

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## ANALYSIS AND RECOMMENDATIONS PENNSYLVANIA

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

#### *Legal Components:*

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

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

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

Pennsylvania's law requires proof that force or coercion was used in the trafficking for a person to be considered a human trafficking victim, even for a minor under the age of 18. The law states that "[a] person commits an offense if the person knowingly traffics or knowingly attempts to traffic another person, knowing that the other person will be subjected to forced labor or services." 18 Pennsylvania Consolidated Statutes (Pa.

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<sup>1</sup> Unless otherwise specified, all references to Pennsylvania statutes were taken from the Pennsylvania Consolidated Statutes (LEXIS through 2010 Reg. Sess. and 1st Spec. Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-173, approved 8/16/12). This report includes legislation enacted before August 1, 2012.

Cons. Stat.) § 3002(a) (Trafficking of persons). Under this law, “forced labor or services” is defined in 18 Pa. Cons. Stat. §3001 as the following:

Labor or services that are performed or provided by another person which are obtained or maintained when a person:

- (1) attempts to cause, causes or by threat of physical menace puts another person in fear of bodily injury;
- (2) physically restrains or threatens to physically restrain another person unlawfully;
- (3) abuses or threatens to abuse the law or legal process;
- (4) possesses except as required by Federal immigration law or regulation, destroys, conceals, removes or confiscates any actual or purported passport or other immigration document of another person, or any other actual or purported government identification document of another person; or
- (5) engages in criminal coercion of another person.

- 1.1.1 Recommendation: Eliminate the requirement to prove that force or coercion was used in the sex trafficking of a minor.
- 1.1.2 Recommendation: Amend 18 Pa. Cons. Stat. § 3001 to include a definition of “commercial sex act.”
- 1.1.3 Recommendation: Alternatively, enact a separate sex trafficking of a child statute that eliminates the requirement to prove force or coercion.<sup>2</sup>

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

The following laws criminalize CSEC in Pennsylvania:

1. 18 Pa. Cons. Stat. § 5902(b.1) (Prostitution)<sup>3</sup> makes it a third degree felony to “knowingly promote[] prostitution of a minor.”<sup>4</sup> The following constitutes promoting prostitution under subsection (b.1):

(b.1) Promoting prostitution of minor. --A person who knowingly promotes prostitution of a minor commits a felony of the third degree. The following acts shall, without limitation of the foregoing, constitute promoting prostitution of a minor:

- (1) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business in which a victim is a minor;
- (2) procuring an inmate who is a minor for a house of prostitution or a place in a house of prostitution where a minor would be an inmate;
- (3) encouraging, inducing, or otherwise intentionally causing a minor to become or remain a prostitute;
- (4) soliciting a minor to patronize a prostitute;

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<sup>2</sup> Subsequent recommendations in this report referring to 18 Pa. Cons. Stat. § 3002 (Trafficking of persons) or § 3001 (Definitions) are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

<sup>3</sup> Here and elsewhere in this report that 18 Pa. Cons. Stat. § 5902 (Prostitution) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

<sup>4</sup> Pursuant to 18 Pa. Const. Stat. § 5902(f), “[m]inor” is defined as “[a]n individual under 18 years of age.”

- (5) procuring a prostitute who is a minor for a patron;
- (6) transporting a minor into or within this Commonwealth with intent to promote the engaging in prostitution by that minor, or procuring or paying for transportation with that intent;
- (7) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution of a minor or the promotion of prostitution of a minor, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities or other legally available means; or
- (8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.

2. 18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with minor) states,

(a) OFFENSE DEFINED.—A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

- (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).
- (2) Open lewdness as defined in section 5901 (relating to open lewdness).
- (3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).
- (4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).
- (5) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).
- (6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

Under subsection (b), “A violation of subsection (a) is: (1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or (2) a felony of the third degree; whichever is greater.” Subsection (c) defines “contacts” as “[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.”

3. 18 Pa. Cons. Stat. § 5903(a)<sup>5</sup> (Obscene and other sexual materials and performances) states it is illegal to “hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in [subsection (a)].” These things include the following:

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<sup>5</sup> In 1975, the Supreme Court of Pennsylvania held in *Commonwealth v. MacDonald*, 347 A.2d 290, 299 (Pa. 1975), “that section 5903(a) fails to satisfy the *Miller* standard and therefore may not constitutionally be applied unless and until it is amended to specifically define the sexual conduct whose depiction or description is to be regulated thereby.” The statute was subsequently amended and appears to have not been held unconstitutional since. *See, e.g., Commonwealth v. Bond*, 504 A.2d 869, 875 (Pa. Super. Ct. 1986); *Commonwealth v. Croll*, 480 A.2d 266, 268–69 (Pa. Super. Ct. 1984) (“Initially, appellant argues that the obscenity statute is unconstitutionally vague. This question has, however, been considered and decided adversely to appellant by this Court. *See Commonwealth v. Doe . . .* Appellant’s argument was ably refuted by Judge Johnson in that case. Appellant concedes that the Pennsylvania Act was amended ‘with slavish adherence to’ the decision of the United States Supreme Court in *Miller v. California . . .*”) (citations omitted).

Here and elsewhere in this report that 18 Pa. Cons. Stat. § 5903 (Prostitution) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

(a) OFFENSES DEFINED.—No person, knowing the obscene character of the materials or performances involved, shall:

- ...  
(3) ...
  - (ii) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials in which a minor<sup>6</sup> is depicted;
- (4) ...
  - (ii) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom or by what means any obscene materials can be purchased, obtained or had if the victim is a minor in which a minor is included;
- ...  
(5) ...
  - (ii) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity if a minor is included;

Although not expressly commercial, the following laws could apply to commercial sexual exploitation of children in Pennsylvania:

1. 18 Pa. Cons. Stat. § 6320 (Sexual exploitation of children) makes it a felony in the second degree “if [a person] procures for another person a child under 18 years of age for the purpose of sexual exploitation.” 18 Pa. Cons. Stat. § 6320(a), (b). “Sexual exploitation” is defined as “[a]ctual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person.” 18 Pa. Cons. Stat. § 6320(c).
2. Producing child pornography is addressed in 18 Pa. Cons. Stat. § 6312 (Sexual abuse of children), which states in subsection (b),
  - (b) PHOTOGRAPHING, VIDEOTAPING, DEPICTING ON COMPUTER OR FILMING SEXUAL ACTS.—Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act<sup>7</sup> or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.
3. Pennsylvania’s corruption of minors statute, 18 Pa. Cons. Stat. § 6301, could apply to trafficking and states in subsection (a),

(a) OFFENSE DEFINED.—

- (1)
  - (i) Except as provided in subparagraph (ii), whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who

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<sup>6</sup> Pursuant to 18 Pa. Cons. Stat. § 5903(b), “minor” is defined as “an individual under 18 years of age.”

<sup>7</sup> 18 Pa. Cons. Stat. § 6312(g) defines “prohibited sexual act” as “[s]exual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.”

knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

(ii) Whoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.

(2) Any person who knowingly aids, abets, entices or encourages a minor younger than 18 years of age to commit truancy commits a summary offense. Any person who violates this paragraph within one year of the date of a first conviction under this section commits a misdemeanor of the third degree. A conviction under this paragraph shall not, however, constitute a prohibition under section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).

*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.*

Pennsylvania CSEC statutes, including the prostitution law, 18 Pa. Cons. Stat. § 5902(a) (Prostitution) when the person engaged in prostitution is under 18, do not refer to 18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons) to clarify the status of the victim.

1.3.1 Recommendation: Amend 18 Pa. Cons. Stat. § 5902 (Prostitution), § 6301(a) (Corruption of minors), § 6312 (Sexual abuse of children), § 6320 (Sexual exploitation of children), § 5903(a)(6) (Obscene and other sexual materials and performance), and § 6318(a) (Unlawful contact with a minor) to refer cases of commercial sexual exploitation of a minor to 18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons) in order to ensure proper identification of the minor as a sex 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.*

Pennsylvania's Corrupt Organizations statute<sup>8</sup> is codified at 18 Pa. Cons. Stat. § 911 and may be applicable to traffickers facilitators.

18 Pa. Cons. Stat. § 911(b) states in part,

“(1) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity<sup>9</sup> in which such person participated as a principal, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise<sup>10</sup>: . . . .

(2) It shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

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<sup>8</sup> For additional information on racketeering offenses, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHI-WhitePaperFederalStateRacketeeringGangCrimeLaws.pdf>.

<sup>9</sup> A “pattern of racketeering activity” is defined as “a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section.” 18 Pa. Cons. Stat. §911(h)(4).

<sup>10</sup> An “enterprise” is defined as “any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and includes legitimate as well as illegitimate entities and governmental entities.” 18 Pa. Cons. Stat. §911(h)(3).

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

(4) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (1), (2) or (3) of this subsection.”

“Racketeering activity” is defined in 18 Pa. Cons. Stat. § 911(h)(1)(i) and means all of the following:

- (i) An act which is indictable under any of the following provisions of this title:
  - Chapter 30 (relating to trafficking of persons)
  - Chapter 59 (relating to public indecency) [which includes 18 Pa. Cons. Stat. § 5902 (Prostitution and related offenses)].”

Conviction under this statute is a first degree felony, which is punishable by a possible fine not to exceed \$25,000 and possible imprisonment up to 20 years. 18 Pa. Cons. Stat. §§ 911(c), 1101(2), 1103(1).

Additionally, an offender is subject to civil asset forfeiture. 18 Pa. Cons. Stat. § 911(d)(1)(i) provides, in part,

(1) The several courts of common pleas, and the Commonwealth Court, shall have jurisdiction to prevent and restrain violations of subsection (b) of this section by issuing appropriate orders, including but not limited to:

- (i) ordering any person to divest himself of any interest direct or indirect, in the enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in. . .

. . .

- 1.4.1 Recommendation: Amend 18 Pa. Cons. Stat. § 911(h)(1)(i) to include the following offenses within the definition of racketeering activity: 18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with minor), and § 902 (Criminal solicitation).

**Legal Components:**

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

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**Legal Analysis:**

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

18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons) states that a person commits the offense of trafficking “if the person knowingly traffics or knowingly attempts to traffic another person, knowing that the other person will be subjected to forced labor or services.” “Traffic” is defined in 18 Pa. Cons. Stat. § 3001 as occurring when one “[r]ecruits, entices, harbors, transports or provides or obtains by any means.” Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),<sup>11</sup> have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”<sup>12</sup> a person under 18 to engage in commercial sex.<sup>13</sup> It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in Pennsylvania’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under 18 Pa. Cons. Stat. § 3002(a). Under the Pennsylvania statute, however, the buyer would need to “knowingly traffic[] or knowingly attempt[] to traffic” and to “know[] that the other person will be subjected to forced labor or services.” 18 Pa. Cons. Stat. §§ 3002(a), 3001. This requirement makes it less likely that 18 Pa. Cons. Stat. § 3002(a) would be applicable against buyers.

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<sup>11</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>12</sup> 18 U.S.C. § 1591(a).

<sup>13</sup> See, e.g., Indictment at 1, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

- 2.1.1 Recommendation: Amend the definition of “traffic” in Pa. Cons. Stat. § 3001 to clearly make the law applicable to buyers.
- 2.1.2 Recommendation: Eliminate the requirement that buyers of commercial sex with minors must “know” of the force or coercion occurring in the trafficking situation.

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

Pennsylvania law has several offenses applicable to the crime of buying sex with a minor. Patronizing a prostitute is a crime that applies to those who patronize both minors and adults for commercial sexual purposes. Under 18 Pa. Cons. Stat. § 5902(e), “[A] person commits the offense of patronizing prostitutes if that person hires a prostitute or any other person enters or remains in a house of prostitution for the purpose of engaging in sexual activity.” The crime is a third degree misdemeanor for the first or second offense, a second degree misdemeanor for the third offense, and a first degree misdemeanor for the fourth and subsequent offenses. 18 Pa. Cons. Stat. § 5902(e)(E.1)(1)–(3).

A buyer in Pennsylvania could be charged with unlawful contact with a minor under 18 Pa. Cons. Stat. § 6318. Under 18 Pa. Cons. Stat. § 6318(a)(3),

A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

- • • •
- (3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).<sup>14</sup>

Under this statute, a crime constitutes either “(1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or (2) a felony of the third degree; whichever is greater.” 18 Pa. Cons. Stat. § 6318(b). Since prostitution is generally a misdemeanor offense in Pennsylvania, the buyer could be guilty of a third degree felony under this statute. 18 Pa. Cons. Stat. § 5902(a), (A.1).

A buyer could be charged with criminal solicitation under 18 Pa. Cons. Stat. § 902 if he attempts to patronize a prostitute under 18 Pa. Cons. Stat. § 5902(a).

Lastly, a buyer could possibly be charged with corruption of minors under Pa. Cons. Stat. § 6301(a)(1)(ii), which states that “[w]hoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31<sup>15</sup> (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.”

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<sup>14</sup> A person is guilty of “prostitution” in 18 Pa. Cons. Stat. § 5902(a) “if he or she: (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.”

<sup>15</sup> Offenses falling within Chapter 31 include the following: Pa. Cons. Stat. § 3121 (Rape), § 3122.1 (Statutory sexual assault), § 3123 (Involuntary deviate sexual intercourse), § 3124.1 (Sexual assault), § 3124.2 Institutional sexual assault), § 3125 (Aggravated indecent assault), § 3126 (Indecent assault), and § 3127 (Indecent exposure).



2.2.1 Recommendation: Enact a statute, apart from the prostitution statute, to address the exploitation of minors through prostitution and live or recorded sexual performance, which will specifically criminalize buying sex acts with a minor.

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

18 Pa. Cons. Stat. § 5902(e), which addresses “patronizing prostitutes,” does not differentiate between buying sex with a minor and buying sex with an adult. The law is age-neutral and makes buying sex a third degree misdemeanor for the first and second offense, a second degree misdemeanor for the third offense, and a first degree misdemeanor for a fourth or subsequent offense. 18 Pa. Cons. Stat. § 5902(e), (E.1). It is also possible that a buyer soliciting a minor to engage in prostitution could be charged with criminal solicitation under 18 Pa. Cons. Stat. § 902(a) with the underlying criminal conduct alleged as prostitution under 18 Pa. Cons. Stat. § 5902(a). But, this would result in a failure to recognize solicitation of a minor for prostitution as more severe than solicitation of an adult. However, under Pa. Cons. Stat. § 6318(a)(3) (Unlawful contact with a minor), a buyer potentially faces a third degree felony for contacting a minor under 18 in order to engage in prostitution. 18 Pa. Cons. Stat. § 6318(a)(3), (b).

2.3.1 Recommendation: Amend 18 Pa. Cons. Stat. § 5902(e) and § 902(a) when the crime solicited is any commercial sex act to indicate that solicitation of a minor is an offense under 18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons).

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

In the unlikely event that the trafficking provision applies to buyers, then the buyer would be guilty of a first degree felony with a fine up to \$25,000 and possible imprisonment up to 20 years. 18 Pa. Cons. Stat. §§ 3002(b), 1101(2), 1103(1). If, however, a trafficker commits the offense of trafficking of persons while also committing “(1) 18 Pa.C.S. § 2901 (relating to kidnapping); (2) 18 Pa.C.S. § 3121 (relating to rape); or (3) 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse),” then the maximum possible term of imprisonment increases to life imprisonment. 42 Pa. Cons. Stat. § 9720.2.

For “patronizing a prostitute,” regardless of the age of the prostituted person, the buyer is guilty of a third degree misdemeanor for the first and second offense with a possible fine of \$2,500 and a potential term of imprisonment not to exceed one year. 18 Pa. Cons. Stat. §§ 5902(E.1)(1), 1101(6), 1104(3). A third offense is a second degree misdemeanor with a possible fine of \$5,000 and possible imprisonment up to 2 years. 18 Pa. Cons. Stat. §§ 5902(E.1)(2), 1101(5), 1104(2). Fourth and subsequent offenses of patronizing a prostitute are first degree misdemeanors with a possible fine of \$10,000 and possible imprisonment up to 5 years. 18 Pa. Cons. Stat. §§ 5902(E.1)(3), 1101(4), 1104(1).

If convicted of unlawful contact with a minor under 18 Pa. Cons. Stat. § 6318, which includes being in contact with a minor for prostitution, or if convicted of corruption of minors under 18 Pa. Cons. Stat. § 6301(a)(1)(ii) involving sexual offenses codified in Chapter 31, the buyer will be convicted of a felony in the third degree punishable by a fine up to \$15,000 and imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 6318(a), (b), 6301(a)(1)(ii), 1101(3), 1103(3). Corruption of minors not involving the sexual offenses in Chapter 31, such as Chapter 59 offenses (Prostitution), is prohibited under 18 Pa. Cons. Stat. § 6301(a)(1)(i), and the buyer will be convicted of a first degree misdemeanor punishable by a fine up to \$10,000 and imprisonment up to 5 years. 18 Pa. Cons. Stat. §§ 6301(a)(1)(i), 1101(4), 1104(1).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1),

3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>16</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>17</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>18</sup>

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

18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with a minor) can possibly be used to prosecute those who use the Internet to lure, entice, recruit, or purchase commercial and non-commercial sex acts with minors. Under this provision,

(a) OFFENSE DEFINED—A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

- (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).
- (2) Open lewdness as defined in section 5901 (relating to open lewdness).
- (3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).
- (4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).
- (5) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).
- (6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

“Contacts” is defined in subsection (c) as “[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.” 18 Pa. Cons. Stat.

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<sup>16</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>17</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

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

§ 6318(c). A violation of 18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with a minor) is “(1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or (2) a felony of the third degree; whichever is greater.” 18 Pa. Cons. Stat. § 6318(b). The statute gives concurrent jurisdiction to the Attorney General and district attorney “when the person charged with a violation of this section contacts a minor through the use of a computer, computer system or computer network.” 18 Pa. Cons. Stat. § 6318(B.1).

2.5.1 Recommendation: Amend 18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with a minor) to specify that any of the enumerated offenses committed against a minor for purposes of commercial sexual exploitation is punishable under 18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons) and amend subsection (b) to indicate that if the underlying offense in subsection (a) for which the defendant contacted the minor is commercial sexual exploitation then punishment is the same grade and degree as that provided in 18 Pa. Cons. Stat. § 3002 (Trafficking of persons) where the victim is a minor in sexual servitude.

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

18 Pa. Cons. Stat. § 6312(E.1) (Sexual abuse of children—Mistake of age) eliminates the possibility of a defense to a prosecution of 18 Pa. Cons. Stat. § 6312(b)<sup>19</sup> based on the defendant’s lack of knowledge of the age of the child victimized. Further, it states, “Neither a misrepresentation of age by the child nor a bona fide belief that the person is over the specified age shall be a defense.” 18 Pa. Cons. Stat. § 6312(E.1).

Also, 18 Pa. Cons. Stat. § 6301 (Corruption of minors) prohibits a mistake of age defense when the minor victim is under 16. Subsection (d)(1) states, “Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years.” However, the same statute permits a mistake of age defense when the minor victim is 16–18 years old, pursuant to 18 Pa. Cons. Stat. 6301(d)(2) as follows, “Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is 16 years or more but less than 18 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the minor to be 18 years or older.”

18 Pa. Cons. Stat. § 3102 creates a mistake of age provision for sexual offenses under Chapter 31, including 18 Pa. Cons. Stat. § 3122.1 (Statutory sexual assault), which criminalizes sexual intercourse with a minor under 16 in certain cases. Section 3102 states, “Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child’s being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.”

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<sup>19</sup> 18 Pa. Cons. Stat. § 6312(b), states,

**PHOTOGRAPHING, VIDEOTAPING, DEPICTING ON COMPUTER OR FILMING SEXUAL ACTS.**—Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

Furthermore, 18 Pa. Cons. Stat. § 304 (Ignorance or mistake) holds that “[i]gnorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if: (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required a [sic] establish a material element of the offense; or (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.”

2.6.1 Recommendation: Add a provision prohibiting a mistake of age defense in any case of commercial sexual exploitation of a child under 18 in 18 Pa. Cons. Stat. § 3002 (Trafficking of persons).

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

Unlawful contact with a minor, which includes being in contact with a minor for prostitution, defines a minor as under 18 and does not adjust the penalty based on the age of the minor victim. 18 Pa. Cons. Stat. § 6318(b)(2), (c). For this crime, a buyer can be convicted of a third degree felony punishable by a fine up to \$15,000 and imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 1101(3), 1103(3).

If prosecuted as a prostitution offense, then 18 Pa. Cons. Stat. § 5902(e) (Patronizing a prostitute) does not have stiffer penalties for buyers of commercial sex with minors. A first time offender of this crime faces a possible fine of \$2,500 and a term of imprisonment not to exceed one year. 18 Pa. Cons. Stat. §§ 5902(E.1)(1), 1101(6), 1104(3).

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.*

If convicted of trafficking of persons under 18 Pa. Cons. Stat. § 3002(a), a buyer faces a first degree felony with a possible fine up to \$25,000 in addition to imprisonment up to 20 years. 18 Pa. Cons. Stat. §§ 3002(b), 1101(2), 1103(1).

If convicted of unlawful contact with a minor, which includes being in contact with a minor for prostitution, or corruption of minors, the buyer will be convicted of a felony in the third degree punishable by a fine up to \$15,000. 18 Pa. Cons. Stat. §§ 6318(b)(2), 6301, 1101(3).

Fines for the misdemeanor offense of patronizing a prostitute pursuant to 18 Pa. Cons. Stat. § 5902, range from \$2,500 for the first and second offense under 18 Pa. Cons. Stat. §§ 5902(E.1)(1), 1101(6) to \$5,000 for a third offense under 18 Pa. Cons. Stat. §§ 5902(E.1)(2), 1101(5) to \$10,000 for a fourth and subsequent offenses under 18 Pa. Cons. Stat. §§ 5902(E.1)(3), 1101(4).

A buyer prosecuted under 18 Pa. Cons. Stat. § 3002 (Trafficking of persons) faces mandatory civil asset forfeiture<sup>20</sup> pursuant to 18 Pa. Cons. Stat. § 3004, which states in subsection (a),

(a) GENERAL RULE.—The following shall be subject to forfeitures to the Commonwealth, and no property right shall exist in them:

(1) All assets, foreign or domestic:

(i) Of an individual, entity or organization engaged in planning or perpetrating an act in this Commonwealth which violates section 3002 (relating to trafficking of persons) and all assets, foreign or domestic, affording a person a source of influence over such individual, entity or organization.

(ii) Acquired or maintained by a person with the intent and for the purpose of supporting,

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<sup>20</sup> For additional information on asset forfeiture laws and procedure, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>

planning, conducting or concealing an act in this Commonwealth which violates section 3002.  
(iii) Derived from, involved in or used or intended to be used to commit an act in this Commonwealth which violates section 3002.

(2) All assets within this Commonwealth:

- (i) Of an individual, entity or organization engaged in planning or perpetrating an act which violates section 3002.
- (ii) Acquired or maintained with the intent and for the purpose of supporting, planning, conducting or concealing an act which violates section 3002.
- (iii) Derived from, involved in or used or intended to be used to commit an act which violates section 3002.

“Property subject to forfeiture under this section may be seized by the law enforcement authority upon process issued by any court of common pleas having jurisdiction over the property.” 18 Pa. Cons. Stat. §3004(b). Distribution of forfeited property is governed by 18 Pa. Cons. Stat. §3004(d), which states,

Whenever property is forfeited under this section, the property shall be transferred to the custody of the district attorney. The district attorney, where appropriate, may retain the property for official use or sell the property, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs. The balance of the proceeds shall be used for the enforcement of the criminal laws of Pennsylvania.

Additionally, buyers who are convicted of trafficking are subject to mandatory restitution. Under 18 Pa. Cons. Stat. § 3003(a), “A person convicted of an offense under this chapter [Trafficking of persons] shall, in addition to any other remedy deemed appropriate by the court, be sentenced to pay the victim restitution, including the greater of: (1) the gross income or value to the person to whom the labor or services were performed by the victim; or (2) the value of the victim’s labor based on the minimum wage of this Commonwealth.”

A buyer convicted of a sexual crime other than trafficking of persons, is subject to mandatory restitution orders, under 18 Pa. Cons. Stat. § 1106(a) (Restitution for injuries to person or property), which states, “Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.” 18 Pa. Cons. Stat. § 1106(a) (Restitution for injuries to person or property). “Personal injury” is defined as “[a]ctual bodily harm, including pregnancy, directly resulting from the crime.” 18 Pa. Cons. Stat. § 1106(h). As a result, if the victim<sup>21</sup> suffered “personal injury directly resulting from the crime,” then the buyer could potentially be required to pay restitution for every crime related to trafficking. 18 Pa. Cons. Stat. § 1106(a).

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<sup>21</sup> “Victim” is defined in the Crime Victim’s Act, codified at 18 Pa. Cons. Stat. § 11.103. The definition of victim included in 18 Pa. Cons. Stat. § 1106(h) refers to “section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as the Administrative Code of 1929.” 18 Pa. Cons. Stat. § 1106(h). This statute has been repealed and replaced by the Crime Victim’s Act, also known as “the act of November 24, 1998, P.L. 822, No. 111.” *Restitution for injuries to person or property—18 Pa. Cons. Stat. § 1106*, ONECLE, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.011.006.000.html> (last visited July 14, 2011); 1998 Pa. Laws 111; 18 Pa. Cons. Stat. § 11.103. See Section 5.1 for a definition of “victim” as defined in the Crime Victim’s Act.

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

Pursuant to 18 Pa. Cons. Stat. § 6312(d)(1), “Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.” A first time offender of this provision is guilty of a third degree felony, punishable by a possible fine up to \$15,000 and possible imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 6312(d)(2), 1101(3), 1103(3). Second and subsequent offenses of this provision are second degree felonies with possible fines up to \$25,000 and possible imprisonment up to 10 years. 18 Pa. Cons. Stat. §§ 6312(d)(2), 1101(2), 1103(2).

In comparison, a federal conviction for possession of child pornography<sup>22</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>23</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>24</sup>

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

While convictions for most CSEC offenses require defendants to register as sex offenders, those convicted of trafficking of persons under 18 Pa. Cons. Stat. § 3002 or of patronizing a prostitute of any age under 18 Pa. Cons. Stat. § 5902(e) are not required to register as sex offenders. Under 42 Pa. Cons. Stat. § 9795.1(a)(1)<sup>25</sup> (Registration), an individual convicted of promoting the prostitution of a minor under 18 Pa. Cons. Stat. § 5902(b.1), unlawful contact with a minor pursuant to 18 Pa. Cons. Stat. § 6318, sexual abuse of a child under 18 Pa. Cons. Stat. § 6312, kidnapping under 18 Pa. Cons. Stat. § 2901 “where the victim is a minor,” sexual exploitation of a minor under 18 Pa. Cons. Stat. § 6320, or certain offenses under 18 Pa. Cons. Stat. § 5903(a) (Obscene and other sexual materials and performances), will be required to register “with the Pennsylvania State Police for a period of ten years.” 42 Pa. Cons. Stat. § 9795.1(a)(1).

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<sup>22</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>23</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>24</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>25</sup> Here and elsewhere in this report that 42 Pa. Cons. Stat. § 9795.1 (Registration) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

Under 42 Pa. Cons. Stat. § 9799.13<sup>26</sup> (Applicability), a person convicted of a sexually violent offense must “register with the Pennsylvania state police as provided in sections 9799.15 (relating to period of registration), 9799.19 (relating to initial registration) and 9799.25 (relating to verification by sexual offenders and Pennsylvania state police) and otherwise comply with the provisions of this subchapter.” Pursuant to 42 Pa. Cons. Stat. § 9799.12<sup>27</sup> (Definitions), “sexually violent offense” is defined as “an offense specified in section 9799.14 (relating to sexual offenses and tier system) as a tier I, tier II or tier III sexual offense.” Under 42 Pa. Cons. Stat. § 9799.14<sup>28</sup> (Sexual offenses and tier system), tier I offenses include corruption of minors under 18 Pa. Cons. Stat. § 6301(A)(1)(II) and tier II offenses include promoting prostitution of a minor under § 5902(b.1), offenses involving obscene and other sexual materials and performances under § 5903(A)(3)(II), (4)(II), (5)(II) OR (6), sexual abuse of children under § 6312(B) and (C), unlawful contact with minors under § 6318, and sexual exploitation of children under § 6320. 42 Pa. Cons. Stat. § 9799.14(B)(8), (C)(2)–(7).

Notably, incarcerated buyers of commercial sex with minors will be required to attend “sexual offender treatment” under 42 Pa. Cons. Stat. § 9718.1 (Sexual offender treatment), which requires those who commit a crime of “[p]rostitution, as defined in section 5902 (relating to prostitution and related offenses), if the offense involved a minor under 18 years of age” or sexual exploitation of a minor under 18 Pa. Cons. Stat. § 6320(a) to receive treatment. 42 Pa. Cons. Stat. § 9718.1(a)(5), (9).

- 2.10.1 Recommendation: Amend the sex offender registry statute under 42 Pa. Cons. Stat. § 9795.1 to include violations of 18 Pa. Cons. Stat. § 3002 (Trafficking of persons) when they involve trafficking a minor for sexual purposes and commercial sexual exploitation of children offenses pursuant to 18 Pa. Cons. Stat. § 6301(a) (Corruption of minors).

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<sup>26</sup> Here and elsewhere in this report that 42 Pa. Cons. Stat. § 9799.13 (Applicability) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

<sup>27</sup> Here and elsewhere in this report that 42 Pa. Cons. Stat. § 9799.12 (Definition) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

<sup>28</sup> Here and elsewhere in this report that 42 Pa. Cons. Stat. § 9799.14 (Sexual offenses and tier system) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

***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.*

Trafficking a minor under 18 is a first degree felony with a possible fine not to exceed \$25,000 and possible imprisonment up to 20 years. 18 Pa. Cons. Stat. §§ 3002(b), 1101(2), 1103(1). If, however, a trafficker commits the offense of trafficking of persons while also committing “(1) 18 Pa.C.S. § 2901 (relating to kidnapping); (2) 18 Pa.C.S. § 3121 (relating to rape); or (3) 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse),” then the maximum possible term of imprisonment increases to life imprisonment. 42 Pa. Cons. Stat. § 9720.2.

For the offense of promoting prostitution of a minor under 18 pursuant to 18 Pa. Cons. Stat. § 5902(b.1), a trafficker is guilty of a third degree felony punishable by a fine up to \$15,000 and possible imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 1101(3), 1103(3). .

A trafficker could be punished under 18 Pa. Cons. Stat. § 6301 (Corruption of minors). Subsection (a)(1)(i), states, “Except as provided in subparagraph (ii), whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.” 18 Pa. Cons. Stat. § 6301(a)(1)(i). This crime is punishable by a possible fine of \$10,000 and possible imprisonment up to 5 years. 18 Pa. Cons. Stat. §§ 1101(4), 1104(1). However, a trafficker age 18 or older who “by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31” may be found guilty of a third degree felony. 18 Pa. Cons. Stat. § 6301(a)(1)(ii). This crime is punishable by a possible fine up to \$15,000 and possible imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 6301(a)(1)(ii), 1101(3), 1103(3).

18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with minor) states,

(a) OFFENSE DEFINED.—A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

- ....
- (3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).



- (4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).
- (5) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).
- (6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

Under subsection (b), “A violation of subsection (a) is: (1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or (2) a felony of the third degree; whichever is greater.” Subsection (c) defines “contacts” as “[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.”

Sexual exploitation of a child, which is defined as “procur[ing] for another person a child under 18 years of age for the purpose of sexual exploitation”<sup>29</sup> is a second degree felony punishable by a fine up to \$25,000 and possible imprisonment up to 10 years. 18 Pa. Cons. Stat. §§ 6320(a), (b), 1101(2), 1103(2).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>30</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>31</sup> against a minor.

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

18 Pa. Cons. Stat. § 6312 criminalizes creating and distributing child pornography by stating in subsections (b) and (c),

(b) PHOTOGRAPHING, VIDEOTAPING, DEPICTING ON COMPUTER OR FILMING SEXUAL ACTS.—Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

(c) DISSEMINATION OF PHOTOGRAPHS, VIDEOTAPES, COMPUTER DEPICTIONS AND FILMS.—

(1) Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

<sup>29</sup> 18 Pa. Cons. Stat. § 6320(c) defines “procure” as “[t]o obtain or make available for sexual exploitation” and “sexual exploitation” as “[a]ctual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person.”

<sup>30</sup> See *supra* note 11.

<sup>31</sup> See *supra* note 16 for the definition of “federal sex offense.”

- (2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree

Creating child pornography is a second degree felony punishable by a fine up to \$25,000 and possible imprisonment up to 10 years. 18 Pa. Cons. Stat. §§ 6312(b), 1101(2), 1103(2). For a first offense, disseminating or selling child pornography is a third degree felony punishable by a fine up to \$15,000 and possible imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 6312(c), 1101(3), 1103(3). A subsequent offense is a second degree felony. 18 Pa. Cons. Stat. §§ 6312(c).

Creating child pornography is also criminalized under 18 Pa. Cons. Stat. § 5903(a)<sup>32</sup> (Obscene and other sexual materials and performances) which states:

(a) OFFENSES DEFINED.—No person, knowing the obscene character of the materials or performances involved, shall:

...  
(3) . . . .

(ii) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials in which a minor is depicted;

(4) . . . .

(ii) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom or by what means any obscene materials can be purchased, obtained or had in which a minor is included;

(5) . . . .

(ii) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity if a minor is included;

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>33</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>34</sup> is generally

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<sup>32</sup> In 1975, the Supreme Court of Pennsylvania held in *Commonwealth v. MacDonald*, 347 A.2d 290, 299 (Pa. 1975), “that section 5903(a) fails to satisfy the *Miller* standard and therefore may not constitutionally be applied unless and until it is amended to specifically define the sexual conduct whose depiction or description is to be regulated thereby.” The statute was subsequently amended and appears to have not been held unconstitutional since. *See, e.g.*, *Commonwealth v. Bond*, 504 A.2d 869, 875 (Pa. Super. Ct. 1986); *Commonwealth v. Croll*, 480 A.2d 266, 268–69 (Pa. Super. Ct. 1984) (“Initially, appellant argues that the obscenity statute is unconstitutionally vague. This question has, however, been considered and decided adversely to appellant by this Court. *See Commonwealth v. Doe* . . . . Appellant’s argument was ably refuted by Judge Johnson in that case. Appellant concedes that the Pennsylvania Act was amended ‘with slavish adherence to’ the decision of the United States Supreme Court in *Miller v. California* . . . .”) (citations omitted).

Here and elsewhere in this report that 18 Pa. Cons. Stat. § 5903 (Obscene and other sexual materials and performances) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

<sup>33</sup> *See supra* note 16 for the definition of “federal sex offense.”

<sup>34</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>35</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>36</sup>

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

18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with minor) can possibly be used to prosecute those who use the Internet to lure, entice or recruit minors to engage in commercial and non-commercial sex acts. Under this provision,

(a) OFFENSE DEFINED.—A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

- (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).
- (2) Open lewdness as defined in section 5901 (relating to open lewdness).
- (3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).
- (4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).
- (5) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).
- (6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

“Contacts” is defined in subsection (c) as “[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.” 18 Pa. Cons. Stat. § 6318(c). A violation of 18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with a minor) is “(1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or (2) a felony of the third degree; whichever is greater.” 18 Pa. Cons. Stat. § 6318(b).

The statute gives concurrent jurisdiction, which exists with the Attorney General and district attorney, “when the person charged with a violation of this section contacts a minor through the use of a computer, computer system or computer network.” 18 Pa. Cons. Stat. § 6318(B.1).

#### 3.3.1 Recommendation: Amend 18 Pa. Cons. Stat. § 6318(a) (Unlawful contact with minor) to specify use of the Internet and provide heightened penalties in such cases.

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<sup>35</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>36</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

Trafficking a minor under 18 is a first degree felony with a fine up to \$25,000. 18 Pa. Cons. Stat. §§ 3002(b), 1101(2). If convicted of corruption of a minor under 18 Pa. Cons. Stat. § 6301(a)(1)(ii), a third degree felony, then traffickers can receive a fine up to \$15,000. 18 Pa. Cons. Stat. §§ 6301(a)(1)(ii), 1101(3). If convicted of sexual exploitation of a child under 18 Pa. Cons. Stat. § 6320, a second degree felony, then traffickers can receive a fine up to \$25,000. 18 Pa. Cons. Stat. §§ 6320(b), 1101(2). For promoting prostitution of minors under 16 and for some forms of promoting prostitution of minors 16 and 17 years of age, including “(1) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business; (2) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; (3) encouraging, inducing, or otherwise intentionally causing another to become or remain a prostitute” or “compel[ing] another to engage in or promote prostitution,” then the trafficker is guilty of a third degree felony with a possible fine up to \$15,000. 18 Pa. Cons. Stat. §§ 5902(b)(1)–(3), 5902(c)(1)(i)–(iii), 1101(3). With a few other exceptions, for other forms of promoting prostitution of 16 and 17 year olds, the trafficker is guilty of a second degree misdemeanor with a possible fine up to \$5,000. 18 Pa. Cons. Stat. §§ 5902(b)(4)–(6), 5902(c)(2), 1101(5).

Mandatory restitution for victims of trafficking is available through 18 Pa. Cons. Stat. § 3003(a), which states, “A person convicted of an offense under this chapter [Trafficking of persons] shall, in addition to any other remedy deemed appropriate by the court, be sentenced to pay the victim restitution, including the greater of: (1) the gross income or value to the person to whom the labor or services were performed by the victim; or (2) the value of the victim’s labor based on the minimum wage of this Commonwealth.” Additionally, mandatory restitution is available for other crimes under 18 Pa. Cons. Stat. § 1106(a) (Restitution for injuries to person or property) which states, “Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.”

Traffickers prosecuted under 18 Pa. Cons. Stat. § 3002 (Trafficking of persons) also face mandatory, civil asset forfeiture under 18 Pa. Cons. Stat. § 3004. The statute states,

- (a) GENERAL RULE.—The following shall be subject to forfeitures to the Commonwealth, and no property right shall exist in them:
- (1) All assets, foreign or domestic:
    - (i) Of an individual, entity or organization engaged in planning or perpetrating an act in this Commonwealth which violates section 3002 (relating to trafficking of persons) and all assets, foreign or domestic, affording a person a source of influence over such individual, entity or organization.
    - (ii) Acquired or maintained by a person with the intent and for the purpose of supporting, planning, conducting or concealing an act in this Commonwealth which violates section 3002.
    - (iii) Derived from, involved in or used or intended to be used to commit an act in this Commonwealth which violates section 3002.
  - (2) All assets within this Commonwealth:
    - (i) Of an individual, entity or organization engaged in planning or perpetrating an act which violates section 3002.
    - (ii) Acquired or maintained with the intent and for the purpose of supporting, planning, conducting or concealing an act which violates section 3002.
    - (iii) Derived from, involved in or used or intended to be used to commit an act which violates section 3002.

....

“Property subject to forfeiture under this section may be seized by the law enforcement authority upon process issued by any court of common pleas having jurisdiction over the property.” 18 Pa. Cons. Stat. §3004(b). Distribution of forfeited property is governed by 18 Pa. Cons. Stat. §3004(d), which states,

Whenever property is forfeited under this section, the property shall be transferred to the custody of the district attorney. The district attorney, where appropriate, may retain the property for official use or sell the property, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs. The balance of the proceeds shall be used for the enforcement of the criminal laws of Pennsylvania.

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

While convictions for most CSEC offenses require defendants to register as sex offenders, those convicted of trafficking of persons under 18 Pa. Cons. Stat. § 3002 are not required to register as sex offenders. Under 42 Pa. Cons. Stat. § 9795.1(a)(1)<sup>37</sup> (Registration), an individual convicted of promoting the prostitution of a minor under 18 Pa. Cons. Stat. § 5902(b.1), unlawful contact with a minor pursuant to 18 Pa. Cons. Stat. § 6318, sexual abuse of a child under 18 Pa. Cons. Stat. § 6312, kidnapping under 18 Pa. Cons. Stat. § 2901 “where the victim is a minor,” sexual exploitation of a minor under 18 Pa. Cons. Stat. § 6320, or certain offenses under 18 Pa. Cons. Stat. § 5903(a) (Obscene and other sexual materials and performances), will be required to register “with the Pennsylvania State Police for a period of ten years.” 42 Pa. Cons. Stat. § 9795.1(a)(1).

Under 42 Pa. Cons. Stat. § 9799.13<sup>38</sup> (Applicability), a person convicted of a sexually violent offense must “register with the Pennsylvania state police as provided in sections 9799.15 (relating to period of registration), 9799.19 (relating to initial registration) and 9799.25 (relating to verification by sexual offenders and Pennsylvania state police) and otherwise comply with the provisions of this subchapter.” Pursuant to 42 Pa. Cons. Stat. § 9799.12<sup>39</sup> (Definitions), “sexually violent offense” is defined as “an offense specified in section 9799.14 (relating to sexual offenses and tier system) as a tier I, tier II or tier III sexual offense.” Under 42 Pa. Cons. Stat. § 9799.14<sup>40</sup> (Sexual offenses and tier system), tier I offenses include corruption of minors under 18 Pa. Cons. Stat. § 6301(A)(1)(II), and tier II offenses include promoting prostitution of a minor under 18 PA.C.S. § 5902(b.1), offenses involving obscene and other sexual materials and performances under 18 PA.C.S. § 5903(A)(3)(II), (4)(II), (5)(II) OR (6), sexual abuse of children under 18 PA.C.S. § 6312(B) and (C), unlawful contact with minors under 18 PA.C.S. § 6318, sexual exploitation of children under 18 PA.C.S. § 6320. 42 Pa. Cons. Stat. § 9799.14(B)(8), (C)(2)–(7).

An incarcerated trafficker may also be required to attend “sexual offender treatment” pursuant to 42 Pa. Cons. Stat. § 9718.1 if the trafficker is convicted of any prostitution offense (including promoting prostitution) under 18 Pa. Cons. Stat. § 5902(b.1) or sexual exploitation of a minor under 18 Pa. Cons. Stat. § 6320(a). 42 Pa. Cons. Stat. § 9718.1(a)(5), (9).

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<sup>37</sup> Here and elsewhere in this report that 42 Pa. Cons. Stat. § 9795.1 (Registration) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

<sup>38</sup> Here and elsewhere in this report that 42 Pa. Cons. Stat. § 9799.13 (Applicability) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1183, Act 2011-111, P.L. 446, § 1.2. (Effective Feb. 18, 2012).

<sup>39</sup> See *supra* note 27.

<sup>40</sup> See *supra* note 28.

3.5.1 Recommendation: Amend the sex offender registry statute under 42 Pa. Cons. Stat. § 9795.1 to include violations of 18 Pa. Cons. Stat. § 3002 (Trafficking of persons) when they involve trafficking minors for sexual purposes and commercial sexual exploitation of children offenses pursuant to 18 Pa. Cons. Stat. § 6301(a) (Corruption of minors).

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.*

In Pennsylvania, only a few violent crimes are grounds for the terminating parental rights. These select crimes must have been committed by the parent against one of the parent’s children. Neither trafficking of persons nor commercial sexual exploitation crimes against children are included on this list. 23 Pa. Cons. Stat. § 2511 (Grounds for involuntary termination—Version effective April 25, 2011) states,

The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

....

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

....

(9) The parent has been convicted of one of the following in which the victim was a child of the parent:

- (i) an offense under 18 Pa.C.S. Ch. 25 (relating to criminal homicide);
- (ii) a felony under 18 Pa.C.S. § 2702 (relating to aggravated assault);
- (iii) an offense in another jurisdiction equivalent to an offense in subparagraph (i) or (ii); or
- (iv) an attempt, solicitation or conspiracy to commit an offense in subparagraph (i), (ii) or (iii).

3.6.1 Recommendation: Add the crimes of 18 Pa. Cons. Stat. § 3002 (Trafficking of persons) and § 5902(b) (Prostitution and related offenses), when the victim is a minor, along with 18 Pa. Cons. Stat. § 6320 (Sexual exploitation of children), and § 6318 (Unlawful contact with a minor), when commercial sexual exploitation is involved, to the list of crimes in 23 Pa. Cons. Stat. § 2511 constituting grounds for petition for terminating 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.*
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***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.*

18 Pa. Cons. Stat. § 3002 (Trafficking in persons) states, “A person commits an offense if the person knowingly traffics or knowingly attempts to traffic another person, knowing that the other person will be subjected to forced labor or services.” The term “traffics” includes “[r]ecruits, entices, harbors, transports or provides or obtains by any means,” which could reach some facilitators. But the term does not include benefiting, assisting, or aiding, which are terms more explicitly applicable to facilitators. 18 Pa. Cons. Stat. § 3001. Trafficking is a first degree felony if the person trafficked is under 18, with a possible fine not to exceed \$25,000 and possible imprisonment up to 20 years. 18 Pa. Cons. Stat. §§ 3002, 1101(2), 1103(2).

Facilitators may be charged under several sections of 18 Pa. Cons. Stat. § 5902 (Prostitution and related offenses). Under 18 Pa. Cons. Stat. § 5902(b) (Promoting prostitution), “owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business” constitutes a third degree felony, but “leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means” is only a second degree misdemeanor. 18 Pa. Cons. Stat. § 5902(b)(1), (b)(7), (c)(1)(i), (c)(2). The possible penalty for a third degree felony crime is a fine up to \$15,000 and possible imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 1101(3), 1103(3).

Additional facilitator crimes that fall within promoting prostitution are “soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.” 18 Pa. Cons. Stat. § 5902(b)(8). If the child involved is under 16, then these offenses are felonies in the third degree punishable by a fine up to \$15,000 and imprisonment not to exceed 7 years. 18 Pa. Cons. Stat. §§ 5902(c)(1)(iii), 1101(3), 1103(3). For these offenses, if the minor is 16 or over, the offense is punishable as a misdemeanor in the second degree by a fine up to \$5,000 and a term of imprisonment up to 2 years. 18 Pa. Cons. Stat. §§ 5902(c)(2), 1101(5), 1104(2).

- 4.1.1 Recommendation: Raise the severity of the crime of promoting prostitution of a minor under 18 Pa. Cons. Stat. § 5902(b), (c) to align with 18 Pa. Cons. Stat. § 3002 (Trafficking of persons).

- 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.*

If convicted of trafficking of persons under 18 Pa. Cons. Stat. § 3002, facilitators may have assets forfeited pursuant to 18 Pa. Cons. Stat. § 3004, which states,

(a) GENERAL RULE.—The following shall be subject to forfeitures to the Commonwealth, and no property right shall exist in them:

- (1) All assets, foreign or domestic:
  - (i) Of an individual, entity or organization engaged in planning or perpetrating an act in this Commonwealth which violates section 3002 (relating to trafficking of persons) and all assets, foreign or domestic, affording a person a source of influence over such individual, entity or organization.
  - (ii) Acquired or maintained by a person with the intent and for the purpose of supporting, planning, conducting or concealing an act in this Commonwealth which violates section 3002.
  - (iii) Derived from, involved in or used or intended to be used to commit an act in this Commonwealth which violates section 3002.
- (2) All assets within this Commonwealth:
  - (i) Of an individual, entity or organization engaged in planning or perpetrating an act which violates section 3002.
  - (ii) Acquired or maintained with the intent and for the purpose of supporting, planning, conducting or concealing an act which violates section 3002.
  - (iii) Derived from, involved in or used or intended to be used to commit an act which violates section 3002.

“Property subject to forfeiture under this section may be seized by the law enforcement authority upon process issued by any court of common pleas having jurisdiction over the property.” 18 Pa. Cons. Stat. §3004(b). Distribution of forfeited property is governed by 18 Pa. Cons. Stat. §3004(d), which states,

Whenever property is forfeited under this section, the property shall be transferred to the custody of the district attorney. The district attorney, where appropriate, may retain the property for official use or sell the property, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs. The balance of the proceeds shall be used for the enforcement of the criminal laws of Pennsylvania.

Additionally, facilitators who are convicted of trafficking are subject to mandatory restitution. Under 18 Pa. Cons. Stat. § 3003(a), “A person convicted of an offense under this chapter [Trafficking of persons] shall, in addition to any other remedy deemed appropriate by the court, be sentenced to pay the victim restitution, including the greater of: (1) the gross income or value to the person to whom the labor or services were performed by the victim; or (2) the value of the victim’s labor based on the minimum wage of this Commonwealth.”

A facilitator convicted of a crimes other than trafficking of persons, is subject to mandatory restitution orders, under 18 Pa. Cons. Stat. § 1106(a) (Restitution for injuries to person or property), which states, “Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.” 18 Pa. Cons. Stat. § 1106(a) (Restitution for injuries to person or property). “Personal injury” is defined as “[a]ctual bodily harm, including pregnancy, directly resulting from the crime.” 18 Pa. Cons. Stat. § 1106(h). As a result, if the victim<sup>41</sup> suffered “personal injury directly resulting from the

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<sup>41</sup> “Victim” is defined in the Crime Victim’s Act, codified at 18 Pa. Cons. Stat. § 11.103. The definition of victim included in 18 Pa. Cons. Stat. § 1106(h) refers to “section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as the Administrative Code of 1929.” 18 Pa. Cons. Stat. § 1106(h). This statute has been repealed and



crime,” then the buyer could potentially be required to pay restitution for every crime related to trafficking. 18 Pa. Cons. Stat. § 1106(a).

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

Pennsylvania has no provision related to 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, if occurring in Pennsylvania.

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

The facilitation of child pornography is illegal in Pennsylvania. 18 Pa. Cons. Stat. § 6312(c)(1) states, “Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.” A first time offender is guilty of a felony in the third degree punishable by a fine up to \$15,000 and a term of imprisonment up to 7 years. 18 Pa. Cons. Stat. §§ 5902(c)(2), 1101(3), 1103(3). A second time offender is guilty of a felony in the second degree punishable by a fine up to \$25,000 and possible imprisonment up to 10 years. 18 Pa. Cons. Stat. §§ 5902(c)(2), 1101(2), 1103(2).

Promoting child pornography is also criminalized under 18 Pa. Cons. Stat. § 5903(a)(4)<sup>42</sup> (Obscene and other sexual materials and performances) which states:

(a) OFFENSES DEFINED.—No person, knowing the obscene character of the materials or performances involved, shall:

...

(4) ....

(ii) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom or by what means any obscene materials can be purchased, obtained or had in which a minor is included

....

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replaced by the Crime Victim’s Act, also known as “the act of November 24, 1998, P.L. 822, No. 111.” *Restitution for injuries to person or property—18 Pa. Cons. Stat. § 1106*, ONECLE, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.011.006.000.html> (last visited July 14, 2011); 1998 Pa. Laws 111; 18 Pa. Cons. Stat. § 11.103. See Section 5.1 for a definition of “victim” as defined in the Crime Victim’s Act.

<sup>42</sup> See *supra* note 32.

***Legal Components:***

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

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

Pennsylvania’s Crime Victims Act under 18 Pennsylvania Statutes (Pa. Cons. Stat.) § 11.103 defines a “direct victim” in part as “[a]n individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act.” For purposes of this statute, a “crime” is “[a]n act which was committed: (1) In this Commonwealth by a person, including a juvenile, without regard to legal exemption or defense which would constitute a crime under the following: . . . (ii) 18 Pa.C.S. (relating to crimes and offenses).” 18 Pa. Cons. Stat. § 11.103. Since the crimes of trafficking of persons pursuant to 18 Pa. Cons. Stat. § 3002, promoting prostitution pursuant to 18 Pa. Cons. Stat. § 5902, and sexual exploitation of children pursuant to 18 Pa. Cons. Stat. § 6302 all fall within title 18 (Crimes and offenses), commercially sexually exploited minors are included as victims within the Crime Victims Act.

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.*

Trafficking of persons under 18 Pa. Cons. Stat. § 3002 does not refer to a defense based on the minor's consent to the commercial sex act. However, the law does not specifically prohibit a defendant from raising such a defense.

- 5.2.1 Recommendation: Add a provision that specifically prohibits a consent defense in prosecutions under 18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons) where the victim is a minor under 18 and the purpose is for sexual servitude, and under 18 Pa. Cons. Stat. § 5902, § 6318, § 6301, § 6320, § 6312, and § 5903(A)(6) where the sexual offense is commercial in nature and involves minors.

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

Pennsylvania's prostitution statute under 18 Pa. Cons. Stat. § 5902(a) is age-neutral and so allows for the arrest and prosecution of a minor for the offense of prostitution. Specifically, "A person is guilty of prostitution if he or she: (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity." 18 Pa. Cons. Stat. § 5902(a).

- 5.3.1 Recommendation: Amend 18 Pa. Cons. Stat. § 5902(a) (Prostitution and related offenses) to make the law 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.*

A commercially sexually exploited child could be charged with prostitution and face criminal proceedings. However, 42 Pa. Cons. Stat. § 6322(a) (Transfer from criminal proceedings) states in part that, apart from certain exceptions, "if it appears to the court in a criminal proceeding that the defendant is a child, this chapter shall immediately become applicable, and the court shall forthwith halt further criminal proceedings, and, where appropriate, transfer the case to the division or a judge of the court assigned to conduct juvenile hearings, together with a copy of the accusatory pleading and other papers, documents, and transcripts of testimony relating to the case."

In Pennsylvania, law enforcement officers may take a child into custody on various grounds. 42 Pa. Cons. Stat. § 6324 states,<sup>43</sup>

A child may be taken into custody:

- (1) Pursuant to an order of the court under this chapter. Prior to entering a protective custody order removing a child from the home of the parent, guardian or custodian, the court must determine that to allow the child to remain in the home is contrary to the welfare of the child.

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<sup>43</sup> According to a notation in LEXIS, "Pursuant to Pa.R.C.P. No. 1800(6), for purposes of delinquency proceedings, 42 Pa.C.S. § 6324 is suspended where inconsistent with Pa.R.C.P. No. 1202." Pursuant to Rule 1800(6) of the Pennsylvania Rules of Juvenile Court Procedure, "The Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S. § 6324, which authorizes law enforcement officers to take a child into custody, is suspended only insofar as the Act is inconsistent with Rule 1202, which provides for police officers taking a child into custody." Pa. R.J.C.P. 1800(6). At this time, Rule 1202 of the Pennsylvania Rules of Juvenile Court Procedure is not substantially inconsistent with 42 Pa. Cons. Stat. § 6324.

(2) Pursuant to the laws of arrest.

(3) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child is suffering from illness or injury or is in imminent danger from his surroundings, and that his removal is necessary.

(4) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian.

(5) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has violated conditions of his probation.

Specific provisions govern the detention of a child taken into custody. Under 42 Pa. Cons. Stat. § 6325, “A child taken into custody shall not be detained or placed in shelter care prior to the hearing on the petition unless his detention or care is required to protect the person or property of others or of the child or because the child may abscond or be removed from the jurisdiction of the court or because he has no parent, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required, or an order for his detention or shelter care has been made by the court pursuant to this chapter.”

A court could find a commercially sexually exploited child to be a delinquent if the minor commits, with some exceptions, “an act designated a crime under the law of this Commonwealth, or of another state if the act occurred in that state, or under Federal law, or under local ordinances.” 42 Pa. Cons. Stat. § 6302. Since a minor could be charged with prostitution, a court could find a commercially sexually exploited minor to be a delinquent. If a court finds a minor to be a delinquent, pursuant to 42 Pa. Cons. Stat. § 6327(a) he or she may be detained in one of the following places:

(1) A licensed foster home or a home approved by the court.

(2) A facility operated by a licensed child welfare agency or one approved by the court.

(3) A detention home, camp, center or other facility for delinquent children which is under the direction or supervision of the court or other public authority or private agency, and is approved by the Department of Public Welfare.

(4) Any other suitable place or facility, designated or operated by the court and approved by the Department of Public Welfare.

Under no circumstances shall a child be detained in any facility with adults, or where the child is apt to be abused by other children.

Notably, a commercially sexually exploited child may not be detained in jail, and “[i]t is unlawful for any person in charge of or employed by a jail knowingly to receive for detention or to detain in the jail any person whom he has or should have reason to believe is a child unless, in a criminal proceeding, the child has been charged with or has been found guilty of an act set forth in paragraph (2)(i), (ii), (iii) or (v) of the definition of ‘delinquent act’ in section 6302 (relating to definitions).” 42 Pa. Cons. Stat. § 6327(c). The provisions in § 6302 include murder, certain offenses committed with a deadly weapon, child with certain prior offenses, or certain children found guilty in criminal proceedings.

If a commercially sexually exploited minor was placed on probation for a delinquent offense, a probation officer may take the minor back into custody “if the probation officer has reasonable cause to believe that the health or safety of the child is in imminent danger, or that he may abscond or be removed from the jurisdiction of the court, or when ordered by the court pursuant to this chapter or that he violated the conditions of his probation.” 42 Pa. Cons. Stat. § 6304(a)(5).

A commercially sexually exploited child could also be found to be a “dependent child” in 42 Pa. Cons. Stat. § 6302 if the child

(1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals. A determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk, including evidence of the parent's, guardian's or other custodian's use of alcohol or a controlled substance that places the health, safety or welfare of the child at risk;

...

(5) while subject to compulsory school attendance is habitually and without justification truant from school;

....

If the child is "alleged to be dependent" the child "may be detained or placed only in a Department of Public Welfare approved shelter care facility as stated in subsection (a)(1), (2) and (4), and shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses, but may be detained in the same shelter care facilities with alleged or adjudicated delinquent children." 42 Pa. Cons. Stat. § 6327(e).

5.4.1 Recommendation: Establish a mandatory response law directing any minor involved in prostitution under 18 Pa. Cons. Stat. § 5902 or who is a victim of trafficking of persons for commercial sexual exploitation under 18 Pa. Cons. Stat. § 3002(a) away from the criminal justice system and into a protective system..

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

Commercial sexual exploitation of a minor is included in the definition of "sexual abuse or exploitation" in 23 Pa. Cons. Stat. § 6303(a), in the chapter on child protective services, which is defined as,

(1) The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in sexually explicit conduct.

(2) The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in simulation of sexually explicit conduct for the purpose of producing visual depiction, including photographing, videotaping, computer depicting and filming.

(3) Any of the following offenses committed against a child:

(i) Rape.

(ii) Sexual assault.

(iii) Involuntary deviate sexual intercourse.

(iv) Aggravated indecent assault.

(v) Molestation.

(vi) Incest.

(vii) Indecent exposure.

(viii) Prostitution.

(ix) Sexual abuse.

(x) Sexual Exploitation.

Additionally, under 23 Pa. Cons. Stat. § 6303(b) "child abuse" is defined as including "[a]n act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age." 23 Pa. Cons. Stat. § 6303(b)(1)(ii).

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.*

Under 42 Pa. Cons. Stat. § 6302 (Definitions), “custodian” is defined as a “[a] person other than a parent or legal guardian, who stands in loco parentis<sup>44</sup> to the child, or a person to whom legal custody of the child has been given by order of a court.” 42 Pa. Cons. Stat. § 6302. There is a legitimate question as to whether this definition applies to traffickers.

Additionally, 23 Pa. Cons. Stat. § 6303 (Definitions), which provides definitions for the code chapter on “child protective services,” includes in the definition of “perpetrator” “a person responsible for the welfare of a child.” The term “person responsible for the child’s welfare” is further defined to include “a person who provides permanent or temporary care, supervision, mental health diagnosis or treatment, training or control of a child in lieu of parental care, supervision and control.” 23 Pa. Cons. Stat. § 6303. This definition is possibly broad enough to include a trafficker.

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.*

A sexually exploited child will likely qualify as a victim for crime victims’ compensation in Pennsylvania. Specifically, “persons eligible for compensation” include “a direct victim.” 18 Pa. Cons. Stat. § 11.701(a)(1). For purposes of this statute, a “direct victim” is defined in part as “[a]n individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act.” 18 Pa. Cons. Stat. § 11.103. For purposes of this statute, a “crime” is “[a]n act which was committed: (1) In this Commonwealth by a person, including a juvenile, without regard to legal exemption or defense which would constitute a crime under the following: . . . (ii) 18 Pa. Cons. Stat. (relating to crimes and offenses).” 18 Pa. Cons. Stat. § 11.103. Since the crimes of trafficking of persons under 18 Pa. Cons. Stat. § 3002, promoting prostitution under 18 Pa. Cons. Stat. § 5902(b), and sexual exploitation of children under 18 Pa. Cons. Stat. § 6320 all fall within Title 18 (Crimes and offenses), then commercially sexually exploited minors are covered under Pennsylvania’s Crime Victims Act.

However, if the commercially sexually exploited child is regarded as “criminally responsible for the crime upon which a claim is based or an accomplice,” the child may be ineligible for compensation. 18 Pa. Cons. Stat. § 11.701(b). Additionally, a victim may be ineligible for crime victims’ compensation if the case was not immediately reported to the police under 18 Pa. Cons. Stat. § 11.707, which states,

(a) REQUIREMENTS.—No award shall be made unless it is determined by a preponderance of the evidence that:

. . . .

(3) The crime was promptly reported to the proper authorities. In no case may an award be made if the record shows that the report was made more than 72 hours after the occurrence of the crime unless:

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<sup>44</sup> Case law defines the term “*in loco parentis*” in Chapter 63 as follows: “The phrase “*in loco parentis*” refers to a person who puts oneself [sic] in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties . . . . The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child.” *In re D.M.*, 995 A.2d 371, 378 (2010) (alteration in the original) (citations omitted) (quoting *Peters v. Costello*, 891 A.2d 705, 710 (2005)).

- (i) the victim is under 18 years of age at the time of the occurrence of the crime and the alleged offender is the victim's parent or a person responsible for the victim's welfare, an individual residing in the same home as the victim or a paramour of the victim's parent; or
- (ii) the Office of Victims' Services finds the delay to have been justified, consistent with bureau regulations.

Also, to receive an award, the Office of Victims' Services in the Pennsylvania Commission on Crime and Delinquency must determine that "[t]he direct victim, intervenor or claimant has fully cooperated with all law enforcement agencies and the Office of Victims' Services unless the Office of Victims' Services finds the noncompliance to have been justified consistent with Office of Victims' Services regulations." 18 Pa. Cons. Stat. § 11.707(a)(4). Due to the trauma victims of commercial sexual exploitation have undergone, they frequently do not immediately cooperate with the police, and thus victims could become ineligible for funds.

Even if the victim clears the hurdles to obtain victims' compensation, the commercially sexually exploited minor could have the amount of the award reduced if the Office of Victims' Services determines that "the direct victim or intervenor, because of conduct, contributed to the infliction of the injury." 18 Pa. Cons. Stat. § 11.707(f)(1). This provision, however, does include a provision stating that "[i]f the crime involved is rape or sexual assault, the conduct of the direct victim shall not be considered." 18 Pa. Cons. Stat. § 11.707(f)(2).

- 5.7.1 Recommendation: Amend the crime victims' compensation rules to stipulate an exception to the ineligibility factors contained in 18 Pa. Cons. Stat. § 11.701(b) and § 11.707 for minor victims of sexual offenses under 18 Pa. Cons. Stat. § 5902, § 6318, § 6301, § 6320, § 6312, and § 5903(A)(6) where the sexual offense is commercial in nature and for minor victims of trafficking of persons under 18 Pa. Cons. Stat. § 3002 when the purpose is for sexual servitude.

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

Child victims under 16 are entitled to certain victim-friendly criminal justice procedures. 42 Pa. Cons. Stat. § 5982. 42 Pa. Cons. Stat. § 5985(a)<sup>45</sup> (Testimony by contemporaneous alternative method) states that the court may allow "the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method" or "may order that the child victim's or child material witness's testimony be recorded for presentation in court by any method that accurately captures and preserves the visual images, oral communications and other information presented during such testimony" under 42 Pa. Cons. Stat. § 5984.1(a) (Recorded testimony).<sup>46</sup>

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<sup>45</sup> In 1994, the Pennsylvania Supreme Court held 42 Pa. Cons. Stat. § 5985 violated the confrontation clause of Art. 1 § 9 of the Pennsylvania Constitution. *Commonwealth v. Loudon*, 638 A.2d 953 (Pa. 1994). The statute was subsequently amended in 1996 and in 2004. It does not appear that a case has either upheld or overturned the statute since the amendments. In 1998, a proposed amendment to the Pennsylvania Constitution allowing the legislature to enact laws regarding the manner of children's testimony was held to violate the state constitution. *Commonwealth v. Wilson*, 707 A.2d 1114, 1121 n.2 (Pa. 1998) (Newman, J., dissenting) (citing *Bergdoll v. Kane*, 694 A.2d 1155 (Pa. 1997)); *See* Pa. Const., art. XI, § 1 (explaining that two amendments may not be proposed in one question on the ballot). It has not been re-proposed since. The Pennsylvania Supreme Court stated of 42 Pa. Cons. Stat. § 5985 in 1998, "[I]t is apparent that the use of videotaped depositions and closed-circuit television as testimony continues to be an unresolved issue." *Id.*

<sup>46</sup> 42 Pa. Cons. Stat. § 5984.1(b) states,

- (b) DETERMINATION.—Before the court orders the child victim or the child material witness to testify by recorded testimony, the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in

Additionally, “in a prosecution involving a child victim of sexual or physical abuse, unless the court otherwise orders, the name of the child victim shall not be disclosed by officers or employees of the court to the public, and any records revealing the name of the child victim will not be open to public inspection.” 42 Pa. Cons. Stat. § 5988(a).

Statutes providing protections to victims of sexual crimes do not protect victims of commercial sexual exploitation. These statutes include 18 Pa. Cons. Stat. § 3104 (Evidence of victim’s sexual conduct), § 3105 (Prompt complaint), which does not require prompt reporting for prosecution, and § 3107 (Resistance not required). These statutes generally prevent introducing a victim’s past sexual conduct, which could negatively affect a jury’s view of the victim, allow an extended time for prosecuting the crime, since victims often do not come forward quickly, and do not require that the victim resist the defendant’s advances. 18 Pa. Cons. Stat. §§ 3104(a), 3105, 3107. However, these statutes only apply to chapter 31 offenses within title 18 of the Pennsylvania Consolidated Statutes, which include 18 Pa. Cons. Stat. § 3121 (Rape), § 3122.1 (Statutory sexual assault), § 3123 (Involuntary deviate sexual intercourse), § 3124.1 (Sexual assault), § 3124.2 (Institutional sexual assault), § 3125 (Aggravated indecent assault), § 3126 (Indecent assault), and § 3127 (Indecent exposure). 18 Pa. Cons. Stat. § 3002 (Trafficking of persons), § 5902 (Prostitution and related offenses), and § 6320 (Sexual exploitation of children) are located in other chapters. Therefore, victims of these crimes do not benefit from these protections.

5.8.1 Recommendation: Extend victim protections to minor victims under 18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons), § 5902 (Prostitution and related offenses), and § 6320 (Sexual exploitation of children).

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.*

Offenses a minor committed while a victim of commercial sexual exploitation can be expunged pursuant to 18 Pa. Cons. Stat. § 9123, which states in subsection (a),

(a) EXPUNGEMENT OF JUVENILE RECORDS.—Notwithstanding the provisions of section 9105 (relating to other criminal justice information) and except upon cause shown, expungement of records of juvenile delinquency cases wherever kept or retained shall occur after 30 days’ notice to the district attorney, whenever the court upon its motion or upon the motion of a child or the parents or guardian finds:

- (1) a complaint is filed which is not substantiated or the petition which is filed as a result of a complaint is dismissed by the court;
- (2) six months have elapsed since the final discharge of the person from supervision under a consent decree and no proceeding seeking adjudication or conviction is pending;
- (3) five years have elapsed since the final discharge of the person from commitment, placement, probation or any other disposition and referral and since such final discharge, the person has not been convicted of a felony, misdemeanor or adjudicated delinquent and no proceeding is pending seeking such conviction or adjudication; or
- (4) the individual is 18 years of age or older, the attorney for the Commonwealth consents to the expungement and a court orders the expungement after giving consideration to the following factors:

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the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim’s or child material witness’s ability to reasonably communicate.



- (i) the type of offense;
- (ii) the individual's age, history of employment, criminal activity and drug or alcohol problems;
- (iii) adverse consequences that the individual may suffer if the records are not expunged; and
- (iv) whether retention of the record is required for purposes of protection of the public safety.

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.*

If the perpetrator is prosecuted as a trafficker under 18 Pa. Cons. Stat. § 3002, the commercially sexually exploited victim will be entitled to restitution. 18 Pa. Cons. Stat. § 3003(a) states that

A person convicted of an offense under this chapter shall, in addition to any other remedy deemed appropriate by the court, be sentenced to pay the victim restitution, including the greater of:

- (1) the gross income or value to the person to whom the labor or services were performed by the victim; or
- (2) the value of the victim's labor based on the minimum wage of this Commonwealth.

Additionally, a commercially sexually exploited child victim could receive restitution "for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim<sup>47</sup> suffered personal injury directly resulting from the crime." 18 Pa. Cons. Stat. § 1106(a). "Personal injury" is defined as "[a]ctual bodily harm, including pregnancy, directly resulting from the crime." 18 Pa. Cons. Stat. § 1106(h).

18 Pa. Cons. Stat. § 3003(b) (Restitution for offenses) states, "Nothing in this section shall be construed to preclude any other remedy at law or in equity."

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.*

A commercially sexually exploited minor must bring a civil action against the offender in a definitive time, but that length of time could be extended under 42 Pa. Cons. Stat. § 5533(b) in cases where force is involved. Specifically, 42 Pa. Cons. Stat. § 5533(b) states in part,

- (1)
  - (i) If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter.
  - (ii) As used in this paragraph, the term "minor" shall mean any individual who has not yet attained 18 years of age.

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<sup>47</sup> "Victim" is defined in the Crime Victim's Act, codified at 18 Pa. Cons. Stat. § 11.103. The definition of victim included in 18 Pa. Cons. Stat. § 1106(h) cites "section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as the Administrative Code of 1929." 18 Pa. Cons. Stat. § 1106(h). This statute has been repealed and replaced by the Crime Victim's Act, also known as "the act of November 24, 1998, P.L. 822, No. 111." *Restitution for injuries to person or property—18 Pa. Cons. Stat. § 1106*, ONECLE, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.011.006.000.html> (last visited July 14, 2011); 1998 Pa. Laws 111; 18 Pa. Cons. Stat. § 11.103. See Section 5.1 for a definition of "victim" as defined in the Crime Victim's Act.

(2)

(i) If an individual entitled to bring a civil action arising from childhood sexual abuse is under 18 years of age at the time the cause of action accrues, the individual shall have a period of 12 years after attaining 18 years of age in which to commence an action for damages regardless of whether the individual files a criminal complaint regarding the childhood sexual abuse.

(ii) For the purposes of this paragraph, the term “childhood sexual abuse” shall include, but not be limited to, the following sexual activities between a minor and an adult, provided that the individual bringing the civil action engaged in such activities as a result of forcible compulsion or by threat of forcible compulsion which would prevent resistance by a person of reasonable resolution:

(A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;

(B) deviate sexual intercourse, which includes sexual intercourse per os or per anus; and

(C) indecent contact, which includes any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.<sup>48</sup>

This cause of action requires “forcible compulsion;” however, that term is defined broadly.

With respect to criminal statutes of limitation, “major sexual offenses” have a statute of limitations of 12 years, and the list of offenses includes sexual abuse of children under 18 Pa. Cons. Stat. § 6312 but does not include other commercial sexual exploitation offenses. 42 Pa. Cons. Stat. § 5552(B.1). The general limit is two years. 42 Pa. Cons. Stat. § 5552(a). However, the time period for bringing criminal actions is extended for “[a]ny sexual offense committed against a minor who is less than 18 years of age any time up to the later of the period of limitation provided by law after the minor has reached 18 years of age or the date the minor reaches 50 years of age.” 42 Pa. Cons. Stat. § 5552(c)(3). For purposes of this provision, “sexual offense” includes corruption of minors under 18 Pa. Cons. Stat. § 6301, sexual abuse of children under 18 Pa. Cons. Stat. § 6312(b), and sexual exploitation of children under 18 Pa. Cons. Stat. § 6320. Under subsection (b), the prosecution of “major offenses” “must be commenced within five years” from the time the crime was committed. For the purposes of this provision, “major offense” includes promoting prostitution under 18 Pa. Cons. Stat. § 5902(b), criminal attempt under 18 Pa. Cons. Stat. § 901, criminal solicitation under 18 Pa. Cons. Stat. § 902, and corrupt organizations under 18 Pa. Cons. Stat. § 911. While some commercial sexual exploitation offenses, such as sexual exploitation of a minor, are included in these lists, notably absent are the trafficking of persons statute codified at 18 Pa. Cons. Stat. § 3002 and the living off prostitutes and patronizing prostitution provisions codified at 18 Pa. Cons. Stat. § 5902(d), (e).

5.11.1 Recommendation: Add 18 Pa. Cons. Stat. § 3002(a) (Trafficking of persons) and § 5902(d), (e) (Prostitution) to the list of crimes constituting “major sexual offenses” that are given extended statutes of limitations under 42 Pa. Cons. Stat. § 5552(B.1).

5.11.2 Recommendation: Amend 42 Pa. Cons. Stat. § 5533(b) to permit the extended statute of limitations for civil actions for childhood sexual abuse by victims of commercial sexual exploitation without proof of “forcible compulsion.”

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<sup>48</sup> 18 Pa. Con. Stat. § 3101 (Relating to definitions) defines “forcible compulsion” for 42 Pa. Cons. Stat. § 5533(b) as “[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person’s death, whether the death occurred before, during or after sexual intercourse.”

***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.*

Training on domestic minor sex trafficking does not appear to be required for law enforcement in Pennsylvania. Training on the sexual assault collection program pursuant to 35 Pa. Cons. Stat. § 10172.3, crime victims’ compensation program pursuant to 18 Pa. Cons. Stat. § 11.212, and training on electronic surveillance techniques pursuant to 18 Pa. Cons. Stat. § 5724 are required and might include aspects related to domestic minor sex trafficking.

- 6.1.1 Recommendation: Add training on human trafficking and domestic minor sex trafficking to the trainings required on the sexual assault collection program under 35 Pa. Cons. Stat. § 10172.3, Crime Victims Act under 18 Pa. Cons. Stat. § 11.212, and on electronic surveillance techniques under 18 Pa. Cons. Stat. § 5724.

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

Pennsylvania law requires both parties to consent to audiotaping. Those who intentionally intercept wire, electronic, or oral communications are guilty of third degree felonies. 18 Pa. Cons. Stat. § 5703. An exception exists “where all parties to the communication have given prior consent to such interception.” 18 Pa. Cons. Stat. § 5704(4).

Notably, 18 Pa. Cons. Stat. § 5704 also provides an exception for offenses related to corrupt organizations under 18 Pa. Cons. Stat. § 911, trafficking of persons under 18 Pa. Cons. Stat. § 3002, and unlawful contact with a minor under 18 Pa. Cons. Stat. § 6318. 18 Pa. Cons. Stat. §§ 5704(2), 5708(1). 18 Pa. Cons. Stat. § 5704(2) states,

It shall not be unlawful and no prior court approval shall be required under this chapter for:

....

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities, including, but not limited to, the crimes enumerated in section 5708<sup>49</sup> (relating to order authorizing interception of wire, electronic or oral communications), where:

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<sup>49</sup> Crimes falling under 18 Pa. Cons. Stat. § 5708 include 18 Pa. Cons. Stat. § 911 (Corrupt organizations), § 3002 (Trafficking of persons), § 5902 (Prostitution and related offenses) (“where such offense is dangerous to life, limb

(i) (Deleted by amendment).

(ii) one of the parties to the communication has given prior consent to such interception.

However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception . . . ;

(iii) the investigative or law enforcement officer meets in person with a suspected felon and wears a concealed electronic or mechanical device capable of intercepting or recording oral communications. However, no interception under this subparagraph may be used in any criminal prosecution except for a prosecution involving harm done to the investigative or law enforcement officer. This subparagraph shall not be construed to limit the interception and disclosure authority provided for in this subchapter; or

(iv) the requirements of this subparagraph are met. If an oral interception otherwise authorized under this paragraph will take place in the home of a nonconsenting party, then, in addition to the requirements of subparagraph (ii), the interception shall not be conducted until an order is first obtained from the president judge, or his designee who shall also be a judge, of a court of common pleas, authorizing such in-home interception, based upon an affidavit by an investigative or law enforcement officer that establishes probable cause for the issuance of such an order. No such order or affidavit shall be required where probable cause and exigent circumstances exist. For the purposes of this paragraph, an oral interception shall be deemed to take place in the home of nonconsenting party only if both the consenting and nonconsenting parties are physically present in the home at the time of the interception.

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

Certain specified law enforcement officers may make a written application for “an order authorizing the interception of a wire, electronic or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation involving suspected criminal activities when such interception may provide evidence of the commission of any of the following offenses, or may provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the following offenses,” which includes 18 Pa. Cons. Stat. § 911 (Corrupt organizations), 18 Pa. Cons. Stat. § 3002 (Trafficking of persons), 18 Pa. Cons. Stat. § 5902 (Prostitution and related offenses) (“where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year”), and 18 Pa. Cons. Stat. § 6318 (Unlawful contact with minor). 18 Pa. Cons. Stat. § 5708(1), (2).

In emergency situations for the same offenses, 18 Pa. Cons. Stat. § 5713(a) would apply. 18 Pa. Cons. Stat. § 5713(a) states,

Whenever, upon informal application by the Attorney General or a designated deputy attorney general authorized in writing by the Attorney General or a district attorney or an assistant district attorney authorized in writing by the district attorney of a county wherein the suspected criminal activity has been, is or is about to occur, a judge determines there are grounds upon which an order could be issued pursuant to this chapter, and that an emergency situation exists with respect to the investigation of an offense designated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), and involving conspiratorial activities characteristic of organized crime or a substantial danger to life or limb, dictating authorization for immediate interception of wire, electronic or oral

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or property and punishable by imprisonment for more than one year”), and § 6318 (Unlawful contact with minor). 18 Pa. Cons. Stat. § 5708(1), (2).

communications before an application for an order could with due diligence be submitted to him and acted upon, the judge may grant oral approval for such interception without an order, conditioned upon the filing with him, within 48 hours thereafter, of an application for an order which, if granted, shall recite the oral approval and be retroactive to the time of such oral approval. Such interception shall immediately terminate when the communication sought is obtained or when the application for an order is denied, whichever is earlier. In the event no application for an order is made, the content of any wire, electronic or oral communication intercepted shall be treated as having been obtained in violation of this subchapter.

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.*

18 Pa. Cons. Stat. § 6318 (Unlawful contact with minor) permits a law enforcement decoy to investigate situations of commercial sexual exploitation of children. 18 Pa. Cons. Stat. § 6318(a) states,

A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

....

(3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).

(4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances)

....

(6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

Other CSEC offenses are silent on this investigative technique.

6.4.1 Recommendation: Amend the various CSEC crimes to specifically allow law enforcement to investigate these offenses through the use of decoys.

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

Pennsylvania's statutes allow using the Internet for investigations in certain offenses related to human trafficking under 18 Pa. Cons. Stat. § 6318 (Unlawful contact with a minor). This statute gives concurrent jurisdiction to the attorney general and district attorney to prosecute when "any crime arising out of the activity prohibited by this section when the person charged with a violation of this section contacts a minor through the use of a computer, computer system or computer network." 18 Pa. Cons. Stat. § 6318(B.1). Under 18 Pa. Cons. Stat. § 6318(a),

A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

....

(3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).

(4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances)

....

(6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

Therefore, because 18 Pa. Cons. Stat. § 6318(B.1) allows prosecution by various levels of state government, this section allows undercover officers to use computers for investigations. Subsection (c) defines “contacts” as “[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.” 18 Pa. Cons. Stat. § 313 allows for an entrapment defense by stating,

(a) GENERAL RULE.—A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(1) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (2) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

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

Law enforcement officers are required “[t]o make an entry into the Missing Persons File through the Commonwealth Law Enforcement Assistance Network (CLEAN) in accord with Pennsylvania State Police policy and procedures immediately upon receipt of sufficient identification information on the missing child.” 18 Pa. Cons. Stat. § 2908(a)(3). Subsection (a)(1) also requires that law enforcement agencies “investigate a report of a missing child immediately upon receipt of the report regardless of the age of the missing child or the circumstances surrounding the disappearance of the child. In no case shall law enforcement agencies impose a mandatory waiting period prior to commencing the investigation of a missing child.” Under subsection (a)(4), law enforcement shall, “insure timely cancellation of any entry made pursuant to this section where the missing child has returned or is located.”