

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.



ANALYSIS AND RECOMMENDATIONS MASSACHUSETTS

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *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 Analysis¹:

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

In November 2011, Massachusetts passed its first sex trafficking law. Pursuant to Mass. Gen. Laws ch. 265, § 50² (Human trafficking—Sexual servitude),

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by

¹ Unless otherwise specified, all references to statutes were taken from the Annotated Laws of Massachusetts (LEXIS through Act 92 of the 2011 Legislative Session), all references to regulations were taken from the Code of Massachusetts Regulations (LEXIS current through regulations in effect as of Sept. 2, 2011), and all federal statutes were taken from United States Code (LEXIS through PL 112-173, approved 8/16/12). This report includes legislation enacted before August 1, 2012.

² The text of Mass. Gen. Laws ch. 265, § 50 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

any means, another person to engage in commercial sexual activity,³ a sexually-explicit performance⁴ or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.

Additionally, if a person is convicted of second or subsequent violations, the person shall be punished by imprisonment from 10 years to life, and the offender is not eligible for parole in the first 10 years. Mass. Gen. Laws ch. 265, § 52(a)⁵ (Human trafficking—Subsequent violations of section 50 or 51).

Mass. Gen. Laws ch. 265, § 50 clearly addresses sex trafficking and does not require force, fraud or coercion for minors under 18.

Massachusetts's trafficking of persons for forced services law under Mass. Gen. Laws ch. 265, § 51⁶ (Human trafficking—Forced services) may also apply since the definition of services includes “commercial sexual activity and sexually-explicit performances.” Mass. Gen. Laws ch. 265, § 49⁷ (Human trafficking—Definitions). Pursuant to Mass. Gen. Laws ch. 265, § 51⁸ (Human trafficking—Forced services),

³ “Commercial sexual activity” is defined as “any sexual act on account of which anything of value is given, promised to or received by any person.” Mass. Gen. Laws. Ch. 265, § 49.

⁴ “Sexually-explicit performance” is defined as “an unlawful live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.”

⁵ The text of Mass. Gen. Laws ch. 265, § 52 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

⁶ The text of Mass. Gen. Laws ch. 265, § 51 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

⁷ The text of Mass. Gen. Laws ch. 265, § 48 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

⁸ The text of Mass. Gen. Laws ch. 265, § 51 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

(a) Whoever knowingly: (i) subjects, or attempts to subject, another person to forced services,⁹ or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person, intending or knowing that such person will be subjected to forced services; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of trafficking of persons for forced services and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for forced services upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for forced labor services shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of person for forced labor or services shall be civilly liable for an offense under this section.

Additionally, if a person is convicted of a second or subsequent violations, the person shall be punished by imprisonment from 10 years to life, and the offender is not eligible for parole in the first 10 years. Mass. Gen. Laws ch. 265, § 52(a). (Human trafficking—Subsequent violations of section 50 or 51).

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

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

1. Mass. Gen. Laws ch. 272, § 53A(c)¹⁰ (Engaging in sexual conduct for fee; payors and payees; penalties) states,

⁹ Pursuant to Mass Gen. Laws 265, § 49,

"Forced services", services performed or provided by a person that are obtained or maintained by another person who: (i) causes or threatens to cause serious harm to any person; (ii) physically restrains or threatens to physically restrain another person; (iii) abuses or threatens to abuse the law or legal process; (iv) knowingly destroys, conceals, removes, confiscates or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person; (v) engages in extortion under section 25; or (vi) causes or threatens to cause financial harm to any person.

"Services", acts performed by a person under the supervision of or for the benefit of another including, but not limited to, commercial sexual activity and sexually-explicit performances.

¹⁰ The text of Mass. Gen. Laws ch. 272, § 53A included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than \$3,000 and not more than \$10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.

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

Any one [sic] who entices¹¹ a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that he or another person will violate section 13B [Indecent assault and battery on child under fourteen], 13B 1/2 [Indecent assault and battery on child under —aggravating factors], 13B 3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . 23 [Rape and abuse of child], 23A [Rape and abuse of a child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], . . . of chapter 265, section 4A [Promoting child prostitution; mandatory sentence], . . . 28 [Matter harmful to minors—dissemination or possession with intent], . . . 29A [Child pornography—enticement, solicitation, employment of children], 29B [child pornography—dissemination], 29C [child pornography—purchase or possession], 35A [Obscene material/acts—acts with child under sixteen], 53 [Common night walkers, disorderly persons and disturbers of the peace¹²] or 53A [Engaging in sexual conduct for a fee; payors and payees; penalties] of chapter 272, or any offense that has as an element the use or attempted use of force . . .

A conviction under Mass. Gen. Laws ch. 265, § 26C(b) is punishable by imprisonment up to 5 years in the state prison¹³ or imprisonment up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000.¹⁴

¹¹ Mass. Gen. Laws ch. 265, § 26C(a) defines “entice” as “to lure, induce, persuade, tempt, incite, solicit, coax, or invite.”

¹² Mass. Gen. Laws ch. 272, § 53 states,

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

¹³ Mass. Ann. Laws ch. 274, § 1 (Felony and Misdemeanor) states, “A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.” In determining whether a crime is a felony or misdemeanor, “[T]he issue is how the crime itself may *potentially* be punished, not how a particular defendant before a particular court may be punished.” *United States v. Sousa*, 468 F.3d 42, 45 (1st Cir. 2006) (quoting *Commonwealth v. Smith*, 829 N.E.2d 1090, 1092 n.1 (Mass. 2005)). In other words, an offense is classified as a felony if the offense is punishable by imprisonment in a state prison and not whether the offender is actually sentenced to a term of imprisonment in state prison. Here and elsewhere in this report that a potential punishment of imprisonment in state prison is mentioned, the offense is classified as a felony.

¹⁴ Mass. Gen. Laws ch. 279, § 6 (Sentence to jail or house of correction) states, “Whoever is convicted of a crime punishable wholly or in part by imprisonment in jail may be sentenced to such imprisonment in the house of correction or to confinement at hard labor either in the jail or house of correction; and if convicted of a crime punishable by imprisonment in the house of correction may be sentenced to such imprisonment in a jail.” Mass.

3. Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse) provides, “Whoever fraudulently and deceitfully entices or takes away a person from the house of his parent or guardian or elsewhere, for the purpose of prostitution or for the purpose of unlawful sexual intercourse, and whoever aids and assists in such abduction for such purpose, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment in jail.”
4. Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) makes it a crime if a person “induces a minor to become a prostitute, or . . . knowingly aids and assists in such inducement.” A conviction under Mass. Gen. Laws ch. 272, § 4A is punishable by imprisonment for 3–5 years in the state prison and a fine of \$5,000.¹⁵ Mass. Gen. Laws ch. 272, § 4A.
5. Mass. Gen. Laws ch. 272, § 4B (Deriving support from child prostitution; mandatory sentence), makes it a crime if a person “lives or derives support or maintenance, in whole or in part, from the earnings or proceeds of prostitution committed by a minor, knowing the same to be earnings or proceeds of prostitution, or shares in such earnings, proceeds or monies.” A conviction under Mass. Gen. Laws ch. 272, § 4B is punishable by imprisonment for at least 5 years in the state prison and a fine of \$5,000.¹⁶ Mass. Gen. Laws ch. 272, § 4B.
6. Mass. Gen. Laws ch. 272, § 29A (Child pornography—enticement, solicitation, employment of children) states,
 - (a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material, shall be punished
 - (b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or engage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct, shall be punished

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

Gen. Laws ch. 126, § 8 (Houses of correction provided by county) explains that a house of correction is operated by the county. Here and elsewhere in this report that imprisonment in a jail or house of correction is mentioned, it appears that those two terms are used interchangeably.

¹⁵ The statute also specifies that the sentence “shall not be reduced to less than three years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served three years of such sentence.” Mass. Gen. Laws ch. 272, § 4A.

¹⁶ The statute also specifies that the sentence “shall not be reduced to less than five years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served five years of such sentence.” Mass. Gen. Laws ch. 272, § 4B.

7. Mass. Gen. Laws ch. 265, § 26D¹⁷ (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity) makes it unlawful for “[w]hoever, by electronic communication,¹⁸ knowingly entices¹⁹ a child under the age of 18 years, to engage in prostitution in violation of section 50 [Human trafficking—Sexual servitude] or section 53A [Engaging in sexual conduct for fee; payors and payees; penalties] of chapter 272, human trafficking in violation of section 50 [Human trafficking—Sexual servitude], 51 [Human trafficking—Forced service], 52 [Human trafficking—Subsequent violations of 50 or 51] or 53 [Human trafficking—organ trafficking] or commercial sexual activity as defined in section 49 [Definitions for Secs. 49 to 57]. . . .”

A conviction under Mass. Gen. Laws ch. 265, § 26D is punishable by” imprisonment in a house of correction for not more than 2 ½ years or in or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment.

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

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

Whoever commits an indecent assault and battery²⁰ on a child under the age of 14 shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years. . . .

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

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

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

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

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

¹⁷ The text of Mass. Gen. Laws ch. 265, § 26D included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹⁸ “Electronic communication” is defined under Mass. Gen. Laws ch. 265, § 26D as including, but not limited to “any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or 270 photo-optical system.”

¹⁹ “Entice” is defined under Mass. Gen. Laws ch. 265, § 26D as “to lure, induce, persuade, tempt, incite, solicit, coax or invite.”

²⁰ See *infra* note 22 for the definition of “sexual abuse” under Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children), which explains that “sexual abuse” includes “an indecent assault and battery on a child under 14.”

3. Mass. Gen. Laws ch. 265, § 13L (Reckless endangerment of children) makes it a crime if a person “wantonly or recklessly²¹ engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse²² to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act.” A conviction under Mass. Gen. Laws ch. 265, §13L is punishable by imprisonment up to 2½ years in the house of correction.
4. Mass. Gen. Laws ch. 265, § 23 (Rape and abuse of child) makes it a crime if a person “unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age.” A conviction under Mass. Gen. Laws ch. 265, §23 generally will “be punished by imprisonment in the state prison for life or for any term of years or, except as otherwise provided, for any term in a jail or house of correction,” except that Mass. Gen. Laws Ch. 265, §23A (Rape and abuse of child—aggravating factors) provides enhanced penalties in the following circumstances:
 - (a) there exists more than a 5 year age difference between the defendant and the victim and the victim is under 12 years of age;
 - (b) there exists more than a 10 year age difference between the defendant and the victim where the victim is between the age of 12 and 16 years of age; or
 - (c) at the time of such intercourse, was a mandated reporter as defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 10 years of such sentence. . . .
5. Mass. Gen. Laws ch. 265, § 24B (Assault on child under sixteen with intent to commit rape) makes it a crime if a person “assaults a child under sixteen with intent to commit a rape, as defined in [ch. 277, § 39].”²³ A conviction under Mass. Gen. Laws ch. 265, § 24B will “be punished by imprisonment in the state prison for life or for any term of years; and whoever over the age of eighteen commits a subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years but not less than five years.”
6. Mass. Gen. Laws ch. 272, § 4 (Enticing to unlawful intercourse) makes it a crime if a person “induces any person under 18 years of age of chaste life to have unlawful sexual intercourse.” A conviction under Mass. Gen. Laws ch. 272, § 4 is punishable by imprisonment up to 3 years in the state prison or imprisonment up to 2½ years in a jail or house of correction, a fine up to \$1,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 4.

²¹ Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children) states, “For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”

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

²³ Mass. Gen. Laws ch. 277, § 39 (Meaning of certain words and phrases) defines “rape” as “[s]exual intercourse or unnatural sexual intercourse by a person with another person who is compelled to submit by force and against his will or by threat of bodily injury, or sexual intercourse or unnatural sexual intercourse with a child under sixteen years of age.”

7. Mass. Gen. Laws ch. 272, § 35A (Obscene material/acts—acts with child under sixteen) makes it a crime if a person “commits any unnatural and lascivious act²⁴ with a child under the age of sixteen.” An offender’s first conviction under Mass. Gen. Laws ch. 272, § 35A is punishable by imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in jail or the house of correction, or a fine of \$100–\$1,000, while subsequent convictions by adult offenders (persons over the age of eighteen) are punishable by imprisonment for at least 5 years in the state prison. Mass. Gen. Laws ch. 272, § 35A.

1.3 *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.*

Except for the computer-based offense under Mass. Gen. Laws ch. 265, § 26D²⁵ (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), the CSEC statutes do not refer to Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude). Massachusetts’ prostitution statute, Mass. Gen. Laws ch. 272, § 53A²⁶ (Engaging in sexual conduct for fee; payors and payees; penalties), also does not refer to Mass. Gen. Laws ch. 265, § 50 (Human trafficking – Sexual servitude) when a minor is involved in prostitution. However, Mass. Gen. Laws ch. 265, § 57²⁷ (Human Trafficking—Victims Accused of Common Night Walking or Streetwalking—Affirmative Defense) provides an “affirmative defense to charges of engaging in common night walking or common streetwalking in violation of section 53 of chapter 272 and to a violation of section 53A of said chapter 272 that, while a human trafficking victim, such person was under duress or coerced into committing the offenses for which such person is being prosecuted or against whom juvenile delinquency proceedings have commenced.”

1.2.1 Recommendation: Amend the state CSEC laws to refer to Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) to clarify these victims’ status as human trafficking victims.

1.3.2 Recommendation: Amend Mass. Gen. Laws ch. 272, § 53A (Engaging in sexual conduct for fee; payors and payees; penalties) to refer to Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) when a minor is involved in prostitution.

²⁴ Mass. Gen. Laws ch. 272, § 31 (Obscene material/acts—definitions) defines, “Lascivious intent” as

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

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

²⁵ See *supra* note 17.

²⁶ See *supra* note 10.

²⁷ The text of Mass. Gen. Laws ch. 265, § 57 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

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.*

Mass. Gen. Laws ch. 271A (Enterprise Crime) defines “Criminal enterprise activity” under Mass. Gen. Laws ch. 271(A), § 1(1) as

the commission, attempt to commit or conspiracy to commit or the solicitation, coercion, aiding, abetting or intimidation of another to commit any of the following criminal activities under the laws of the commonwealth or equivalent crimes under the laws of any other jurisdiction: . . . child exploitation; assault and battery on a child; rape of a child; rape and abuse of a child; enticement of a child under 16; human trafficking . . . prostitution under sections 2, 3, 4A, 4B, 6, 7, 12 and 13 of chapter 272

However, Mass. Gen. Laws ch. 271A, § 2 only criminalizes criminal enterprise activity if it results in an interest or control of “an enterprise which is engaged in, or the activities of which affect, licensed gaming under chapter 23K or ancillary industries which do business with a gaming establishment.” Thus, although human trafficking and some CSEC crimes are included in the definition of predicate acts, the activity is not penalized under Mass. Gen. Laws ch. 271A unless the enterprise is also involved with gambling establishments in some way.

Penalties include “imprisonment in the state prison for not more than 15 years or by a fine of not more than \$25,000 or by both such imprisonment and fine,” Mass. Gen. Laws ch. 271A, § 2(4), and asset forfeiture, Mass. Gen. Laws ch. 271A, § 3.

- 1.4.1 Recommendation: Amend Mass. Gen. Laws ch. 271A, § 2 to apply to all criminal enterprise activity undertaken for purposes of financial gain regardless of association with the gaming industry in order to make the Criminal Enterprise Act available as a tool for the prosecution of trafficking enterprises.
- 1.4.2 Recommendation: Amend Mass. Gen. Laws ch. 271A, § 1 to include violations of Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties), Mass. Gen. Laws ch. 272, § 29A (Child pornography—enticement, solicitation, employment of children) and Mass. Gen. Laws ch. 265, § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity) as predicate acts.

Legal Components:

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

Mass. Gen. Laws ch. 265, § 50(a)²⁸ (Human trafficking—Sexual servitude) addresses the sex trafficking of minors specifically, and holds buyers liable for “causing” a minor to engage in commercial sex acts, stating, in part,

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity,²⁹ a sexually-explicit performance³⁰ or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; . . . shall be guilty of the crime of trafficking of persons for sexual servitude

Additionally, federal prosecutors, under the Trafficking Victims Protection Act (TVPA),³¹ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”³² a person under 18 to engage in commercial sex.³³ It is unsettled whether the courts will

²⁸ See *supra* note 2.

²⁹ “Commercial sexual activity” is defined as “any sexual act on account of which anything of value is given, promised to or received by any person.” Mass. Gen. Laws. Ch. 265, § 49.

³⁰ “Sexually-explicit performance” is defined as “an unlawful live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.”

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

³² 18 U.S.C. 1591(a).

³³ See, e.g., Indictment at 1, *United States v. Oflyng*, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of

uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in Massachusetts’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under Mass. Gen. Laws ch. 265, § 50(a).

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

Massachusetts has made it a crime to buy sex acts with a minor through two CSEC laws. Pursuant to Mass. Gen. Laws ch. 272, § 53A(c)³⁴ (Engaging in sexual conduct for fee; payors and payees; penalties),

Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than \$3,000 and not more than \$10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.

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

A buyer might also be prosecuted under a range of general sex offenses.³⁵

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

Massachusetts’s laws distinguish between buying sex with an adult and buying sex with a minor under 18 years of age. Enhanced penalties apply where a person buys or offers to buy sex with a minor under Mass. Gen. Laws ch. 272, § 53A(c)³⁶ (Engaging in sexual conduct for fee; payors and payees; penalties). Mass. Gen. Laws ch. 272, § 53A(b) states,

Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than 2 and one-half years or by a fine of not less than \$1,000 and not more than \$5,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

Mass. Gen. Laws ch. 272, § 53A(c) imposes enhanced penalties where a buyer “pays, agrees to pay, or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18.” Mass. Gen. Laws ch. 272, § 53A(c). A conviction under this statute is punishable by imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction. Mass. Gen. Laws ch. 272, § 53A(b).

Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

³⁴ See *supra* note 10.

³⁵ See *supra* Section 1.2 for discussion of sex offenses that may be applicable to certain buyers of sex acts with minors.

³⁶ See *supra* note 10.

In addition, a buyer who “entices”³⁷ a child under 16 “to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent” to engage in sexual conduct with the child, in violation of Mass. Gen. Laws ch. 272, § 53A(b), may be imprisoned up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children).

By contrast, the age-neutral solicitation law, Mass. Gen. Laws ch. 272, § 8 (Soliciting) makes it illegal to “solicit or receive compensation for soliciting for a prostitute,” and is punishable by up to 2½ years imprisonment in the house of correction, a fine of \$1,000-\$5,000, or both imprisonment or a fine. Mass. Gen. Laws ch. 272, § 8.

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

If a buyer of commercial sex with a minor can be charged with sex trafficking under Mass. Gen. Laws ch. 265, § 50(a)³⁸ (Human trafficking—Sexual servitude), the buyer will face “a fine of not more than 25,000” and 5–20 years imprisonment. Mass. Gen. Laws ch. 265, § 50(a). While Mass. Gen. Laws ch. 265, § 50(b), which provides an enhanced penalty when the “crime of trafficking of persons for sexual servitude [is committed] upon a person under 18 years of age,” does not enhance the fine provided under subsection (a), a buyer sentenced under subsection (b) for obtaining commercial sex with a minor will face “imprisonment in the state prison for life or for any term of years, but not less than 5 years,” and will not be eligible for “parole, work release or furlough or receive any deduction from his sentence for good conduct until he has served 5 years of such sentence.” Mass. Gen. Laws ch. 265, § 50(b).

Buyers convicted under Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties) for paying, agreeing to pay, or offering to pay to engage in sexual conduct with a child under 18 may be imprisoned up to 10 years in the state prison or imprisoned up to 2½ years in the house of correction and face a fine not less than \$3,000 and not more than \$10,000. Mass. Gen. Laws ch. 272, § 53A(c). Buyers convicted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be imprisoned by up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b). Lastly, buyers convicted under Mass. Gen. Laws ch. 265, § 26D(c) (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity) face imprisonment for not more than 2½ years in a house of correction or up to 5 years in a state prison or a fine not less than \$2,500.

In comparison, if the victim is under the age of 14, a conviction under the federal Trafficking Victims Protection Act (TVPA)³⁹ 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 offense⁴⁰ against a minor.

³⁷ See *supra* note 11 for the definition of “entice” as used in Mass. Gen. Laws ch. 265, § 26C, which includes “solicit.”

³⁸ See *supra* note 2.

³⁹ 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.).

⁴⁰ 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

18 U.S.C. § 3559(e)(1) To the extent buyers can be prosecuted under other federal CSEC laws,⁴¹ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.⁴²

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

Massachusetts has a law specifically directed at the use of the Internet to purchase commercial sex acts with a minor. Pursuant to Mass. Gen. Laws ch. 265, § 26D⁴³ (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity),

(a) As used in this section, the term “enticement” shall mean to lure, induce, persuade, tempt, incite, solicit, coax or invite.

(b) As used in this section, the term “electronic communication” shall include, but not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system.

(c) Whoever, by electronic communication, knowingly entices a child under the age of 18 years, to engage in prostitution in violation of section 50 or section 53A of chapter 272, human trafficking in violation of section 50, 51, 52 or 53 or commercial sexual activity as defined in section 49, or attempts to do so, shall be punished by imprisonment in a house of correction for not more than 2 ½ years or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment.

(d) Whoever, after having been convicted of, or adjudicated delinquent by reason of a violation of this section, commits a second or subsequent such violation, shall be punished by imprisonment in the state prison for not less than 5 years and by a fine of not less than \$10,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release or furlough or receive any deduction from the sentence for good conduct until that person has served 5 years of such sentence.

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

Neither Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties) nor Mass. Gen. Laws ch. 265, § 26C (Enticement of children) prohibit a buyer from asserting a defense of age mistake. Mass. Gen. Laws ch. 265, § 50(b) (Human trafficking—Sexual servitude) also does not expressly bar a defense based on mistake of age.

exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

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

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

⁴³ *See supra* note 17.

- 2.6.1 Recommendation: Include a prohibition on asserting an age mistake defense in prosecutions under Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) and Mass. Gen. Laws ch. 265, § 51 (Human trafficking—Forced services).

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

Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) and Mass. Gen. Laws ch. 265, § 51 (Human trafficking—Forced services) do not stagger penalties and apply to all minors under 18. Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) staggers penalties based on the age of the minor, imposing lesser penalties where the victim is an older minor. Mass. Gen. Laws ch. 265, § 26C(b)) fails to protect minors because it applies only where the buyer “entices a child under the age of 16 to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent” to engage in sexual conduct with the minor in violation of Mass. Gen. Laws ch. 272, § 35A (Obscene material/acts—acts with child under sixteen), or § 53A (Engaging in sexual conduct for fee; payors and payees; penalties).

- 2.7.1 Recommendation: Amend Mass. Gen. Laws ch. 265, § 26C (Enticement of children) to apply to buyers of sex acts with all minors under the age of 18.

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

A buyer of commercial sex with a minor can be charged under Mass. Gen. Laws ch. 265, § 50(a)⁴⁴ (Human trafficking—Sexual servitude), will face “a fine of not more than 25,000” Buyers convicted of violating Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be required to pay a fine up to \$5,000, while those convicted under Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties), where the victim is 18 years of age or older may be required to pay a fine up to \$500. However, buyers convicted under Mass. Gen. Laws ch. 272, § 53A(c), criminalizing the purchase of commercial sex acts with a minor 18 and younger, are required to pay a fine not less than \$3,000 and not more than \$10,000. Mass. Gen. Laws ch. 272, § 53A(c).

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

If convicted of human trafficking or trafficking for sexual servitude, buyers are subject to mandatory asset forfeiture. Pursuant to Mass. Gen. Laws ch. 265, § 55⁴⁵ “[a]ll monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 or 51 shall be subject to forfeiture. . .” These monies “shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B.” Mass. Gen. Laws ch. 265, §55.

Additionally, pursuant to Mass. Gen. Laws ch. 265, § 56⁴⁶ (Human trafficking—Property subject to forfeiture),

⁴⁴ See *supra* note 2.

⁴⁵ The text of Mass. Gen. Laws ch. 265, § 55 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

⁴⁶ The text of Mass. Gen. Laws ch. 265, § 56 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

- (a) The following property shall be subject to forfeiture to the commonwealth and all property rights therein shall be in the commonwealth:
- (i) all conveyances, including aircraft, vehicles or vessels used, or intended for use, to transport, conceal or otherwise facilitate a violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services];
 - (ii) all books, records and research, including microfilm, tapes and data which are used, or intended for use, in violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services];;
 - (iii) all negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, all proceeds traceable to such an exchange, including real estate and any other thing of value, and all negotiable instruments and securities used or intended to be used to facilitate any violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services]; and
 - (iv) all real property, including any right, title and interest in the whole of any lot or tract of land and any appurtenances or improvements thereto, which is used in any manner or part to commit or to facilitate any violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services].
- ...
- (ii) no conveyance shall be forfeited by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, of the commonwealth or of any state; and
 - (iii) no conveyance or real property shall be subject to forfeiture unless the owner thereof knew or should have known that such conveyance or real property was used in violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services].
-

Seizure of forfeitable property is governed by Mass. Gen. Laws ch. 265, §56(g), which states, “During the pendency of the proceedings, the court may issue at the request of the commonwealth ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody.” The final order of the court shall be deposited into the Victims of Human Trafficking Trust Fund⁴⁷ established in section 66A of chapter 10.⁴⁸ Mass. Gen. Laws ch. 265, §56(e).

⁴⁷ Pursuant to Mass. Gen. Laws ch. 10, § 66A (Victims of human trafficking trust fund), “[t]here shall be established and set up on the books of the commonwealth a separate fund to be known as the Victims of Human Trafficking Trust Fund. The fund shall consist of proceeds of assets seized and forfeited pursuant to sections 55 and 56 of chapter 265 and fines and assessments collected pursuant to sections 50, 51 and 54 of said chapter 265, together with any interest or earnings accrued on such monies through investment or deposit. The state treasurer shall be the custodian of the fund and shall receive, deposit and invest all monies transmitted to him under this section in accordance with sections 34 and 38 of chapter 29 in such a manner as to secure the highest rate of return available consistent with the safety of the fund, and shall credit interest and earnings on the trust fund corpus to the trust fund. The state treasurer shall transfer funds from the income and receipts of the fund to the victim and witness assistance board, as established in section 4 of chapter 258B, from time to time, at the request of the board. The board shall award and administer grants from the fund, without further appropriation, to public, private non-profit or community-based programs in the commonwealth to provide services to victims of offenses under said sections 50 and 51 of said chapter 265.”

⁴⁸ The text of Mass. Gen. Laws ch. 10, § 66A included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

2.8.1 Recommendation: Enact provisions mandating minimum fines for sex trafficking and CSEC offenses.

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

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

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

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

...

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

In comparison, a federal conviction for possession of child pornography⁴⁹ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁵⁰ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁵¹

⁴⁹ 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).

⁵⁰ 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).

⁵¹ 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

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

Buyers convicted of Mass. Gen. Laws ch. 265, § 26C (Enticement of children), ch. 265, § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), ch. 265, § 50 (Trafficking of persons for sexual servitude) and ch. 265, § 52 (Subsequent violations of Sec. 50 or 51; penalties; evidence of prior adjudication or conviction) are required to register as sex offenders; however, those convicted under Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) and Mass. Gen. Laws ch. 272, § 8 (Soliciting) are not required to register. Mass. Gen. Laws ch. 6, §§ 178C, 178D. Pursuant to Mass. Gen. Laws ch. 6, § 178D (Establishment and maintenance of sex offender registry), the sex offender registry board is required to “establish and maintain a central computerized registry of all sex offenders required to register pursuant to section 178C [Definitions] to 178P [Police officer’s authority to arrest for sex offender’s failure to comply with registration requirements], inclusive, known as the sex offender registry.” Mass. Gen. Laws ch. 6, § 178C (Definitions) defines “sex offender” in part as “a person . . . who has been convicted of a sex offense . . .” “Sex offense” is defined in Mass. Gen. Laws ch. 6, § 178C⁵² (Definitions) in relevant part as

an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B1/2 of said chapter 265; a repeat offense under section 13B 3/4 of said chapter 265; . . . indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; . . . rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265 [Rape and abuse of child—previous youthful offender]; . . . enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; . . . dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272 [Child pornography—dissemination]; . . .⁵³

Additionally, the definitions of “sex offense involving a child” and “sexually violent offense” under Mass. Gen. Laws ch. 6, § 178C include,

enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265

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).

⁵² The text of Mass. Gen. Laws ch. 6, § 178C included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

⁵³ Mass. Gen. Laws ch. 6, § 178C (Definitions) contains a definition for “sex offense involving a child,” and the offenses listed as a “sex offense involving a child” are all also listed as “sex offenses.”

Legal Components:

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

Legal Analysis:

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

A conviction under Mass. Gen. Laws ch. 265, § 50(a)⁵⁴ (Human trafficking – Sexual servitude) shall result in:

imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000.⁵⁵ Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

Additionally, a person convicted under Mass. Gen. Laws ch. 265, § 50(b) when committed against a person under 18 years of age

shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

Traffickers may also be prosecuted under several of Massachusetts’s CSEC laws. Traffickers convicted under Mass. Gen. Laws ch. 272, § 2⁵⁶ (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), which is punishable by imprisonment up to 3 years in the state prison or imprisonment by 1 year in jail, a fine of up to \$1,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 4A⁵⁷ (Promoting child prostitution; mandatory sentence) is punishable by imprisonment for 3–5 years in the state prison and a fine of \$5,000.⁵⁸ Mass. Gen. Laws ch. 272, § 4A.

⁵⁴ See *supra* note 2.

⁵⁵ Pursuant to Mass. Gen. Laws ch. 265, § 54 (Transmittal of fines to state treasurer), “The court shall transmit fines collected pursuant to sections 50 and 51 to the state treasurer. The treasurer shall deposit such fines into the Victims of Human Trafficking Trust Fund established in section 66A of chapter 10.”

⁵⁶ See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 2.

⁵⁷ See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 4A.

⁵⁸ The imprisonment “shall not be reduced to less than three years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served three years of such sentence.” Mass. Gen. Laws ch. 272, § 4A.

Traffickers may be prosecuted under Mass. Gen. Laws ch. 272, § 53A(c)⁵⁹ (Engaging in sexual conduct for fee; payors and payees; penalties) if the trafficker was “paid . . . in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18.” Mass. Gen. Laws ch. 272, § 53A(c) is punishable by up to 10 years imprisonment in the state prison or in the house of correction for not more than 2 ½ years and by a \$3,000—10,000 fine.

Traffickers also may be prosecuted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) to the extent that the trafficker “entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that he or another person will violate . . . [Mass. Gen. Laws ch. 272] section 4A [Promoting child prostitution; mandatory sentence] . . . 29A [Child pornography—enticement, solicitation, employment of children], 29B [Child pornography—dissemination], 29C [Child pornography—purchase or possession], 35A [Obscene material/acts—acts with child under sixteen] . . . or 53A [Engaging in sexual conduct for fee; payors and payees; penalties] of chapter 272, or any offense that has as an element the use or attempted use of force . . .” A trafficker convicted of Mass. Gen. Laws ch. 265, § 26C (Enticement of children) may be imprisoned up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000.

Mass. Gen. Laws ch. 272 § 4B⁶⁰ (Deriving support from child prostitution; mandatory sentence) may also be used to prosecute traffickers and a conviction is punishable by imprisonment for at least 5 years in the state prison and a fine of \$5,000.⁶¹ Mass. Gen. Laws ch. 272 § 4B. Traffickers who are “paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18” may be convicted under Mass. Gen. Laws ch. 272, § 53A(c)⁶² (Engaging in sexual conduct for fee; payors and payees; penalties), which is punishable by imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction and a fine of \$3,000—\$10,000. Mass. Gen. Laws ch. 272, § 53A(b). Lastly, convictions under Mass. Gen. Laws ch. 272, § 29A(b)⁶³ (Child pornography—enticement, solicitation, employment of children) are punishable by imprisonment for 10–20 years in the state prison, by a fine of \$10,000–\$50,000, or by both such fine and imprisonment. Mass. Gen. Laws ch. 272, § 29A(a), (b).

Lastly, a trafficker could be prosecuted under Mass. Gen. Laws ch. 265, § 26D⁶⁴ (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), which is punishable by “imprisonment in a house of correction for not more than 2 1/2 years or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment,” and “a second or subsequent . . . [offense] shall be punished by imprisonment in the state prison for not less than 5 years and by a fine of not less than \$10,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release or furlough or receive any deduction from the sentence for good conduct until that person has served 5 years of such sentence.” In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)⁶⁵ 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. §§

⁵⁹ See *supra* note 10.

⁶⁰ See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 4B.

⁶¹ The imprisonment “shall not be reduced to less than five years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served five years of such sentence.” Mass. Gen. Laws ch. 272 § 4B

⁶² See *supra* Section 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 53A.

⁶³ See *supra* Section 1.2 for the substantive provisions of Mass. Gen. Laws ch. 272, § 29A.

⁶⁴ See *supra* note 17.

⁶⁵ 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.).

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 offense⁶⁶ against a minor.

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

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

(a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material

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

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

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

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

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

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

In 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

⁶⁶ See *supra* note 40.

federal sex offense⁶⁷ against a minor. Additionally, a federal conviction for distribution of child pornography⁶⁸ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁶⁹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁷⁰

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

Massachusetts has a law specifically directed at the use of the Internet to commit domestic minor sex trafficking. Pursuant to Mass. Gen. Laws ch. 265, § 26D⁷¹ (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity),

(a) As used in this section, the term “entice” shall mean to lure, induce, persuade, tempt, incite, solicit, coax or invite.

(b) As used in this section, the term “electronic communication” shall include, but not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system.

(c) Whoever, by electronic communication, knowingly entices a child under the age of 18 years, to engage in prostitution in violation of section 50 or section 53A of chapter 272, human trafficking in violation of section 50 [Human trafficking—Sexual servitude], 51 [Human trafficking—Forced services], 52 [Human trafficking—Subsequent violations of sections 50 or 51] or 53 [Human trafficking—Organ trafficking] or commercial sexual activity as defined in section 49, or attempts to do so, shall be punished by imprisonment in a house of correction for not more than 2 ½ years or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment.

(d) Whoever, after having been convicted of, or adjudicated delinquent by reason of a violation of this section, commits a second or subsequent such violation, shall be punished by imprisonment in the state prison for not less than 5 years and by a fine of not less than \$10,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release or furlough or receive any deduction from the sentence for good conduct until that person has served 5 years of such sentence.

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

⁶⁷ See *supra* note 40.

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

⁶⁹ 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).

⁷⁰ 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).

⁷¹ See *supra* note 17.

Traffickers are subject to various criminal fines, restitution orders, and asset forfeiture. Traffickers convicted under Mass. Gen. Laws ch. 265, § 50⁷² (Human trafficking – Sexual servitude) are subject to a fine not to exceed \$25,000 and “[a] business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.”⁷³ Mass. Gen. Laws ch. 265, § 50(a), (c).

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

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

Traffickers face mandatory asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 55,⁷⁴ which states, “[a]ll monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 or 51 shall be subject to forfeiture. . .” These monies “shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B.” Mass. Gen. Laws ch. 265, §55.

Additionally, traffickers face asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 56⁷⁵ (Human trafficking—Property subject to forfeiture).⁷⁶ Seizure of forfeitable property is governed by Mass. Gen. Laws ch. 265, §56(g), which states “During the pendency of the proceedings, the court may issue at the request of the commonwealth ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody.”

- 3.4.1 Recommendation: Enact provisions mandating minimum fines for convictions under Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) and 51 (Human trafficking—Forced services) and Massachusetts’ CSEC laws.

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

Traffickers convicted of violating Mass. Gen. Laws ch. 265, § 50⁷⁷ (Human trafficking—Sexual servitude), ch. 265, § 26D⁷⁸ (Enticing a child under 18 via electronic communication to engage in prostitution), a second or

⁷² See *supra* note 2.

⁷³ See *supra* note 55.

⁷⁴ See *supra* note 45.

⁷⁵ See *supra* note 46.

⁷⁶ See *supra* Section 2.8 for full discussion of Mass. Gen. Laws ch. 265, § 56⁷⁶ (Human Trafficking—Property subject to forfeiture).

⁷⁷ See *supra* note 2.

⁷⁸ See *supra* note 17.

subsequent conviction of ch. 265, § 52 (Human trafficking—Subsequent Violation of Sections 50 or 51), ch. 265, § 26C (Enticement of children), ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), § 29A (Child pornography—enticement, solicitation, employment of children), and § 29B (Child pornography—dissemination) are required to register as sex offenders pursuant to Mass. Gen. Laws ch. 6, § 178D (Establishment and maintenance of sex offender registry) and Mass. Gen. Laws ch. 6, § 178C (Definitions).⁷⁹ Traffickers convicted of Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for a fee; payors and payees; penalties) or Mass. Gen. Laws ch. 272, § 24 (Keeping house of prostitution) are not required to register as these offenses are not included within the definition of “sex offense” under Mass. Gen. Laws ch. 6 § 178C.

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

Although Massachusetts law does not expressly provide that violations of state CSEC laws are grounds for terminating parental rights, parental rights potentially may be terminated for sexual abuse or exploitation, depending on whether the definition of abuse applicable to mandatory reporters under Mass. Gen. Laws ch. 119, § 51A(a)⁸⁰ (Mandated reporter—responsibilities)—which includes trafficking and CSEC offenses—applies when determining parental rights. Massachusetts handles termination through its laws on adoption and custody in Chapter 210, which does not define abuse or neglect. Mass. Gen. Laws ch. 210, § 3 (Consent not required in certain cases) states,

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

(b)

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

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

⁷⁹ See *supra* Section 2.10 for the provisions of Mass. Gen. Laws ch. 6, § 178C.

⁸⁰ The text of Mass. Gen. Laws ch. 119, § 51A included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

....

(c)

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

....

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

...

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

...

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

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

....

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

Legal Components:

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

Legal Analysis:

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

Mass. Gen. Laws ch. 265, § 50⁸¹ (Human trafficking—Sexual servitude) includes all facilitators as it applies to a person who “benefits, financially or by receiving anything of value, as a result of a violation of clause (i),” which states,

(i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272. . . .

A facilitator convicted under Mass. Gen. Laws ch. 265, § 50(a) “shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.” Additionally, a facilitator who “commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.” Mass. Gen. Laws ch. 265, § 50(b).

A business entity may also be prosecuted for a violation of Mass. Gen. Laws ch. 265, § 50(a) and punished by a fine of not more than \$1,000,000. Mass. Gen. Laws ch. 265, § 50(c).

A facilitator may also face prosecution under Mass. Gen. Laws ch. 272, § 53A(c)⁸² (Engaging in sexual conduct for a fee; engaging in sexual conduct with child under age 14 for a fee; penalties), which provides in part,

whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-

⁸¹ See *supra* note 2.

⁸² See *supra* note 10.

half years and by a fine of not less than \$3,000 and not more than \$10,000, or by both such imprisonment and fine

Several CSEC laws may be used to prosecute facilitators. Facilitators may be prosecuted for violating Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse)⁸³ where the facilitator “aids and assists in such abduction” for the purpose of prostitution. A conviction under Mass. Gen. Laws ch. 272, § 2 is punishable by imprisonment up to 3 years in the state prison or up to 1 year imprisonment in jail, a fine of up to \$1,000, or both imprisonment and a fine. If convicted under Mass. Gen. Laws ch. 272, § 53A(c), a facilitator faces a mandatory fine of at least \$3,000 and up to \$10,000.

Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) could be used to prosecute a facilitator who “knowingly aids and assists” in inducing a minor to become a prostitute. A facilitator may also be prosecuted under ch. 272, § 4B (Living off or sharing earnings of minor prostitute). A conviction under Mass. Gen. Laws ch. 272, § 4A is punishable by imprisonment for 3–5 years in the state prison and a fine of \$5,000.⁸⁴ Mass. Gen. Laws ch. 272, § 4A.

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

Facilitators may be subject to fines ranging from \$1,000–\$1,000,000 for convictions related to their activities. Facilitators convicted under Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) are subject to fines. Mass. Gen. Laws ch. 265, § 50⁸⁵ is punishable by a fine not to exceed \$25,000. Corporations shall also be fined for facilitation of Mass. Gen. Laws ch. 265, § 50, which requires that “[a] business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.”⁸⁶ Mass. Gen. Laws ch. 265, § 50(c). Additionally, facilitators who violate Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) or § 4B (Living off or sharing earnings of minor prostitute) may be required to pay a fine of \$5,000, and facilitators who violate Mass. Gen. Laws ch. 272, § 2 may be required to pay a fine of \$1,000.

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

Facilitators face mandatory asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 55, which states, “[a]ll monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 or 51 shall be subject to forfeiture. . . .” These monies “shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B.” Mass. Gen. Laws ch. 265, § 55.

Additionally, facilitators face asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 56⁸⁷ (Human Trafficking—Property subject to forfeiture).⁸⁸ Seizure of forfeitable property is governed by Mass. Gen. Laws

⁸³ See *supra* Section 1.2 for the provisions of Mass. Gen. Laws ch. 272, § 2.

⁸⁴ See *supra* note 58.

⁸⁵ See *supra* note 2.

⁸⁶ See *supra* note 55.

⁸⁷ See *supra* note 46.

⁸⁸ See *supra* Section 2.8 for full discussion of Mass. Gen. Laws ch. 265, § 56⁸⁸ (Human Trafficking—Property subject to forfeiture).

ch. 265, § 56(g), which states “During the pendency of the proceedings, the court may issue at the request of the commonwealth ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody.” The final order of the court shall be deposited into the Victims of Human Trafficking Trust Fund⁸⁹ established in section 66A of chapter 10.⁹⁰ Mass. Gen. Laws ch. 265, § 56(e).

4.2.1 Recommendation: Enact provisions mandating minimum fines and restitution for victims of under Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) and 51(Human trafficking—Forced services).

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

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

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

4.4 *Promoting and selling child pornography is illegal.*

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

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

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

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

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

⁸⁹ See *supra* note 47.

⁹⁰ The text of Mass. Gen. Laws ch. 10, § 66A included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

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.*

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.*

The Massachusetts Code defines sexually exploited children as victims. For purposes of the child welfare statutes, Mass. Gen. Laws ch. 119, § 21⁹¹ (Definitions applicable to § 21 to 55H) defines “sexually exploited child” as any person under the age of 18 who has been subjected to sexual exploitation because such person:

- (1) is the victim of the crime of sexual servitude pursuant to section 50 of chapter 265 [Human trafficking—Sexual servitude] or is the victim of the crime of sex trafficking as defined in 22 United States Code 7105 [Protection and assistance for victims of human trafficking];
- (2) engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, in violation of subsection (a) of section 53A of chapter 272 [Engaging in sexual conduct for fee; payors and payees; penalties], or in exchange for food, shelter, clothing, education or care;
- (3) is a victim of the crime, whether or not prosecuted, of inducing a minor into prostitution under by section 4A of chapter 272 [Promoting child prostitution; mandatory sentence]; or

⁹¹ The text of Mass. Gen. Laws ch. 119, § 21 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

(4) engages in common night walking or common streetwalking under section 53 of chapter 272 [Common night walkers, disorderly persons and disturbers of the peace].

For purposes of Massachusetts' crime victims compensation laws, Mass. Gen. Laws ch. 258C, §1 (Definitions) defines a "victim" as

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

- (a) as a direct result of a crime⁹² as defined in this section;
- (b) as a result of attempting to assist a person against whom a crime was attempted or committed; or
- (c) as a result of efforts to prevent a crime or an attempted crime from occurring in his presence or to apprehend a person who had committed a crime in his presence.

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

any natural person who suffers direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of a crime or delinquency offense, as demonstrated by the issuance of a complaint or indictment, the family members of such person if the person is a minor . . . and, for relevant provisions of this chapter, a person who is the subject of a case reported to a prosecutor pursuant to . . . section fifty-one B of chapter one hundred and nineteen [Duties of Department as to Child Abuse Reports], and the family members of such person if the person is a minor

For purposes of confidential communications related to caseworker privileges for victims of human trafficking, "victim" is defined under Mass. Gen. Laws ch. 233, § 20M (Confidential communication between human trafficking victim and victim's caseworker) as

a person who is subjected to the conduct prohibited under sections 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services] of chapter 265.

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

The Massachusetts human trafficking law does not expressly prohibit a defendant from raising consent of the minor to the commercial sex acts as a defense. Mass. Gen. Laws ch. 265, §§ 50⁹³ (Human trafficking—Sexual servitude). Only one of Massachusetts's CSEC laws expressly states that a minor's consent to the offenses is not a defense for the perpetrator. Mass. Gen. Laws ch. 272, § 29A(c) (Child pornography—enticement, solicitation, employment of children), states that, "[i]n a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted." None of Mass. Gen. Laws ch. 265, § 26C (Enticement of children), § 26D⁹⁴ (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), or § 53A (Engaging in sexual conduct for a fee; payors and payees; penalties) expressly prohibit a defendant from using the consent of a minor to a commercial sex act as a defense to the crime. However, the sex offense Mass. Gen. Laws ch. 265, § 13B 1/2 (Commission of indecent assault and battery on a child under the age of 14 during commission of certain offenses or by mandated reporters) states in part, "In a prosecution under this

⁹² Mass. Gen. Laws ch. 258C, § 1 (Definitions) defines a "crime" in part as "an act committed by a person which, if committed by a mentally competent, criminally responsible adult who has no legal exemption or defense, would constitute a crime."

⁹³ See *supra* note 2.

⁹⁴ See *supra* note 17.

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

5.2.1 Recommendation: Amend Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude), § 26C(b) (Enticement of children), § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 53A(b) (Engaging in sexual conduct for a fee; payors and payees; penalties) to clarify that a minor’s consent is not a defense to commercial sexual exploitation.

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

Massachusetts’s prostitution law does not exclude minors from prosecution for prostitution offenses. Mass. Gen. Laws ch. 272, § 53A(a)⁹⁵ (Engaging in sexual conduct for fee; payors and payees; penalties) makes it illegal if anyone “engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee” A conviction under this statute is punishable by imprisonment up to 1 year in the house of correction or a fine up to \$500, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 53A(a).

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

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

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

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

However, under Mass. Gen. Laws ch. 265, § 57⁹⁶ (Human trafficking—Victims accused of common night walking or streetwalking—Affirmative defense),

In any prosecution or juvenile delinquency proceeding of a person who is a human trafficking victim, as defined by section 20M of chapter 233⁹⁷ [Confidential communication between human trafficking victim and the victim’s caseworker], it shall be an affirmative defense to charges of engaging in common night walking or common streetwalking in violation of section 53 of chapter 272 and to a violation of section 53A of said chapter 272 that, while a human trafficking victim, such person was under duress or coerced into committing the offenses for which such person is being prosecuted or against whom juvenile delinquency proceedings have commenced.

⁹⁵ See *supra* note 10.

⁹⁶ The text of Mass. Gen. Laws ch. 265, § 57 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

⁹⁷ Pursuant to Mass. Gen. Laws ch. 233, § 20M, “‘Human trafficking victim’ or ‘victim’, a person who is subjected to the conduct prohibited under sections 50 or 51 of chapter 265.”

5.3.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties) and ch. 272, § 53 (Common nightwalkers, disorderly persons and disturbers of the peace) to make the laws inapplicable to minors under 18.

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.*

I. Child Initially Identified as Abused/Neglected

Despite the absence of a definition of abuse or neglect under Mass. Gen. Laws ch. 119, § 21⁹⁸ (Definitions Applicable to Sections 21 to 55H)⁹⁹, a commercially sexually exploited child¹⁰⁰ is likely to be identified as abused or neglected and directed to child protective services under the mandatory reporting requirements in Mass. Gen. Laws ch. 119, § 51A(a)¹⁰¹ (Mandated reporter—responsibilities). Mass. Gen. Laws ch. 119, § 51A(a) (Mandated reporter—responsibilities) requires mandated reporters¹⁰² who have “reasonable cause to believe that a child is suffering physical or emotional injury resulting from: (i) abuse inflicted upon him which causes harm or substantial risk of harm to the child’s health or welfare, including sexual abuse. . .(iv) being a sexually exploited child; or (v) being a human trafficking victim as defined by section 20M of chapter 233,” to immediately report the abuse to the Department. Mass. Gen. Laws ch. 119, § 51A(a) also authorizes the mandated reporter to contact law enforcement about the suspected abuse. Mass. Gen. Laws ch. 119, § 51B(k)(3) (Investigation of report of abuse filed under Sec. 51A; removal of child; transmission and filing of written reports; notice to district attorney; disclosure of information by mandated reporter) provides that the Department must advise the district attorney and local law enforcement of any evidence indicating “there is reasonable cause to believe that . . . (3) a child has been sexually exploited, which shall include a violation of section 4A [Promoting child prostitution; mandatory sentence], 4B [Deriving support from child prostitution; mandatory sentence] or 29A [Child pornography—enticement, solicitation, employment of children] of said chapter 272 or is a sexually exploited child or a child who is otherwise a human trafficking victim.”

If a child is identified as abused or neglected under Mass. Gen. Laws ch. 119, § 21 (Definitions Applicable to Sections 21 to 55H), the definition of “caretaker”¹⁰³ under 110 Mass. Code Regs. § 2.00 is sufficiently broad to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker. In addition to being directed to child protective services by a mandatory reporter¹⁰⁴ under Mass.

⁹⁸ The text of Mass. Gen. Laws ch. 119, § 21 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

⁹⁹ See section 5.5 for a full analysis of the definition of abuse.

¹⁰⁰ See *supra* section 5.1 for the definition of “sexually exploited child.”

¹⁰¹ The text of Mass. Gen. Laws ch. 119, § 51A included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹⁰² See *supra* note 104.

¹⁰³ See Section 5.6 for a full analysis of the definition of “caretaker.”

¹⁰⁴ Mass. Gen. Laws ch. 119, § 21 (Definitions applicable to Secs. 21 to 51H) defines a “mandated reporter” as

a person who is: (i) a physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, optometrist, osteopath, allied mental health and human services professional licensed under section 165 of chapter 112, drug and alcoholism counselor, psychiatrist or clinical social worker; (ii) a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licenser of the department of early education and care or school attendance officer; (iii) a probation officer, clerk-magistrate of a district court, parole officer, social worker, foster parent, firefighter, police officer; (iv) a priest, rabbi,

Gen. Laws ch. 119, § 51A(a)¹⁰⁵ (Mandated reporter—responsibilities),¹⁰⁶ a sexually exploited minor who seeks treatment for injuries at a hospital may also be identified by a health care practitioner pursuant to Mass. Gen. Laws ch. 119, § 51C (Custody of child pending transfer or hearing).

a. Point of contact for initial custody of abused/neglected child

After receiving a 51A report¹⁰⁷ of suspected child abuse or neglect, Mass. Gen. Laws ch. 119, § 51B(a)¹⁰⁸ (Duties of department as to child abuse reports) requires the Department, to investigate the allegations. Mass. Gen. Laws ch. 119, § 51B further provides

(a) Upon receipt of a report filed under section 51A, the department shall investigate the suspected child abuse or neglect, provide a written evaluation of the household of the child, including the parents and home environment and make a written determination relative to the safety of and risk posed to the child and whether the suspected child abuse or neglect is substantiated. The department shall immediately report to the district attorney and local law enforcement authorities, a sexually exploited child or a child who is otherwise a human trafficking victim, regardless of whether the child is living with a parent, guardian or other caretaker.

....

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

....

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

....

(k) The department shall notify and shall transmit copies of substantiated 51A reports and its written evaluations and written determinations under subsection (a) or (b) to the district attorney for the county in which the child resides and for the county in which the suspected abuse or neglect occurred, and to the local law enforcement authorities in the city or town in which the child resides and in the city or town in which the suspected abuse or neglect occurred when the department has reasonable cause to believe that 1 of the conditions listed below resulted from abuse or neglect.

....

(3) a child has been sexually exploited, which shall include a violation of section 4A [Promoting child prostitution; mandatory sentence], 4B [Deriving support from child prostitution; mandatory sentence] or 29A [Child pornography—enticement, solicitation, employment of children] of said chapter 272 or is a sexually exploited child or a child who is otherwise a human trafficking victim.

clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis; (v) in charge of a medical or other public or private institution, school or facility or that person’s designated agent; or (vi) the child advocate.

¹⁰⁵ See *supra* note 101.

¹⁰⁶ See *supra* section 5.4 for a full analysis of mandatory reporting and victim identification.

¹⁰⁷ Mass. Gen. Laws ch. 119 § 21 (Definitions applicable to Secs. 21 to 51H) defines “51A report” as “a report filed with the department under section 51A that details suspected child abuse or neglect.”

¹⁰⁸ The text of Mass. Gen. Laws ch. 119, 51B included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

In cases where the report under section 51A is made by a health care practitioner after a minor has sought treatment for injuries at a hospital and “[i]f hospital personnel collect physical evidence of abuse or neglect of the child, the local district attorney, local law enforcement authorities, and the department shall be immediately notified. Mass. Gen. Laws ch. 119, § 51A(b) (Mandated reporter—responsibilities).

a. Process following initial custody of abused/neglected child

Mass. Gen. Laws ch. 119, § 51C (Custody of child pending transfer or hearing) further provides,

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

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

Once a 51A or 51B report has been filed identifying a child as sexually exploited, Mass. Gen. Laws ch. 119 § 51D¹⁰⁹ authorizes multi-disciplinary response teams to assess the child’s case and make recommendations. Pursuant to Mass. Gen. Laws ch. 119 § 51D,

Each team shall consist of the department’s caseworker for the particular case, 1 representative of the appropriate district attorney, and at least 1 other member appointed by the area director who is not an employee of either office. The additional member shall have training and experience in the fields of child welfare or criminal justice and, as far as practicable, be involved with the provision of services to these families. No members of a team shall receive any compensation, or in the case of a state employee, any additional compensation, for service on the team.

For 51A reports specifically involving a sexually exploited child or a child who is otherwise a human trafficking victim, the multi-disciplinary service team may consist of a team of professionals trained or otherwise experienced and qualified to assess the needs of sexually exploited children or children who are otherwise human trafficking victims including, but not limited to, a police officer, as defined by section 1 of chapter 90C, or other person designated by a police chief, as defined in said section 1 of said chapter 90C, an employee of the department of children and families, a representative of the appropriate district attorney, a social service provider, a medical professional or a mental health professional.

The team shall review and monitor the service plan developed by the department under subsection (g) of section 51B. The team shall evaluate the effectiveness of the service plan in protecting the child from further abuse or neglect. The team shall make recommendations regarding amendments to the service plan, the advisability of prosecuting members of the family,

¹⁰⁹ The text of Mass. Gen. Laws ch. 119, § 51D included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

and the possibility of utilizing diversionary alternatives. If the team finds that services required under such plan are not provided to the family, the case shall be referred to the commissioner.

....

For 51B reports specifically involving a sexually exploited child, the purpose of the multi-disciplinary service team shall be to determine whether the child has been sexually exploited or is otherwise a human trafficking victim and to recommend a plan for services to the department that may include, but shall not be limited to, shelter or placement, mental health and medical care needs and other social services. . . .

For the Department to maintain protective custody of a child for another 72 hours, the Department must file a care and protection petition with the juvenile court pursuant to Mass. Gen. Laws Ch. 119 § 24 (Powers and duties of divisions of juvenile court department as to custody of children), which states in part,

A person may petition under oath the juvenile court alleging on behalf of a child within its jurisdiction that the child:

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

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

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

b. Adjudication of abuse/neglect

Pursuant to Mass. Gen. Laws ch. 119, § 25 (Hearing; custody of child), "The petition under section 24 may be heard on the merits when a child is taken into custody and brought before the court or may be continued to a time fixed for hearing. Pending the hearing on the merits, the court may allow the child to be placed in the care of some suitable person or licensed agency¹¹⁰ providing foster care for children or may commit the child to the custody of the department. If the court commits a child to the custody of the department, the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C." When the court hears the petition on the merits, Mass. Gen. Laws ch. 119, § 26(b) (Procedure at hearing; order of commitment; petition to dispense with parental consent to adoption; reimbursement of commonwealth; petition for review) provides in part, "If the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that the child is in need of care and protection. In making

¹¹⁰ Mass. Gen. Laws. Ch. 119, § 23(a)(7) (Responsibility of department to provide foster care for children; placement with relatives; funeral expenses; child profile form; extension of support of child until 22 years of age; assignment of support rights; assistance to foster care families) provides, "A temporary shelter care facility program or a group care facility, licensed under chapter 15D [repealed], may provide temporary shelter for a 72-hour period to a child without parental consent, if the child's welfare would be endangered if such shelter were not immediately provided. At the expiration of the 72-hour period, the licensee shall: (i) secure the consent of a parent or guardian to continued custody and care; (ii) refer the child to the department for custody and care; or (iii) refuse to provide continued care and custody to the child."

such adjudication, the health and safety of the child shall be of paramount concern. If the child is adjudged to be in need of care and protection, the court may commit the child to the custody of the department until he becomes an adult or until, in the opinion of the department, the object of his commitment has been accomplished, whichever occurs first; and the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C.” The court may also make other orders as set forth in the statute.

c. Process outcomes

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

II. Child Initially Identified as a Child In Need of Services

a. Point of contact for initial custody of Child In Need of Services

A child in need of services may be identified by a mandatory reporter under Mass. Gen. Laws ch. 119, § 51A(a) (Mandated reporter—responsibilities)¹¹¹ as a sexually exploited child and directed to child protective services or may be identified by a health care practitioner after a minor has sought treatment for injuries at a hospital, Mass. Gen. Laws ch. 119, § 51C (Custody of child pending transfer or hearing).

Pursuant to Mass. Gen. Laws ch. 119, § 21,¹¹² a sexually exploited minor is specifically defined as a “child in need of services,” which is defined, in part, as

a child between the ages of 6 and 17 who: (a) repeatedly runs away from the home of a parent or legal guardian; (b) repeatedly fails to obey the lawful and reasonable commands of a parent or legal guardian, thereby interfering with the parent’s or legal guardian’s ability to adequately care for and protect the child; (c) repeatedly fails to obey lawful and reasonable school regulations; (d) when not otherwise excused from attendance in accordance with lawful and reasonable school regulations, willfully fails to attend school for more than 8 school days in a quarter; or (e) is a sexually exploited child.

Pursuant to Mass. Gen. Laws ch. 119, § 21, a “sexually exploited child” is defined as,

¹¹¹ See *supra* Section 5.4 for a full analysis of mandatory reporting and victim identification.

¹¹² See *supra* note 98.

any person under the age of 18 who has been subjected to sexual exploitation because such person:

- (1) is the victim of the crime of sexual servitude pursuant to section 50 of chapter 265 or is the victim of the crime of sex trafficking as defined in 22 United States Code 7105;
- (2) engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, in violation of subsection (a) of section 53A of chapter 272, or in exchange for food, shelter, clothing, education or care;
- (3) is a victim of the crime, whether or not prosecuted, of inducing a minor into prostitution under by section 4A of chapter 272; or
- (4) engages in common night walking or common streetwalking under section 53 of chapter 272.

b. Process following initial custody of child in need of services/sexually exploited child

A specialized post-custody process is available for children identified as sexually exploited. Under Mass. Gen. Laws ch. 119, § 39K¹¹³ (Sexually exploited children – child welfare services),

- (a) Notwithstanding any general or special law to the contrary, the department of children and families, in collaboration with the department of mental health and other appropriate state agencies, shall: (i) provide for the child welfare services needs of sexually exploited children including, but not limited to, services for sexually-exploited children residing in the commonwealth at the time they are taken into custody by law enforcement or are identified by the department as sexually-exploited children, for the duration of any legal or administrative proceeding in which they are either the complaining witness, defendant or the subject child; and (ii) provide appropriate services¹¹⁴ to a child reasonably believed to be a sexually exploited child in order to safeguard the child's welfare. If a child reasonably believed to be a sexually exploited child declines services or is unable or unwilling to participate in the services offered, the department or any person may file a care and protection petition under section 24. Sexually exploited children shall have access to an advocate.¹¹⁵ The advocate or a member of the multi-disciplinary service team established under section 51D shall accompany the child to all court appearances and may serve as a liaison between the service providers and the court.
- (b) The services that shall be provided under this section shall be available to all sexually exploited children, whether they are accessed voluntarily, through a court proceeding under this section or through a referral, which may be made by any person.
- (c) In determining the need for and capacity of the services that may be provided under this section, the department of children and families shall recognize that sexually exploited youth have separate and distinct service needs according to gender and appropriate services shall be made available while ensuring that an appropriate continuum of services exists.

¹¹³ The text of Mass. Gen. Laws ch. 119, § 39K included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹¹⁴ Mass. Gen. Laws ch. 119, § 21 (Definitions applicable to Secs. 21 to 51H) defines “[a]ppropriate services” as “the assessment, planning and care provided by a state agency or non-governmental organization or entity, through congregate care facilities, whether publicly or privately funded, emergency residential assessment services, family-based foster care or the community, including food, clothing, medical care, counseling and appropriate crisis intervention services, provided: (i) that such agency, organization or entity has expertise in providing services to sexually exploited children or children who are otherwise human trafficking victims; and (ii) that such services are provided in accordance with such regulations that the department of children and families may adopt or the policies of such department.” *See supra* note 98.

¹¹⁵ Pursuant to Mass. Gen. Laws ch. 119, § 21, “Advocate” is defined as “an employee of a governmental or non-governmental organization or entity providing appropriate services, or a similar employee of the department of children and families who has been trained to work and advocate for the needs of sexually exploited children.”

(d) The commissioner of the department may, subject to appropriation, contract with non-governmental organizations or entities with experience working with sexually exploited children to train law enforcement officials likely to encounter sexually exploited children in the course of their law enforcement duties. The training shall include, but not be limited to, awareness and compliance with the provisions of this section, identification of, access to, and the provision of services for sexually-exploited children and any other services the department deems necessary.

(e) The department may apply to the victim and witness assistance board for grants from the Victims of Human Trafficking Trust Fund, established in section 66A of chapter 10., grants from the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention or any other federal agency, or grants from any other private source to fund the law enforcement training and services for sexually-exploited children.

(f) The department shall adopt regulations to carry out this section.

Additionally, identification and review of existing services and benefits for victims of domestic minor sex trafficking are included among the responsibilities of a Massachusetts task force. Pursuant to section 31 of House Bill 3808, Massachusetts has appointed a task force that requires, subject to appropriation, various agencies¹¹⁶ to

(iii) identify and review the existing services and facilities that meet the needs of victims of human trafficking including, but not limited to, health and mental health services, housing, education and job training, legal services and victim compensation;

...

(vi) examine the costs associated with establishing a safe house pilot program for adult and child victims of human trafficking and identify public and private funding sources that may be used to develop and implement a safe house pilot program;

...

(vii) examine cost-effective notices, announcements or advertisements that may be displayed in public places, such as airports, train stations, bus stations, hotels, massage parlors, spas, strip clubs and other sexually-oriented businesses providing information relating to services for human trafficking victims;

....

c. Adjudication of child in need of services/sexually exploited child

¹¹⁶ Pursuant to HB 3808, “[t]he task force shall consist of the attorney general or the attorney general’s designee, who shall serve as the chair, the colonel of state police or the colonel’s designee, a representative of the Massachusetts police chiefs association, a representative of the Massachusetts district attorneys’ association, the commissioner of the Boston police department or the commissioner’s designee, the director of the division of professional licensure or the director’s designee, a representative of the 558 Massachusetts office for victim assistance, the director of the department of labor standards or the director’s designee, the commissioner of the department of children and families or the commissioner’s designee, the secretary of the executive office of public safety or the secretary’s designee, the commissioner of the office of probation or the commissioner’s designee; a representative of a group dedicated to immigrant and refugee issues appointed by the governor; a representative of a group dedicated to the prevention of violence against women appointed by the governor; a representative of an entity dedicated to prevention of and intervention in the trafficking of children appointed by the governor; a survivor of human trafficking appointed by the governor; a human trafficking attorney appointed by the governor; a human trafficking caseworker appointed by the governor; a mental health professional appointed by the governor and a university researcher with a background in human trafficking appointed by the governor.

Sexually exploited children are presumed to be a child in need of services and may be diverted from juvenile delinquency proceedings. Under Mass. Gen. Laws ch. 119, § 39L¹¹⁷ (Sexually exploited children – safeguarding welfare during criminal proceedings),

(a) Before or after arraignment in any juvenile delinquency or criminal proceeding against a sexually exploited child alleging that such juvenile or such defendant violated the prohibition against common night walking or common streetwalking under section 53 of chapter 272 or the provisions of subsection (a) of section 53A of said chapter 272, there shall be a presumption that a care and protection petition on behalf of such child, or a child in need of services petition under section 39E, shall be filed. Any person, including the juvenile, may file a care and protection petition on behalf of such child, including a petition for emergency commitment under section 24, or a parent or a police officer may file a child in need of services petition under section 39E.

(b) The court may appoint a guardian ad litem and shall hold a hearing on such petition. The court may allow a reasonable delay in the proceedings, including any arraignment, to consider the petition. The necessary findings of fact to support the court's decision shall be reduced to writing and made part of the court record.

(c) Upon a motion by a party to the juvenile delinquency or criminal proceeding or by a guardian ad litem, unless the district attorney or the attorney general objects, and upon a finding that a child alleged to be a juvenile delinquent by reason of violating section 53 of chapter 272 or subsection (a) of section 53A of said chapter 272 is a child in need of care and protection or a child in need of services, the court shall, if arraignment has not yet occurred, indefinitely stay arraignment and place the proceeding on file. If the court finds that the child has failed to substantially comply with the requirements of services or that the child's welfare or safety so requires, the court may remove the proceeding from file, arraign the child and restore the delinquency or criminal complaint to the docket for trial or further proceedings in accordance with the regular course of such proceedings. If arraignment has already occurred, unless the district attorney or the attorney general objects, the court shall place the child on pretrial probation under section 87 of chapter 276. If appropriate, the conditions of such probation shall include, but not be limited to, requiring the child to substantially comply with all lawful orders of the court, including orders relating to any care and protection or child in need of services proceeding, and the child shall also comply with the guidance and services of the department or any designated non-governmental service provider. If the child fails to substantially comply with the conditions of probation or if the child's welfare or safety so requires, the court may in its discretion restore the delinquency or criminal complaint to the docket for trial or further proceedings in accordance with the regular course of such proceedings.

d. Process outcomes

A victim of domestic minor sex trafficking may be placed in a specialized program designed for sexually exploited children that begins following custody, continues after the child has been adjudicated as a sexually exploited child, and provides access to an advocate that can safeguard the welfare of the child. Under Mass. Gen. Laws ch. 119 § 39K(a) (Sexually exploited children – child welfare services),

Notwithstanding any general or special law to the contrary, the department of children and families, in collaboration with the department of mental health and other appropriate state agencies, shall: (i) provide for the child welfare services needs of sexually exploited children including, but not limited to, services for sexually-exploited children residing in the commonwealth at the time they are taken into custody by law enforcement or are identified by the

¹¹⁷ The text of Mass. Gen. Laws ch. 119, § 39L included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

department as sexually-exploited children, for the duration of any legal or administrative proceeding in which they are either the complaining witness, defendant or the subject child; and (ii) provide appropriate services to a child reasonably believed to be a sexually exploited child in order to safeguard the child's welfare. If a child reasonably believed to be a sexually exploited child declines services or is unable or unwilling to participate in the services offered, the department or any person may file a care and protection petition under section 24. Sexually exploited children shall have access to an advocate. The advocate or a member of the multi-disciplinary service team established under section 51D shall accompany the child to all court appearances and may serve as a liaison between the service providers and the court.

However, if a sexually exploited child is adjudicated as a delinquent child under Mass. Gen. Laws ch. 119, § 58 (Adjudication; proceedings after adjudication; payment for support of child), the court may place the child on probation, commit the child to the department of youth services, or impose

- a sentence provided by law; or
- a combination sentence which shall be a commitment to the department of youth until he reaches the age of twenty-one, and an adult sentence to a house of correction or to the state prison as is provided by law for the offense. . . .
- a commitment to the department of youth services until he reaches the age of twenty-one.
-

Additionally, a victim of domestic minor sex trafficking adjudicated for a sexual offense that is in the custody of the department may be required to undergo specific placement procedures. Pursuant to Mass. Gen. Laws ch. 119, § 33B (Placement of child adjudicated for sexual offense, arson or other violent offense),

[T]he department or any other child-care agency shall determine whether the child has been adjudicated delinquent for a sexual offense . . . or has admitted to such behavior, or is the subject of a documented or substantiated report of such behavior. If the department or other agency determines that the child has been so adjudicated, admitted, or found to have engaged in such behavior, it shall immediately refer the child to a qualified diagnostician for evaluation and assessment, including a risk management assessment of the child and a recommendation as to the type of appropriate and safe placement for the child. . . .

If the diagnostician recommends that the placement, including situations in which the child remains at home, should have adequate sex offender or arson specific risk management procedures, the department or agency responsible for placing the child shall prepare and implement a plan to address the safety of the child and other children in the home or residence, and to address the safety of the children in the immediate neighborhood. Such plan must include notification to all adults responsible for supervising the child in the home or residence of the child's behavioral history, including adjudications, if any, and education of all persons living in the home or residence about the known risks attendant to the child's behavior and methods of preventing such behavior, and provision for appropriate treatment for the child who is being placed. Where the department or agency makes a referral of such child to a foster home, residential facility, other agencies or organizations, or individuals for the purpose of receiving custodial services, the department or agency shall disclose the child's behavioral history, including adjudications, if any, to the designated recipient of the referral, prior to placement or at referral

III. Child Initially Identifies as Delinquent Child In Need of Services

a. Point of contact for initial custody of delinquent child in need of services

A delinquent child in need of services may enter child protective services pursuant to arrest. Mass. Gen. Laws ch. 119, § 39H (Arrest of child; notification of probation officer; placement of child; bail and detention), which provides,

A child may be arrested for committing the behavior described in the definition of child in need of services in section twenty-one,¹¹⁸ only if such child has failed to obey a summons issued pursuant to section thirty-nine E, or if the arresting law enforcement officer has probable cause to believe that such child has run away from the home of his parents or guardian and will not respond to a summons.

....

b. Process following initial custody of delinquent child in need of services

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

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

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

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

....

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

A parent or legal guardian of a child having custody of such child, or a police officer may apply for a petition in one of said courts alleging that said child persistently runs away from the home of said

¹¹⁸ Mass. Gen. Laws Ch. 119, § 21 (Definitions applicable to Secs. 21 to 51H) defines "child in need of services" as "a child between the ages of 6 and 17 who: (a) repeatedly runs away from the home of a parent or legal guardian; (b) repeatedly fails to obey the lawful and reasonable commands of a parent or legal guardian, thereby interfering with the parent's or legal guardian's ability to adequately care for and protect the child; (c) repeatedly fails to obey lawful and reasonable school regulations; or (d) when not otherwise excused from attendance in accordance with lawful and reasonable school regulations, willfully fails to attend school for more than 8 school days in a quarter."

parent or guardian or persistently refuses to obey the lawful and reasonable commands of said parent or guardian resulting in said parent's or guardian's inability to adequately care for and protect said child.

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

....

If despite these protections, a victim of domestic minor sex trafficking is taken into custody for violating a law, by-law or ordinance¹¹⁹ and put through delinquency proceedings under sections 52 to 63, such “[p]roceedings against children . . . shall not be deemed criminal proceedings” pursuant to Mass. Gen. Laws ch. 119, § 53. Following arrest for a delinquent offense, Mass. Gen. Laws Ch. 119 § 67 (Notice of arrest of child to be given to probation officer and parent or guardian) states,

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

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

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

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

that the appearance of the child at such examination or trial, shall be the responsibility of the court for which he is being held in safekeeping.

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

....

The department may provide special foster homes, and places of temporary custody commonly referred to as detention homes of the department of youth services for the care, maintenance and safekeeping of such children who may be committed by the court to said department under this section; provided, however, that no more than five such children shall be detained in any such special foster home at any one time.¹²⁰

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

....

c. Adjudication of delinquent child in need of services

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

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

d. Process outcomes

If a child is adjudicated as a delinquent child on a complaint under Mass. Gen. Laws ch. 119, § 58 (Adjudication; proceedings after adjudication; payment for support of child), the court may "may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services, but the probationary or

¹²⁰ Mass. Gen. Laws ch. 119, § 68B (Special foster homes; detention homes) further provides, "The department of youth services may use or provide special foster homes and places of temporary custody commonly referred to as detention homes, at various places in the commonwealth which shall be completely separate from any police station, town lockup or jail, and which shall be used solely for the temporary care, custody and study of children committed to the care of the department of youth services. Nothing in this section shall prevent the department from using or providing alternative placements and employing alternative measures which, in its discretion, will reasonably assure the appearance of the children before the court."

commitment period shall not be for a period longer than until such child attains the age of eighteen, or nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday.”

- 5.4.1 Recommendation: Amend Mass. Gen. Laws ch. 119, § 39L and the definition of “delinquent child” under Mass. Gen. Laws ch. 119, § 52 (Definitions) to prohibit delinquency proceedings against any sexually exploited child.

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

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

the non-accidental commission of any act by a caretaker upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury,¹²¹ or constitutes a sexual offense under the laws of the Commonwealth¹²² or any sexual contact between a caretaker and a child under the care of that individual. Abuse is not dependent upon location (*i.e.*, abuse can occur while the child is in an out-of-home or in-home setting.)

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

failure *by a caretaker*, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; provided, however, that such inability is not due

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

- (a) death; or
- (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or
- (c) soft tissue swelling or skin bruising depending upon such factors as the child’s age, circumstances under which the injury occurred, and the number and location of bruises; or
- (d) addiction to drug at birth; or
- (e) failure to thrive.

¹²² Mass. Gen. Laws ch. 6, § 178C (Definitions) defines “sex offense” for purposes of sex offender registration to include:

an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B1/2 of said chapter 265; a repeat offense under section 13B 3/4 of said chapter 265; . . . indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; . . . rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265 [Rape and abuse of child—previous youthful offender]; . . . enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265;. . . dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272 [Child pornography—dissemination]; . . .

solely to inadequate economic resources or solely to the existence of a handicapping condition. This definition is *not* dependent upon location (*i.e.*, neglect can occur while the child is in an out-of-home or in-home setting.)

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

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

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

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

a child’s:

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

Additionally, Mass. Gen. Laws ch. 119 § 39K(a)¹²³ (Sexually exploited children – child welfare services) extends the jurisdiction of the department of children and families to any sexually exploited child by requiring the department to “provide for the child welfare services needs” of all sexually exploited children.¹²⁴

- 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.*

¹²³ See *supra* note 113.

¹²⁴ See *infra* Section 5.4 for discussion of requirement that the department of mental health and other state agencies provide services to all sexually exploited youth.

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

Pursuant to Mass. Gen. Laws ch. 258C, § 2(a) (Eligibility for compensation; assistance of counsel), victims¹²⁵ of crimes will receive compensation if the division¹²⁶ "finds that a crime was committed and that such crime directly resulted in personal physical or psychological injury to, or death of, the victim." Mass. Gen. Laws ch. 258C, § 2(b) makes compensation available only if the claimant

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

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

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

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

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

Confidential communications¹²⁷ between a human trafficking victim¹²⁸ and a human trafficking victim's caseworker¹²⁹ are expressly protected under Mass. Gen. Laws ch. 233, § 20M(b)¹³⁰ which requires that

¹²⁵ See *supra* Section 5.1 for definition of "victim."

¹²⁶ Mass. Gen. Laws ch. 258C, § 1 (Definitions) defines "division" as "the division of victim compensation and assistance within the department of the attorney general, established in section 11K of chapter 12."

¹²⁷ "Confidential communication" is defined under Mass. Gen. Laws ch. 233, § 20M(a) as "information transmitted in confidence by and between a victim and a victim's caseworker by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term confidential communication shall include all information received by a victim's caseworker which arises out of and in the course of such counseling and assisting including, but not limited to, reports, records, working papers or memoranda."

¹²⁸ See *supra* section 5.1.

¹²⁹ Mass. Gen. Laws ch. 233, § 20M(a) defines "human trafficking victim's caseworker" as "a person who is employed by or volunteers with a program serving human trafficking victims, who has undergone a minimum of 25 hours of training and who reports to and is under the direct control and supervision of a direct service supervisor of a human trafficking victim program, and whose primary purpose is the rendering of advice, counseling or assistance to human trafficking victims."

¹³⁰ The text of Mass. Gen. Laws ch. 233, § 20M(b) included here and elsewhere in this report reflects amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

A human trafficking victims' caseworker shall not disclose any confidential communication without the prior written consent of the victim, or the victim's guardian in the case of a child, except as hereinafter provided. Such confidential communication shall not be subject to discovery in any civil, legislative or administrative proceeding without the prior written consent of the victim, or victim's guardian in the case of a child, to whom such confidential communication relates. In criminal actions such confidential communication shall be subject to discovery and shall be admissible as evidence but only to the extent of information contained therein which is exculpatory in relation to the defendant; provided, however, that the court shall first examine such confidential communication and shall determine whether or not such exculpatory information is contained in the communication before allowing such discovery or the introduction of such evidence.

Additionally, human trafficking victims are notified of their right to confidentiality under Mass. Gen. Laws ch. 233, § 20M(c) which requires that “[d]uring the initial meeting between a caseworker and victim, the caseworker shall inform the human trafficking victim and any guardian thereof of the confidentiality of communications between a caseworker and victim and the limitations thereto.”

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

Mass. Gen. Laws ch. 278, § 16D(b)(1)¹³¹ (Definitions; alternative procedure for taking testimony of child witness; order; presence of counsel and defendant; filming, videotaping, or transmitting of testimony) provides,

At any time after the issuance of a complaint or indictment alleging an offense punished by any of the statutes listed herein, the court on its own motion or on motion of the proponent of a child witness,¹³² and after a hearing, may order the use of a suitable alternative procedure for taking the testimony of the child witness, in proceedings pursuant to said complaint or indictment, provided that the court finds by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in the

¹³¹ The text of Mass. Gen. Laws ch. 278, § 16D included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹³² Mass. Gen. Laws ch. 278, § 16D(a) defines a “child witness” as

a person who is under the age of fifteen years and who is alleged to have been a victim of, or a witness to an alleged violation of section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . thirteen H [Indecent assault and battery on person over fourteen], . . . twenty-three [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], twenty-four [Assault with intent to commit rape], twenty-four B [Assault on child under sixteen with intent to commit rape] or 50 [Human trafficking – sexual servitude] of chapter two hundred and sixty-five, or section two [Abduction of persons for the purpose of prostitution or unlawful sexual intercourse], . . . four [Enticing to unlawful intercourse], four A [Promoting child prostitution; mandatory sentence], four B [Deriving support from child prostitution; mandatory sentence], . . . six [Maintaining a house of prostitution], seven [Deriving support from an inmate of a house of prostitution], eight [Solicitation], twelve [Penalty for sending a person to a house of prostitution], thirteen [Detaining a person in house of prostitution], . . . twenty-eight [Matter harmful to minors—dissemination or possession with intent], twenty-nine [Obscene matter—dissemination or possession with intent], twenty-nine A [Child pornography—enticement, solicitation, employment of children], twenty-nine B [Child pornography—dissemination], . . . or thirty-five A [Obscene materials/acts—acts with child under sixteen] of chapter two hundred and seventy-two.

presence of the defendant, or as a result of both testifying in open court and testifying in the presence of the defendant. If the court orders the use of a suitable alternative for taking the testimony of a child witness pursuant to this section, the court shall make and enter specific findings upon the record describing with particularity the reasons for such order.

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

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

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

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

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

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

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

Additionally, Mass. Gen. Laws ch. 233, § 21B¹³³ (Evidence of victim’s sexual conduct) limits the admissibility of certain evidence related to prior sexual behavior, stating,

Evidence of the reputation of a victim’s sexual conduct shall not be admissible in any investigation or proceeding before a grand jury or any court of the commonwealth for a violation of sections 13B [Indecent Assault and Battery on Child Under Fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . 13 H [Indecent assault and battery on person over fourteen], 22 [Rape], 22A [Rape of child], 22B [Rape of child—aggravating factors], 22C [Rape of child—previous youthful offender], 23 [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], 24 [Assault with intent to commit rape] and 24B [Assault on child under sixteen with intent to commit rape] 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services] of chapter 265 . . . Evidence of specific instances of a victim’s sexual conduct in such an investigation or proceeding shall not be admissible except evidence of the victim’s sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim; provided, however, that such evidence shall be admissible only after an in camera hearing on a written motion for admission of same and an offer of proof. If, after said hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim, the evidence shall be admitted; otherwise not. . . .

Mass. Gen. Laws ch. 9A, § 2 (Address confidentiality program; application and certification procedures; false information; penalty) establishes an address confidentiality program under which “an adult person, a parent or guardian acting on behalf of a minor, or a guardian acting on behalf of an incapacitated person may apply to the secretary to have an address designated by the secretary serve as the person’s address or the address of the minor or incapacitated person.” Mass. Gen. Laws ch. 9A, § 2(1). For purposes of this program, Mass. Gen. Laws ch. 9a, § 1 defines “sexual assault” to include human trafficking under Mass. Gen. Laws ch. 265, § 50.

Mass. Gen. Laws ch. 258B, § 3 (Rights of victims and witnesses of crime) also generally affords various rights and services to victims and witnesses of crime, such as the right to be informed about their rights, protective services, social services, available civil remedies, and restitution, and to be notified about when proceedings will take place. Additionally, Mass. Gen. Laws ch. 265, § 24C¹³⁴ (Confidentiality of records containing name of victim of rape; disclosure unlawful; penalties) protects the identity of victims in an arrest, investigation, or complaint for certain crimes¹³⁵ from public inspection, “except with the consent of a justice of such court where

¹³³ The text of Mass. Gen. Laws ch. 233, § 21B included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹³⁴ The text of Mass. Gen. Laws ch. 265, § 24C included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹³⁵ Pursuant to Mass. Gen. Laws ch. 265, § 24C, the identity of a victim “shall be withheld from public inspection” when “an arrest, investigation or complaint is for rape or assault with intent to rape under section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], twenty two [Rape], twenty-two A [Rape of Child], 22B [Rape of child—aggravating factors], 22C [Rape of a child—previous youthful offender], twenty-three [Rape and abuse of a child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of a child—previous youthful offender], twenty-four [Assault with intent to commit rape] or twenty-four B [Assault on child under sixteen with intent to commit rape], inclusive of chapter two hundred and sixty-five, or an arrest, investigation, complaint for trafficking of persons under section 50 of said chapter 265 [Human trafficking—Sexual servitude].”

the complaint or indictment is or would be prosecuted.” Disclosing the “name of any individual identified as an alleged victim of any of the offenses” is unlawful and punishable by “a fine of not less than \$2,500 nor more than \$10,000.”

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.*

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

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

....

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

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

....

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

Victims of Mass. Gen. Laws ch. 265, § 50(a) “may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.” Mass. Gen. Laws ch. 265, §50(d). Victims of Mass. Gen. Laws ch. 265, § 51(a), which may include minor victims of sex trafficking, are afforded an identical civil remedy under Mass. Gen. Laws ch. 265, § 51(d).

Commercially sexually exploited children who are the victims of specified sexual assault or CSEC crimes, including Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude), ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 29A (Child pornography—enticement, solicitation, employment of children), may also be able to bring a civil action for injuries resulting from the crimes. Mass. Gen. Laws ch. 260, § 4C. The action must “be commenced within three years of the acts alleged to have caused an injury or condition or within three years of

the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act.” Mass. Gen. Laws ch. 260, § 4C. However, time is tolled until the victim is 18. Mass. Gen. Laws ch. 260, § 4C.

Additionally, pursuant to Mass. Gen. Laws ch. 260, § 4D (Actions by victims of sexual servitude, or forced labor or services),¹³⁶

(a) A victim of trafficking of persons for sexual servitude under section 50 of chapter 265 or of trafficking of persons for forced services under section 51 of said chapter 265 may bring a civil action for trafficking of persons for forced labor or services or sexual servitude. The court may award actual damages, compensatory damages, punitive damages, injunctive relief or any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages may be awarded on proof of actual damages if the defendant's acts were willful and malicious.

...

(f) Any legal guardian, family member, representative of the human trafficking victim or court appointee may represent the human trafficking victim's rights, in the event the human trafficking victim is deceased or otherwise unable to represent his own interests in court.

Victims of domestic minor sex trafficking may also receive restitution from asset forfeiture. Pursuant to Mass. Gen. Laws ch. 265, § 55 (Human trafficking—Monies to be directed to victim restitution),

All monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 [Trafficking for sexual servitude] or 51 [Human trafficking] shall be subject to forfeiture to the commonwealth and shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B.

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

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

5.11 Statutes of limitations for civil and criminal actions for child sex trafficking or 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.

Mass. Gen. Laws ch. 277, § 63¹³⁷ (Limitation of criminal prosecutions) sets a 6-year limitation for most CSEC crimes, unless otherwise noted in the statute. It also tolls the statute of limitations applicable to criminal prosecutions for violations of Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory

¹³⁶ The text of Mass. Gen. Laws ch. 260, § 4D included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹³⁷ The text of Mass. Gen. Laws ch. 277, § 63 included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

sentence), § 4B (Deriving support from child prostitution; mandatory sentence), § 29A (Child pornography—enticement, solicitation, employment of children), where the victim was under 16 at the time of the offense, until the earlier of the time the victim reaches 16 or the time the crime was reported to law enforcement.¹³⁸ Mass. Gen. Laws ch. 277, § 63. Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) is subject to the 6-year statute of limitations.

However, Mass. Gen. Laws ch. 277, § 63 eliminates the statute of limitations for prosecutions of minor sex trafficking offenses under Mass. Gen. Laws ch. 265, § 50(b), and extends the statute of limitations for sex trafficking prosecutions under ch. 265, § 50(a). Mass. Gen. Laws ch. 277, § 63 provides in part,

An indictment or complaint for an offense set forth in . . . subsection (b) of section 50 of chapter 265 [Human trafficking—Sexual servitude] . . . may be found and filed at any time after the date of the commission of such offense¹³⁹ . . . An indictment for an offense set forth in . . . subsection (a) of section 50 of chapter 265 . . . may be found and filed within 15 years of the date of commission of such offense.

The civil statute of limitations for domestic minor sex trafficking cases is tolled. Pursuant to Mass. Gen. Laws ch. 260, § 4D(b)–(e) (Actions by victims of sexual servitude, or forced labor or services),

- (b) A civil action for trafficking of persons for forced labor or services or sexual servitude shall be commenced within 3 years of the date on which the human trafficking victim was freed from human trafficking or, if the victim was a child during the commission of the offense, within 3 years after the date the plaintiff attains the age of 18.
- (c) If a person entitled to sue is under a disability at the time the cause of action accrues, such that it is impossible or impracticable for such person to bring an action, the time during which the plaintiff is under a disability shall toll the statute until the disability ceases.
- (d) In the event that a child plaintiff is under a disability, the failure of the child's guardian ad litem to bring a plaintiff's action within the applicable limitation period shall not prejudice the plaintiff's right to do so after his disability ceases.
- (e) A defendant shall be estopped from asserting a defense of the statute of limitations if the expiration of the statute is due to the defendant inducing the plaintiff to delay the filing of the action, preventing the plaintiff from filing the action or threats made by the defendant that caused duress upon the plaintiff.

. . . .

To the extent that a domestic minor sex trafficking victim has a tort claim for personal injuries resulting from their commercial sexual exploitation, Mass. Gen. Laws ch. 260, § 2A (Limitation of three years in certain cases) establishes a 3-year statute of limitations for actions of tort and contracts to recover for personal injuries.

¹³⁸ Other offenses tolled by Mass. Gen. Laws ch. 277, § 63 include in relevant part Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), § 4 (Enticing to unlawful intercourse), § 6 (Maintaining a house of prostitution), § 7 (Deriving support from an inmate of a house of prostitution), § 8 (Soliciting), § 12 (Penalty for sending a person to a house of prostitution), § 13 (Detaining a person in house of prostitution), § 29B (Child pornography—dissemination), or § 35A (Obscene material/acts—acts with child under sixteen).

¹³⁹ Mass. Gen. Laws ch. 277, § 63 also provides, with regard to the statute of limitations for prosecutions under Mass. Gen. Laws ch. 265, 50(b), “any indictment or complaint found and filed more than 27 years after the date of commission of such offense shall be supported by independent evidence that corroborates the victim's allegation. Such independent evidence shall be admissible during trial and shall not consist exclusively of the opinions of mental health professionals.”

Additionally, Mass. Gen. Laws ch. 260, § 4C¹⁴⁰ (Statute of limitations on civil action for assault and battery by sexual abuse of minor) imposes a 3 year statute of limitations for bringing civil claim to recover damages related to the sexual abuse¹⁴¹ of a minor. Mass. Gen. Laws ch. 260, § 4C states,

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

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

5.11.1 Recommendation: Amend Mass. Gen. Laws ch. 260 § 4D(b)–(e) (Actions by victims of sexual servitude, or forced labor or services) to extend the time in which minor victims of sex trafficking may bring an action for civil damages against their traffickers to account for their unique trauma and the time needed for recovery.

¹⁴⁰ The text of Mass. Gen. Laws ch. 260, § 4C included here and elsewhere in this report includes amendments made by the passage of House Bill 3808 during the Massachusetts 187th General Assembly. 2012 Mass. Public Acts 178.

¹⁴¹ Mass. Gen. Laws ch. 260, § 4C states, “For purposes of this section, ‘sexual abuse’ shall mean the commission of any act against a minor as set forth in section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], thirteen H [Indecent assault and battery on person over fourteen], twenty-two [Rape], twenty-two A [Rape of child], 22B [Rape of child—aggravating factors], 22C [Rape of child—previous youthful offender], twenty-three [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], 24 [Assault with intent to commit rape], 24B [Assault on child under sixteen with intent to commit rape] or subsection (b) of section 50 [Human trafficking—sexual servitude] of chapter two hundred and sixty-five or section two [Abduction of persons for the purpose of prostitution or unlawful sexual intercourse], three [Administering drug], four [Enticing unlawful intercourse], four A [Promoting child prostitution; mandatory sentence], four B [Deriving support from child prostitution; mandatory sentence], seven [Deriving support from an inmate of a house of prostitution], eight [Soliciting], thirteen [Detaining a person in house of prostitution], seventeen [Incest], twenty-nine A [Child pornography—enticement, solicitation, employment of children], thirty-four [Obscene materials/acts—sodomy and buggery], thirty-five [Obscene material/acts—unlawful and lascivious Acts] or thirty-five A [Obscene material/acts—acts with child under sixteen] of chapter two hundred and seventy-two.”

Legal Components:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *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.*

Legal Analysis:

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

Massachusetts has not enacted a law mandating law enforcement training on human trafficking or domestic minor sex trafficking. However, pursuant to Mass. Gen. Laws ch. 119, § 39K(d) (Sexually exploited children – child welfare services),

The commissioner of the department may, subject to appropriation, contract with non-governmental organizations or entities with experience working with sexually exploited children to train law enforcement officials likely to encounter sexually exploited children in the course of their law enforcement duties. The training shall include, but not be limited to, awareness and compliance with the provisions of this section, identification of, access to, and the provision of services for sexually-exploited children and any other services the department deems necessary.

Training on other special topics, including domestic violence, minors and hate crimes, is required. Mass. Gen. Laws ch. 6, § 116A (Training of law enforcement personnel in domestic violence), ch. 6, § 116B (Training of law enforcement personnel regarding hate crimes).

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

Massachusetts has enacted a task force law that requires, subject to appropriation, various protocols to strengthen interagency cooperation¹⁴² to address “all aspects of human trafficking.” Pursuant to House Bill 3808, § 31(b), the task force shall:

- (i) coordinate the collection and sharing of human trafficking data among government agencies; provided, however, that such data collection shall respect the privacy of victims of human trafficking; coordinate strategies and make recommendations for law enforcement to share information for the purposes of detecting individuals and groups engaged in human trafficking;

¹⁴² See *supra* note 116.

(ii) review and recommend policies and procedures to enable state government to work with non-governmental organizations and other elements of civil society to prevent human trafficking and to protect and provide assistance to victims of trafficking;

...

(iv) evaluate approaches to increase public awareness of human trafficking and offer recommendations for programs and educational and training opportunities for law enforcement and social service providers including, but not limited to, methods used to identify human trafficking victims including preliminary interviewing and questioning techniques, methods of protecting the special needs of women and child human trafficking victims, developments in state and federal laws regarding human trafficking and methods to increase effective collaboration between state and local agencies, law enforcement, social service providers and 588 non-governmental organizations;

...

(viii) recommend strategy and relevant methodologies for training providers in health and human services in the recognition of signs and circumstances indicating that an individual is the victim of human trafficking and the appropriate steps to report the individual to the appropriate law enforcement personnel or agencies;

....

6.1.1 Recommendation: Statutorily mandate training on domestic minor sex trafficking issues for law enforcement officers.

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

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

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

....

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

to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

Under this definition of “interception” and the provisions of Mass. Gen. Laws ch. 272, § 99(C)(1), the consent of all parties to a communication is required unless one of the parties is a law enforcement officer or has given prior authorization to a law enforcement officer to record the communication, the communication does not

occur in a home or a place that has a reasonable expectation of privacy,¹⁴³ and the recording is a part of the investigation of a “designated offense,”¹⁴⁴ which includes an investigation related to prostitution when it is part of organized crime activity. Mass. Gen. Laws ch. 272, § 99(C)(1), (B)(7).

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

6.2.2 Recommendation: Enact a law allowing single party consent for Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), Mass. Gen. Laws ch. 272, § 4B (Deriving support from child prostitution; mandatory sentence), Mass. Gen. Laws ch. 272, § 29A (Child pornography—enticement, solicitation, employment of children), and Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties).

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

Massachusetts laws permits the use of wiretapping in certain circumstances. Exemptions to the prohibition on interception of wire or oral communications under Mass. Gen. Laws ch. 272, § 99(C)(1) (Eavesdropping, wiretapping, and other interception of communications)¹⁴⁵ are provided in Mass. Gen. Laws ch. 272, §99(D), which states,

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

 - c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.
 - d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.
 - e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an

¹⁴³ See *Commonwealth v. Blood*, 507 N.E. 2d 1029, 1034 (Mass. 1987) (holding that conversations held in private homes have a reasonable expectation of privacy and that one-party consent allowed under Mass. Gen. Laws ch. 272, § 99(B)(4) does not “obviate the need for a warrant requirement” in such instances).

¹⁴⁴ Mass. Gen. Laws ch. 272, § 99(B)(7) defines a “designated offense” as

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

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

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

¹⁴⁵ See *supra* Section 6.2 for the substantive provisions of Mass. Gen. Laws ch. 272, § 99(C)(1).

undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

....

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

a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

....

d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

....

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

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense¹⁴⁶ has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

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

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

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

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

¹⁴⁶ See *supra* note 144 for the definition of “designated offense.”

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

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

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

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

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

Mass. Gen. Laws ch. 22A, § 2 (Establishment of statewide central register) directs the executive director of the criminal history systems board to establish a “statewide central register containing all available identifying data of any missing child,¹⁴⁷ including, but not limited to, fingerprints and blood types. The director may use existing data processing and data communications systems of the criminal justice information system.” Mass. Gen. Laws ch. 22A, § 4 (Reports of missing children; entry into central register; search for missing children) requires any police officer who receives a report of a missing child to immediately enter information regarding the missing child into the central register and begin looking for the missing child. Pursuant to Mass. Gen. Laws ch. 22A, § 9 (Notice by law enforcement agency to last known school of missing child; marking of child’s record; notice that child has been located), when a law enforcement agency receives a report of a missing child, it must notify the child’s last known school of the child’s disappearance. Furthermore, Mass. Gen. Laws ch. 22A, § 9, states,

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

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

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

Whenever the Department receives information concerning the possible or suspected current whereabouts of a child who has run away or is missing from a foster/pre-adoptive home, or from any

¹⁴⁷ Mass. Gen. Laws ch. 22A, § 1 (Definitions) defines “Missing child or children” as “any person under the age of eighteen years missing from his normal and ordinary place of residence and whose whereabouts cannot be determined by the person responsible for such child’s care.”

temporary substitute care placement, the Department shall immediately notify the appropriate law enforcement agencies and provide such information to them. . . .

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

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