

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

ANALYSIS AND RECOMMENDATIONS WASHINGTON

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

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

Legal Analysis¹:

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

Wash. Rev. Code Ann. § 9A.40.100(1)(a) (Trafficking) states that one may be found guilty of human trafficking in the first degree if

(i) Such person:

(A) Recruits, harbors, transports, transfers, provides, obtains, or receives by any means another person knowing that force, fraud, or coercion² as defined in RCW 9A.36.070 will be used to cause

¹ Unless otherwise specified, all references to Washington statutes were taken from the Revised Code of Washington (LEXIS through 2012 Regular Sess., effective through June 6, 2012), and all federal statutes were taken from the United States Code (LEXIS through PL 112-173, approved 8/16/12). This report includes legislation enacted before August 1, 2012.

² Wash. Rev. Code Ann. § 9A.36.070(1), (2) (Coercion) states,

- the person to engage in forced labor, involuntary servitude, a sexually explicit act,³ or a commercial sex act;⁴ or
- (B) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in (a)(i)(A) of this subsection; and
- (ii) The acts or venture set forth in (a)(i) of this subsection:
 - (A) Involve committing or attempting to commit kidnapping;
 - (B) Involve a finding of sexual motivation under RCW 9.94A.835 [Special allegation—sexual motivation—procedures];⁵
 - (C) Involve the illegal harvesting or sale of human organs; or
 - (D) Result in a death.

While Wash. Rev. Code Ann. § 9A.40.100(1)(a)(ii)(A)–(D) provides that human trafficking in the first degree under subsection (1)(a) occurs when “the acts or venture” that constitute human trafficking are sexually motivated or involve kidnapping, the illegal sale of organs, or death, no similar requirement applies to human trafficking in the second degree under Wash. Rev. Code Ann. § 9A.40.100(2)(a), which states,

- A person is guilty of trafficking in the second degree when such person:
- (i) Recruits, harbors, transports, transfers, provides, obtains, or receives by any means another person knowing that force, fraud, or coercion as defined in RCW 9A.36.070 will be used to cause the person to engage in forced labor, involuntary servitude, a sexually explicit act,⁶ or a commercial sex act; or
 - (ii) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in (a)(i) of this subsection.

(1) A person is guilty of coercion if by use of a threat he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from, or to abstain from conduct which he or she has a legal right to engage in.

(2) “Threat” as used in this section means:

- (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
- (b) Threats as defined in RCW 9A.04.110(27) (a), (b), or (c) [Definitions].

³ Wash. Rev. Code Ann. § 9A.40.100(3)(d) defines a “sexually explicit act” as “a public, private, or live photographed, recorded, or videotaped act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.” The text of Wash. Rev. Code Ann. § 9A.40.100 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6257 during the 2nd Session of the 62nd Washington Legislature. 2012 Wa. Ch. 144. (WA 2012) (effective June 7, 2012).

⁴ Pursuant to Wash. Rev. Code Ann. § 9A.40.010(2) commercial sex act is defined as “any act of sexual contact or sexual intercourse for which something of value is given or received.”

⁵ Wash. Rev. Code Ann. § 9.94A.835 (Special allegation—sexual motivation—procedures) states,

(1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

(2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.

(3) The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

⁶ See *supra* note 3.

Washington’s human trafficking statute requires proof of knowledge that force, fraud or coercion were used to cause the victim to engage in involuntary servitude, and there are a number of key terms that are not defined, including involuntary servitude. A conviction under Wash. Rev. Code Ann. § 9A.40.100(1) is punishable as Class A felony, seriousness level XIV, by imprisonment for 123–397⁷ months and a possible fine up to \$50,000, while a conviction under Wash. Rev. Code Ann. § 9A.40.100(2) is punishable as Class A felony, seriousness level XII, by imprisonment for 93–318 months, a possible fine up to \$50,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9A.40.100(1)(b), (2)(b), 9.94A.515, 9.94A.510, 9.94A.550, 9A.20.021.⁸ No separate provision or enhanced penalties apply to the sex trafficking of minors.

1.1.1 Recommendation: Amend Wash. Rev. Code Ann. § 9A.40.100 (Human trafficking) to differentiate between the trafficking of a minor and that of an adult and eliminate the requirement to prove force, fraud, or coercion in the sex trafficking of a minor.⁹

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

The following laws make CSEC a distinct crime in Washington:

1. Wash. Rev. Code Ann. § 9.68A.100(1) (Commercial sexual abuse of a minor) states,

A person is guilty of commercial sexual abuse of a minor if:

- (a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct¹⁰ with him or her;
- (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or
- (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

⁷ Wash. Rev. Code Ann. § 9.94A.510 lists a range of imprisonment terms. Each prison term is dependent on a specific offender score rated from 0–9. Several factors, including prior convictions, are considered in determining each defendant’s offender score. Wash. Rev. Code Ann. § 9.94A.525. The sentencing range used throughout this report encompasses the entire offender score range of 0–9.

⁸ Wash. Rev. Code Ann. § 10.64.025(1) states, “A defendant who has been found guilty of a felony and is awaiting sentencing shall be detained unless the court finds by clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community if released.” The offenses of human trafficking in the first or second degree are two of the felonies for which a defendant “shall be detained pending sentencing.” Wash. Rev. Code Ann. § 10.64.025(2).

⁹ Subsequent recommendations in this report referring to the state human trafficking law(s) are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

¹⁰ Wash. Rev. Code Ann. § 9.68A.100(4) defines “sexual conduct” as “sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW [Sex offenses].” Wash. Rev. Code Ann. § 9A.44.010(1) (Definitions) explains that “sexual intercourse”

- (a) has its ordinary meaning and occurs upon any penetration, however slight, and
- (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
- (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

While Wash. Rev. Code Ann. § 9A.44.010(2) defines “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.”

A conviction under Wash. Rev. Code Ann. § 9.68A.100(1) is punishable as a Class B felony, seriousness level VIII, by imprisonment for 21 months to 10 years, a possible fine up to \$20,000, or both imprisonment and a fine.¹¹ Wash. Rev. Code Ann. §§ 9.68A.100(2), 9.94A.515, 9.94A.510, 9A.20.021.¹²

2. Wash. Rev. Code Ann. § 9.68A.101(1) (Promoting commercial sexual abuse of a minor)¹³ makes it a crime when a person “knowingly advances commercial sexual abuse or a sexually explicit act of a minor or profits from a minor engaged in sexual conduct or a sexually explicit act.”¹⁴ Wash. Rev. Code Ann. § 9.68A.101(3) states,

(a) A person “advances commercial sexual abuse of a minor” if, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual

¹¹ Wash. Rev. Code Ann. § 9A.88.130 (Additional requirements) states,

(1) When sentencing or imposing conditions on a person convicted of, or receiving a deferred sentence or deferred prosecution for, violating RCW 9A.88.110 [Patronizing a prostitute] or 9.68A.100, the court must impose a requirement that the offender:

- (a) Not be subsequently arrested for patronizing a prostitute or commercial sexual abuse of a minor;
- (b) Remain outside the geographical area, prescribed by the court, in which the person was arrested for violating RCW 9A.88.110 or 9.68A.100, unless such a requirement would interfere with the person’s legitimate employment or residence or otherwise be infeasible; and
- (c) Fulfill the terms of the program, if a first-time offender, designated by the sentencing court, designed to educate offenders about the negative costs of prostitution.

(2) This requirement is in addition to the penalties set forth in RCW 9A.88.110, 9A.88.120 [Additional fee assessment], and 9.68A.100.

The text of Wash. Rev. Code Ann. § 9A.88.130 included here and elsewhere in this report includes amendments made by the passage of House Bill 2692 of the 2nd session of the 62nd Washington legislature. 2012 Wa. Ch. 136. (WA 2012) (effective June 7, 2012).

Additionally, Wash. Rev. Code Ann. § 9A.88.140 (Vehicle impoundment—fees and fine) states,

(1)(a) Upon an arrest for a suspected violation of patronizing a prostitute, promoting prostitution in the first degree, promoting prostitution in the second degree, promoting travel for prostitution, the arresting law enforcement officer may impound the person’s vehicle if (i) the motor vehicle was used in the commission of the crime; (ii) the person arrested is the owner of the vehicle or the vehicle is a rental car as defined in RCW 46.04.465; and (iii) either (A) the person arrested has previously been convicted of one of the offenses listed in this subsection or (B) the offense was committed within an area designated under (b) of this subsection.

(2) Upon an arrest for a suspected violation of commercial sexual abuse of a minor, promoting commercial sexual abuse of a minor, or promoting travel for commercial sexual abuse of a minor, the arresting law enforcement officer shall impound the person’s vehicle if (a) the motor vehicle was used in the commission of the crime; and (b) the person arrested is the owner of the vehicle or the vehicle is a rental car as defined in RCW 46.04.465.

¹² Sexual offenses and human trafficking under Wash. Rev. Code Ann. ch. 9A.44 (Sex offenses) and ch. 9.68A (Sexual exploitation of children) are punishable under Wash. Rev. Code Ann. ch. 9A.20 (Classification of crimes), which lays out the maximum penalties for these crimes. The sentencing guidelines outlined in Wash. Rev. Code Ann. § 9.94A.510 (Table 1—sentencing grid), as informed by seriousness levels outlined in Wash. Rev. Code Ann. § 9.94A.515 (Table 2—crimes included within each seriousness level), provide the minimum sentence and the range depending on the offender score.

¹³ The text of Wash. Rev. Code Ann. § 9.68A.101 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6257 of the 2nd session of the 62nd Washington Legislature. 2012 Wa. Ch. 144. (WA 2012) (effective June 7, 2012).

¹⁴ Wash. Rev. Code Ann. § 9.68A.101(4) defines “sexual conduct” as “sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.” See *supra* note 10 for the definition of “sexual contact” and “sexual intercourse.”

abuse of a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers for commercial sexual abuse of a minor, provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.

(b) A person “profits from commercial sexual abuse of a minor” if, acting other than as a minor receiving compensation for personally rendered sexual conduct, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or will participate in the proceeds of commercial sexual abuse of a minor.

(c) A person “advances a sexually explicit act of a minor” if he or she causes or aids a sexually explicit act of a minor, procures or solicits customers for a sexually explicit act of a minor, provides persons or premises for the purposes of a sexually explicit act of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate a sexually explicit act of a minor.

(d) A “sexually explicit act” is a public, private, or live photographed, recorded, or videotaped act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons and for which something of value is given or received.

(e) A “patron” is a person who pays or agrees to pay a fee to another person as compensation for a sexually explicit act of a minor of who solicits or requests a sexually explicit act of a minor in return for a fee.

A conviction under Wash. Rev. Code Ann. § 9.68A.101(1) is punishable as a Class A felony, seriousness level XII, by imprisonment for 93–318 months, a possible fine up to \$50,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.68A.101(2), 9.94A.515, 9.94A.510, 9.94A.550.¹⁵

3. Wash. Rev. Code Ann. § 9.68A.102(1) (Promoting travel for commercial sexual abuse of a minor) states,

A person commits the offense of promoting travel for commercial sexual abuse of a minor if he or she knowingly sells or offers to sell travel services¹⁶ that include or facilitate travel for the purpose of engaging in what would be commercial sexual abuse of a minor or promoting commercial sexual abuse of a minor, if occurring in this state.

A conviction under Wash. Rev. Code Ann. § 9.68A.102(1) is punishable as a Class C felony by imprisonment for up to 12 months, a possible fine up to \$10,000, or both imprisonment and a fine.¹⁷ Wash. Rev. Code Ann. §§ 9.68A.102(2), 9.94A.505(2)(b), 9.94A.550.

¹⁵ Wash. Rev. Code Ann. § 10.64.025(1) states, “A defendant who has been found guilty of a felony and is awaiting sentencing shall be detained unless the court finds by clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community if released.” The offense of promoting commercial sexual abuse of a minor is one of the felonies covered by this statute. Wash. Rev. Code Ann. § 10.64.025(2).

¹⁶ Wash. Rev. Code Ann. § 9.68A.102(3) states, “‘travel services’ has ‘the same meaning as defined in RCW 19.138.021 [Definitions].” Wash. Rev. Code Ann. § 19.138.021(7) defines “travel services” as “transportation by air, sea, or ground, hotel or any lodging accommodations, package tours, or vouchers or coupons to be redeemed for future travel or accommodations for a fee, commission, or other valuable consideration.”

¹⁷ Wash. Rev. Code Ann. § 9.94A.505(2)(b) (Sentences) explains,

If a standard sentence range has not been established for the offender’s crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 [Community custody—offenders sentenced for one year or less] not to exceed one year; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement and a community custody term under RCW 9.94A.701 [Community custody—offenders sentenced to the custody of the department] if the court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.

4. Wash. Rev. Code Ann. § 9.68A.103(1) (Permitting commercial sexual abuse of a minor) states,

A person is guilty of permitting commercial sexual abuse of a minor if, having possession or control of premises which he or she knows are being used for the purpose of commercial sexual abuse of a minor, he or she fails without lawful excuse to make reasonable effort to halt or abate such use and to make a reasonable effort to notify law enforcement of such use.

A conviction under Wash. Rev. Code Ann. § 9.68A.103(1) is punishable as a gross misdemeanor by imprisonment for up to 364 days, a possible fine up to \$5,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.68A.103(2), 9.92.020.

5. Wash. Rev. Code Ann. § 9.68A.040(1) (Sexual exploitation of a minor) states,

A person is guilty of sexual exploitation of a minor if the person:

- (a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
- (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or
- (c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.¹⁸

A conviction under Wash. Rev. Code Ann. § 9.68.040(1) is punishable as a Class B felony, seriousness level IX, by imprisonment of 31 months to 10 years, a fine up to \$20,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.68A.040(2), 9A.20.021(1)(b), 9.94A.515, 9.94A.510.

Other crimes against children that are not specifically commercial in nature but may be used in a case of domestic minor sex trafficking include the following:

1. Wash. Rev. Stat. Ann. § 9A.44.073 (Rape of a child in the first degree) states,

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(2) Rape of a child in the first degree is a class A felony.

Wash. Rev. Stat. Ann. § 9A.44.073 is a Class A felony offense, seriousness level XII, punishable by imprisonment for 93–123 months, a possible fine up to \$50,000, or both. Wash. Rev. Code Ann. §§ 9A.44.073(2), 9.94A.510, 9.94A.515, 9.94A.550.

2. Wash. Rev. Stat. Ann. § 9A.44.076 (Rape of a child in the second degree) states,

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Rape of a child in the second degree is a class A felony.

Wash. Rev. Stat. Ann. § 9A.44.076 is a Class A felony offense, seriousness level XI, punishable by imprisonment for 78–102 months, a possible fine up to \$50,000, or both. Wash. Rev. Code Ann. §§ 9A.44.076(2), 9.94A.510, 9.94A.515, 9.94A.550.

¹⁸ Wash. Rev. Code Ann. § 9.68A.011(6) defines a “live performance” as “any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration.”

3. Wash. Rev. Stat. Ann. § 9A.44.079 (Rape of a child in the third degree) states,

- (1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.
- (2) Rape of a child in the third degree is a class C felony.

Wash. Rev. Stat. Ann. § 9A.44.079 is a Class C felony offense, seriousness level VI, punishable by imprisonment for 12–14 months, a possible fine up to \$10,000, or both. Wash. Rev. Code Ann. §§ 9A.44.079(2), 9.94A.510, 9.94A.515, 9.94A.550.

4. Wash. Rev. Stat. Ann. § 9A.44.083 (Child molestation in the first degree) states,

- (1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
- (2) Child molestation in the first degree is a class A felony.

Wash. Rev. Stat. Ann. § 9A.44.083 is a Class A felony offense, seriousness level X, punishable by imprisonment for 51–68 months, a possible fine up to \$50,000, or both. Wash. Rev. Code Ann. §§ 9A.44.083(2), 9.94A.510, 9.94A.515, 9.94A.550.

5. Wash. Rev. Stat. Ann. § 9A.44.086 (Child molestation in the second degree) states,

- (1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
- (2) Child molestation in the second degree is a class B felony.

Wash. Rev. Stat. Ann. § 9A.44.086 is a Class B felony offense, seriousness level VII, punishable by imprisonment for 15–20 months, a possible fine up to \$20,000, or both. Wash. Rev. Code Ann. §§ 9A.44.086(2), 9.94A.510, 9.94A.515, 9.94A.550.

6. Wash. Rev. Stat. Ann. § 9A.44.089 (Child molestation in the third degree) states,

- (1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.
- (2) Child molestation in the third degree is a class C felony.

Wash. Rev. Stat. Ann. § 9A.44.089 is a Class C felony offense, seriousness level V, punishable by imprisonment for 6–12 months, a possible fine up to \$10,000, or both. Wash. Rev. Code Ann. §§ 9A.44.089(2), 9.94A.510, 9.94A.515, 9.94A.550.

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.

Neither Washington’s CSEC laws nor its age-neutral prostitution offense, § 9A.88.030 (Prostitution), refer to Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) to clarify that CSEC victims are sex trafficking victims. Additionally, pursuant to Wash. Rev. Code Ann. § 9A.88.040,

In any prosecution for prostitution under RCW 9A.88.030, it is an affirmative defense that the actor committed the offense as a result of being a victim of trafficking, RCW 9A.40.100, promoting prostitution in the first degree, RCW 9A.88.070, or trafficking in persons under the trafficking victims protection act of 2000, 22 U.S.C. Sec. 7101 et seq. Documentation that the actor is named as a current victim in an information or the investigative records upon which a conviction is obtained for trafficking, promoting prostitution in the first degree, or trafficking in persons shall create a presumption that the person's participation in prostitution was a result of having been a victim of trafficking, promoting prostitution in the first degree or trafficking in persons. 2012 Wa. Ch. 142.

Additionally, Wash. Rev. Code Ann. § 13.40.219 (Arrest for prostitution or prostitution loitering), within the Juvenile Justice Act of 1977, states,

In any proceeding under this chapter related to an arrest for prostitution or prostitution loitering, there is a presumption that the alleged offender meets the criteria for a certification as a victim of a severe form of trafficking in persons as defined in section 7105 of Title 22 of the United States code [the federal Trafficking Victims Protection Act of 2000 (TVPA), as amended], and that the alleged offender is also a victim of commercial sex abuse of a minor.¹⁹

Also, Wash. Rev. Code Ann. § 9.68A.001 (Legislative findings, intent) expresses the legislative finding that the prevention of child sexual exploitation and abuse is a key concern of the government.²⁰

1.3.1 Recommendation: Specifically refer to Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) in the CSEC and juvenile prostitution arrest statutes to identify prostituted minors as victims of sex trafficking.

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.*

The racketeering²¹ statute, Wash. Rev. Code Ann. § 9A.82.080 (Use of proceeds of criminal profiteering), states,

¹⁹ However, reference to the federal definition of “severe forms of trafficking” in 22 U.S.C. § 7105, combined with the term “certification” in Wash. Rev. Code Ann. § 13.40.219, could prove problematic in application of this presumption. 22 U.S.C § 7105(b)(1)(C), which applies to victims in the United States, provides a definition of “victim of a severe form of trafficking in persons” to include a person “subjected to an act or practice” defined in 22 U.S.C. § 7102(8) who is a minor under 18 or subject to certification under subsection (E). Subsection (E) requires the person to be willing to assist in the investigation and prosecution of the trafficker and to have made an application for a T visa that has not been denied or be “a person whose continued presence in the United States the Attorney General the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.” Clarification is needed that the use of the word “certification” in Wash. Rev. Code Ann. § 13.40.219 does not mean that the victim must have the certification in 22 U.S.C. § 7105(b)(1)(E).

²⁰ Wash. Rev. Code Ann. § 9.68A.001 (Legislative findings, intent) states in part that

The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children. . . .

. . . .
. . . It is the intent of the legislature to encourage these children to engage in prevention and intervention services and to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children.

²¹ For additional information on racketeering statutes, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHI-WhitePaperFederalStateRacketeeringGangCrimeLaws.pdf>.

(1) (a) It is unlawful for a person who has knowingly received any of the proceeds derived, directly or indirectly, from a pattern of criminal profiteering²² activity²³ to use or invest, whether directly or indirectly, any part of the proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(b) A violation of this subsection is a class B felony.

(2) (a) It is unlawful for a person knowingly to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property through a pattern of criminal profiteering activity.

(b) A violation of this subsection is a class B felony.

A conviction for use of profiteering proceeds is punishable as a Class B felony, seriousness level IV, by imprisonment for 3-9 months, a fine of \$20,000, or both. Wash. Rev. Code Ann. §§ 9A.82.080(1), (2), 9.94A.515, 9.94A.510, 9.94A.550.

An offender may also face penalties under Wash. Rev. Code Ann. § 9A.82.060 (Leading organized crime) which includes “[i]ntentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.” This is punishable as a Class A felony, seriousness level X, by imprisonment for 51-68 months, a fine of \$50,000, or both. Wash. Rev. Code Ann. §§ 9A.82.060(1)(a), (2)(a), 9.94A.515, 9.94A.510, 9.94A.550. An offender could also be guilty of “[i]ntentionally inciting or inducing others to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity,” which is punishable as a Class B felony by imprisonment up to 10 years, a fine of \$20,000, or both. Wash. Rev. Code Ann. §§ 9A.82.060(1)(b), (2)(b), 9A.20.021(1)(b).

²² Wash. Rev. Code Ann. § 9A.82.010(4) states,

“Criminal profiteering” means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:

- ...
(s) Leading organized crime, as defined in RCW 9A.82.060;
- (t) Money laundering, as defined in RCW 9A.83.020;
- ...
(x) Sexual exploitation of children, as defined in RCW 9.68A.040, 9.68A.050, and 9.68A.060;
- (y) Promoting prostitution, as defined in RCW 9A.88.070 and 9A.88.080;
- ...
(rr) Commercial sexual abuse of a minor, as defined in RCW 9.68A.100; or
- (ss) Promoting commercial sex abuse of a minor, as defined in RCW 9.68A.101
- ...

The text of Wash. Rev. Code Ann. § 9A.82.010 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6252 during the 2nd session of the 62nd Washington Legislature. 2012 Wa. Ch. 139. (WA 2012) (effective June 7, 2012).

²³ Wash. Rev. Code Ann. § 9A.82.010(12) states, “‘Pattern of criminal profiteering activity’ means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.”

Asset forfeiture is available for these offenses. Pursuant to Wash. Rev. Code Ann. § 9A.82.100(4)(f) (Remedies and procedures),²⁴ following a determination of liability, an order may include,

[o]rdering forfeiture first as restitution to any person damaged . . . by an offense defined in RCW 9A.40.100 [Trafficking], then to the state general fund or antiprofitteering revolving fund of the county, as appropriate, to the extent not already ordered to be paid in other damages, of the following:

- (i) Any property or other interest acquired or maintained in violation of RCW 9A.82.060 [Leading organized crime] or 9A.82.080 [Use of proceeds of criminal profiteering – controlling enterprise or realty – conspiracy or attempt].
- (ii) Any property, contractual right, or claim against property used to influence any enterprise that a person has established, operated, controlled, conducted, or participated in the conduct of, in violation of RCW 9A.82.060 or 9A.82.080.
- (iii) All proceeds traceable to or derived from . . . an offense defined in RCW 9A.40.100, 9.68A.100 [Commercial abuse of a minor – penalties], 9.68A.101 [Promoting commercial sexual abuse of a minor – penalty], or 9A.88.070 [Promoting prostitution in the first degree], and all moneys, negotiable instruments, securities, and other things of value significantly used or intended to be used significantly to facilitate commission of the offense

Finally, where the enterprise alleged is a criminal street gang, gang enhancements may apply. Wash. Rev. Code § 9.94A.030(14),²⁵ defines a “criminal street gang-related offense” as:

any felony or misdemeanor offense, whether in this state or elsewhere, that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons:

....

- (f) To provide the gang with any advantage in, or any control or dominance over any criminal market sector, including, but not limited to, . . . , promoting prostitution (chapter 9A.88 RCW); human trafficking (RCW 9A.40.100); promoting sexual abuse of a minor (RCW 9.68A.101); or promoting pornography (chapter 9.68 RCW).

Wash. Rev. Code Ann. § 9.94A.030(12) defines a “[c]riminal street gang” as:

any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associated individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their member or agents.

Wash. Rev. Code Ann. § 9.94A.533(10),²⁶

²⁴ The text of Wash. Rev. Code Ann. § 9A.82.100 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6252 during the 2nd session of the 62nd Washington legislature. 2012 Wa. Ch. 139. (WA 2012) (effective June 7, 2012).

²⁵ The text of Wash. Rev. Code Ann. § 9.94A.030 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6256 during the 2nd session of the 62nd Washington legislature. 2012 Wa. Ch. 143. (WA 2012) (effective June 7, 2012).

²⁶ The text of Wash. Rev. Code Ann. § 9.94A.533 included here and elsewhere in this report includes amendments made by the passage of House Bill 2302 during the 2nd session of the 62nd Washington legislature. 2012 Wa. Ch. 42. (WA 2012) (effective June 7, 2012).

(a) [f]or a person age eighteen or older convicted of any criminal street gang-related felony offense for which the person compensated, threatened, or solicited a minor in order to involve the minor in the commission of the felony offense, the standard sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by one hundred twenty-five percent. If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

(b) This subsection does not apply to any criminal street gang-related felony offense for which involving a minor in the commission of the felony offense is an element of the offense.

1.4.1 Recommendation: Amend Wash. Rev. Code Ann. § 9A.82.010(4) (Definitions—Criminal profiteering act) to include the following offenses within the definition of profiteering activity: Wash. Rev. Code Ann. § 9A.40.100(1)(a) (Trafficking), § 9.68A.102(1) (Promoting travel for commercial sexual abuse of a minor), and § 9.68A.103(1) (Permitting commercial sexual abuse of a minor).

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

Legal Analysis:

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

Washington’s human trafficking law, Wash. Rev. Code Ann. § 9A.40.100 (Trafficking), makes it a crime when a person “obtains . . . by any means another person knowing that force, fraud, or coercion . . . will be used to cause the person to engage in . . . a commercial sex act.” Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) might apply to buyers of sex from victims of domestic minor sex trafficking through the term “obtain.” Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),²⁷ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”²⁸ a person under 18 to engage in commercial sex.²⁹ It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in Washington’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under Wash. Rev. Code Ann. § 9A.40.100. Even if applied, however, the placement of the word “obtain” in Wash. Rev. Code Ann. § 9A.40.100, requires the buyer know “that force, fraud, or coercion as defined in RCW 9A.36.070 will be used to cause the person to engage in forced labor, involuntary servitude, a sexually explicit act,³⁰ or a commercial sex act.” This requirement makes it less likely that Wash. Rev. Code Ann. § 9A.40.100 would be applicable against buyers.

- 2.1.1 Recommendation: Amend Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) to expressly apply to buyers of commercial sex with minors.

²⁷ 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.).

²⁸ 18 U.S.C. § 1591(a).

²⁹ 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>.

³⁰ See *supra* note 3.

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

Wash. Rev. Code Ann. § 9.68A.100(1) (Commercial sexual abuse of a minor) includes the crime of buying sex with a minor.³¹ A conviction under Wash. Rev. Code Ann. § 9.68A.100(1) is punishable as a Class B felony, seriousness level VIII, by imprisonment for 21 months to 10 years, a possible fine up to \$20,000, or both imprisonment and a fine.³² Wash. Rev. Code Ann. §§ 9.68A.100(2), 9.94A.515, 9.94A.510, 9.94A.550, 9A.20.021.

Several sexual offenses could be used to prosecute certain buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child and do not refer to the human trafficking statute to bring these criminal offenses within the ambit of human trafficking under Wash. Rev. Code Ann. § 9A.40.100 (Trafficking).³³

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

Wash. Rev. Code Ann. § 9.68A.100(1) (Commercial sexual abuse of a minor) specifically criminalizes paying for commercial sex with a minor. A conviction under Wash. Rev. Code Ann. § 9.68A.100(1) is punishable as a Class B felony, seriousness level VIII, by imprisonment for 21 months to 10 years and a possible fine up to \$20,000. Wash. Rev. Code Ann. §§ 9.68A.100(2), 9.94A.515, 9.94A.510, 9.94A.550. Washington's general solicitation law, Wash. Rev. Code Ann. § 9A.88.110 (Patronizing a prostitute), is age neutral and does not differentiate between paying for sex with adults and paying for sex with minors. The penalty is a misdemeanor.

2.3.1 Recommendation: Amend Wash. Rev. Code Ann. § 9A.88.110 (Patronizing a prostitute) to distinguish the solicitation of a minor by providing heightened penalties when the person solicited or patronized is a minor, or by referring cases involving minors to Wash. Rev. Code Ann. § 9.68A.100 (Commercial sexual abuse of a minor), and Wash. Rev. Code Ann. § 9A.44.100 (Trafficking).

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

Penalties for buyers of commercial sex with minors prosecuted for Wash. Rev. Code Ann. § 9.68A.100 (Commercial sexual abuse of a minor) are not as high as federal penalties for offenders of domestic minor sex trafficking prosecuted under the federal child sex trafficking law. A conviction under Wash. Rev. Code Ann. § 9.68A.100(1) (Commercial sexual abuse of a minor) is punishable as a Class B felony, seriousness level VIII, by imprisonment for 21 months to 10 years, a possible fine up to up to \$20,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.94A.515, 9.94A.510, 9.94A.550, 9A.20.021.

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 offense³⁴ against a minor. 18 U.S.C. § 3559(e)(1). To the

³¹ See *supra* Section 1.2 for the relevant provisions.

³² See *supra* note 11.

³³ See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

³⁴ 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),

extent buyers can be prosecuted under other federal CSEC laws,³⁵ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.³⁶

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.*

Wash. Rev. Code Ann. § 9.68A.090(1) (Communication with minor for immoral purposes) makes it illegal when a person “communicates with a minor for immoral purposes, or . . . communicates with someone the person believes to be a minor for immoral purposes.” A first conviction under Wash. Rev. Code Ann. § 9.68A.090(1) is punishable as a gross misdemeanor. Under Wash. Rev. Code Ann. § 9.68A.090(2), it is a Class C felony “if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A [Sexual exploitation of children], 9A.44 [Sex offenses], or 9A.64 [Family offenses] RCW or of any other felony sexual offense in [Washington] or any other state . . .” The penalty is also increased to a Class C felony if the communication is done “through the sending of an electronic communication,” which could include email or Internet communications. This statute does not specifically address commercial sex acts.

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

Wash. Rev. Code Ann. § 9.68A.110(3) (Certain defenses barred, permitted) states that “it is not a defense that the defendant did not know the alleged victim’s age” for prosecutions under Wash. Rev. Code Ann. § 9.68A.040 (Sexual exploitation of a minor), § 9.68A.090 (Communication with minor for immoral purposes), § 9.68A.100 (Commercial sexual abuse of a minor), § 9.68A.101 (Promoting commercial sexual abuse of a minor), or § 9.68A.102 (Promoting travel for commercial sexual abuse of a minor). However, Wash. Rev. Code Ann. § 9.68A.110(3) states,

It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver’s license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

Wash. Rev. Code Ann. § 9.68A.110(2) states in part that “it is not a defense that the defendant did not know the age of the child depicted in the visual or printed matter” for prosecutions involving child pornography under Wash. Rev. Code Ann. § 9.68A.050 (Dealing in depictions of minor engaged in sexually explicit conduct), § 9.68A.060 (Sending, bringing into state depictions of minor engaged in sexually explicit conduct), § 9.68A.070 (Possession of depictions of minor engaged in sexually explicit conduct), or § 9.68A.080 (Reporting of depictions of minor engaged in sexually explicit conduct—civil immunity). However, “It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant was not in possession of any facts on the basis of which he or she should reasonably have known that

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).

³⁵ 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).

³⁶ 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).

the person depicted was a minor.” Other defenses based on age exist for non-commercial sex offenses under chapter 9A.44 (Sex offenses) and are listed in Wash. Rev. Code Ann. § 9A.44.030 (Defenses to prosecution under this chapter).

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

Penalties for buying sex with a minor under Wash. Rev. Code Ann. § 9.68A.100 (Commercial sex abuse of a minor) are not staggered according to the victim’s age—all minors under 18 who are commercially sexually abused are protected equally.

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

Buyers may be required to pay fines. A buyer convicted under Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) is subject to a possible fine up to \$50,000, while one convicted under Wash. Rev. Code Ann. § 9.68A.100(1) (Commercial sexual abuse of a minor) may be required to pay a possible fine up to \$20,000. Wash. Rev. Code Ann. §§ 9A.40.100 (1)(b), (2)(b), 9.68A.100(2), 9.94A.550.

Additionally, Wash. Rev. Code Ann. § 9.68A.105(1)(a) (Additional fee assessment) mandates a fine of \$5,000 for

a person who is either convicted or given a deferred sentence or a deferred prosecution or who has entered into a statutory or nonstatutory diversion agreement as a result of an arrest for violating RCW 9.68A.100 [Commercial sexual abuse of a minor], 9.68A.101 [Promoting commercial sexual abuse of a minor], or 9.68A.102 [Promoting travel for commercial sexual abuse of a minor], or a comparable county or municipal ordinance

Furthermore, Wash. Rev. Code Ann. § 9A.40.100 (Trafficking)³⁷ was recently amended to mandate a \$3,000 fee³⁸ for “a person who is either convicted or given a deferred prosecution or who has entered into a statutory or nonstatutory diversion agreement as a result of an arrest for a violation of a trafficking crime . . .”

Wash. Rev. Code Ann. § 9A.88.140(2) (Vehicle impoundment—fees and fines) provides for mandatory impoundment of vehicles and states,

Upon an arrest for a suspected violation of commercial sexual abuse of a minor, promoting commercial sexual abuse of a minor, or promoting travel for commercial sexual abuse of a minor, the arresting law enforcement officer shall impound the person’s vehicle if (a) the motor vehicle was used in the commission of the crime; and (b) the person arrested is the owner of the vehicle or the vehicle is a rental car as defined in RCW 46.04.465 [Rental car].

Wash. Rev. Code Ann. § 9A.88.140(4) sets a \$2,500 fine to the impounding agency to redeem the vehicle.

Buyers are also subject to a number of discretionary criminal forfeiture proceedings.³⁹ Assets related to violations of Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) and § 9.68A.100 (Commercial sexual abuse of a

³⁷ The text of Wash. Rev. Code Ann. § 9A.40.100 included here and elsewhere in this report includes amendments made by the passage of House Bill 1983 during the 2nd Session of the 62nd Washington Legislature. 2012 Wa. Ch. 134. (WA 2012) (effective June 7, 2012).

³⁸ As amended, Wash. Rev. Code Ann. § 9A.40.100 also states in subsection (3)(c)(I) that “at least fifty percent of the revenue from fees imposed under this section must be spent on prevention, including education programs for offenders, such as job school, and rehabilitation services, such as mental health and substance abuse counseling, parenting skills, training, house relief, education, vocational training, drop-in centers, and employment counseling. 2012 Wa. Ch. 134.

minor) are subject to criminal forfeiture. Wash. Rev. Code §§ 10.105.010(1), 10.105.900. Wash. Rev. Code Ann. § 10.105.010(1) (Seizure and forfeiture) states in part,

The following are subject to seizure and forfeiture and no property right exists in them: All personal property, including, but not limited to, any item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, security, or negotiable instrument, which has been or was actually employed as an instrumentality in the commission of, or in aiding or abetting in the commission of any felony, or which was furnished or was intended to be furnished by any person in the commission of, as a result of, or as compensation for the commission of, any felony, or which was acquired in whole or in part with proceeds traceable to the commission of a felony. No property may be forfeited under this section until after there has been a superior court conviction of the owner of the property for the felony in connection with which the property was employed, furnished, or acquired.

. . . .

Wash. Rev. Code Ann. § 10.105.010(2) provides for seizure in the following manner:

Personal property subject to forfeiture under this chapter may be seized by any law enforcement officer of this state upon process issued by any superior court having jurisdiction over the property. Seizure of personal property without process may be made if:

- (a) The seizure is incident to an arrest or a search under a search warrant;
- (b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding;
- (c) A law enforcement officer has probable cause to believe that the property is directly dangerous to health or safety; or
- (d) The law enforcement officer has probable cause to believe that the property was used or is intended to be used in the commission of a felony.

Disposition of the forfeited property is governed by Wash. Rev. Code Ann. § 10.105.010(6), which provides in relevant part,

When property is forfeited under this chapter, after satisfying any court-ordered victim restitution, the seizing law enforcement agency may:

- (a) Retain it for official use or upon application by any law enforcement agency of this state release such property to such agency for the exclusive use of enforcing the criminal law;
- (b) Sell that which is not required to be destroyed by law and which is not harmful to the public.

Buyers may face additional forfeiture penalties under Wash. Rev. Code Ann. § 9A.88.150⁴⁰ relating to seizure and forfeiture of property rights. Pursuant to § 9A.88.150,

- (1) The following are subject to seizure and forfeiture and no property rights exist in them:
 - (a) Any property or other interest acquired or maintained in violation of RCW 9.68A.100 [Commercial sexual abuse of a minor] . . . to the extent of the investment of funds, and any appreciation of income attributable to the investment, from a violation of RCW 9.68A.100
 - (b) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, in any manner to facilitate a violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070, except that:
 - (i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or

³⁹ For additional information on asset forfeiture laws and procedure, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

⁴⁰ The text of Wash. Rev. Code Ann. § 9A.88 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6253 during the 2nd session of the 62nd Washington legislature, 2012 Wa. Ch. 140. (WA 2012) (effective June 7, 2012).

other person in charge of the conveyance is a consenting party or privy to a violation of RCW 9.68A.100, 9.68A.101, or 9A.99.070.

....
(c) Any property, contractual right, or claim against property used to influence any enterprise that a person has established, operated, controlled, conducted, or participated in the conduct of, in violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070;(d) All proceeds traceable to or derived from an offense defined in RCW 9.68A.100, 9.68A.101, or 9A.88.070 and all moneys, negotiable instruments, securities, and other things of value significantly used or intended to be used significantly to facilitate commission of the offense;

(e) All books, record, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070;

(f) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070, all tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070, and all moneys, negotiable instruments, and securities used of intended to be used to facilitate any violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070. A forfeiture of money, negotiable instruments, securities, or other tangible or intangible property encumbered by a bona fide security interest is subject to the interest of the secured party if, at the time the security interest was created, the secured party neither had knowledge of nor consented to the act or omission. No personal property may be forfeited under this subsection (1) (f), to the extent of the interest of an owner, by reason of any act or omission, which that owner established was committed or omitted without the owner's knowledge or consent; and

(g) All real property, including any right title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for a violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070, or which have been acquired in whole or in part in violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070, if a substantial nexus exists between the violation and the real property. However:

(i) No property may be forfeited pursuant to this subsection (1) (g), to the extent of the interest of an owner, by reason of any act or omission committed or omitted without the owner's knowledge or consent;

(ii) A forfeiture of real property encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party, at the time the security interest was created neither had knowledge or consented to the act or omission.

....

Seizure of the aforementioned property is governed by subsection (2), which provides that real or personal property subject to forfeiture may be seized by any law enforcement officer upon process issued by any superior court having jurisdiction over the property. Seizure may be made without process if:

(a) The seizure is incident to an arrest or a search under a search warrant;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding; or

(c) The law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of RCW 9.68A.100, 9.68A.101, or 9A.88.070.

Pursuant to Wa. Rev. Code Ann. § 9A.88.150(7), "When property is forfeited under this chapter, the seizing law enforcement agency shall sell the property that is not required to be destroyed by law and that is not harmful to the public." "By January 31st of each year, each seizing agency shall remit to the state treasurer the net proceeds of any property forfeited during the preceding calendar year. Money remitted shall be deposited in the prostitution prevention and intervention account under RCW 43.63A.740." Wa. Rev. Code Ann. § 9A.88.150(9).

Under Wash. Rev. Code Ann. § 9.68A.120 (Seizure and forfeiture of property) buyers involved in child pornography may also be required to forfeit the following:

- (1) All visual or printed matter that depicts a minor engaged in sexually explicit conduct.
- (2) All raw materials, equipment, and other tangible personal property of any kind used or intended to be used to manufacture or process any visual or printed matter that depicts a minor engaged in sexually explicit conduct, and all conveyances, including aircraft, vehicles, or vessels that are used or intended for use to transport, or in any manner to facilitate the transportation of, visual or printed matter in violation of RCW 9.68A.050 [Dealing in depictions of minor engaged in sexually explicit conduct] or 9.68A.060 [Sending, bringing into state depictions of minor engaged in sexually explicit conduct]
- (3) All personal property, moneys, negotiable instruments, securities, or other tangible or intangible property furnished or intended to be furnished by any person in exchange for visual or printed matter depicting a minor engaged in sexually explicit conduct, or constituting proceeds traceable to any violation of this chapter.
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Property subject to forfeiture under this chapter may be seized by any law enforcement officer of this state upon process issued by any superior court having jurisdiction over the property. Pursuant to Wash. Rev. Code Ann. §9.68A.120(4), seizure without process may be made if:

- (a) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
- (b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;
- (c) A law enforcement officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (d) The law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

Disposition of the property under this section is governed by Wash. Rev. Code Ann. §9.68A.120(9), which states that the seizing agency may retain the property for official use or sell that which is not required to be destroyed by law. Proceeds of the sale shall first be used to pay expenses arising from the investigation and forfeiture proceedings. Fifty percent of the money remaining after payment of expenses shall be deposited in the state general fund and fifty percent shall be deposited in the general fund of the state, county, or city of the seizing law enforcement agency. Wash. Rev. Code Ann. §9.68A.120(9).

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

A conviction under Wash. Rev. Code Ann. § 9.68A.070(1) (Possession of depictions of minor engaged in sexually explicit conduct) in the first degree is punishable as a Class B felony, seriousness level VI, by imprisonment for 12–102 months and a possible fine up to \$20,000. Wash. Rev. Code Ann. §§ 9.68A.070(1)(b), 9.94A.515, 9.94A.510, 9.94A.550. Under Wash. Rev. Code Ann. § 9.68A.070(1)(c), “For the purposes of determining the unit of prosecution . . . each depiction or image of visual or printed matter constitutes a separate offense.” When committed in the second degree a conviction under Wash. Rev. Code Ann. § 9.68A.070(2) is punishable as a Class C felony, seriousness level IV, by imprisonment for 3–60 months, a possible fine up to \$10,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.94A.515, 9.94A.510, 9.94A.550, 9A.020.021. Under Wash. Rev. Code Ann. § 9.68A.070(2), “For the purposes of determining the unit of prosecution . . . each incident of possession of one or more depictions or images of visual or printed matter constitutes a separate offense.” A conviction under Wash. Rev. Code Ann. § 9.68A.075 (Viewing depictions of a minor engaged in sexually explicit conduct) in the first degree is punishable as a Class B felony, seriousness level IV, by imprisonment for 3–84 months, a possible fine up to \$20,000, or both

imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.94A.515, 9.94A.510, 9.94A.550. When committed in the second degree it is punishable as a Class C felony, currently unranked in seriousness level, by imprisonment of no more than 12 months and a possible fine up to \$20,000. Wash. Rev. Code Ann. §§ 9.94A.505(2)(b), 9.94A.550. Under Wash. Rev. Code Ann. § 9.68A.075(4), “For the purposes of this section, each separate internet session of intentionally viewing over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.”⁴¹ Additionally, under Wash. Rev. Code Ann. § 9.68A.075(3),

⁴¹ Wash. Rev. Code Ann. § 9.68A.001(Legislative findings, intent) expresses legislative intent by stating in part,

By amending current statutes governing depictions of a minor engaged in sexually explicit conduct, it is the intent of the legislature to ensure that intentional viewing of and dealing in child pornography over the internet is subject to a criminal penalty without limiting the scope of existing prohibitions on the possession of or dealing in child pornography, including the possession of electronic depictions of a minor engaged in sexually explicit conduct. It is also the intent of the legislature to clarify, in response to *State v. Sutherby*, 204 P.3d 916 (2009), the unit of prosecution for the statutes governing possession of and dealing in depictions of a minor engaged in sexually explicit conduct. It is the intent of the legislature that the first degree offenses under RCW 9.68A.050 [Dealing in depictions of minor engaged in sexually explicit conduct], 9.68A.060 [Sending, bringing into state depictions of minor engaged in sexually explicit conduct], and 9.68A.070 [Possession of depictions of minor engaged in sexually explicit conduct] have a per depiction or image unit of prosecution, while the second degree offenses under RCW 9.68A.050, 9.68A.060, and 9.68A.070 have a per incident unit of prosecution as established in *State v. Sutherby*, 204 P.3d 916 (2009). Furthermore, it is the intent of the legislature to set a different unit of prosecution for the new offense of viewing of depictions of a minor engaged in sexually explicit conduct such that each separate session of intentionally viewing over the internet of visual depictions or images of a minor engaged in sexually explicit conduct constitutes a separate offense.

The decisions of the Washington Supreme court in *State v. Boyd*, 260 W.2d 424, 158 P.3d 54 (2007), and *State v. Grenning*, 169 Wn.2d 47, 234 P.3d 169 (2010), require prosecutors to duplicate and distribute depictions of a minor engaged in sexually explicit conduct (“child pornography”) as part of the discovery process in criminal prosecution. The legislature finds that the importance of protecting children from repeat exploitation in pornography is not being given sufficient weight under these decisions. The importance of protecting children from repeat sexual exploitation in child pornography is based upon the following findings:

- (1) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited;
- (2) The state has a compelling interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain;
- (3) Every instance of viewing images of child pornography represents a renewed violation of the victims and a repetition of their abuse;
- (4) Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys;
- (5) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violations and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense. The legislature is also aware that the Adam Walsh child protection and safety act, P.L. 109-248, 120 Stat. 587 (2006), codified at 18 U.S.C. Sec. 3509(m), prohibits the duplication and distribution of child pornography as part of the discovery process in federal prosecutions. This federal law has been in effect since 2006, and upheld repeatedly as constitutional. Courts interpreting the Walsh act have found that such limitations can be employed while still providing the defendant due process. The legislature joins congress, and the legislatures of other states that have passed similar provisions, in protecting these child victims so that our justice system does not cause repeat exploitation, while still providing due process to criminal defendants.

The text of Wash. Rev. Code Ann. § 9.68A.001 included here and elsewhere in this report includes amendments made by the passage of House Bill 2177 during the 2nd session of the 62nd Washington legislature. 2012 Wa. Ch. 135. (WA 2012) (effective June 7, 2012).

For the purposes of determining whether a person intentionally viewed over the internet a visual or printed matter depicting a minor engaged in sexually explicit conduct in subsection (1) or (2) of this section, the trier of fact shall consider the title, text, and content of the visual or printed matter, as well as the internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

In comparison, a federal conviction for possession of child pornography⁴² is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁴³ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁴⁴

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

Wash. Rev. Code Ann. § 9A.44.130(1)(a)⁴⁵ (Registration of sex offenders and kidnapping offenders) requires adults residing in Washington, among others, who have been “convicted of any sex offense or kidnapping offense” to register for the sex offender registry. Wash. Rev. Code Ann. § 9A.44.128(10) (Definitions applicable to RCW 9A.44.130 through 9A.44.145, 10.01.200, 43.43.540, 70.48.470, and 72.09.330), with its cross reference to the definition of “sex offense” in Wash. Rev. Code Ann. § 9.94A.030 (Definitions), defines “sex offense” to include, by reference, felony violations of chapter 9.68A (Sexual exploitation of children) (with the exception of Wash. Rev. Code Ann. § 9.68A.080) . . . if the person has a prior conviction for one of these offenses.”⁴⁶ As a result, buyers convicted of Wash. Rev. Code Ann. § 9.68A.100 are required under to register as sex offenders. In addition, those convicted for possessing and viewing child pornography under Wash. Rev. Code Ann. § 9.68A.070 and § 9.68A.075, are required to register as sex offenders. However, buyers convicted of Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) are not expressly required to register, though a special allegation of sexual motivation in a sex trafficking of a minor crime will result in a requirement to register as a sex offender. Wash. Rev. Code Ann. §§ 9.94A.030(46)(c), 9.94A.835, 9A.44.128(10), 9A.44.130.

⁴² 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).

⁴³ 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).

⁴⁴ 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).

⁴⁵ The text of Wash. Rev. Code Ann. § 9A.44.128 included here and elsewhere in this report includes amendments made by the passage of House Bill 1983 during the 2nd session of the 62nd Washington Legislature. 2012 Wa. Ch. 134. (WA 2012) (effective June 7, 2012).

⁴⁶ The text of Wash. Rev. Code Ann. § 9A.44.128 included here and elsewhere in this report includes amendments made by the passage of House Bill 1983 during the 2nd session of the 62nd Washington Legislature. 2012 Wa. Ch. 134. (WA 2012) (effective June 7, 2012).

2.10.1 Recommendation: Add Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) to the list of sex offenses in Wash. Rev. Code Ann. § 9A.44.128 (Definitions applicable to RCW 9A.44.130 through 9A.44.145, 10.01.200, 43.43.540, 70.48.470, and 72.09.330) for which offenders must register to ensure sex trafficking is identified as a crime requiring registration as a sex offender.

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.

Wash. Rev. Code Ann. § 9A.40.100(1)(a) (Trafficking)⁴⁷ in the first degree is punishable as a Class A felony, seriousness level XIV, by imprisonment for 123–397 months and a possible fine up to \$50,000. Wash. Rev. Code Ann. §§ 9A.40.100(1)(b), 9.94A.515, 9.94A.510, 9.94A.550. Convictions for human trafficking in the second degree, under Wash. Rev. Code Ann. § 9A.40.100(2)(a) and for Wash. Rev. Code Ann. § 9.68A.101 (Promoting commercial sexual abuse of a minor) are also punishable as Class A felonies, with a seriousness level of XII, by imprisonment for 93–318 months and a possible fine up to \$50,000.⁴⁸ Wash. Rev. Code Ann. §§ 9A.40.100(2)(b), 9.68A.101(2), 9.94A.515, 9.94A.510, 9.94A.550. Wash. Rev. Code Ann. § 9.68A.102 (Promoting travel for commercial sexual abuse) is punishable as a Class C felony, unranked on the sentencing grid, by imprisonment up to 12 months and a possible fine up to \$10,000.⁴⁹ Wash. Rev. Code Ann. §§ 9.68A.102(2), 9.94A.505(2)(b), 9.94A.550.

Traffickers may also be punished for “advertising commercial sexual abuse of a minor” under Wash. Rev. Code Ann. §9.68A.104 (Advertising commercial sexual abuse of a minor—Penalty)⁵⁰ as established by 2012 Wa. Ch. 138.⁵¹ Under Wash. Rev. Code Ann. § 9.68A.104 (1),

⁴⁷ See *supra* Section 1.1 for the relevant provisions.

⁴⁸ See *supra* Sections 1.1 and 1.2 for the relevant provisions.

⁴⁹ See *supra* Section 1.2 for the relevant provisions.

⁵⁰ The text of Wash. Rev. Stat. § 9.68A included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6251 during the 2nd session of the 62nd Washington legislature. 2012 Wa. Ch. 138. (WA 2012) (effective June 7, 2012). As of July 7, 2012, this law was temporarily restrained from taking effect by *Backpage.com v. McKenna*, No. 2:12-CV-00954 (W.D. Wash. filed June 4, 2012), and a preliminary injunction barring prosecution under the law pending a trial on the merits was granted on July 27, 2012. *Backpage.com v. McKenna*, No. C12-954-RSM (W.D. Wash July 17, 2012). The temporary restraining order was extended until joint submission of an order for preliminary injunction, *Id.*, which was submitted on August 6, 2012 and granted on September 25, 2012. *Backpage.com v. McKenna*, No. 2:12-cv-000954-RSM (W.D. Wash Sept. 25, 2012). The law therefore is in effect but the preliminary injunction on enforcement and prosecution is to remain in effect until the conclusion of the lawsuit. *Id.*

⁵¹ The 2012 Washington legislature also included a section on legislative findings in Senate Bill 6251 (2012 Wa. Ch. 138), appended as a note to Wash. Code Ann. § 9.68A.104 expressing that:

The legislature finds it unacceptable that Washington’s children are being sold for sex in advertisements ... The legislature finds that the practice of escort services including minors who are being sold for sex, a form of sex trafficking and commercial abuse of minors ... The legislature is committed to eliminating trafficking of minors in a manner consistent with federal laws prohibiting sexual exploitation of children.

[a] person commits the offense of advertising commercial sexual abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act,⁵² which is to take place in the state of Washington and that includes the depiction⁵³ of a minor.

Advertising commercial sexual abuse of a minor is a Class C felony. Wash. Rev. Code Ann. § 9.68A.104(3). Furthermore, as Wash. Rev. Code Ann. § 9.68A.104(2) stipulates, “it is not a defense that the defendant did not know the age of the minor depicted in the advertisement.” However, pursuant to 2012 Wash. Rev. Code Ann. § 9.68A.104(2),

. . . [i]t is a defense, which the defendant must prove by a preponderance of the evidence, that the defendant made a reasonable bona fide attempt to ascertain the true age of the minor depicted in the advertisement by requiring, prior to publication, dissemination, or display of the advertisement, production of a driver’s license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written representations of the minor’s age, or the apparent age of the minor as depicted. In order to invoke the defense, the defendant must produce for inspection by law enforcement a record of the identification used to verify the age of the person depicted in the advertisement.

A trafficker could also be convicted under Wash. Rev. Code Ann. § 9A.83.020 (Money laundering), which states,

- (1) A person is guilty of money laundering when that person conducts or attempts to conduct a financial transaction involving the proceeds⁵⁴ of specified unlawful activity⁵⁵ and:
- (a) Knows the property is proceeds of specified unlawful activity; or
 - (b) Knows that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds, and acts recklessly as to whether the property is proceeds of specified unlawful activity; or
 - (c) Knows that the transaction is designed in whole or in part to avoid a transaction reporting requirement under federal law.

A conviction for money laundering is punishable as a Class B felony by imprisonment up to 10 years, a fine of \$20,000, or both. Wash. Rev. Code Ann. §§ 9A.83.020(4), 9A.20.021(1)(b).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)⁵⁶ 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.

⁵² Wash. Rev. Code Ann. § 9.68A.104(1)(b) defines “[c]ommercial sex act” as “any act of sexual contact or sexual intercourse, both as defines in chapter 9A.44 RCW, for which something of value is given or received by any person.” Wash. Rev. Code Ann. § 9.68A.104 (1)(a) defines “[a]dvertisement for a commercial sex act” as “any advertisement or offer in electronic or print media, which includes either an explicit or implicit offer for a commercial sex act to occur in Washington.” 2012 Wa. Ch. 138.

⁵³ Wash. Rev. Code Ann. § 9.68A.104(1)(c) defines “[d]epiction” as “any photograph or visual or printed matter as defined in RCW 9.68A.011 (2) and (3).”

⁵⁴ Pursuant to Wash. Rev. Code Ann. § 9A.83.010(5), “Proceeds’ means any interest in property directly or indirectly acquired through or derived from an act or omission, and any fruits of this interest, in whatever form.”

⁵⁵ Wash. Rev. Code Ann. § 9A.83.010(7) states, “‘Specified unlawful activity’ means an offense committed in this state that is a class A or B felony under Washington law or that is listed as ‘criminal profiteering’ in RCW 9A.82.010, or an offense committed in any other state that is punishable under the laws of that state by more than one year in prison, or an offense that is punishable under federal law by more than one year in prison.”

⁵⁶ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

§§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense⁵⁷ against a minor.

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

Creating child pornography is illegal under Wash. Rev. Code Ann. § 9.68A.040 (Sexual exploitation of a minor),⁵⁸ which is punishable as a Class B felony, seriousness level IX, by imprisonment for 31 months to 10 years, a possible fine up to \$20,000, or both. Wash. Rev. Code Ann. §§ 9.68A.040(2), 9.94A.515, 9.94A.510, 9.94A.550, 9A.20.021. Acts related to the distribution of child pornography is illegal under Wash. Rev. Code Ann. § 9.68A.050 (Dealing in depictions of minor engaged in sexually explicit conduct) and § 9.68A.060 (Sending, bringing into state depictions of minor engaged in sexually explicit conduct). Wash. Rev. Code Ann. § 9.68A.050(1)(a), (2)(a) states,

(1)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she:

- (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells a visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e) [Definitions]; or
- (ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e).

....

(2)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when he or she:

- (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g); or
- (ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

Wash. Rev. Code Ann. § 9.68A.060(1)(a), (2)(a) states,

(1)(a) A person commits the crime of sending or bringing into the state depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, a visual or printed matter that depicts a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e).

....

(2)(a) A person commits the crime of sending or bringing into the state depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, any visual or printed matter that depicts a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

Wash. Rev. Code Ann. § 9.68A.050(1)(a) and § 9.68A.060(1)(a) are punishable as Class B felonies, seriousness level VII, by imprisonment for 15–116 months and a possible fine up to \$20,000. Wash. Rev. Code Ann. §§ 9.68A.050(1)(b), 9.68A.060(1)(b), 9.94A.515, 9.94A.510, 9.94A.550. Wash. Rev. Code Ann. § 9.68A.050(2)(a) and § 9.68A.060(2)(a) are punishable as Class C felonies, seriousness level of V, by imprisonment for 6–60 months, a fine up to \$10,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.68A.050(2)(b), 9.68A.060(2)(b), 9.94A.515, 9.94A.510, 9.94A.550, 9A.20.021.

⁵⁷ See *supra* note 34.

⁵⁸ See *supra* Section 1.2 for the relevant provisions.

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 offense⁵⁹ against a minor. Additionally, a federal conviction for distribution of child pornography⁶⁰ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁶¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁶²

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.*

Wash. Rev. Code Ann. § 9.68A.090 (Communication with minor for immoral purposes)⁶³ prohibits communication with a minor or someone one believes to be a minor for immoral purposes. While this is a gross misdemeanor, it is increased to a Class C felony in Wash. Rev. Code Ann. § 9.68A.090(2) when the communication is done through “the sending of an electronic communication,” such as by email or over the Internet. This statute does not specifically address commercial sex acts.

3.3.1 Recommendation: Amend Wash. Rev. Code Ann. § 9.68A.090 (Communication with minor for immoral purposes) to expressly apply the penalty enhancement to use of the Internet to commit CSEC or sex trafficking offenses.

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

Traffickers convicted under Wash. Rev. Code Ann. § 9A.40.100(1)(a), (2)(a) (Trafficking) or § 9.68A.101 (Promoting commercial sexual abuse of a minor) may be required to pay possible fines up to \$50,000. Wash. Rev. Code Ann. §§ 9A.40.100(1)(b), (2)(b), 9.68A.101(2), 9.94A.550. Those convicted of Wash. Rev. Code Ann. § 9.68A.040 (Sexual exploitation of a minor) may be required to pay a possible fine up to \$20,000, while traffickers convicted under Wash. Rev. Code Ann. § 9.68A.102 (Promoting travel for commercial sexual abuse) may be required to pay a possible fine up to \$10,000. Wash. Rev. Code Ann. §§ 9.68A.040(2), 9.68A.102(2), 9.94A.550. A conviction for money laundering could also result in a fine of \$20,000. Wash. Rev. Code Ann. §§ 9A.83.020(4), 9A.20.021(1)(b). Mandatory fines are assessed pursuant to Wash. Rev. Code Ann. § 9A.88.140(2) (Vehicle impoundment—fees and fine), which provides for mandatory impoundment of vehicles, stating, “Upon an arrest for a suspected violation of commercial sexual abuse of a minor, promoting commercial sexual abuse of a minor, or promoting travel for commercial sexual abuse of a minor, the arresting law enforcement officer shall impound the person’s vehicle if (a) the motor vehicle was used in the commission

⁵⁹ See *supra* note 34.

⁶⁰ 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).

⁶¹ 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).

⁶² 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).

⁶³ See *supra* Section 2.5 for the relevant provisions.

of the crime; and (b) the person arrested is the owner of the vehicle or the vehicle is a rental car as defined in RCW 46.04.465.” Wash. Rev. Code Ann. § 9A.88.140(4) sets a \$2,500 fine to be paid to the impounding agency in order to redeem the vehicle. In addition, Wash. Rev. Code Ann. § 9.68A.105 (Additional fee assessment) imposes a non-discretionary \$5,000 penalty for any conviction under Wash. Rev. Code Ann. § 9.68A.101 (Promoting commercial sexual abuse of a minor).

Traffickers may also be required to pay restitution at the discretion of the court. Pursuant to Wash. Rev. Code Ann. § 9.94A.750 (Restitution),

(1) If restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days.

....

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender’s gain or the victim’s loss from the commission of the offense.

...

(5) Restitution may be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section. In addition, restitution may be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor’s recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(6) Restitution for the rape of a child in the first, second, or third degree, in which the victim becomes pregnant, shall include:

(a) All of the victim’s medical expenses that are associated with the rape and resulting pregnancy; and

(b) child support for any child born as a result of the rape if child support is ordered pursuant to a proceeding in superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim’s child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior court order for support of the victim’s child. . . .

....

Traffickers also face asset forfeiture under several statutes.⁶⁴

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

Wash. Rev. Code Ann. § 9A.44.130(1)(a) (Registration of sex offenders and kidnapping offenders) requires adults residing in Washington, among others, who have been “convicted of any sex offense or kidnapping offense” to register for the sex offender registry. Wash. Rev. Code Ann. § 9A.44.128(10) (Definitions applicable to RCW 9A.44.130 through 9A.44.145, 10.01.200, 43.43.540, 70.48.470, and 72.09.330), with its cross reference to the definition of “sex offense” in Wash. Rev. Code Ann. § 9.94A.030 (Definitions), defines “sex offense” to include, by reference to felony violations of chapter 9.68A (Sexual exploitation of children), Wash. Rev. Code Ann. § 9.68A.100 (Commercial sexual abuse of a minor), § 9.68A.102 (Promoting commercial sexual abuse of a minor), § 9.68A.103 (Permitting commercial sexual abuse of a minor), § 9.68A.040 (Sexual exploitation of a minor), § 9.68A.050 (Dealing in depictions of minor engaged in sexually

⁶⁴ See Section 2.8 *supra* for a full discussion of asset seizure and forfeiture provisions.

explicit conduct), and § 9.68A.060 (Sending, bringing into state depictions of minor engaged in sexually explicit conduct). The definition of a sex offense under Wash. Rev. Code Ann. § 9A.44.128⁶⁵ also includes “[a] violation under RCW 9A.99.070 (promoting prostitution in the first degree) or RCW 9A.88.080 (promoting prostitution in the second degree) if the person has a prior conviction for one of these offenses.” Traffickers convicted of Wash. Rev. Code Ann. § 9A.40.100 (Human trafficking) are not expressly required to register, however, a special allegation of sexual motivation in a sex trafficking of a minor crime will result in a requirement to register as a sex offender. Wash. Rev. Code Ann. §§ 9.94A.030(46)(c), 9.94A.835, 9A.44.128(10), 9A.44.130.

- 3.5.1 Recommendation: Add Wash. Rev. Code Ann. § 9A.40.100 (Human trafficking) to the list of sex offenses in Wash. Rev. Code Ann. § 9A.44.128 for which offenders must register to ensure sex trafficking is identified as a crime requiring registration as a sex offender.

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.*

Grounds and procedures for termination of parental rights are limited and do not apply specifically to crimes of human trafficking or commercial sexual exploitation of children through prostitution or pornography. Wash. Rev. Code Ann. § 13.34.132 (Petition seeking termination of parent-child relationship) and § 13.34.180 (Order terminating parent and child relationship) outline the grounds for terminating parental rights. Wash. Rev. Code Ann. § 13.34.132 sets out the requirements for termination of parental rights, and one prong states, “Because of the existence of aggravated circumstances, reasonable efforts to unify the family are not required. Notwithstanding the existence of aggravated circumstances, reasonable efforts may be required if the court or department determines it is in the best interests of the child. . . .” Wash. Rev. Code Ann. § 13.34.132(4). According to this provision, “In determining whether aggravated circumstances exist by clear, cogent, and convincing evidence, the court shall consider one or more” items. The list includes “[a] finding by a court that a parent is a sexually violent predator as defined in RCW 71.09.020,”⁶⁶ and a “[c]onviction of the parent, when a child has been born of: (A) A sex offense under chapter 9A.44 RCW.” Wash. Rev. Code Ann. § 13.34.132(4)(f), (i). However, convictions for Wash. Rev. Code Ann. § 9A.40.100 (Human trafficking), § 9.68A.102 (Promoting commercial sexual abuse of a minor), or § 9.68A.040 (Sexual exploitation of a minor) are not listed. Wash. Rev. Code Ann. § 13.34.180(3) sets out convictions that may be alleged as part of a petition seeking to terminate parental rights, but Wash. Rev. Code Ann. § 9A.40.100, § 9.68A.102, and § 9.68A.040 are not included in the list.

- 3.6.1 Recommendation: Add the crimes of Wash. Rev. Code Ann. § 9A.40.100 (Human trafficking), § 9.68A.102 (Promoting commercial sexual abuse of a minor), and § 9.68A.040 (Sexual exploitation of a minor) to the list of grounds for termination of parental rights in Wash. Rev. Code Ann. § 13.34.132.

⁶⁵ See *supra* note 46.

⁶⁶ Pursuant to Wash. Rev. Stat. § 71.09.020(17) “‘Sexually violent offense’ means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

Legal Components:

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

Legal Analysis:

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

If knowledge of force, fraud, or coercion used to cause the forced labor or involuntary servitude can be proven, then Wash. Rev. Code Ann. § 9A.40.100 (Human trafficking) applies to facilitators.

Wash. Rev. Code Ann. § 9A.40.100(1)(a)(i) states,

(1)(a) A person is guilty of trafficking in the first degree when:

(i) Such person:

- (A) Recruits, harbors, transports, transfers, provides, obtains, or receives by any means another person knowing that force, fraud, or coercion as defined in RCW 9A.36.070 will be used to cause the person to engage in forced labor, involuntary servitude, a sexually explicit act, or a commercial sex act; or
- (B) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in (a)(i)(A) of this subsection

Wash. Rev. Code Ann. § 9A.40.100(1)(a)(ii) states,

[t]he acts or venture set forth in (a)(i) of this subsection:

- (A) Involve committing or attempting to commit kidnapping;
- (B) Involve a finding of sexual motivation under RCW 9.94A.835 [Special allegation—sexual motivation—procedures];
- (C) Involve the illegal harvesting or sale of human organs; or
- (D) Result in a death.

A conviction under Wash. Rev. Code Ann. § 9A.40.100(1) is punishable as a Class A felony, seriousness level XIV, by imprisonment for 123–397 months and a possible fine up to \$50,000. Wash. Rev. Code Ann. §§ 9A.40.100(1)(b), 9.94A.510, 9.94A.515, 9.94A.550.

Wash. Rev. Code Ann. § 9A.40.100(2)(a) states,

A person is guilty of trafficking in the second degree when such person:

- (i) Recruits, harbors, transports, transfers, provides, obtains, or receives by any means another person knowing that force, fraud, or coercion as defined in RCW 9A.36.070 will be used to cause the person to engage in forced labor, involuntary servitude, a sexually explicit act, or a commercial sex act; or
- (ii) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in (a)(i) of this subsection.

A conviction under Wash. Rev. Code Ann. § 9A.40.100(2) is punishable as a Class A felony, seriousness level XII, by imprisonment for 93–318 months and a possible fine up to \$50,000. Wash. Rev. Code Ann. §§ 9A.40.100(2)(b), 9.94A.510, 9.94A.515, 9.94A.550.

Wash. Rev. Code Ann. § 9.68A.102 (Promoting travel for commercial sexual abuse of a minor)⁶⁷ may apply to facilitators, and a conviction is punishable as a Class C felony, unranked on the sentencing grid, by imprisonment up to 12 months and a possible fine up to \$10,000. Wash. Rev. Code Ann. § 9.68A.102(2), 9.94A.505(2)(b), 9.94A.550. Wash. Rev. Code Ann. § 9.68A.103 (Permitting commercial sexual abuse of a minor) is also available for prosecution of certain facilitators.⁶⁸ A conviction under Wash. Rev. Code Ann. § 9.68A.103(1) is punishable as a gross misdemeanor by imprisonment for up to 364 days, a possible fine up to \$5,000, or both imprisonment and a fine. Wash. Rev. Code Ann. §§ 9.68A.103(2), 9.92.020.

A facilitator could also be convicted under Wash. Rev. Code Ann. § 9A.83.020 (Money laundering), which states,

- (1) A person is guilty of money laundering when that person conducts or attempts to conduct a financial transaction involving the proceeds⁶⁹ of specified unlawful activity⁷⁰ and:
- (a) Knows the property is proceeds of specified unlawful activity; or
 - (b) Knows that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds, and acts recklessly as to whether the property is proceeds of specified unlawful activity; or
 - (c) Knows that the transaction is designed in whole or in part to avoid a transaction reporting requirement under federal law.

A conviction for money laundering is punishable as a Class B felony by imprisonment up to 10 years, a fine of \$20,000, or both. Wash. Rev. Code Ann. §§ 9A.83.020(4), 9A.20.021(1)(b).

Facilitators could also be convicted of advertising commercial sexual abuse of a minor under Wash. Rev. Code Ann. § 9.68A.104(1) (Advertising commercial sexual abuse of a minor—Penalty),⁷¹ which states,

[a] person commits the offense of advertising commercial abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act,⁷² which is to take place in the state of Washington and that includes the depiction⁷³ of a minor.

Advertising commercial sexual abuse of a minor is a Class C felony. Wash. Rev. Code Ann. § 9.68A.104(3). Furthermore, pursuant to Wash. Rev. Code Ann. § 9.68A.104(2) (Advertising commercial sexual abuse of a minor—Penalty),⁷⁴

. . . it is not a defense that the defendant did not know the age of the minor depicted in the advertisement. It is a defense, which the defendant must prove by a preponderance of the evidence, that the defendant made a reasonable bona fide attempt to ascertain the true age of the minor depicted in the advertisement by requiring, prior to publication, dissemination, or display of the advertisement, production of a driver's

⁶⁷ See *supra* Section 1.2 for the relevant provisions.

⁶⁸ See *supra* Section 1.2 for the relevant provisions.

⁶⁹ See *supra* note 54.

⁷⁰ See *supra* note 55.

⁷¹ See *supra* note 50.

⁷² See *supra* note 52.

⁷³ See *supra* note 53.

⁷⁴ See *supra* note 50 for a discussion of *Backpage.com v. McKenna*, a court case temporarily enjoining Wash. Rev. Code Ann. § 9.68A.104.

license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written representations of the minor's age, or the apparent age of the minor as depicted. In order to invoke the defense, the defendant must produce for inspection by law enforcement a record of the identification used to verify the age of the person depicted in the advertisement.

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

Facilitators convicted under Wash. Rev. Code Ann. § 9A.40.100(1)(a), (2)(a) (Trafficking) or § 9.68A.101 (Promoting commercial sexual abuse of a minor) may be required to pay possible fines up to \$50,000. Wash. Rev. Code Ann. §§ 9A.40.100(1)(b), (2)(b), 9.68A.101(2), 9.94A.550. Those convicted under Wash. Rev. Code Ann. § 9.68A.102 (Promoting travel for commercial sexual abuse) may be required to pay a possible fine up to \$10,000. Wash. Rev. Code Ann. §§ 9.68A.040(2), 9.68A.102(2), 9.94A.550. A conviction under Wash. Rev. Code Ann. § 9.68A.104(1) is punishable as a Class C felony and may carry a possible fine up to \$10,000. A conviction for money laundering could also result in a fine of \$20,000. Wash. Rev. Code Ann. §§ 9A.83.020(4), 9A.20.021(1)(b).

Facilitators may also be required to pay restitution at the discretion of the court. Pursuant to Wash. Rev. Code Ann. § 9.94A.750 (Restitution),

(1) If restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the offense.

(5) Restitution may be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section. In addition, restitution may be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(6) Restitution for the rape of a child in the first, second, or third degree, in which the victim becomes pregnant, shall include:

(a) All of the victim's medical expenses that are associated with the rape and resulting pregnancy; and

(b) child support for any child born as a result of the rape if child support is ordered pursuant to a proceeding in superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior court order for support of the victim's child. . . .

Facilitators also face asset forfeiture under several statutes since Wash. Rev. Code Ann. § 10.105.010 (Seizure and forfeiture) applies to most felonies, including Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) and Wash. Rev. Code Ann. § 9.68A.102 (Promoting travel for commercial sexual abuse).⁷⁵

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

Wash. Rev. Code Ann. § 9.68A.102(1) (Promoting travel for commercial sexual abuse of a minor) makes it a Class C felony if a person “knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of engaging in what would be commercial sexual abuse of a minor or promoting commercial sexual abuse of a minor, if occurring in [Washington].” A conviction under Wash. Rev. Code Ann. § 9.68A.102(1) is punishable as a Class C felony, unranked on the sentencing grid, by imprisonment for up to 12 months and a possible fine up to \$10,000. Wash. Rev. Code Ann. §§ 9.68A.102(2), 9.94A.505(2)(b), 9.94A.550.

- 4.3.1 Recommendation: Amend Wash. Rev. Code Ann. § 9.68A.102 (Promoting travel for commercial sexual abuse of a minor) to provide a stronger penalty to reflect the egregious nature of the crime and to better align the penalty with the penalty for a conviction under Wash. Rev. Code Ann. § 9.68A.101 (Promoting commercial sexual abuse of a minor).

4.4 *Promoting and selling child pornography is illegal.*

While promoting child pornography is not expressly made illegal, the distribution of child pornography is illegal under Wash. Rev. Code Ann. § 9.68A.050 (Dealing in depictions of minor engaged in sexually explicit conduct) and § 9.68A.060 (Sending, bringing into state depictions of minor engaged in sexually explicit conduct).⁷⁶ Wash. Rev. Code Ann. § 9.68A.050(1)(a) and § 9.68A.060(1)(a) are punishable as Class B felonies, seriousness level VII, by imprisonment for 15–116 months and a possible fine up to \$20,000. Wash. Rev. Code Ann. §§ 9.68A.050(1)(b), 9.68A.060(1)(b), 9.94A.515, 9.94A.510, 9.94A.550. Wash. Rev. Code Ann. § 9.68A.050(2)(a) and § 9.68A.060(2)(a) are punishable as Class C felonies, seriousness level of V, by imprisonment for 6–60 months and a possible fine up to \$10,000. Wash. Rev. Code Ann. §§ 9.68A.050(2)(b), 9.68A.060(2)(b), 9.94A.515, 9.94A.510, 9.94A.550.

⁷⁵ See Section 2.8 *supra* for a full discussion of the forfeiture and seizure provisions.

⁷⁶ See *supra* Section 3.2 for the relevant provisions.

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 is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into protection of child protective services.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Legal Analysis:

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

A commercially sexually exploited child is defined as a victim throughout Washington’s laws. Pursuant to Wash. Rev. Code Ann. § 70.125.030(9),⁷⁷ “[v]ictim” means any person who suffers physical, emotional, financial, and psychological impact as a proximate result of a sexual assault.” “Sexual assault is defined under Wash. Rev. Code Ann. § 70.125.030(7)(h), (i) to include, “sexual exploitation or commercial sex abuse of a minor.”

Wash. Rev. Code Ann. § 7.68.060(6)(b) (Applications for benefits—accrual of rights) clarifies that

[a] person identified as the “minor” in the charge of commercial sexual abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102 is considered a victim of a criminal act for the purpose of the right to benefits under this chapter even if the person is also charged with prostitution under RCW 9A.88.030.

⁷⁷ The text of Wash. Rev. Code Ann. § 70.125.030 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6100 during the regular session of the 62nd Washington legislature, 2012 Wa. Ch. 259. (WA 2012) (effective June 7, 2012).

For purposes of victim restitution, Wash. Rev. Code Ann. § 9.94A.753(7) (Restitution—application dates) refers to the definition of victim in Wash. Rev. Code Ann. § 7.68.060(6)(b), in stating,

Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter RCW 7.68 [Victims of crimes—compensation, assistance]. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order.

Wash. Rev. Code Ann. § 13.32A.030(17) (Definitions—regulating leave from semi-secure facility) contains a specific provision defining a “sexually exploited child” to mean “any person under the age of eighteen who is a victim of the crime of commercial sex abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102.” Wash. Rev. Code Ann. § 13.40.219 (Arrest for prostitution or prostitution loitering), while implicitly allowing juveniles to be arrested for prostitution, specifies,

In any proceeding under this chapter [Juvenile Justice Act of 1977] related to an arrest for prostitution or prostitution loitering, there is a presumption that the alleged offender meets the criteria for a certification as a victim of a severe form of trafficking in persons as defined in section 7105 of Title 22 of the United States code [Trafficking Victims Protection Act of 2000], and that the alleged offender is also a victim of commercial sex abuse of a minor.

Although the provision does not prohibit the arrest of a minor who is actually a victim, the presumption further defines a prostituted child as a victim of domestic minor sex trafficking.⁷⁸

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

The age of consent in Washington is not explicitly stated in the Code. Sexual intercourse with a minor 16 or older does not constitute rape of a child under Wash. Rev. Code Ann. § 9A.44.073 (Rape of a child in the first degree), § 9A.44.076 (Rape of a child in the second degree), § 9A.44.079 (Rape of a child in the third degree), nor does it constitute molestation of a child under Wash. Rev. Code Ann. § 9A.44.083 (Child molestation in the first degree), § 9A.44.086 (Child molestation in the second degree), or § 9A.44.089 (Child molestation in the third degree). However, consensual sexual intercourse or sexual contact with a person that is 16 or 17 is illegal under Wash. Rev. Code Ann. § 9A.44.093 (Sexual misconduct with a minor in the first degree), subject to defenses outlined in Wash. Rev. Code Ann. § 9A.44.030 (Defenses to prosecution under this chapter). Other than those situations, absent forcible compulsion, incapacity to consent, a clear lack of consent, or incest, having sexual intercourse or sexual contact with a minor who is 16 or 17 is not a crime. Wash. Rev. Code Ann. §§ 9A.44.040, 9A.44.050, 9A.44.060, 9A.64.020. Consent of the minor to a commercial sex act appears to be immaterial to the crimes of Wash. Rev. Code Ann. § 9.68A.100 (Commercial sexual abuse of a minor), § 9.68A.101 (Promoting commercial sexual abuse of a minor), § 9.68A.102 (Promoting travel for commercial sexual abuse of a minor), or § 9.68A.103 (Permitting commercial sexual abuse of a minor), and is not indicated to be a defense for the perpetrator of any of the range of commercial sexual exploitation crimes.

- 5.2.1 Recommendation: Specify in Wash. Rev. Code Ann. § 9A.44.100 (Trafficking), § 9.68A.100 (Commercial sexual abuse of a minor), § 9.68A.101 (Promoting commercial sexual abuse of a minor), § 9.68A.102 (Promoting travel for commercial sexual abuse of a minor), and § 9.68A.103 (Permitting commercial sexual abuse of a minor) that consent of the minor shall not be a defense in any prosecution of an alleged offender.

⁷⁸ See *supra* note 6.

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

Wash. Rev. Code Ann. § 9A.88.030 (Prostitution) is age neutral and fails to specifically make minors immune from prosecution for prostitution. However, pursuant to Wash. Rev. Code Ann. § 9A.88.040,⁷⁹

In any prosecution for prostitution under RCW 9A.88.030, it is an affirmative defense that the actor committed the offense as a result of being a victim of trafficking, RCW 9A.40.100, promoting prostitution in the first degree, RCW 9A.88.070, or trafficking in persons under the trafficking victims protection act of 2000, 22 U.S.C. Sec. 7101 et seq. Documentation that the actor is named as a current victim in an information or the investigative records upon which a conviction is obtained for trafficking, promoting prostitution in the first degree, or trafficking in persons shall create a presumption that the person's participation in prostitution was a result of having been a victim of trafficking, promoting prostitution in the first degree or trafficking in persons.

5.3.1 Recommendation: Amend Wash. Rev. Code Ann. § 9A.88.030 (Prostitution) to make minors under 18 specifically immune from prosecution for the 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.*

Under Wash. Rev. Code Ann. § 26.44.050,⁸⁰ “except as provided in RCW 26.44.030(11) [Reports—Duty and authority to make—Duty of receiving agency—Duty to notify—Case planning and consultation—Penalty for authorized exchange of information—Filing dependency petitions—Investigations—Interviews of Children—Records—Risk assessment process], upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health service must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.” Law enforcement officers are permitted to “take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050.” Wash. Rev. Code Ann. § 26.44.050. For purposes of Title 26, “abuse or neglect” is defined in Wash. Rev. Code Ann. § 26.44.020(1) as “sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.” “Sexual exploitation” is defined as including, “(a) Allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person.” Wash. Rev. Code Ann. § 26.44.020(22).⁸¹

⁷⁹ The text of Wash. Rev. Code Ann. § 9A.88 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6255 during the 2nd session of the 62nd Washington legislature, 2012 Wa. Ch. 142. (WA 2012) (effective June 7, 2012).

⁸⁰ The text of Wash. Rev. Code Ann. § 26.44.050 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6555 during the 2nd session of the 62nd Washington legislature, 2012 Wa. Ch. 259. (WA 2012) (effective December 1, 2013). Title 26 addresses “Domestic Relations” and chapter 26.44 is entitled, “Abuse of Children.”

⁸¹ The text of Wash. Rev. Code Ann. § 26.44.020 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6555 during the 2nd session of the 62nd Washington legislature, 2012 Wa. Ch. 259. (WA 2012) (effective December 1, 2013).

Furthermore, Wash. Rev. Code Ann. § 26.44.030(11)⁸² sets out department response requirements and states,

- (a) Upon receiving a report of alleged abuse or neglect, the department shall use of the following discrete responses to reports of child abuse or neglect that are screened in and accepted for departmental response:
 - (i) Investigation; or
 - (ii) Family assessment.⁸³
- (b) In making the response in (a) of this subsection the department shall:
 - (i) Use a method by which to assign cases to investigation or family assessment which are based on an array of factors that may include the presence of: Imminent danger, level of risk, number of previous child abuse or neglect reports, or other presenting case characteristics, such as the type of alleged maltreatment and the age of the alleged victim. Age of the alleged victim shall not be used as the sole criterion for determining case assignment;
 - (ii) Allow for a change in response assignment based on new information that alters risk or safety level;
 - (iii) Allow families assigned to family assessment to choose to receive an investigation rather than a family assessment;
 - (iv) Provide a full investigation if a family refuses the initial family assessment;
 - (v) Provide voluntary services to families based on the results of the initial family assessment. If a family refuses voluntary services, and the department cannot identify specific facts related to risk or safety that warrant assignment to neglect related to the family, then the department identifies risk or safety factors that warrant an investigation under this chapter, then the family assessment response⁸⁴ case must be reassigned to investigation;
 - (vi) Conduct an investigation, and not a family assessment, in response to an allegation that, the department determines based on the intake assessment:

⁸² The text of Wash. Rev. Code Ann. § 26.44.030 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6555 during the 2nd session of the 62nd Washington legislature. 2012 Wa. Ch. 259. (WA 2012) (effective December 1, 2013).

⁸³ Under Wash. Rev. Code Ann. § 26.44.030(13), “[f]or reports of alleged abuse or neglect that are responded through family assessment response, the department shall:

- (a) Provide the family with a written explanation of the procedure for assessment of the child and the family and its purposes;
- (b) Collaborate with the family to identify family strengths, resources, and service needs, and develop a service plan with a goal of reducing risk of harm to the child and improving or restoring family well-being;
- (c) Complete the family assessment response within forty-five days of receiving the report; however, upon parental agreement, the family assessment response period may be extended up to ninety days;
- (d) Offer services to the family a manner that makes it clear that acceptance of the services is voluntary;
- (e) Implement the family assessment response in a consistent and cooperative manner;
- (f) Have the parent or guardian sign an agreement to participate in services before services are initiated that informs the parents of their rights under family assessment response, all of their options, and the options the department has if the parents do not sign the consent form.

Wash. Rev. Code Ann. § 26.44.020 defines “[f]amily assessment” as “a comprehensive assessment of child safety, risk of subsequent child abuse or neglect, and family strengths and needs that is applied to a child abuse or neglect report. Family assessment does not include a determination as to whether child abuse or neglect occurred, but does determine the need for services to address the safety of the child and the risk of subsequent maltreatment.”

⁸⁴ Wash. Rev. Code Ann. § 26.44.020 defines “[f]amily assessment response” as “a way of responding to certain reports of child abuse and neglect made under this chapter using a differential response approach to child protective services. The family assessment response shall focus on the safety of the child, the integrity and preservation of the family, and shall assess the status of the child and the family in terms of risk of abuse and neglect including the parent’s or guardian’s or other caretaker’s capacity and willingness to protect the child and, if necessary, plan and arrange provision of services to reduce the risk and otherwise support the family. No one is named as a perpetrator, and no investigative finding is entered in the record as a result of a family assessment.”

- (A) Poses a risk of “imminent harm” consistent with the definition provided in RCW 13.34.050, which includes, but is not limited to sexual abuse and sexual exploitation as defined in this chapter;
 - (B) Poses a serious threat of harm to a child;
 - (C) Constitutes conduct involving a criminal offense that has, or is about to occur, in which the child is the victim;
 - (D) The child is an abandoned child as defined under RCW 13.34.030;
 - (E) The child is an adjudicated dependent child as defined in RCW 13.34.030, or the child is in a facility that licensed, operated, or certified for care of children by the department under chapter 74.15 RCW, or by the department of early learning.
- (c) The department may not be held civilly liable for the decision to respond to an allegation of child abuse or neglect by using the family assessment response under this section unless the state or its officers, agents, or employees acted with reckless disregard.

Under Wash. Rev. Code Ann. § 13.34.050,

- (1) The court may enter an order directing a law enforcement officer, probation counselor, or child protective services official to take a child into custody if: (a) A petition is filed with the juvenile court alleging that the child is dependent and that the child’s health, safety, and welfare will be seriously endangered if not taken into custody; (b) an affidavit or declaration is filed by the department in support of the petition setting forth specific factual information evidencing reasonable grounds that the child’s health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child. “Imminent harm” for purposes of this section shall include, but not be limited to, circumstances of sexual abuse, sexual exploitation as defined in RCW 26.44.020 and a parent’s failure to perform basic parental functions, obligations, and duties as the result of substance abuse; and (c) the court finds reasonable grounds to believe the child is dependent and that the child’s health, safety, and welfare will be seriously endangered if not taken into custody.

....

Wash. Rev. Code Ann. § 13.34.060 further provides that a child taken into custody under Wash. Rev. Code Ann. § 13.34.050 or Wash. Rev. Code Ann. § 26.44.050 can be taken immediately to shelter care. Shelter care is limited to 72 hours unless a court order extends the shelter care. Wash. Rev. Code Ann. § 13.34.060.

Wash. Rev. Code Ann. § 13.32A.030(5)(d), (17) includes “sexually exploited child” in the definition of “child in need of services” (CHINS) and defines “sexually exploited child,” as “any person under the age of eighteen who is a victim of the crime of commercial sex abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102.”

RCW § 13.32A.050(1) states,

- (1) A law enforcement officer shall take a child into custody:
 - (a) If a law enforcement agency has been contacted by the parent of the child that the child is absent from parental custody without consent; or
 - (b) If a law enforcement officer reasonably believes, considering the child’s age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child’s safety or that a child is violating a local curfew ordinance; or

....

 - (d) If a law enforcement agency has been notified by the juvenile court that the court finds probable cause exists to believe that the child has violated a court placement order issued

under this chapter or chapter 13.34 RCW or that the court has issued an order for law enforcement pick-up of the child under this chapter or chapter 13.34 RCW.

If a child is taken into custody for a reason specified under subsection (a) or (b), the child must be transported to “his or her home or to a parent at his or her place of employment, if no parent is at home,” although the parent may request for the child to be taken shelter or other places specified in the statute. Wash. Rev. Code Ann. § 13.32A.060(1)(a). Otherwise, the officer may take the child to a shelter if he has attempted to notify the parent and if, among other things, the “child expresses fear or distress at the prospect of being returned to his or her home which leads the officer to believe there is a possibility that the child is experiencing some type of abuse or neglect.” Wash. Rev. Code Ann. § 13.32A.060(1)(b)(i). If a child is taken into custody under subsection (c) or (d), the child “may [be] release[d] . . . to the supervising agency, or shall [be] take[n] . . . to a designated crisis residential center’s secure facility” for a subsection (c) custodial situation or taken to a detention facility for a subsection (d) custodial situation. Wash. Rev. Code Ann. § 13.32A.060(2). Furthermore, under RCW § 13.32A.050(6), “If a law enforcement officer has a reasonable suspicion that a child is being unlawfully harbored in violation of RCW 13.32A.080, the officer shall remove the child from the custody of the person harboring the child and shall transport the child to one of the locations specified in RCW 13.32A.060.”

Under Wash. Rev. Code Ann. § 13.32A.130(1),

A child admitted to a secure facility located in a juvenile detention center shall remain in the facility for at least twenty-four hours after admission but for not more than five consecutive days. A child admitted to a secure facility not located in a juvenile detention center or a semi-secure facility may remain for not more than fifteen consecutive days. If a child is transferred between a secure and semi-secure facility, the aggregate length of time a child may remain in both facilities shall not exceed fifteen consecutive days per admission, and in no event may a child’s stay in a secure facility located in a juvenile detention center exceed five days per admission.

This provision also sets out guidelines for determining when to transfer children to semi-secure facilities. However, under Wash. Rev. Code Ann. § 13.32A.128, “The department may take a runaway youth to a secure facility after attempting to notify the parent of the child’s whereabouts. The department may not take a child to a secure facility if the department has reasonable cause to believe that the reason for the child’s runaway status is the result of abuse or neglect.”

Wash. Rev. Code Ann. § 13.32A.140 sets out the procedures for DSHS to file a CHINS petition for out of home placement. Under Wash. Rev. Code Ann. § 13.32A.060(4), “Whenever an officer transfers custody of a child to a crisis residential center or the department, the child may reside in the crisis residential center or may be placed by the department in an out-of-home placement for an aggregate total period of time not to exceed seventy-two hours excluding Saturdays, Sundays, and holidays. Thereafter, the child may continue in out-of-home placement only if the parents have consented, a child in need of services petition has been filed, or an order for placement has been entered under chapter 13.34 RCW.” Wash. Rev. Code Ann. § 74.15.255(2) requires each crisis residential center to have a staff member, or “access to, a person who has been trained to work with the needs of sexually exploited children.” Under Wash. Rev. Code Ann. § 74.13.034(1), “A child taken into custody and taken to a crisis residential center established pursuant to RCW 74.13.032 may, if the center is unable to provide appropriate treatment, supervision, and structure to the child, be taken at department expense to another crisis residential center, the nearest regional secure crisis residential center, or a secure facility with which it is collocated under RCW 74.13.032. Placement in both locations shall not exceed fifteen consecutive days from the point of intake as provided in RCW 13.32A.130.”

Under the Becca law (RCW § 13.32A.010, et seq.), the court can order an out of home placement of the child for up to 90 days. Wash. Rev. Code Ann. § 13.32A.179(2). This disposition must be reviewed “within three months,” at which time the out-of-home placement can be continued for 180 additional days after the review

hearing. Wash. Rev. Code Ann. § 13.32A.190(1), (4). Wash. Rev. Code Ann. § 13.32A.180(2) states, “No placement made pursuant to this section may be in a secure residence as defined by the federal Juvenile Justice and Delinquency Prevention Act of 1974.”

An alternative response that may keep the minor out of a juvenile detention facility is diversion. Wash. Rev. Code Ann. § 13.40.070(7) (Complaints—screening—filing information—diversion) and § 13.40.213 (Juveniles alleged to have committed offenses of prostitution or prostitution loitering—diversion) provide for diversion in cases of prostitution offenses for juveniles.⁸⁵ Wash. Rev. Code Ann. § 13.40.070(7) states that “[w]here a case is legally sufficient to charge an alleged offender with either prostitution or prostitution loitering and the alleged offense is the offender's first prostitution or prostitution loitering offense, the prosecutor shall divert the case.” Wash. Rev. Code Ann. § 13.40.213(1) states,

When a juvenile is alleged to have committed the offenses of prostitution or prostitution loitering, and the allegation, if proved, would not be the juvenile’s first offense, a prosecutor may divert the offense if the county in which the offense is alleged to have been committed has a comprehensive program that provides:

- (a) Safe and stable housing;
- (b) Comprehensive on-site case management;
- (c) Integrated mental health and chemical dependency services, including specialized trauma recovery services;
- (d) Education and employment training delivered on-site; and
- (e) Referrals to off-site specialized services, as appropriate.

Since diversion under Wash. Rev. Code Ann. § 13.40.213(2) is optional for subsequent offenses in counties that have a comprehensive program in place, minors may be charged with a prostitution crime after their first offense. Accordingly, a child could be held in a juvenile detention facility for prostitution and related offenses after a first offense.

However, if diverted under Wash. Rev. Code Ann. § 13.40.070(7), sexually exploited youth must be directed to specialized services. Wash. Rev. Code Ann. § 13.40.087 states that “[w]ithin available funding, when a youth who has been diverted under RCW 13.40.070 for an alleged offense of prostitution or prostitution loitering is referred to the department, the department shall connect that youth with the services and treatment specified in RCW 74.14B.060 [Repealed]⁸⁶ and 74.14B.070.” However, since Wash. Rev. Code 74.14B.060 (Sexually abused children—Treatment services), which required that “the department of community, trade, and economic development shall provide, subject to available funds, comprehensive sexual assault services to sexually abused

⁸⁵ House Bill 1505 passed in the 61st Regular Session in 2009, which enacted Wash. Rev. Code Ann. § 13.40.213, makes the following statement in Section 1:

The legislature finds that juveniles involved in the commercial sex trade are sexually exploited and that they face extreme threats to their physical and emotional well-being. In order to help them break out of the isolation, fear, and danger of the commercial sex trade and to assist them in their recovery from the resulting mental and physical harm and in the development of skills that will allow them to become independent and achieve long-term security, these juveniles are in critical need of comprehensive services, including housing, mental health counseling, education, employment, chemical dependency treatment, and skill building. The legislature further finds that a diversion program to provide these comprehensive services, working within existing resources in the counties which prosecute juveniles for prostitution and prostitution loitering, may be an appropriate alternative to the prosecution of juveniles involved in the commercial sex trade.

⁸⁶ Wash. Rev. Code Ann. 74.14B.060 (Sexually abused children – treatment services) was repealed by Senate Bill 6100 passed during the 2012 Regular Session of the 62nd Washington legislature, 2012 Wa. Ch. 29, which came into (effective June 7, 2012). Pursuant to 2012 Wa. Ch. 29, some of the language used in Wash. Rev. Code Ann. 74.14B.060 was reincorporated into Wash. Rev. Code Ann. §§ 43.280.010 (Intent), 43.280.011 (Intent, approval of committee recommendations, distribution of services), 43.280.020 (Grant program – funding), and 43.280.080 (Office of crime victims advocacy), 70.125.020 (Legislative findings – program objectives).

children and their families. . . [and] treatment services by qualified, registered, certified, or licensed professionals,” was repealed in 2012 by Senate Bill 6100,⁸⁷ only the services provided under § 74.14B.070 are mandated. Pursuant to Wash. Rev. Code 74.14B.070 (Child victims of sexual assault or sexual abuse—Early identification, treatment),

The department of social and health services through its division of children and family services shall, subject to available funds,⁸⁸ establish a system of early identification and referral to treatment of child victims of sexual assault or sexual abuse. The system shall include schools, physicians, sexual assault centers, domestic violence centers, child protective services, and foster parents. A mechanism shall be developed to identify communities that have experienced success in this area and share their expertise and methodology with other communities statewide.

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

For purposes of Washington’s child abuse reporting laws, Wash. Rev. Code Ann. § 26.44.020(1) (Definitions) defines “abuse or neglect” as

sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100 [Use of force on children—policy—actions presumed unreasonable]; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

Wash. Rev. Code Ann. § 26.44.020(22)⁸⁹ defines “sexual exploitation” as “(a) Allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person.” Pursuant to Wash. Rev. Code Ann. § 26.44.030 (Reports—duty and authority to make—duty of receiving agency—duty to notify), DSHS has jurisdiction to report and investigate most reported instances of abuse or neglect, which, under these definitions, would include situations of pimp-controlled domestic minor sex trafficking.

⁸⁷ Senate Bill 6100 passed during the 2012 Regular Session of the 62nd Washington legislature, 2012 Wa. Ch. 29 (effective June 7, 2012).

⁸⁸ Senate Bill 6100 also amended Wash. Rev. Code Ann. § 43.280.010 to state in part, “The legislature recognizes the need to increase the services available to the victims of sexual assault . . . The legislature intends to enhance the community-based services available to the victims of sexual assault by: (1) Providing consolidated funding support for local programs which provide services to victims of sexual assault, as defined in RCW 70.125.030.” Pursuant to Wash. Rev. Code Ann. § 43.280.020,

- (1) The department of commerce is authorized to distribute funds that have been allocated to the grant program that it administers for serving victims of sexual assault.
- (2) Activities that can be funded through this grant program are limited to those that:
 - (a) Provide effective services to victims of sexual assault;
 -
 - (3) Funding for core, specialized and underserved populations services, as defined in RCW 70.125.030, must be distributed through a funding formula to those applicants that emphasize providing stable, victim-centered sexual assault services and possess the qualifications to provide those services.

The text of Wash. Rev. Code Ann. § 70.125.030 and § 70.125.020 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6100 during the regular session of the 62nd Washington legislature, 2012 Wa. Ch. 259. (WA 2012) (effective June 7, 2012).

⁸⁹ See *supra* note 81.

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

The DSHS Practices and Procedures Guide defines a “caregiver” as

an adult living in the home permanently or semi-permanently and has routine responsibility for childcare. This may be the other legally responsible adult, another adult relative or a live-in partner. It may also be any other adult with regular ongoing time in the home and has routine responsibility for childcare.⁹⁰

- 5.6.1 Recommendation: Clarify that child protection laws reach traffickers by amending the definition of “caregiver” to include a person who physically possesses or controls a child.

- 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.*

Washington’s crime victims’ compensation account is established by Wash. Rev. Code Ann. § 7.68.045 (Crime victims’ compensation account) and set forth in chapter 7.68 (Victims of crimes—compensation, assistance). Wash. Rev. Code Ann. § 7.68.060(6)(b) (Applications for benefits—accrual of rights) clarifies,

A person identified as the “minor” in the charge of commercial sexual abuse of a minor under RCW 9.68A.100, promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102 is considered a victim of a criminal act⁹¹ for the purpose of the right to benefits under this chapter even if the person is also charged with prostitution under RCW 9A.88.030.

This amendment is designed to prevent domestic minor sex trafficking victims from being found ineligible to receive compensation for injuries suffered as a result of being a victim of commercial sexual exploitation. Wash. Rev. Code Ann. § 7.68.060 also outlines the application procedures and time limits. The time limit to receive applications is no later than two years after the crime is reported to law enforcement “or the date the rights of beneficiaries accrued, unless the director has determined that ‘good cause’ exists to expand the time permitted to receive the application.” Wash. Rev. Code Ann. § 7.68.060(1)(a). Wash. Rev. Code Ann. § 7.68.060(1)(a) states, in part,

“Good cause” shall be determined by the department on a case-by-case basis and may extend the period of time in which an application can be received for up to five years after the date the criminal act was reported to a local police department or sheriff’s office or the date the rights of beneficiaries accrued.

However, Wash. Rev. Code Ann. § 7.68.060(5) states,

Because victims of childhood criminal acts may repress conscious memory of such criminal acts far beyond the age of eighteen, the rights of adult victims of childhood criminal acts shall accrue at the time the victim discovers or reasonably should have discovered the elements of the crime. In making determinations as to reasonable time limits, the department shall give greatest weight to the needs of the victim.

Wash. Rev. Code Ann. § 7.68.070(1) (Benefits—right to and amount—limitations) limits the total compensation available to \$50,000.

⁹⁰ Washington State Department of Social and Human Services, *Practices and Procedures Guide, Appendix A: Definitions*, http://www.dshs.wa.gov/ca/pubs/mnl_pnpg/definitions.asp (last visited November 25, 2011).

⁹¹ “Criminal act” is defined in Wash. Rev. Code Ann. § 7.68.020(5) and includes the crime of trafficking in Wash. Rev. Code Ann. § 9A.40.100.

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

Several victim-friendly criminal justice procedures and protections are statutorily provided for certain minor victim-witnesses, such as, when possible, secure waiting areas, the presence of “an advocate⁹² or support person . . . prior to and during any court proceedings,” the appointment of CASA and guardians ad litem,⁹³ and a prohibition (with some exceptions) on releasing names and addresses of the victim-witnesses without permission. Wash. Rev. Code Ann. §§ 7.69A.030(2)–(4), 13.34.100(1). However, closed circuit television testimony is limited to child victims under ten years of age and restrictions on reputation evidence (commonly called the “rape shield law”) is limited to trials of non-commercial sex offenses contained in chapter 9A.44. Wash. Rev. Code Ann. §§ 9A.44.150(1), 9A.44.020(2),(3). Thus, the “rape shield law” does not apply to crimes related to the commercial sexual abuse of a minor under Wash. Rev. Code Ann. ch. 9.68A (Sexual exploitation of children) or to Wash. Rev. Code Ann. § 9A.40.100 (Trafficking). Therefore, victims of these crimes may be subjected to cross-examination related to their sexual history and character in the trials of their traffickers, buyer-exploiters, or both.

Pursuant to Wash. Rev. Code Ann. § 70.125.060 (Personal representative may accompany victim during treatment or proceedings), “If the victim of a sexual assault so desires, a personal representative⁹⁴ of the victim's choice may accompany the victim to the hospital or other health care facility, and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.” Wash. Rev. Code Ann. § 70.125.030(9),⁹⁵ defines “[v]ictim” as “any person who suffers physical, emotional, financial, and psychological impact as a proximate result of a sexual assault,” and “[s]exual assault” is defined under Wash. Rev. Code Ann. § 70.125.030(7)(h), (i) to include, “sexual exploitation or commercial sex abuse of a minor.” Wash. Rev. Code Ann. § 70.125.065 (Records of community sexual assault program and underserved populations provider not available as part of discovery – Exceptions), which provides additional protections for minor victim witnesses’ communications with service providers, states

Records maintained by a community sexual assault program and underserved populations provider shall not be made available to any defense attorney as part of discovery in a sexual assault case unless:

- (1) A written pretrial motion is made by the defendant to the court stating that the defendant is requesting discovery of the community sexual assault program or underserved populations provider records;
- (2) The written motion is accompanied by an affidavit or affidavits setting forth specifically the reasons why the defendant is requesting discovery of the community sexual assault program or underserved populations provider records;
- (3) The court reviews the community sexual assault program or underserved populations provider records in camera to determine whether the community sexual assault program or underserved populations provider records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records to the defendant; and
- (4) The court enters an order stating whether the records or any part of the records are discoverable and setting forth the basis for the court's findings.

⁹² Wash. Rev. Code Ann. § 7.69A.020(6) defines “advocate” as “any person, including a family member not accused of a crime, who provides support to a child victim or child witness during any legal proceeding.”

⁹³ Wash. Rev. Code Ann. § 13.34.100(1) (Appointment of guardian ad litem) provides for the appointment of guardians ad litem in actions under Wash. Rev. ch. 13.34 (Dependency and termination of parent-child relationship), “unless a court for good cause finds the appointment unnecessary.”

⁹⁴ Wash. Rev. Code Ann. § 70.125.030(5) defines “[p]ersonal representative” as “a friend, relative, attorney, or employee or volunteer from a community sexual assault program or specialized treatment service provider.” *See supra* note 77.

⁹⁵ *See supra* note 77.

5.8.1 Recommendation: Specify application of Wash. Rev. Code Ann. § 9A.44.020 (Testimony—evidence—written motion—admissibility) to cases of testifying victims of Wash. Rev. Code Ann. § 9A.40.100 (Trafficking) with sexual motivation or Wash. Rev. Code Ann. ch. 9.68 (Sexual exploitation of children) and increase the age of a child permitted to use closed circuit television testimony pursuant to Wash. Rev. Code Ann. § 9A.44.150 (Testimony of child by closed-circuit television).

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.*

There is no automatic sealing or expungement of juvenile records.⁹⁶ Wash. Rev. Code Ann. § 13.50.050 (Records relating to commission of juvenile offenses) outlines the procedure and requirements for petitioning the court to seal juvenile records. A person must make a motion to the court to have his or her juvenile record sealed which, if granted, covers the juvenile court file, the social file, and other records relating to the case. Wash. Rev. Code Ann. § 13.50.050(11).

Wash. Rev. Code Ann. § 13.50.050(14)(a) explains that an order to seal means,

[T]he proceedings in the case shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed. Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual.

Wash. Rev. Code Ann. § 13.50.050(17), (23) provide for destruction of certain records related to diversion only. Wash. Rev. Code Ann. § 13.50.050(12)⁹⁷ more generally states,

(a) The court shall not grant any motion to seal records for class A offenses made pursuant to subsection (11)⁹⁸ of this section that is filed on or after July 1, 1997, unless:

- (i) Since the last date of release from confinement, including full-time residential treatment, if any, or entry of disposition, the person has spent five consecutive years in the community without committing any offense or crime that subsequently results in an adjudication or conviction;
- (ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;
- (iii) No proceeding is pending seeking the formation of a diversion agreement with that person;

⁹⁶ Senate Bill 6561, introduced in 2009, included automatic sealing of eligible juvenile records. The bill was stripped in committee of this provision due to the high staff level of effort (up to 30 minutes per case) in automatically reviewing juvenile records for sealing. S. Comm. on Human Serv. & Corr. & S. Comm. on Ways & Means, S. Bill Rep. SB 6561, 2010 Reg. Sess. at 4 (Wash. 2010), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/Senate/6561%20SBR%20WM%2010.pdf> (last visited June 22, 2012).

⁹⁷ The text of Wash. Rev. Code Ann. § 13.50.050 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 6240 during the 2nd session of the 62nd Washington legislature, 2012 Wa. Ch. 177. (WA 2012) (effective June 7, 2012).

⁹⁸ Wash. Rev. Code Ann. § 13.50.050(11) states,

In any case in which an information has been filed pursuant to RCW 13.40.100 [Summons or other notification issued upon filing of information] or a complaint has been filed with the prosecutor and referred for diversion pursuant to RCW 13.40.070 [Complaints—screening—filing information—diversion], the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and findings, if any, and, subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case.

- (iv) The person has not been convicted of a sex offense; and
 - (v) Full restitution has been paid.
- (b) The court shall not grant any motion to seal records for class B, C, gross misdemeanor and misdemeanor offenses and diversions made under subsection (11) of this section unless:
- (i) Since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of the diversion agreement, the person has spent two consecutive years in the community without being convicted of any offense or crime;
 - (ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;
 - (iii) No proceeding is pending seeking the formation of a diversion agreement with that person;
 - (iv) The person has not been convicted of a sex offense; and
 - (v) Full restitution has been paid.
- (c) Notwithstanding the requirements in (a) or (b) of this subsection, the court shall grant any motion to seal records of any deferred disposition vacated under RCW 13.40.127(9) prior to the effective date of this section if restitution has been paid and the person is eighteen years of age or older at the time of the motion.

5.9.1 Recommendation: Provide automatic expungement of eligible juvenile records to enable survivors of sex trafficking to fully clear any record incurred as a result of their being trafficked.

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

Victims may receive restitution from the offenders, at the discretion of the court. Pursuant to Wash. Rev. Code Ann. § 9.94A.750 (Restitution),

(1) If restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days.

...

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the offense.

...

(5) Restitution may be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section. In addition, restitution may be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

Wash. Rev. Code Ann. § 9.94A.753(7) (Restitution—application dates) states,

Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter RCW 7.68 [Victims of crimes—compensation, assistance]. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims'

compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order.

Wash. Rev. Code Ann. § 9A.82.100(1)(a) (Remedies and procedures) states,

(1)(a) A person who sustains injury to his or her person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity, or by an offense defined in RCW 9A.40.100 [Human trafficking], 9.68A.100 [Commercial sexual abuse of a minor—Penalties], 9.68A.101 [Promoting commercial sexual abuse of a minor—Penalty], or 9A.88.070 [Promoting prostitution in the first degree], or by a violation of RCW 9A.82.060 or 9A.82.080 may file an action in superior court for the recovery of damages and the costs of the suit, including reasonable investigative and attorney’s fees.

....
(4) Following the determination of liability, orders may include, but are not limited to:

....
(e) Ordering the payment of all costs and expenses of the prosecution and investigation of . . . an offense defined in RCW 9A.40.100, 9.68A.100, 9.68A/101, or 9A.88.070, activity or a violation of RCW 9A.82.060 or 9A.82.080, civil and criminal, incurred by the state or county, including any costs of defense provided at public expense, as appropriate to the state general fund . . .

(f) Ordering forfeiture first as restitution to any person damaged by . . . an offense defined in RCW 9A.40.100, then to the state general fund . . . , as appropriate, to the extent not already ordered to be paid in other damages, of the following:

(i) Any property or other interest acquired or maintained in violation of RCW 9A.82.060 or 9A.82.080 to the extent of the investment of funds, and any appreciation or income attributable to the investment, from a violation of RCW 9A.82.060 or 9A.82.080.

(ii) Any property, contractual right, or claim against property used to influence any enterprise that a person has established, operated, controlled, conducted or participated in the conduct of, in violation of RCW of 9A.82.060 or 9A.82.080.

(iii) All proceeds are traceable to or derived from an offense included in . . . an offense defined in RCW 9A.40.100, 9.68A.100, 9.68A.101, or 9A.88.070, and all moneys, negotiable instruments, securities, and other things of value significantly used or intended to be used significantly to facilitate commission of the offense.

....
Lastly, Wash. Rev. Code Ann. § 9A.82.100(13) explains that “[p]rivate civil remedies provided under this section are supplemental and not mutually exclusive.”

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.

Statutes of limitations have not been eliminated for victims of domestic minor sex trafficking. Wash. Rev. Code Ann. § 9A.04.080 (Limitation of action) provides a 3-year statute of limitations for felony actions, unless otherwise noted in the statute. Wash. Rev. Code Ann. § 4.16.340(1) (Actions based on childhood sexual abuse) states,

All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse⁹⁹ shall be commenced within the later of the following periods:

⁹⁹ Wash. Rev. Code Ann. § 4.16.340(5) states,

- (a) Within three years of the act alleged to have caused the injury or condition;
- (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
- (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought:

PROVIDED, That the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.

Wash. Rev. Code Ann. § 9A.82.100(7) (Remedies and procedures) states,

The initiation of civil proceedings under this section shall be commenced within three years after discovery of the pattern of criminal profiteering activity or after the pattern should reasonably have been discovered or, in the case of an offense that is defined in RCW 9A.40.100, within three years after the final disposition of any criminal charges relating to the offense, whichever is later.

- 5.11.1 Recommendation: Add Wash. Rev. Code Ann. § 9A.44.100 (Trafficking) and crimes related to the commercial sexual abuse of a minor under Wash. Rev. Code Ann. ch. 9.68A (Sexual exploitation of children) to Wash. Rev. Code Ann. § 9A.04.080(1)(a) or (b) (Limitation of action), which would create either no statute of limitations or a ten year statute of limitation for prosecution of these crimes. Also, add commercial sexual abuse of minor offenses and trafficking with sexual motivation of minors to the definition of “childhood sexual abuse” in Wash. Rev. Code Ann. § 4.16.340 (Actions based on childhood sexual abuse) for statute of limitations in civil actions in order to give appropriate time for the discovery of injuries suffered through domestic minor sex trafficking.

As used in this section, “childhood sexual abuse” means any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.

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 audio-taping 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 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.*

Sec. 16 of 2010 Wa. Ch. 289 required law enforcement to develop a model policy on procedures relating to identifying and responding to victims of domestic minor sex trafficking by December 1, 2010, if funds are appropriated, and develop training on the model policy by January 1, 2011.¹⁰⁰

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

Single party consent to audio-recordings is a violation of Wash. Rev. Code Ann. § 9.73.030 (Intercepting, recording, or divulging private communication—consent required—exceptions), except in certain situations of an emergency nature set out in that section and chapter 9.73 (Privacy, violating right of).

However, Wash. Rev. Code Ann. § 9.73.090(2) (Certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080—standards—court authorizations—admissibility) states in part,

It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

Wash. Rev. Code Ann. § 9.73.210(1) (Intercepting, transmitting, or recording conversations concerning controlled substances or commercial sexual abuse of a minor) states,

If a police commander or officer above the rank of first line supervisor has reasonable suspicion that the safety of the consenting party is in danger, law enforcement personnel may, for the sole purpose of

¹⁰⁰ S.B. 6476, 61st Leg., 2010 Reg. Sess. § 16 (Wash. 2010) (partial veto), signed into law on April 1, 2010, <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/6476-S.SL.pdf> (last visited July 5, 2012).

protecting the safety of the consenting party, intercept, transmit, or record a private conversation or communication concerning:

- (b) Person(s) engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102.

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

Wash. Rev. Code Ann. § 9.73.050 (Admissibility of intercepted communication in evidence) restricts admissibility of evidence gained through illegal wiretapping; however, Wash. Rev. Code Ann. § 9.73.090(3) (Certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080) states that “[c]ommunications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9.73.050.” Absent a court order, intercepted communications are illegal and evidence obtained through them is inadmissible.

Pursuant to Wash. Rev. Code Ann. § 9.73.040 (Intercepting private communication),

(1) An ex parte order for the interception of any communication or conversation listed in RCW 9.73.030 may be issued by any superior court judge in the state upon verified application of either the state attorney general or any county prosecuting attorney setting forth fully facts and circumstances upon which the application is based and stating that:

- (a) There are reasonable grounds to believe that national security is endangered, that a human life is in danger, that arson is about to be committed, or that a riot is about to be committed, and
- (b) There are reasonable grounds to believe that evidence will be obtained essential to the protection of national security, the preservation of human life, or the prevention of arson or a riot, and
- (c) There are no other means readily available for obtaining such information.

6.3.1 Recommendation: Amend Wash. Rev. Code Ann. § 9.73.040 (Intercepting private communication) to allow for wiretapping in investigations of sex trafficking and CSEC crimes.

6.4 Using a law enforcement 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.

Washington does not have a statute expressly allowing law enforcement decoys. Wash. Rev. Code Ann. § 9.68A.090(1) (Communication with minor for immoral purposes) states that “a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.” The use of the term “believes to be a minor” appears to indicate that law enforcement may pose as a minor decoy.

6.4.1 Recommendation: Add a provision to expressly permit law enforcement to utilize decoys in investigating child sex trafficking through prostitution and to prohibit a defendant in such a case from asserting a defense that the person engaged in prostitution was not, in fact, a minor.

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

Wash. Rev. Code Ann. § 9.68A.090(1) (Communication with minor for immoral purposes) states that “a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.” The penalty is heightened to a Class C felony “if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.” Wash. Rev. Code

Ann. § 9.68A.090(2). The use of the term “believes to be a minor” appears to indicate that law enforcement may use Internet decoys.

6.5.1. Recommendation: Add a provision expressly allowing law enforcement to utilize the Internet to investigate child sex trafficking and CSEC crimes.

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

Wash. Rev. Code Ann. § 13.60.020 (Entry of information on missing children into missing person computer network—access) requires local law enforcement agencies to “file an official missing person report and enter biographical information into the state missing person computerized network within twelve hours after notification of a missing child is received under” certain provisions of Wash. Rev. Code Ann. § 13.32A.050 (Officer taking child into custody—when authorized—maximum time of custody—transporting to crisis residential center—report on suspected abuse or neglect). Wash. Rev. Code Ann. § 13.60.020 further states,

The patrol shall collect such information as will enable it to retrieve immediately the following information about a missing child: Name, date of birth, social security number, fingerprint classification, relevant physical descriptions, and known associates and locations. Access to the preceding information shall be available to appropriate law enforcement agencies, and to parents and legal guardians, when appropriate.

Wash. Rev. Code Ann. § 13.60.040 (Children receiving services from department of social and health services) directs DSHS to do the following:

[D]evelop a procedure for reporting missing children information to the missing children clearinghouse on children who are receiving departmental services in each of its administrative regions. . . . When the department has obtained information that a minor child has been located at a facility funded by the department, the department shall notify the clearinghouse and the child’s legal custodian, advising the custodian of the child’s whereabouts or that the child is subject to a dependency action. The department shall inform the clearinghouse when reunification occurs.

Wash. Rev. Code Ann. § 13.60.010 (Missing children clearinghouse—hot line—distribution of information—amber alert plan) states,

The Washington state patrol shall establish a missing children clearinghouse which shall include the maintenance and operation of a toll-free, twenty-four-hour telephone hotline. The clearinghouse shall distribute information to local law enforcement agencies, school districts, the department of social and health services, and the general public regarding missing children. The information shall include pictures, bulletins, training sessions, reports, and biographical materials that will assist in local law enforcement efforts to locate missing children. The state patrol shall also maintain a regularly updated computerized link with national and other statewide missing person systems or clearinghouses, and within existing resources, shall develop and implement a plan, commonly known as an “amber alert plan,” for voluntary cooperation between local, state, tribal, and other law enforcement agencies, state government agencies, radio and television stations, and cable and satellite systems to enhance the public’s ability to assist in recovering abducted children.

In addition, Wash. Rev. Code Ann. § 13.60.050 (Endangered missing person advisory plan) states,

Within existing resources, the Washington state patrol shall develop and implement a plan, commonly known as an “endangered missing person advisory plan,” for voluntary cooperation between local, state, tribal, and other law enforcement agencies, state government agencies, radio and television stations, and cable and satellite systems to enhance the public’s ability to assist in recovering endangered missing persons who do not qualify for inclusion in an amber alert.

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