options through a juvenile court disposition for a child determined delinquent pursuant to Ind. Code Ann. § 31-37-1 (Delinquent children who commit acts that would be offenses if committed by adults) including awarding wardship to the department of correction or a "community based correctional facility for children," awarding wardship to a person or to a shelter, removing the child from the home to be placed in another home or shelter, order the child confined for a period of time in a juvenile detention facility, or placing the child in a secure private facility. Juveniles who have committed more serious offenses are confined pursuant to Ind. Code Ann. § 31-37-19-10.

Additionally, for children delinquent under Ind. Code Ann. § 31-37-1, Ind. Code Ann. § 31-37-19-5(b) provides the juvenile court with several dispositional alternatives that may be taken in conjunction with the placement options in Ind. Code Ann. § 31-37-19-6, including ordering probationary supervision of the child, ordering outpatient treatment, ordering wardship, and ordering the attendance of an alcohol and drug program.

Children under 12 may not be awarded to the department of corrections under Ind. Code Ann. § 31-37-19-6(b)(2)(A) unless the child is 10 or 11 and “committed an act that would have been murder if committed by an adult.” Ind. Code Ann. § 31-37-19-7(a), (b).

5.4.1 Recommendation: Establish a mandatory response law directing any minor involved in prostitution, pornography or sexual performance 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.*

For purposes of investigating possible instances of child abuse and neglect within family law, under Ind. Code Ann. § 31-32-11-1 (Privileged communications), § 31-33 (Juvenile law: reporting and investigation of child abuse and neglect), § 31-34-7-4 (Persons accused of child abuse or neglect entitled to access to report), and § 31-39-8-4 (Probative value of information—Unsubstantiated information), “child abuse and neglect . . . refers to a child described in IC 31-34-1-1 through IC 31-34-1-5, regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.”<sup>74</sup> Ind. Code Ann. § 31-9-2-14.<sup>75</sup> However, subsection (b) specifies that “child abuse and neglect” does not apply to a child who is alleged to be “a victim of a sexual offense under IC 35-42-4-3 [Child molesting] unless the alleged offense under IC 35-42-4-3 involves the fondling or touching of the buttocks, genitals, or female breasts, regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.” Under subsection (c), “‘Child abuse or neglect’, for purposes of IC 31-34-2.3 [Child protective orders for removal of alleged perpetrators], refers to acts or omissions by a person against a child as described in IC 31-34-1-1 through IC 31-34-1-9, regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.”

Ind. Code Ann. § 31-34-1-3(a)(1) (Victim of sex offenses) defines a “child in need of services” as a child who, before reaching the age of 18, is the victim of a specified sex offense, including a victim of Ind. Code Ann. § 35-42-4-3 (Child molesting), § 35-42-4-4 (Child exploitation), § 35-42-4-9 (Sexual misconduct with a minor), § 35-45-4-2 (Prostitution), or “the law of another jurisdiction . . . that is substantially equivalent to any of the offenses listed,” and “the child needs care, treatment, or rehabilitation that: (A) the child is not receiving; and (B) is unlikely to be provided or accepted without the coercive intervention of the court.”

A child also is a child in need of services if “the child lives in the same household as another child who is the victim of a sex offense” listed above; “the child lives in the same household as the adult who committed the sex offense,” and the offense “resulted in a conviction or judgment,” the child needs care or treatment as noted above, and

a caseworker assigned to provide services to the child:

- (A) places the child in a program of informal adjustment or other family or rehabilitative services based upon the existence of the circumstances described in subdivisions (1) and (2) and the assigned caseworker subsequently determines further intervention is necessary; or
- (B) determines that a program of informal adjustment or other family or rehabilitative services is inappropriate. Ind. Code Ann. § 31-34-1-3(b).

<sup>74</sup> Ind. Code Ann. § 31-34-1-1 (Impairment or serious endangerment of physical or mental condition); Ind. Code Ann. § 31-34-1-2 (Endangerment of physical or mental health); Ind. Code Ann. § 31-34-1-3 (Victims of sex offenses); Ind. Code Ann. § 31-34-1-4 (Participation in obscene performances); Ind. Code Ann. § 31-34-1-5 (Sex offenses committed by child).

<sup>75</sup> The text of Ind. Code Ann. § 35-42-3.5-1 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 286 during the second regular session of 117th Indiana General Assembly.

5.5.1 Recommendation: Amend Ind. Code Ann. § 31-34-1-3 (Victim of sex offenses) to include victims of Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking), § 35-42-4-5 (Vicarious sexual gratification), § 35-42-4-6 (Child solicitation), § 35-45-4-3 (Patronizing a prostitute), and § 35-45-4-4 (Promoting prostitution) as children in need of services.

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.*

For juvenile law, “custodian” is defined as “a person with whom a child resides.” Ind. Code Ann. § 31-9-2-31(a). For purposes of the chapter on child in need of services, “custodian” is defined in Ind. Code Ann. § 31-9-2-31(b), in part, as, including “any person who is . . . (3) a child caregiver, as defined in section 16.4 [IC 31-9-2-16.4] of this chapter;<sup>76</sup> (4) a member of the household of the child’s noncustodial parent; or (5) an individual who has or intends to have direct contact, on a regular and continuing basis, with a child for whom the individual provides care and supervision.” These definitions may be sufficiently broad to capture a trafficker in the definition of “caregiver.”

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*

Pursuant to Ind. Code Ann. § 5-2-6.1-12(1), a victim of a violent crime is eligible to receive compensation under Title 5, Article 2, Chapter 6.1 (Compensation for victims of violent crime). A “victim” is defined as “an individual who suffers bodily injury or death as a result of a violent crime.” Ind. Code Ann. § 5-2-6.1-7. Violent crimes include, with some exceptions, those felonies or Class A misdemeanors that result in bodily injury or death to the victim. Ind. Code Ann. § 5-2-6.1-8(1).<sup>77</sup> Violent crimes also include Ind. Code Ann. § 35-42-4-3 (Child molesting) and § 35-42-4-7 (Child seduction). Ind. Code Ann. § 5-2-6.1-8(1). “Bodily injury” is defined as: “(1) an impairment of a physical condition; (2) a visible injury; (3) physical pain; or (4) emotional trauma that stems directly from the impairment of a physical condition, a visible injury, or physical pain.” Ind. Code Ann. § 5-2-6.1-0.5.

After proving “bodily injury,” other requirements and ineligibility factors present special difficulties for domestic minor sex trafficking victims. A victim who “sustained the injury as a result of participating in or assisting in . . . a criminal act,” or “profited or would have profited from the criminal act” may not receive victim’s compensation benefits. Ind. Code Ann. § 5-2-6.1-13(a)(1), (3).<sup>78</sup> However, an exception to the reporting requirement exists for alleged victims of child sex crimes and may apply to CSEC victims. Ind. Code Ann. § 5-2-6.1-17(a) states “(a) Except for an alleged victim of a child sex crime,<sup>79</sup> the division may not award

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<sup>76</sup> A “child caregiver” is defined in Ind. Code Ann. § 31-9-2-16.4 as “a person who provides, or is responsible for providing, care and supervision of a child (other than a child of whom the person is a parent, stepparent, grandparent, aunt, uncle, sibling, legal guardian or custodian with whom the person resides) at a residential property that is not the child’s place of residence, if the person: (1) is not required to be licensed as the operator of . . . a child care home . . . a foster family home . . . ; (2) provides care and supervision of a child while unattended by the child’s: (A) parent; (B) guardian; or (C) custodian with whom the child resides; and (3) receives more than two thousand dollars (\$2,000) in annual compensation for providing care and supervision of a child or children.”

<sup>77</sup> The text of Ind. Code Ann. § 5-2-6.1-8 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 286 during the second regular session of 117th Indiana General Assembly.

<sup>78</sup> Pursuant to Ind. Code Ann. § 5-2-6.1-13(b), “If the victim is a dependent child or dependent parent of the person who commits a violent crime, compensation may be awarded where justice requires.”

<sup>79</sup> Ind. Code Ann. § 5-2-6.1-7.5 provides,

As used in this chapter, “victim of a child sex crime” means an individual who was the victim of:  
(1) child molesting (IC 35-42-4-3(a));

compensation under this chapter unless the violent crime was reported to a law enforcement officer not more than seventy-two (72) hours after the occurrence of the crime.” In addition, if an eligible victim’s application for compensation is not received within 180 days after the date of the crime, or within 2 years given a showing of good cause, compensation will not be granted to the victim. Ind. Code Ann. § 5-2-6.1-16(b). Nothing in Ind. Code Ann. § 5-2-6.1 (Compensation for victims of violent crime), however, explains what constitutes “good cause” for purposes of Ind. Code Ann. § 5-2-6.1-16(b) (Applications for assistance). An exception to this requirement may also apply to CSEC victims in some cases since “an alleged victim of a child sex crime may submit an application to the division until the victim becomes thirty-one (31) years of age.” Ind. Code Ann. § 5-2-6.1-16(e). Finally, if “the claimant fails to fully cooperate with law enforcement personnel in the investigation, apprehension, and prosecution of the offender,” compensation may be denied. Ind. Code Ann. § 5-2-6.1-18.

- 5.7.1 Recommendation: Amend Ind. Code Ann. § 5-2-6.1-13(a) to specifically extend the exceptions to the reporting requirement and ineligibility criteria to victims of domestic minor sex trafficking.
- 5.7.2 Recommendation: Amend Ind. Code Ann. § 5-2-6.1-8(1) to include Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) within the definition of a violent crime, regardless of whether the victim suffers bodily injury or death as a result of the offense.

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

Ind. Code Ann. § 35-42-3.5-4(a)(3) (Additional rights of victim) provides that human trafficking victims shall be provided protection if their “safety is at risk or if there is danger of additional harm by recapture of the victim by the person who allegedly committed the offense . . . .” Protections include “ensuring that the names and identifying information of the alleged victim and the victim’s family members are not disclosed to the public.” Ind. Code Ann. § 35-42-3.5-4(a)(3)(B).

In addition, victims of trafficking and sexual offenses who are under 14 are entitled to certain victim-friendly protections throughout the criminal justice process, as listed in Ind. Code Ann. Title 35, Article 37, Chapter 4 (Evidence). In prosecutions for certain listed crimes, including, Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) and § 35-42-4 (Sex crimes), “On the motion of the prosecuting attorney, the court may order that the testimony of a protected person be taken in a room other than the courtroom, and that the questioning of the protected person by the prosecution and the defense be transmitted using a two-way closed circuit television arrangement that: (1) allows the protected person<sup>80</sup> to see the accused and the trier of fact; and (2) allows the accused and the trier of fact to see and hear

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- (2) vicarious sexual gratification (IC 35-42-4-5);
  - (3) child solicitation (IC 35-42-4-6);
  - (4) child seduction (IC 35-42-4-7); or
  - (5) incest (IC 35-46-1-3);

and was less than eighteen (18) years of age at the time the crime occurred.

<sup>80</sup> Pursuant to Ind. Code Ann. § 35-37-4-8(b), “protected person” is defined by referring to Ind. Code Ann. § 35-37-4-6. Ind. Code Ann. § 35-37-4-6(c) states,

As used in this section, “protected person” means:

- (1) a child who is less than fourteen (14) years of age;
- (2) an individual with a mental disability who has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:
  - (A) is manifested before the individual is eighteen (18) years of age;
  - (B) is likely to continue indefinitely;

the protected person.” Ind. Code Ann. § 35-37-4-8(c). Videotaped testimony of a “protected person” may also be ordered by the court upon motion of the prosecuting attorney or the defendant under the same requirements of Ind. Code Ann. § 35-37-4-8(c). Ind. Code Ann. § 35-37-4-8(d). Pursuant to Ind. Code Ann. § 35-37-4-8(e), the court may not allow closed-circuit or videotaped testimony unless certain conditions are met, including the conditions outlined in subsection (e)(1)(B) that the court find that the protected person should testify outside of court because

- (i) the court finds from the testimony of a psychiatrist, physician, or psychologist and any other evidence that the protected person’s testifying in the physical presence of the defendant would cause the protected person to suffer serious emotional harm and the court finds that the protected person could not reasonably communicate in the physical presence of the defendant to the trier of fact;
- (ii) a physician has certified that the protected person cannot be present in the courtroom for medical reasons; or
- (iii) evidence has been introduced concerning the effect of the protected person’s testifying in the physical presence of the defendant, and the court finds that it is more likely than not that the protected person’s testifying in the physical presence of the defendant creates a substantial likelihood of emotional or mental harm to the protected person.

Ind. Code Ann. § 35-37-4-8 does not permit the defendant to be present in the room while the witness gives testimony via closed-circuit television. Ind. Code Ann. § 35-37-4-8(f). If the court allows testimony to be given via videotape, Ind. Code Ann. § 35-37-4-8(g) provides that only certain persons may be present in the room during the witness’s testimony, including the defendant if he is not represented by an attorney. Ind. Code Ann. § 35-37-4-8(g)(3). Also, “if the defendant is not represented by an attorney, the defendant may question the protected person.” Ind. Code Ann. § 35-37-4-8(g)(7).

The court also must provide safeguards all sex trafficking victims, such as separate waiting rooms, “to minimize the contact of the victim of an offense” with the defendant and the defendant’s friends and relatives during criminal proceedings. Ind. Code Ann. § 35-37-4-11(a), (b).

Furthermore, in prosecutions under Ind. Code Ann. § 35-42-4 (Sex crimes), evidence of the victim’s past sexual conduct, including both opinion and reputation evidence, may not be admitted or referred to in the presence of the jury. Ind. Code Ann. § 35-37-4-4(a). However, pursuant to Ind. Code Ann. § 35-37-4-4(b), evidence

- (1) Of the victim’s or a witness’s past sexual conduct with the defendant;
- (2) Which in a specific instance of sexual activities shows that some person other than the defendant committed the act upon which the prosecution is founded; or
- (3) That the victim’s pregnancy at the time of the trial was not caused by the defendant; may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and its inflammatory or prejudicial nature does not outweigh its probative value.

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(C) constitutes a substantial impairment of the individual's ability to function normally in society; and

(D) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated; or

(3) an individual who is:

(A) at least eighteen (18) years of age; and

(B) incapable by reason of mental illness, mental retardation, dementia, or other physical or mental incapacity of:

(i) managing or directing the management of the individual's property; or

(ii) providing or directing the provision of self-care.

Certain additional protections are afforded to children who are the victims of sex crimes. Under Ind. Code Ann. § 35-40-5-11 (Interview by defense counsel of child less than sixteen who is alleged victim of sex offense), defense counsel who wish to interview victims of sexual offenses under 16 after charges are filed must “contact the prosecuting attorney” rather than the child, and “[t]he child has the right . . . to confer with the prosecuting attorney before the interview occurs.” Ind. Code Ann. § 35-40-5-11(c). “If the parties are unable to agree to the terms of the interview, the parties may petition the court for a hearing on the terms of the interview prior to the interview taking place. The court shall review the terms suggested by the parties and consider the age of the child, any special considerations, and the rights of victims provided by IC 35-40-5-1 in setting reasonable terms for the interview.” Ind. Code Ann. § 35-40-5-11(d).

5.9 *Expungement or sealing of juvenile delinquency 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.*

Under Ind. Code Ann. § 31-39-8-2 (Petition to juvenile court for removal of records), “Any person may petition a juvenile court at any time to remove from: (1) the court’s files; (2) the files of law enforcement agencies; and (3) the files of any other person who has provided services to a child under a court order; those records pertaining to the person’s involvement in juvenile court proceedings.” In determining whether to grant such a petition, Ind. Code Ann. § 31-39-8-3 states the court may consider the following:

- (1) the best interests of the child;
- (2) the age of the person during the person’s contact with the juvenile court or law enforcement agency;
- (3) the nature of any allegations;
- (4) whether there was an informal adjustment or an adjudication;
- (5) the disposition of the case;
- (6) the manner in which the person participated in any court ordered or supervised services;
- (7) the time during which the person has been without contact with the juvenile court or with any law enforcement agency;
- (8) whether the person acquired a criminal record; and
- (9) the person’s current status.

Furthermore, a person who was arrested but not charged with a criminal offense, or if the charges were dropped, may petition the court to have records related to the arrest expunged. Ind. Code Ann. § 35-38-5-1(a). If the petition is granted, “no information concerning the arrest may be placed or retained in any state central repository for criminal history information or in any other alphabetically arranged criminal history information system maintained by a local, regional, or statewide law enforcement agency. However, this chapter does not require any change or alteration in any record (such as a police blotter entry) made at the time of the arrest or in the record of any court in which the criminal charged were filed.” Ind. Code Ann. § 35-38-5-3.

5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*

Victim restitution for victims of human trafficking offenses is mandatory. Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under section 1 [Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking)] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3.” Ind. Code Ann. § 35-50-5-3(k) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim's labor or services.
- (2) The value of the victim's labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage);whichever is greater.

In addition, persons convicted of Ind. Code Ann. § 35-42-3.5-1 may also be liable to the victim for civil damages, including actual and punitive damages, reasonable attorney's fees, and court costs. Ind. Code Ann. § 35-42-3.5-3(a).

Victims are entitled to restitution more broadly under Ind. Code Ann. § 35-50-5-3(a) (Restitution orders), which permits the court to order a defendant convicted of any felony or misdemeanor to make restitution to the victim. This restitution provision is subject to the discretion of the court. In determining the amount of restitution a victim is entitled to, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Victims may also be entitled to receive "[a]n amount not to exceed three (3) times . . . the actual damages" they suffered as a result of a violation of Ind. Code Ann. § 35-45-9-3 (Criminal gang activity). Ind. Code Ann. § 34-24-3-1.

Lastly, victims whose offenders are convicted of racketeering may pursue additional remedies. A victim who has suffered damages as a result of a violation of Ind. Code Ann. § 35-45-6-2 (Corrupt business influence) may bring a civil suit to recover three times the amount of damages incurred, attorney's fees, court costs, and any punitive damages the court may award. Ind. Code Ann. § 34-24-2-6(b). The trafficker or facilitator can also be ordered to forfeit "any property: (1) used in the course of; (2) intended for use in the course of; (3) derived from; or (4) realized through; conduct in violation of IC 35-45-6-2 [Corrupt business influence]." Ind. Code Ann. § 34-24-2-2(a). Pursuant to Ind. Code Ann. § 34-24-2-6(d), "an aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds."

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

Pursuant to Ind. Code Ann. § 35-41-4-2(c), no statute of limitations applies to criminal prosecutions of Class A felonies, such as violations of Ind. Code Ann. § 35-42-3.5-1(b) (Sexual trafficking of a minor) and, when aggravating factors are present, Ind. Code Ann. § 35-42-4-9(a) (Sexual misconduct with a minor).

Pursuant to Ind. Code Ann. § 35-41-4-2(a)(1), a statute of limitations of 5 years applies to criminal prosecutions of Class B, C, or D felonies, such as violations of Ind. Code Ann. § 35-42-3.5-1(a), (d) ((Promotion of human



trafficking—Sexual trafficking of a minor—Human trafficking), § 35-45-4-4 (Promoting prostitution), § 35-42-4-4 (Child exploitation), § 35-42-4-9(a) and (b) (Sexual misconduct with a minor), § 35-45-9-3 (Participation in criminal gang), § 35-45-9-5 (Criminal gang recruitment), § 35-45-6-2(1) (Corrupt business influence), and § 35-45-15-5 (Money laundering).<sup>81</sup>

Pursuant to Ind. Code Ann. § 35-41-4-2(a)(2), a statute of limitations of 2 years applies to criminal prosecutions for any misdemeanor, such as Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with a child) and § 35-45-4-3 (Patronizing a prostitute).

Criminal prosecutions for Ind. Code Ann. § 35-42-4-3(a) (Child molesting), § 35-42-4-5 (Vicarious sexual gratification), and § 35-42-4-6 (Child solicitation) must be “commenced before the date that the alleged victim of the offense reaches thirty-one (31) years of age.” Ind. Code Ann. § 35-41-4-2(e).

For civil claims, a 2-year statute of limitations, running from the date of the offender’s conviction, applies to domestic minor sex trafficking victims civil claims for damages under Ind. Code Ann. § 35-42-3.5-3(a) (Civil cause of action). Ind. Code Ann. § 35-42-3.5-3(b).

- 5.11.1 Recommendation: Amend Ind. Code Ann. § 35-41-4-2(e) to include Ind. Code Ann. § 35-42-3.5-1(a) and (d) (Promotion of human trafficking—Sexual trafficking of a minor—Human trafficking) as an offense for which prosecution is not barred until the victim of the offense reaches the age of 31.

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<sup>81</sup> See *supra* note 11.

**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 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
- 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.*

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**Legal Analysis:**

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

Pursuant to Ind. Code Ann. § 5-2-1-9(a)(10), which discusses mandatory training for law enforcement officers, the Indiana Law Enforcement Training Board is required to provide the following:

Minimum standards for a course of study on human and sexual trafficking that must be required for each person accepted for training at a law enforcement training school or academy and for in service training programs for law enforcement officers. The course must cover the following topics:

- (A) Examination of the human and sexual trafficking laws (IC 35-42-3.5).
- (B) Identification of human and sexual trafficking.
- (C) Communicating with traumatized persons.
- (D) Therapeutically appropriate investigative techniques.
- (E) Collaboration with federal law enforcement officials.
- (F) Rights of and protections afforded to victims.
- (G) Providing documentation that satisfies the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons (Form I-914, Supplement B) requirements established under federal law.
- (H) The availability of community resources to assist human and sexual trafficking victims.

A law enforcement officer appointed after June 30, 1993 may not “(1) make an arrest; (2) conduct a search or a seizure of a person or property; or (3) carry a firearm” unless they complete basic training requirements. Ind. Code Ann. § 5-2-1-9(d).

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

Pursuant to Ind. Code Ann. § 35-33.5-5-4(a)(1), “[a] person whose communications are intercepted, disclosed, or used in violation of this article: (1) has a civil cause of action against a person who intercepts, discloses, uses, or procures another person to intercept, disclose, or use a communication in violation of this article.” However, pursuant to Ind. Code Ann. § 35-31.5-2(176) (Definitions),<sup>82</sup> “[i]nterception,” for purposes of IC 35-33.5, means the intentional recording or acquisition of the contents of an electronic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article.”

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<sup>82</sup> The text of Ind. Code Ann. § 35-31.5-2 included here and elsewhere in this report reflects amendments made by the passage of Senate Bill 26 during the second regular session of 117th Indiana General Assembly. Senate Bill 26 also repealed § 35-33.5-1 (“Interception” defined.).

### 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*

In general, an application for a warrant for intercepting electronic communications must be in writing and include, among other things, pursuant to Ind. Code Ann. § 35-33.5-2-2(a)(2)(A), “(2) An affidavit setting forth the facts relied upon by an applicant to show why a warrant should be issued or an extension granted, including the following: (A) Facts establishing probable cause for the belief that a designated offense allegedly has been, is being, or may be committed.”

“Designated offense” is defined in Ind. Code Ann. § 35-31.5-2(91) “for purposes of IC 35-33.5” as including “human and sexual trafficking crimes under IC 35-42-3.5,” as well as Ind. Code Ann. § 35-42-4-6 (Child solicitation). Notably, Ind. Code Ann. § 35-44-4-2 (Prostitution), § 35-45-4-3 (Patronizing a prostitute) and § 35-45-4-4 (Promoting prostitution) are not included as designated offenses.

Because human and sexual trafficking crimes under Ind. Code Ann. § 35-42-3.5-1 are considered “designated offenses,” wiretapping may be used in domestic minor sex trafficking investigations. Furthermore, the contents and evidence received from the interception may be received into evidence, but only if “each party, not less than fourteen (14) days before the proceeding, has been furnished with a copy of the application, warrant, and any orders for an extension under which the interception was authorized.” Ind. Code Ann. § 35-33.5-5-1. However, “[t]he fourteen (14) day period may be waived by the court if” certain findings are made by the court. Ind. Code Ann. § 35-33.5-5-1.

- 6.3.1 Recommendation: Amend Ind. Code Ann. § 35-31.5-2 (“Designated offense” defined) to include Ind. Code Ann. § 35-44-4-2 (Prostitution), § 35-45-4-3 (Patronizing a prostitute), and § 35-45-4-4 (Promoting prostitution) within the definition of a “designated offense.”

### 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.*

The use of a decoy by law enforcement in the investigation of prostitution or sex trafficking appears to be permitted under both Ind. Code Ann. § 35-42-4-6(b) and (c) (Child solicitation) and § 35-42-4-13(c) (Inappropriate communication with a child). Ind. Code Ann. § 35-42-4-6(b) (Child solicitation) uses the phrase “a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age.” Similarly, Ind. Code Ann. § 35-42-4-6(c) (Child solicitation) uses the phrase “a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age.” Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child) uses the phrase “an individual whom the person believes to be a child less than fourteen (14) years of age.” These phrases indicate that the victim does not have to be a minor.

Indiana does provide a defense of entrapment when, “(1) The prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and (2) The person was not predisposed to commit the offense.” Ind. Code Ann. § 35-41-3-9(a) (Entrapment). However, “merely affording a person an opportunity to commit the offense does not constitute entrapment.” Ind. Code Ann. § 35-41-3-9(b).

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

Law enforcement can likely use the Internet to investigate offenses under Ind. Code Ann. § 35-42-4-6(b), (c) (Child solicitation). Ind. Code Ann. § 35-42-4-6(b) makes it illegal if a person 18 or older to “knowingly or intentionally solicits a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in” certain sexual acts.<sup>83</sup> Similarly, Ind. Code Ann. § 35-42-4-6(c) makes it illegal if a person 21 years of age or older to “knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in” certain sexual acts. Ind. Code Ann. § 35-42-4-6(c). Ind. Code Ann. § 35-42-4-6(a) defines “solicit” as, “to command, authorize, urge, incite, request, or advise an individual: . . . (4) by using a computer network (as defined in IC 35-43-2-3(a)); . . . to perform an act described in [Ind. Code Ann. § 35-42-4-6(b) or (c)].”

Both of the above offenses provide enhanced crime classifications in the event the offense is committed through use of a computer network. Ind. Code Ann. § 35-42-4-6(b), (c).

6.5.1 Recommendation: Enact a law that expressly authorizes the use of the Internet to investigate buyers and traffickers in domestic minor sex trafficking investigations.

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

Pursuant to Ind. Code Ann. § 10-13-5-5 (Indiana clearing house for information on missing children and missing endangered adults established), Indiana has established the Indiana Clearinghouse for Information on Missing Children and Missing Endangered Adults (Clearinghouse). The Clearinghouse staff’s duties include operating a “central data storage, retrieval, and information distribution system designed for the exchange of information on missing children,”<sup>84</sup> publishing a quarterly directory of missing children, and compiling statistics on missing children cases handled by the Clearinghouse each year. Ind. Code Ann. § 10-13-5-6(b)(2), (7), (8). Law enforcement agencies that receive notification of a missing child are required to prepare a report on the missing child within 5 hours. Ind. Code Ann. §§ 31-36-1-1, 31-36-1-2.<sup>85</sup> After completing the report, the law enforcement agency must immediately forward its contents to, among others, all law enforcement agencies having jurisdiction in areas where the child lives and last was seen, as well as to the Clearinghouse and the National Crime Information Center’s Missing Person File. Ind. Code Ann. § 31-36-1-3. Within 24 hours of receiving notification that a child is missing, the law enforcement agency must begin an investigation. Ind. Code Ann. § 31-36-2-1. When a law enforcement agency is notified that a child previously reported missing has been found, it must promptly notify all those to whom the report was filed pursuant to Ind. Code Ann. § 31-36-1-3 and § 31-36-1-4. Ind. Code Ann. § 31-36-2-6.

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<sup>83</sup> See *supra* Section 1.2 for discussion of relevant provisions.

<sup>84</sup> A “missing child” is defined as “a person less than eighteen (18) years of age who: (1) is, or is believed to be: (A) a temporary or permanent resident of Indiana; (B) at a location that cannot be determined by the person’s parent or legal custodian; and (C) reported missing to a law enforcement agency; or (2) is, or is believed to be: (A) a temporary or permanent resident of Indiana; and (B) a victim of the offense of criminal confinement (IC 35-42-3-3) or interference with custody (IC 35-42-3-4).” Ind. Code Ann. § 10-13-5-4.

<sup>85</sup> An exception to the 5 hour reporting requirement applies where the law enforcement agency has received a prior, unrelated notification that the child was missing and the “agency has reason to believe that the child is missing because the child has committed a delinquent act.” Ind. Code Ann. § 31-36-1-2.