

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

2013 ANALYSIS AND RECOMMENDATIONS NEW HAMPSHIRE

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 *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.*

N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) addresses sex trafficking by including commercial sex acts or sexually explicit performances within the definition of “involuntary servitude,” but it does not clearly define human trafficking victims to include any minor under the age of 18 used in a commercial sex act without regard to the use of force, fraud, or coercion. While a penalty enhancement applies when the offense involves a minor under 18, proof of force, fraud or coercion is still required for offenses involving a minor under 18. N.H. Rev. Stat. Ann. § 633:7(I) states,

¹ Unless otherwise specified, all references to New Hampshire statutes were taken from New Hampshire Revised Statutes Annotated (LEXIS through Chapter 69 of the 2013 Session) and all federal statutes were taken from United States Code (LEXIS through PL 113-15, approved 6/25/13). This report includes legislation enacted as of August 1, 2013.

(a) It is a class A felony to knowingly subject a person to involuntary servitude,² where the compulsion is accomplished by any of the following means:

- (1) Causing or threatening to cause serious harm to any person.
- (2) Confining the person unlawfully as defined in RSA 633:2, II [Criminal restraint], or threatening to so confine the person.
- (3) Abusing legal process or threatening to bring legal action against the person relating to the person's legal status or potential criminal liability.
- (4) Destroying, concealing, removing, confiscating, or otherwise making unavailable to that person any actual or purported passport or other immigration document, or any other actual or purported government identification document.
- (5) Threatening to commit a crime against the person.
- (6) False promise relating to the terms and conditions of employment, education, marriage, or financial support.
- (7) Threatening to reveal any information sought to be kept concealed by the person which relates to the person's legal status or which would expose the person to criminal liability.
- (8) Facilitating or controlling the person's access to an addictive controlled substance.
- (9) Engaging in any scheme, plan, or pattern, whether overt or subtle, intended to cause the person to believe that, if he or she did not perform such labor, services, commercial sex acts,³ or sexually

² N.H. Rev. Stat. Ann. § 633:6(V) (Definitions) defines "involuntary servitude" as

a condition of compulsory service or labor, including commercial sex acts or sexually explicit performances, performed by one person, against his or her will, for the benefit of another. If a person willingly begins to perform the labor or service but later attempts to withdraw and is forced to remain and perform against his or her will, the service becomes involuntary. The payment of a wage or salary is not determinative of the question as to whether that person has been held in involuntary servitude.

³ N.H. Rev. Stat. Ann. § 633:6(I) defines "commercial sex act" as "any sex act because of which anything of value is given, promised to, or received, directly or indirectly, by any person." N.H. Rev. Stat. Ann. § 633:6(II) defines "sex act" as "any act of sexual contact as defined in RSA 632-A:1, IV [Definitions], any act of sexual penetration as defined in RSA 632-A:1, V, or any other sexually explicit conduct as defined in RSA 649-A:2 [Definitions]." N.H. Rev. Stat. Ann. § 632-A:1(IV) defines "sexual contact" as "the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification." N.H. Rev. Stat. Ann. § 632-A:1(V) states,

(a) "Sexual penetration" means:

- (1) Sexual intercourse; or
- (2) Cunnilingus; or
- (3) Fellatio; or
- (4) Anal intercourse; or
- (5) Any intrusion, however slight, of any part of the actor's body, including emissions, or any object manipulated by the actor into genital or anal openings of the victim's body; or
- (6) Any intrusion, however slight, of any part of the victim's body, including emissions, or any object manipulated by the victim into the oral, genital, or anal openings of the actor's body; or
- (7) Any act which forces, coerces, or intimidates the victim to perform any sexual penetration as defined in subparagraphs (1)–(6) on the actor, on another person, or on himself.

(b) Emissions include semen, urine, and feces. Emission is not required as an element of any form of sexual penetration.

(c) "Objects" include animals as defined in RSA 644:8, II [Cruelty to animals].

N.H. Rev. Stat. Ann. § 649-A:2(III) defines "sexually explicit conduct" as

explicit performances,⁴ that such person or any person would suffer serious harm or physical restraint.

(10) Withholding or threatening to withhold food or medication that the actor has an obligation or has promised to provide to the person.

(11) Coercing a person to engage in any of the foregoing acts by requiring such in satisfaction of a debt owed to the actor.

A conviction under N.H. Rev. Stat. Ann. § 633:7(I) is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both,⁵ but if the offense involves “a commercial sex act or sexually explicit performance by a victim under the age of 18,” a conviction is punishable as a Class A felony by imprisonment for 10–30 years,⁶ a fine not to exceed \$4,000,⁷ or both. N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (c),

human masturbation, the touching of the actor’s or other person’s sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, or any lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture. Sexual intercourse is simulated when it depicts explicit sexual intercourse that gives the appearance of the consummation of sexual intercourse, normal or perverted.

⁴ N.H. Rev. Stat. Ann. § 633:6(III) defines “sexually-explicit performance” as “an act or show involving one or more sex acts, intended to arouse, satisfy the sexual desires of, or appeal to the prurient interests of patrons or viewers, whether public or private, live, photographed, recorded, or videotaped.”

⁵ N.H. Rev. Stat. Ann. § 651:2(I) (Sentences and limitations) states, “A person convicted of a felony or a Class A misdemeanor may be sentenced to imprisonment, probation, conditional or unconditional discharge, or a fine.” N.H. Rev. Stat. Ann. § 651:2(IV) states in part, “A fine may be imposed in addition to any sentence of imprisonment, probation, or conditional discharge.”

⁶ Extended terms of imprisonment may apply under certain circumstances. N.H. Rev. Stat. Ann. § 651:6(I)–(IV) (Extended term of imprisonment) states,

I. A convicted person may be sentenced according to paragraph III if the jury also finds beyond a reasonable doubt that such person:

(a) Based on the circumstances for which he or she is to be sentenced, has knowingly devoted himself or herself to criminal activity as a major source of livelihood;

...

(c) Has manifested exceptional cruelty or depravity in inflicting death or serious bodily injury on the victim of the crime;

(d) Has committed an offense involving the use of force against a person with the intention of taking advantage of the victim’s age or physical disability;

(e) Has committed or attempted to commit any of the crimes defined in RSA 631 [Assault and related offenses] or 632-A [Sexual assault and related offenses] against a person under 13 years of age;

...

(m) Has committed or attempted to commit aggravated felonious sexual assault in violation of RSA 632-A:2, I(1) or RSA 632-A:2, II where the defendant was 18 years of age or older at the time of the offense;

(n) Has committed or attempted to commit aggravated felonious sexual assault in violation of RSA 632-A:2, III, and one or more of the acts comprising the pattern of sexual assault was an offense under RSA 632-A:2, I(1) or RSA 632-A:2, II, or both, and the defendant was 18 years of age or older when the pattern of sexual assault began;

...

(q) Has knowingly committed any of the following offenses as a criminal street gang member, or for the benefit of, at the direction of, or in association with any criminal street gang, with the purpose to promote, further, or assist in any such criminal conduct by criminal street gang members:

(1) Violent crime as defined in RSA 651:5, XIII [includes “[a]ny felonious child pornography offense under [N.H. Rev. Stat. Ann. §] 649-A”].

651:2(I), (II)(a), (IV)(a). Similarly, N.H. Rev. Stat. Ann. § 633:7(II) states in part, “It is a class A felony to recruit, harbor, transport, provide, obtain, or otherwise make available a person, knowing or believing it likely that the person will be subjected to trafficking as defined in paragraph I.” A conviction under this statute is

....
(6) Criminal street gang solicitation as defined in RSA 644:20 [Criminal street gang; solicitation];
or

....
II. A convicted person may be sentenced according to the terms of paragraph III if the court finds, and includes such findings in the record, that such person:

(a) Has twice previously been convicted in this state, or in another jurisdiction, on sentences in excess of one year;

....
III. If authorized by paragraph I or II, and if written notice of the possible application of this section is given the defendant at least 21 days prior to the commencement of jury selection for his or her trial, a defendant may be sentenced to an extended term of imprisonment. An extended term is, for a person convicted of:

(a) Any felony, other than murder or manslaughter, a minimum to be fixed by the court of not more than 10 years and a maximum to be fixed by the court of not more than 30 years;
(b) A misdemeanor, a minimum to be fixed by the court of not more than 2 years and a maximum to be fixed by the court of not more than 5 years;

....
(e) Two or more offenses under RSA 632-A:2, life imprisonment without parole;
(f) A third offense under RSA 632-A:3 [Felonious sexual assault], life imprisonment; or

....
IV. If authorized by subparagraphs I(m), (n), or (o) and if notice of the possible application of this section is given to the defendant prior to the commencement of trial:

(a) There is a presumption that a person shall be sentenced to a minimum to be fixed by the court of not less than 25 years and a maximum of life imprisonment unless the court makes a determination that the goals of deterrence, rehabilitation, and punishment would not be served, based on the specific circumstances of the case, by such a sentence and the court makes specific written findings in support of the lesser sentence. . . .

....
(b) The sentence shall also include, in addition to any other penalties provided by law, a special sentence of lifetime supervision by the department of corrections. . . .

....
⁷ Under N.H. Rev. Stat. Ann. § 651:2(IV), the fines imposed for a felony violation vary depending on whether the offender is an individual or organization or whether the offender gained property through the illegal violation. N.H. Rev. Stat. Ann. § 651:2(IV) states,

IV. A fine may be imposed in addition to any sentence of imprisonment, probation, or conditional discharge. The limitations on amounts of fines authorized in subparagraphs (a) and (b) shall not include the amount of any civil penalty, the imposition of which is authorized by statute or by a properly adopted local ordinance, code, or regulation. The amount of any fine imposed on:

(a) Any individual may not exceed \$4,000 for a felony, \$2,000 for a class A misdemeanor, \$1,200 for a class B misdemeanor, and \$1,000 for a violation.

(b) A corporation or unincorporated association may not exceed \$100,000 for a felony, \$20,000 for a misdemeanor and \$1,000 for a violation. A writ of execution may be issued by the court against the corporation or unincorporated association to compel payment of the fine, together with costs and interest.

(c) If a defendant has gained property through the commission of any felony, then in lieu of the amounts authorized in paragraphs (a) and (b), the fine may be an amount not to exceed double the amount of that gain.

punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, but if the victim is under the age of 18 and “the offender knew or believed it likely that the victim would be coerced into engaging in a commercial sex act or sexually explicit performance,” a conviction is punishable by imprisonment for 10 years to a maximum “fixed by the court,” a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 633:7(II), 651:2(I), (II)(a), (IV)(a).

- 1.1.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) to eliminate the compulsion requirement if the victim is a minor under the age of 18 used in a commercial sex act or sexually explicit performance.⁸

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 statutes specifically prohibit CSEC in New Hampshire:

1. N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses) makes it a crime if a person
 - (a) Solicits, agrees to perform, or engages in sexual contact⁹ as defined in RSA 632-A:1, IV or sexual penetration¹⁰ as defined in RSA 632-A:1, V, in return for consideration; or
 - (b) Induces or otherwise purposely causes another to violate subparagraph (a); or
 - (c) Transports another into or within this state with the purpose of promoting or facilitating such other in engaging in conduct in violation of subparagraph (a); or
 - (d) Not being a legal dependent incapable of self support, knowingly is supported in whole or in part by the proceeds of violation of subparagraph (a); or
 - (e) Knowingly permits a place under such person’s control to be used for violation of subparagraph (a); or
 - (f) Pays, agrees to pay, or offers to pay another person to engage in sexual contact as defined in RSA 632-A:1, IV or sexual penetration as defined in RSA 632-A:1, V, with the payor or with another person.

A conviction under this statute is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a). If the offense involves a minor under the age of 18, however, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

2. N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited) states,
 - I. No person shall knowingly:
 - (a) Compile, enter into, or transmit by means of computer;
 - (b) Make, print, publish, or reproduce by other computerized means;
 - (c) Cause or allow to be entered into or transmitted by means of computer; or
 - (d) Buy, sell, receive, exchange, or disseminate by means of computer, any notice, statement, or advertisement, or any minor’s name, telephone number, place of residence, physical characteristics,

⁸ Subsequent recommendations in this report referring to N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

⁹ See *supra* note 3 for the definition of “sexual contact.”

¹⁰ See *supra* note 3 for the definition of “sexual penetration.”

or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any child,¹¹ or the visual depiction of such conduct.

A conviction under N.H. Rev. Stat. Ann. § 649-B:3(I) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

Several other New Hampshire laws, while not expressly commercial in nature, may also be applicable in cases involving the commercial sexual exploitation of a child. Some of those statutes are as follows:

1. N.H. Rev. Stat. Ann. § 632-A:4(I) (Sexual assault) states,

I. A person is guilty of a class A misdemeanor under any of the following circumstances:

- (a) When the actor subjects another person who is 13 years of age or older to sexual contact under any of the circumstances named in RSA 632-A:2 [Aggravated felonious sexual assault].
- (b) When the actor subjects another person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age to sexual contact where the age difference between the actor and the other person is 5 years or more.
- (c) In the absence of any of the circumstances set forth in RSA 632-A:2, when the actor engages in sexual penetration with a person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 4 years or less.

A conviction under N.H. Rev. Stat. Ann. § 632-A:4(I) is punishable as a Class A misdemeanor by imprisonment up to 1 year, a fine not to exceed \$2,000, or both. N.H. Rev. Stat. Ann. §§ 632-A:4(I), 651:2(I), (II)(c), (IV)(a).

2. N.H. Rev. Stat. Ann. § 632-A:3(II), (III) (Felonious sexual assault) states,

A person is guilty of a class B felony if such person:

...

- II. Engages in sexual penetration with a person, other than his legal spouse, who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 4 years or more; or
- III. Engages in sexual contact with a person other than his legal spouse who is under 13 years of age.

A first or second conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 632-A:3, 651:2(I), (II)(b), (IV)(a). Under certain circumstances, a third conviction is punishable by an extended term of life imprisonment. N.H. Rev. Stat. Ann. § 651:6(I), (III)(f).¹²

3. N.H. Rev. Stat. Ann. § 632-A:2 (Aggravated felonious sexual assault) states,

I. A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances:

....

¹¹ "In this chapter, 'child' means any person under the age of 16 years." N.H. Rev. Stat. Ann. § 649-B:2.

¹² See *supra* note 6 for the provisions of N.H. Rev. Stat. Ann. § 651:6(I), (III)(f).

(l) When the victim is less than 13 years of age.

....

II. A person is guilty of aggravated felonious sexual assault without penetration when he intentionally touches whether directly, through clothing, or otherwise, the genitalia of a person under the age of 13 under circumstances that can be reasonably construed as being for the purpose of sexual arousal or gratification.

III. A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault¹³ against another person, not the actor's legal spouse, who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.

First convictions under this statute are punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both; second convictions¹⁴ are punishable by imprisonment for 20–40 years, a fine not to exceed \$4,000, or both, while third and subsequent convictions are punishable by life imprisonment without the possibility of parole. N.H. Rev. Stat. Ann. §§ 632-A:10-a(I)–(III), 651:2(I), (IV)(a). Under certain circumstances, convictions under N.H. Rev. Stat. Ann. § 632-A:2(I)(1) (Aggravated felonious sexual assault when the victim is under the age of 13) are subject to enhanced punishments including 25 years to life imprisonment for a first conviction, life imprisonment for subsequent convictions, and life-time supervision by the department of corrections. N.H. Rev. Stat. Ann. § 651:6(I)(m), (III)(e), (IV)(a), (b).¹⁵

¹³ Pursuant to N.H. Rev. Stat. Ann. § 632-A:1(I-c) (Definitions), “[p]attern of sexual assault’ means committing more than one act under RSA 632-A:2 [Aggravated felonious sexual assault] or RSA 632-A:3 [Felonious sexual assault], or both, upon the same victim over a period of 2 months or more and within a period of 5 years.”

¹⁴ For purposes of this statute, prior convictions include previous convictions under N.H. Rev. Stat. Ann. § 632-A:2 “or any other statute prohibiting the same conduct in another state, territory or possession of the United States” N.H. Rev. Stat. Ann. § 632-A:10-a(II). Additionally, N.H. Rev. Stat. Ann. § 632-A:10-a(IV) states that “the phrase ‘previously convicted’ shall mean any conviction obtained by trial on the merits, or negotiated plea with the assistance of counsel and evidencing an knowing, intelligent, and voluntary waiver of the defendant’s rights, provided, however, that previous imprisonment is not required.”

¹⁵ See *supra* note 6 for the substantive provisions of N.H. Rev. Stat. Ann. § 651:6(I)(m), (III)(e), (IV)(a), (b). Additionally, N.H. Rev. Stat. Ann. § 651:6(VI) states,

VI. A person shall be sentenced [to imprisonment for life without the possibility of parole] if the court finds, and includes such findings in the record, that such person:

- (a) (1) Committed a violation of RSA 632-A:2, I(1), RSA 632-A:2, II, or RSA 632-A:2, III, in which one or more of the acts comprising the pattern of sexual assault was an offense under RSA 632-A:2, I(1) or RSA 632-A:2, II, or both, after having previously been convicted of an offense in violation of one of the aforementioned offenses or any other statute prohibiting the same conduct in another state, territory or possession of the United States, and
 - (2) The person committed the subsequent offense while released on bail on the earlier offense or the sentence for the earlier conviction involved a term of incarceration, probation, parole, or other supervised release; or
- (b) (1) Committed a violation of RSA 631:1 [First degree assault] after having previously been convicted of an offense in violation of RSA 631:1, or any other statute prohibiting the same conduct in another state, territory or possession of the United States, if the earlier offense also involved a victim under 13 years of age where the serious bodily injury resulted in brain damage or physical disability to the child that is likely to be permanent; and
 - (2) The person committed the subsequent offense while released on bail on the earlier offense or the sentence for the earlier conviction involved a term of incarceration, probation, parole, or other supervised release; or
- (c) (1) Committed a violation of RSA 630:1-b [Second degree murder] after having previously been convicted of an offense in violation of RSA 630:1-b, or any other statute prohibiting the same conduct in another state, territory, or possession of the United States; and

4. N.H. Rev. Stat. Ann. § 639:3 (Endangering welfare of child or incompetent) states,

I. A person is guilty of endangering the welfare of a child or incompetent if he knowingly endangers the welfare of a child under 18 years of age . . . by purposely violating a duty of care, protection or support he owes to such child . . . , or by inducing such child . . . to engage in conduct that endangers his health or safety.

....

III. In the prosecution of any person under this section, the solicitation by any person of a child under the age of 16 to engage in sexual activity as defined by RSA 649-A:2, III [Definitions]¹⁶ for the purpose of creating a visual representation as defined in RSA 649-A:2, IV,¹⁷ or to engage in sexual penetration as defined by RSA 632-A:1, V [Definitions],¹⁸ constitutes endangering the welfare of such child.

....

A conviction under N.H. Rev. Stat. Ann. § 639:3(I) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 639:3(V), 625:9(IV)(c), 651:2(IV)(a). A conviction under N.H. Rev. Stat. Ann. § 639:3(III), however, is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 639:3(V), 651:2(I), (II)(b), (IV)(a).

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

Under N.H. Rev. Stat. Ann. § 645:2(IV) (Prostitution and related offenses), “[i]t shall be an affirmative defense to a [prostitution] charge under subparagraph I(a) that the defendant engaged in the conduct because he or she was the victim of trafficking in persons, as defined in RSA 633:7.”

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.*

New Hampshire has not enacted a racketeering statute. However, sentence enhancements apply to offenses committed by criminal street gangs. N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) (Extended term of

(2) The person committed the subsequent offense while released on bail on the earlier offense or the sentence for the earlier conviction involved a term of incarceration, probation, parole, or other supervised release.

VII. If the court has made the findings authorized by RSA 651:6, VI, and if notice of the possible application of this section is given to the defendant prior to the commencement of trial, a person shall be sentenced to an extended term of imprisonment of life without parole.

¹⁶ See *supra* note 3 for the definition of “sexually explicit conduct.”

¹⁷ N.H. Rev. Stat. Ann. § 649-A:2(IV) defines “visual representation” as the following:

[A]ny visual depiction, including photograph, film, video, digital image, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

- (a) The production of such visual depiction involves the use of a child engaging in or being engaged in sexually explicit conduct; or
- (b) Such visual depiction is a digital image, computer image, or computer-generated image of a child engaging in or being engaged in sexually explicit conduct; or
- (c) Such visual depiction has been created, adapted, or modified to appear that an identifiable child is engaging in or being engaged in sexually explicit conduct.

¹⁸ See *supra* note 3 for the definition of “sexual penetration.”

imprisonment) states, “A convicted person may be sentenced according to paragraph III¹⁹ if the jury also finds beyond a reasonable doubt that such person . . . Has knowingly committed any of the following offenses as a criminal street gang member, or for the benefit of, at the direction of, or in association with any criminal street gang, with the purpose to promote, further, or assist in any such criminal conduct by criminal street gang members: (1) Violent crime as defined in RSA 651:5, XIII [includes “[a]ny felonious child pornography offense under [N.H. Rev. Stat. Ann. §] 649-A]. . .”

- 1.4.1 Recommendation: Enact a racketeering statute that includes CSEC and trafficking offenses, including N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons); N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses); N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited), as predicate crimes so the racketeering law may be used to prosecute trafficking enterprises.

¹⁹ N.H. Rev. Stat. Ann. § 651:6(III) provides,

If authorized by paragraph I or II, and if written notice of the possible application of this section is given the defendant at least 21 days prior to the commencement of jury selection for his or her trial, a defendant may be sentenced to an extended term of imprisonment. An extended term is, for a person convicted of:

- (a) Any felony, other than murder or manslaughter, a minimum to be fixed by the court of not more than 10 years and a maximum to be fixed by the court of not more than 30 years;
- (b) A misdemeanor, a minimum to be fixed by the court of not more than 2 years and a maximum to be fixed by the court of not more than 5 years;

....

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.*
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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.*

New Hampshire’s human trafficking law can apply to buyers of sex with minors following federal precedent through the term “obtain.”²⁰ However, the statute requires that the buyer have knowledge that the minor is a victim of human trafficking. N.H. Rev. Stat. Ann. § 633:7(II) (Trafficking in persons) makes it illegal for a person to “obtain . . . a person, knowing or believing it likely that the person will be subjected to trafficking as defined in paragraph I.”²¹

- 2.1.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) to eliminate the “knowing or believing” requirement for applying the statute to buyers of commercial sex with minors.

²⁰ See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit specifically addressed whether the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers when it reversed a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers. *United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011). Holding that the conduct of buyers who obtain a child for commercial sex can violate 18 U.S.C. § 1591(a)(1), the Eighth Circuit illustrated through hypothetical buyer scenarios that, under certain circumstances, most of the terms in the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) could apply to buyers. While other terms may apply to buyers’ conduct under state law as well, the analysis here focuses on the term “obtains” which is most likely to apply in the majority of buyer cases.

²¹ See *supra* Section 1.1 for the text of N.H. Rev. Stat. Ann. § 633:7(I).

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

New Hampshire's CSEC laws do not specifically include the crime of buying sex with a minor. While N.H. Rev. Stat. Ann. § 645:2(I)(f)²² (Prostitution and related offenses) makes it a crime if a person “[p]ays, agrees to pay, or offers to pay another person to engage in sexual contact as defined in RSA 632-A:1, IV or sexual penetration as defined in RSA 632-A:1, V, with the payor or with another person,” and enhances the penalty when an offense involves a minor under 18 for offenses committed under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e), this penalty enhancement does not apply when subsection (f) is violated. As a result, New Hampshire's prostitution statute, N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses) does not distinguish between buying sex with an adult and buying sex with a minor. Regardless of the age of the victim, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(f) is punishable as a Class B misdemeanor by a fine up to \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a).

N.H. Rev. Stat. Ann. § 649-B:3(I)(d) (Computer pornography prohibited) does make it illegal, however, for a person to knowingly,

[b]uy, sell, receive, exchange, or disseminate by means of computer, any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any child, or the visual depiction of such conduct.

This law could apply to buyers who attempt to obtain information about where to purchase commercial sex with a minor or arrange to meet a minor for these purposes. The law, however, does not explicitly refer to commercial sex acts. A conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

Several of New Hampshire's sexual offenses may also be used to prosecute certain buyers of commercial sex acts with a minor.²³

- 2.2.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 645:2 (Prostitution and related offenses) to impose enhanced penalties where a person solicits or pays for sex with a minor under the age of 18.

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

N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses) does not distinguish between the solicitation of an adult and of a minor. Regardless of the age of the victim, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(f) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a).

- 2.3.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 645:2 (Prostitution and related offenses) to impose enhanced penalties when a person solicits sex with a minor under the age of 18.

²² See N.H. Rev. Stat. Ann. §645:2(I)(f) where the application of this subsection was held unconstitutionally overbroad when applied to the facts in *State v. Theriault*, 158 N.H. 123, where the defendant offered to remunerate a couple for video-taping themselves having sex.

²³ See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

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

Buyers convicted under N.H. Rev. Stat. Ann. § 633:7(I) (Trafficking in persons)²⁴ are guilty of a Class A felony punishable by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, but if the offense involves “a commercial sex act or sexually explicit performance by a victim under the age of 18,” a conviction is punishable as a Class A felony by imprisonment for 10–30 years, a fine not to exceed \$4,000,²⁵ or both. N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (c), 651:2(I), (II)(a), (IV)(a).

A conviction under N.H. Rev. Stat. Ann. § 649-B:3(I)(d) (Computer pornography prohibited) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both, while a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a), 645:2(I), 625:9(IV)(c), 651:2(IV)(a).

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 offense²⁶ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,²⁷ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²⁸

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.*

N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited) states,

I. No person shall knowingly:

...

²⁴ See *supra* Section 1.1 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:7.

²⁵ See *supra* note 7.

²⁶ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

²⁷ 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).

²⁸ 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).

(d) Buy, sell, receive, exchange, or disseminate by means of computer, any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any child,²⁹ or the visual depiction of such conduct.

This law could apply to buyers who use a computer to attempt to obtain information about where to purchase commercial sex with a minor or arrange for meeting a minor for these purposes. The law, however, does not explicitly refer to commercial sex acts. A conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

Additionally, N.H. Rev. Stat. Ann. § 649-B:4(I) (Certain uses of computer services prohibited) states,

No person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child³⁰ or another person believed by the person to be a child, to commit any of the following:

- (a) Any offense under RSA 632-A, relative to sexual assault and related offenses.
- (b) Indecent exposure and lewdness under RSA 645:1.
- (c) Endangering a child as defined in RSA 639:3, III.

If the victim is under 16 or the offender believes the child to be 13–15 years old, a first conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both, while a second conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (b), (IV)(a), 649-B:2. If the offender believed the child to be under the age of 13, however, a first conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while a second conviction is punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (IV)(a), 649-B:2. Third and any subsequent convictions, regardless of whether the defendant believed the victim to be under 13, are punishable by imprisonment up to 30 years. N.H. Rev. Stat. Ann. § 649-B:4(II)(c).

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

N.H. Rev. Stat. Ann. § 633:7(II) (Trafficking in persons) does not expressly prohibit a mistake of age defense, and a mistake of age defense is irrelevant in prosecutions of N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses), as its penalties for soliciting and buying sex are not dependent on the age of the victim.

- 2.6.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) to expressly prohibit a defendant asserting a mistake of age defense.

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

The only age-based distinction in New Hampshire's human trafficking law is a heightened penalty which applies to all human trafficking offenses committed against all minors under the age of 18. Violators of N.H. Rev. Stat. Ann. § 633:7(I)(c) (Trafficking in persons)³¹ are guilty of a Class A felony punishable by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, but if the offense involves "a commercial sex

²⁹ See *supra* note 11.

³⁰ See *supra* note 11.

³¹ See *supra* Section 1.1 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:7.

act or sexually explicit performance by a victim under the age of 18,” a conviction is punishable as a Class A felony by imprisonment for 10–30 years, a fine not to exceed \$4,000,³² or both. N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (c), 651:2(I), (II)(a), (IV)(a). However, a conviction under the statute still requires a demonstration that the crime was committed using force, fraud, or coercion.

Since New Hampshire’s CSEC laws do not specifically include the crime of buying sex with a minor, New Hampshire does not impose heightened penalties for buying sex acts with any minor.³³

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 are subject to potential fines ranging from \$1,200–\$4,000.³⁴ Buyers convicted under N.H. Rev. Stat. Ann. § 633:7(I) (Trafficking in persons)³⁵ are guilty of a Class A felony punishable by a fine not to exceed \$4,000, N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (c), 651:2(I), (II)(a), (IV)(a).

Pursuant to N.H. Rev. Stat. Ann. § 651:2(IV)(a) (Sentences and limitations), a buyer convicted of any felony, which includes N.H. Rev. Stat. Ann. § 649-B:3(I)(d) (Computer pornography prohibited) and § 649-B:4(I) (Certain uses of computer services prohibited), is subject to a possible fine not to exceed \$4,000. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 649-B:4(II). A violation of N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses), however, is a Class B misdemeanor, and, pursuant to N.H. Rev. Stat. Ann. § 651:2(IV)(a), is punishable by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a).

Buyers convicted of any offense may be ordered to pay restitution under New Hampshire’s general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to sentence any offender³⁶ “to make restitution in an amount determined by the court.”

Additionally, a buyer convicted under N.H. Rev. Stat. Ann. § 633:7, a buyer will be subject to asset forfeiture proceedings that are civil in nature.³⁷ N.H. Rev. Stat. Ann. § 633:8 (Forfeiture of items used in connection with trafficking in persons) states in part,

I. All offenses under this section shall qualify as offenses for forfeiture and thereby upon petition of the attorney general, shall be subject to forfeiture to the state and said property interest shall be vested in the state:

- (a) All materials, products, and equipment of any kind used in violation of this section.
- (b) Any property interest in any conveyance used in furtherance of an act which violates this section.
- (c) Any moneys, coin, currency, negotiable instruments, securities, or other investments knowingly used or intended for use in violation of this section.
- (d) Any books, records, ledgers, and research material, including formulae, microfilm, tapes, and any other data which are used or intended for use in felonious violation of this section.
- (e) Any real property, including any right, title, leasehold interest, and other interest in the whole of

³² See *supra* note 7.

³³ See *supra* Section 2.2.

³⁴ See *supra* note 7.

³⁵ See *supra* Section 1.1 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:7.

³⁶ N.H. Rev. Stat. Ann. § 651:62(IV) defines “offender” as “any person convicted of a criminal or delinquent act.”

³⁷ For additional information on asset forfeiture laws and procedure, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

any lot or tract of land and any appurtenances or improvements, which real property is knowingly used or intended for use, in any manner or part, in felonious violation of this section.

....
XI. The court may order forfeiture of all items or property interests under this section, except no item or property interest shall be subject to forfeiture unless the owner or owners thereof were consenting parties to a felonious violation of this section and had knowledge thereof.

Property that is subject to forfeiture may be seized upon process, without process in certain circumstances or constructively, pursuant to N.H. Rev. Stat. Ann. §633:8 (III). Final orders of forfeiture shall be implemented by the department of justice and shall provide for disposition of the items or property interests in any manner not prohibited by law, including payment of restitution or sale of the property. The department of justice shall first pay the reasonable expenses of the forfeiture proceeding and sale. N.H. Rev. Stat. Ann. § 633:8(XVI). Following the payment of costs, “any forfeited money and the proceeds of any sale or public auction of forfeited items shall first be used to satisfy any order of restitution or compensation imposed by the court. Any remaining funds shall go to the victims' assistance fund as defined in RSA 21-M:8-i.”

N.H. Rev. Stat. Ann. § 633:9(I) (Administrative forfeiture of items used in connection with trafficking in persons) further states,

Interests in property subject to forfeiture under the provisions of RSA 633:8, I(a), I(b), I(c) excepting proceeds, and I(d), but not real property, shall be subject to administrative forfeiture by the department of justice provided that the total amount or value of such property does not exceed \$75,000. The provisions of RSA 633:8 shall apply in any case of administrative forfeiture except as otherwise provided in this section.

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

N.H. Rev. Stat. Ann. § 649-A:3(I)(a) (Possession of child sexual abuse images) makes it illegal for a person to knowingly “[b]uy, procure, possess, or control any visual representation of a child engaging in sexually explicit conduct.”³⁸ A first conviction under this statute is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while subsequent convictions are punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3(II), 651:2(I), (II)(a), (IV)(a).

A conviction under N.H. Rev. Stat. Ann. § 649-B:3(I)(d) (Computer pornography prohibited) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

In comparison, a federal conviction for possession of child pornography³⁹ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁴⁰ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁴¹

³⁸ See *supra* note 3 for the definition of “sexually explicit conduct.”

³⁹ 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).

⁴⁰ 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

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

Buyers convicted under N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses), § 649-B:3(I)(d) (Computer pornography prohibited), § 649-A:3(I)(a) (Possession of child sexual abuse images), or § 649-B:4(I) (Certain uses of computer services prohibited) are required to register as a sexual offender. N.H. Rev. Stat. Ann. §§ 651-B:1(VII)(b), 651-B:2(I).

N.H. Rev. Stat. Ann. § 651-B:2(I) (Registration) states that “[e]very sexual offender or offender against children shall be registered with the department of safety, division of state police” N.H. Rev. Stat. Ann. § 651-B:1(IV) (Definitions) defines “sexual offender” as “a person who is required to register for any sexual offense,” while N.H. Rev. Stat. Ann. § 651-B:1(V) defines a “sex offense” in part to include convictions under N.H. Rev. Stat. Ann. § 632-A:2 (Aggravated felonious sexual assault), § 632-A:4(I)(a) (Sexual assault) § 632-A:3 (Felonious sexual assault), or “[a]ny other criminal offense . . . if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register.”

N.H. Rev. Stat. Ann. § 651-B:1(VI) defines an “offender against children” as “a person who is required to register for an offense against a child” and N.H. Rev. Stat. Ann. § 651-B:1(VII) explains that “offense against a child”

means the following offenses, including an accomplice to, or an attempt, conspiracy, or solicitation to commit, any of the following offenses:

(a) Any of the following offenses, where the victim was under the age of 18 at the time of the offense: . . . aggravated felonious sexual assault, RSA 632-A:2; felonious sexual assault, RSA 632-A:3; sexual assault, RSA 632-A:4, I(a) or RSA 632-A:4, III; . . . or prostitution, RSA 645:2.

(b) Intentional contribution to the delinquency of a minor, RSA 169-B:41, II; sexual assault, RSA 632-A:4, I(b) if the actor was 18 years of age or older at the time of the offense; endangering the welfare of a child, RSA 639:3, III; child pornography, RSA 649-A:3, RSA 649-A:3-a and RSA 649-A:3-b; computer pornography, RSA 649-B:3; certain uses of computer services prohibited, RSA 649-B:4; or obscene matters, RSA 650:2, II.

. . . .

(e) Any other criminal offense which is not specifically listed in subparagraph (a) if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register. . . .

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).

⁴¹ 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).

- 2.10.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 651-B:1 (Definitions) to include N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) as an “offense against a child” requiring sex offender registration.

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.*

Traffickers convicted under N.H. Rev. Stat. Ann. § 633:7(I) (Trafficking in persons)⁴² are guilty of a Class A felony punishable by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, but if the offense involves “a commercial sex act or sexually explicit performance by a victim under the age of 18,” a conviction is punishable as a Class A felony by imprisonment for 10–30 years, a fine not to exceed \$4,000,⁴³ or both. N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (c), 651:2(I), (II)(a), (IV)(a). Similarly, a conviction under N.H. Rev. Stat. Ann. § 633:7(II) is punishable as a Class A felony punishable by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, but if the victim is under the age of 18 and “the offender knew or believed it likely that the victim would be coerced into engaging in a commercial sex act or sexually explicit performance,” a conviction is punishable by imprisonment for 10 years to a maximum “fixed by the court,” a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 633:7(II), 651:2(I), (II)(a), (IV)(a).

Traffickers may also be prosecuted under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e) (Prostitution and related offenses).⁴⁴ A conviction under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a). If the offense involves a minor under the age of 18, however, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

A conviction under N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited)⁴⁵ is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

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

⁴² See *supra* Section 1.1 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:7.

⁴³ See *supra* note 7.

⁴⁴ See *supra* Section 1.2 for the provisions of N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e).

⁴⁵ See *supra* Section 1.2 for the provisions of N.H. Rev. Stat. Ann. § 649-B:3(I).

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 offense⁴⁶ against a minor.

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

New Hampshire expressly prohibits both the manufacturing and distribution of child pornography. Pursuant to N.H. Rev. Stat. Ann. § 649-A:3-b(I) (Manufacture of child sexual abuse images),

No person shall knowingly create, produce, manufacture, or direct a visual representation of a child engaging in or being engaged in sexually explicit conduct,⁴⁷ or participate in that portion of such visual representation that consists of a child engaging in or being engaged in sexually explicit conduct.

A first conviction under this statute is punishable by imprisonment for 15–30 years, a fine not to exceed \$4,000, or both, while subsequent convictions are punishable by “life imprisonment or for such term as the court may order.” N.H. Rev. Stat. Ann. §§ 649-A:3-b(II), 651:2(I), (IV)(a). Additionally, certain penalty enhancements may be available under N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) (Extended term of imprisonment).⁴⁸

Pursuant to N.H. Rev. Stat. Ann. § 649-A:3-a(I) (Distribution of child sexual abuse images),

I. No person shall:

(a) Knowingly sell, exchange, or otherwise transfer, or possess with intent to sell, exchange, or otherwise transfer any visual representation of a child engaging in or being engaged in sexually explicit conduct;

(b) Knowingly publish, exhibit, or otherwise make available any visual representation of a child engaging in or being engaged in sexually explicit conduct.

A first conviction under this statute is punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both, but a first conviction under N.H. Rev. Stat. Ann. § 649-A:3-a(I)(b) by an offender with “less than 3 images or visual representations,” is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II), 651:2(I), (II)(b), (IV)(a). All subsequent convictions are punishable by imprisonment for 15–30 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II)(a), 651:2(I), (IV)(a). Additionally, certain penalty enhancements may be available under N.H. Rev. Stat. Ann. § 651:6(I)(q)(1).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense⁴⁹ against a minor. Additionally, a federal conviction for distribution of child pornography⁵⁰

⁴⁶ See *supra* note 26.

⁴⁷ See *supra* note 3 for the definition of “sexually explicit conduct.”

⁴⁸ See *supra* note 6 for the substantive provisions of N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) as well as other possible penalty enhancements.

⁴⁹ See *supra* note 26.

⁵⁰ 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).

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁵¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁵²

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.*

According to N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited),

I. No person shall knowingly:

- (a) Compile, enter into, or transmit by means of computer;
- (b) Make, print, publish, or reproduce by other computerized means;
- (c) Cause or allow to be entered into or transmitted by means of computer; or
- (d) Buy, sell, receive, exchange, or disseminate by means of computer, any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any child, or the visual depiction of such conduct.

A conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

Additionally, although not directly commercial, N.H. Rev. Stat. Ann. § 649-B:4(I) (Certain uses of computer services prohibited) states,

I. No person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child⁵³ or another person believed by the person to be a child, to commit any of the following:

- (a) Any offense under RSA 632-A, relative to sexual assault and related offenses.
- (b) Indecent exposure and lewdness under RSA 645:1.
- (c) Endangering a child as defined in RSA 639:3, III.

If the victim is under 16 or the offender believes the child to be 13–15 years old, a first conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both, while a second conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (b), (IV)(a), 649-B:2. If the offender believed the child to be under the age of 13, however, a first conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while a second conviction is

⁵¹ 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).

⁵² 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).

⁵³ *See supra* note 11 for the definition of “child.”

punishable by imprisonment for 10–20 years, a fine up to \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (IV)(a), 649-B:2. Third and any subsequent convictions, regardless of whether the defendant believed the victim to be under 13, are punishable by imprisonment up to 30 years. N.H. Rev. Stat. Ann. § 649-B:4(II)(c).

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

Traffickers are subject to a possible fine not to exceed \$4,000 for any felony conviction. N.H. Rev. Stat. Ann. § 651:2(I), (IV)(a). Therefore, a trafficker convicted of N.H. Rev. Stat. Ann. § 633:7(I)(a), (II) (Trafficking in persons), § 645:2(I)(b)–(e) (Prostitution and related offenses) (when the victim is under 18), § 649-B:3(I) (Computer pornography prohibited), § 649-B:4(I) (Certain uses of computer services prohibited), § 649-A:3-b(I) (Manufacture of child sexual abuse images), or § 649-A:3-a(I) (Distribution of child sexual abuse images) is subject to a possible fine not to exceed \$4,000. N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (II), 645:2(II), 649-B:3(II), 649-B:4(II), 649-A:3-b(II), 649-A:3-a(II), 651:2(I), (IV)(a).

In addition to fines, convicted traffickers are subject to mandatory restitution orders. N.H. Rev. Stat. Ann. § 633:10 (Restitution and compensation), specifically requires persons convicted under N.H. Rev. Stat. Ann. § 633:7 to make restitution to their victims. N.H. Rev. Stat. Ann. § 633:10(I), (II) states,

- I. A person convicted under this section shall be ordered by the court to pay restitution to the victim. Such restitution may include but not be limited to:
 - (a) Any economic loss⁵⁴ compensable under RSA 651:62 [Definitions], in accordance with the provisions of RSA 651:61-a through RSA 651:67; and
 - (b) The value of the victim’s labor as guaranteed under the minimum wage law and overtime provisions of the Fair Labor Standards Act or the state minimum wage law, whichever is greater.
- II. To the extent not included in economic loss that is compensable under paragraph I, the court may also order a person convicted under this section to pay compensation as follows:
 - (a) Costs of medical and psychological treatment, including physical and occupational therapy and rehabilitation, at the court’s discretion;
 - (b) Costs of necessary transportation, temporary housing, and child care, at the court’s discretion;
 - (c) Return of property, cost of damage to property, or full value of property if destroyed or damaged beyond repair;
 - (d) Expenses incurred by a victim and any household members or other family members in relocating away from the defendant or his or her associates, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items; and
 - (e) Any and all other losses suffered by the victim as a result of an offense under this section.

⁵⁴ N.H. Rev. Stat. Ann. § 651:62(III) (Definitions) defines “economic loss” as

- out-of-pocket losses or other expenses incurred as a direct result of a criminal offense, including:
- (a) Reasonable charges incurred for reasonably needed products, services and accommodations, including but not limited to charges for medical and dental care, rehabilitation, and other remedial treatment and care including mental health services for the victim or, in the case of the death of the victim, for the victim’s spouse and immediate family;
 - (b) Loss of income by the victim or the victim’s dependents;
 - (c) The value of damaged, destroyed, or lost property;
 - (d) Expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured or deceased victim would have performed, if the crime had not occurred, for the benefit of the victim or the victim’s dependents;
 - (e) Reasonable expenses related to funeral and burial or crematory services for the decedent victim.

Traffickers convicted of other offenses may be subject to restitution payments under New Hampshire's general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to sentence any offender⁵⁵ "to make restitution in an amount determined by the court." Although restitution is not mandatory, "[i]n any case in which restitution is not ordered, the court shall state its reasons therefor on the record or in its sentencing order." N.H. Rev. Stat. Ann. § 651:63(I).

Additionally, a person convicted under N.H. Rev. Stat. Ann. § 633:7 shall be subject to asset forfeiture proceedings that are civil in nature.⁵⁶ N.H. Rev. Stat. Ann. § 633:8 (Forfeiture of items used in connection with trafficking in persons) states in part,

I. All offenses under this section shall qualify as offenses for forfeiture and thereby upon petition of the attorney general, shall be subject to forfeiture to the state and said property interest shall be vested in the state:

- (a) All materials, products, and equipment of any kind used in violation of this section.
- (b) Any property interest in any conveyance used in furtherance of an act which violates this section.
- (c) Any moneys, coin, currency, negotiable instruments, securities, or other investments knowingly used or intended for use in violation of this section.
- (d) Any books, records, ledgers, and research material, including formulae, microfilm, tapes, and any other data which are used or intended for use in felonious violation of this section.
- (e) Any real property, including any right, title, leasehold interest, and other interest in the whole of any lot or tract of land and any appurtenances or improvements, which real property is knowingly used or intended for use, in any manner or part, in felonious violation of this section.

....
XI. The court may order forfeiture of all items or property interests under this section, except no item or property interest shall be subject to forfeiture unless the owner or owners thereof were consenting parties to a felonious violation of this section and had knowledge thereof.

Property that is subject to forfeiture may be seized upon process, without process in certain circumstances or constructively, pursuant to N.H. Rev. Stat. Ann. §633:8 (III). Final orders of forfeiture shall be implemented by the department of justice and shall provide for disposition of the items or property interests in any manner not prohibited by law, including payment of restitution or sale of the property. The department of justice shall first pay the reasonable expenses of the forfeiture proceeding and sale. N.H. Rev. Stat. Ann. § 633:8(XVI). Following the payment of costs, "any forfeited money and the proceeds of any sale or public auction of forfeited items shall first be used to satisfy any order of restitution or compensation imposed by the court. Any remaining funds shall go to the victims' assistance fund as defined in RSA 21-M:8-i."

N.H. Rev. Stat. Ann. § 633:9(I) (Administrative forfeiture of items used in connection with trafficking in persons) further states,

Interests in property subject to forfeiture under the provisions of RSA 633:8, I(a), I(b), I(c) excepting proceeds, and I(d), but not real property, shall be subject to administrative forfeiture by the department of justice provided that the total amount or value of such property does not exceed \$75,000. The provisions of RSA 633:8 shall apply in any case of administrative forfeiture except as otherwise provided in this section.

⁵⁵ N.H. Rev. Stat. Ann. § 651:62(IV) defines "offender" as "any person convicted of a criminal or delinquent act."

⁵⁶ For additional information on asset forfeiture laws and procedure, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

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

Traffickers convicted under N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses), § 649-B:3(I) (Computer pornography prohibited), or § 649-B:4(I) (Certain uses of computer services prohibited) are required to register as a sexual offender. N.H. Rev. Stat. Ann. §§ 651-B:1(VII)(b), 651-B:2(I). Traffickers convicted under N.H. Rev. Stat. Ann. § 633:7(I)(a), (II) (Trafficking in persons), however, are not required to register.

N.H. Rev. Stat. Ann. § 651-B:2(I) (Registration) states that “[e]very sexual offender or offender against children shall be registered with the department of safety, division of state police” N.H. Rev. Stat. Ann. § 651-B:1(IV) (Definitions) defines “sexual offender” as “a person who is required to register for any sexual offense,” while N.H. Rev. Stat. Ann. § 651-B:1(V) defines a “sex offense” in part to include convictions for certain sex offenses, or “[a]ny other criminal offense . . . if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register.”

N.H. Rev. Stat. Ann. § 651-B:1(VI) defines an “offender against children” as “a person who is required to register for an offense against a child” and N.H. Rev. Stat. Ann. § 651-B:1(VII) explains that “offense against a child”

means the following offenses, including an accomplice to, or an attempt, conspiracy, or solicitation to commit, any of the following offenses:

(a) Any of the following offenses, where the victim was under the age of 18 at the time of the offense: . . . aggravated felonious sexual assault, RSA 632-A:2; felonious sexual assault, RSA 632-A:3; sexual assault, RSA 632-A:4, I(a) or RSA 632-A:4, III; . . . or prostitution, RSA 645:2.

(b) Intentional contribution to the delinquency of a minor, RSA 169-B:41, II; sexual assault, RSA 632-A:4, I(b) if the actor was 18 years of age or older at the time of the offense; endangering the welfare of a child, RSA 639:3, III; child pornography, RSA 649-A:3, RSA 649-A:3-a and RSA 649-A:3-b; computer pornography, RSA 649-B:3; certain uses of computer services prohibited, RSA 649-B:4; or obscene matters, RSA 650:2, II.

. . . .

(e) Any other criminal offense which is not specifically listed in subparagraph (a) if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register. . . .

- 3.5.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 651-B:1 (Definitions) to include N.H. Rev. Stat. Ann. § 633:7(II) (Trafficking in persons) as a “offense against a child” requiring sex offender registration.

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.*

Convictions under N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) or other New Hampshire’s CSEC laws are not expressly included as grounds for termination of parental rights. N.H. Rev. Stat. Ann. § 170-C:5 (Grounds for termination of the parent-child relationship) authorizes the termination of parental rights under any of the following circumstances:

. . . .

III. The parents, subsequent to a finding of child neglect or abuse under RSA 169-C [Child Protection Act], have failed to correct the conditions leading to such a finding within 12 months of the finding despite reasonable efforts under the direction of the district court to rectify the conditions.

....

V. The parent knowingly or willfully caused or permitted another to cause severe sexual, physical, emotional, or mental abuse of the child. Subsequent to a finding of such abuse pursuant to RSA 169-C , the parent-child relationship may be terminated if return of the child to the parent would result in a substantial possibility of harm to the child. A substantial possibility of harm to the child shall be established by testimony of at least 2 of the following factors:

- (a) The parent's conduct toward the child has resulted in severe harm to the child.
- (b) The parent's conduct toward the child has continued despite the reasonable efforts of authorized agencies in obtaining or providing services for the parent to reduce or alleviate such conduct.
- (c) The parent's conduct has continued to occur either over a period of time, or many times, or to such a degree so as to indicate a pattern of behavior on the part of the parent which indicates a complete disregard for the child's health and welfare.
- (d) Such conduct is likely to continue with no change in parental behavior, attitude or actions.

Testimony shall be provided by any combination of at least 2 of the following people: a licensed psychiatrist, a clinical psychologist, a physician, or a social worker who possesses a master's degree in social work and is a member of the Academy of Certified Social Workers.

VI. If the parent or guardian is, as a result of incarceration for a felony offense, unable to discharge his responsibilities to and for the child and, in addition, has been found pursuant to RSA 169-C to have abused or neglected his child or children, the court may review the conviction of the parent or guardian to determine whether the felony offense is of such a nature, and the period of incarceration imposed of such duration, that the child would be deprived of proper parental care and protection and left in an unstable or impermanent environment for a longer period of time than would be prudent. . . .

VII. The parent has been convicted of one or more of the following offenses:

....

- (d) A felony assault under RSA 631:1 [First degree assault], 631:2 [Second degree assault], 632-A:2 [Aggravated felonious sexual assault], or 632-A:3 [Felonious sexual assault] which resulted in injury to the child, a sibling or step-sibling of the child, the child's other parent, or other persons related by consanguinity or affinity, including a minor child who resided with the defendant.

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.*

N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) does not specifically prohibit assisting, enabling, or financially benefitting from domestic minor sex trafficking, but N.H. Rev. Stat. Ann. § 633:7(II) may apply to facilitators who “harbor” or “transport” a minor, “knowing or believing it likely that the [minor] will be subjected to trafficking as defined in paragraph I.” If the victim is under the age of 18 and “the offender knew or believed it likely that the victim would be coerced into engaging in a commercial sex act or sexually explicit performance,” a conviction under N.H. Rev. Stat. Ann. § 633:7(II) is punishable as a Class A felony by imprisonment for 10 years to a maximum “fixed by the court,” a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 633:7(II), 651:2(I), (II)(a), (IV)(a).

A facilitator who transports a minor “with the purpose of promoting or facilitating” the minor to engage in prostitution, or who “[k]nowingly permits a place under such person’s control to be used” for purposes of prostitution of a child, may also be prosecuted under N.H. Rev. Stat. Ann. § 645:2(I)(c), (e) (Prostitution and related offenses).⁵⁷ If the offense involves a minor under the age of 18, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(c), (e) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

A facilitator who “disseminate[s] by means of computer, any notice, statement, or advertisement, or any minor’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating . . . sexual conduct of or with any child” may be convicted under N.H. Rev. Stat. Ann. § 649-B:3(I)(d) (Computer pornography prohibited),⁵⁸ which is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

- 4.1.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) to add language specifically capturing the facilitators of sex trafficking who knowingly aids, assists or financially benefits from the trafficking.

⁵⁷ See *supra* Section 1.2 for the provisions of N.H. Rev. Stat. Ann. § 645:2(I).

⁵⁸ See *supra* Section 1.2 for the provisions of N.H. Rev. Stat. Ann. § 649-B:3(I).

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 are subject to a possible fine not to exceed \$4,000 for any felony conviction. N.H. Rev. Stat. Ann. § 651:2(I), (IV)(a). Therefore, a facilitator convicted under N.H. Rev. Stat. Ann. § 633:7(II) (Trafficking in persons), § 645:2(I)(c), (e) (Prostitution and related offenses), § 649-B:3(I)(d) (Computer pornography prohibited), § 649-A:3-b(I) (Manufacture of child sexual abuse images), or § 649-A:3-a(I) (Distribution of child sexual abuse images) is subject to a possible fine not to exceed \$4,000. N.H. Rev. Stat. Ann. §§ 633:7(II), 645:2(II), 649-B:3(II), 649-A:3-b(II), 649-A:3-a(II), 651:2(I), (IV)(a).

In addition to fines, convicted facilitators of trafficking are subject to mandatory orders of restitution. N.H. Rev. Stat. Ann. § 633:10(I), (II) (Restitution and compensation),⁵⁹ specifically requires persons convicted under N.H. Rev. Stat. Ann. § 633:7 to make restitution to their victims for any compensable economic loss⁶⁰ and other costs, including medical treatment. Traffickers convicted of other offenses may be subject to discretionary restitution orders under New Hampshire's general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to sentence any offender "to make restitution in an amount determined by the court."

Additionally, pursuant to N.H. Rev. Stat. Ann. § 633:8(I) (Forfeiture of items used in connection with trafficking in persons),⁶¹ a person convicted under N.H. Rev. Stat. Ann. § 633:7 may be subject to asset forfeiture for any equipment, property, or money used in the commission of the crime.

N.H. Rev. Stat. Ann. § 633:9(I) (Administrative forfeiture of items used in connection with trafficking in persons) further states,

Interests in property subject to forfeiture under the provisions of RSA 633:8, I(a), I(b), I(c) excepting proceeds, and I(d), but not real property, shall be subject to administrative forfeiture by the department of justice provided that the total amount or value of such property does not exceed \$75,000. The provisions of RSA 633:8 shall apply in any case of administrative forfeiture except as otherwise provided in this section.

- 4.2.1 Recommendation: Amend the human trafficking and CSEC laws to increase the fines and require mandatory fines for sex trafficking and CSEC crimes.

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

New Hampshire does not specifically prohibit sex tourism.

- 4.3.1 Recommendation: Enact a law that prohibits selling or offering to sell travel services in New Hampshire that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor either in or outside of New Hampshire.

4.4 *Promoting and selling child pornography is illegal.*

Although promoting child pornography is not a distinct crime under New Hampshire law, selling, publishing, exhibiting, or making available child pornography is illegal under N.H. Rev. Stat. Ann. § 649-A:3-a(I)

⁵⁹ See *supra* Section 3.4 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:10(I), (II).

⁶⁰ See *supra* note 54.

⁶¹ See *supra* Section 3.4 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:8(I).

(Distribution of child sexual abuse images).⁶² A first conviction under this statute is punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both, but a first conviction under N.H. Rev. Stat. Ann. § 649-A:3-a(I)(b) by an offender with “less than 3 images or visual representations,” is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II), 651:2(I), (II)(b), (IV)(a). All subsequent convictions are punishable by imprisonment for 15–30 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II)(a), 651:2(I), (IV)(a). Additionally, certain penalty enhancements may be available under N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) (Extended term of imprisonment).⁶³

Additionally, N.H. Rev. Stat. Ann. § 649-A:3(I)(b) (Possession of child sexual abuse images) makes it illegal for a person to knowingly “[b]ring or cause to be brought into this state any visual representation of a child engaging in sexually explicit conduct.”⁶⁴ A first conviction under this statute is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while subsequent convictions are punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3(II), 651:2(I), (II)(a), (IV)(a).

⁶² See *supra* Section 3.2 for the provisions of N.H. Rev. Stat. Ann. § 649-A:3(I).

⁶³ See *supra* note 6 for the substantive provisions of N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) as well as other possible penalty enhancements.

⁶⁴ See *supra* note 3 for the definition of “sexually explicit conduct.”

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 not specifically defined as a victim. For purposes of receiving restitution, N.H. Rev. Stat. Ann. § 651:62(VI) (Definitions) defines “victim” as a “person or claimant who suffers economic loss⁶⁵ as a result of an offender’s criminal conduct or the good faith effort of any person attempting to prevent or preventing the criminal conduct.” As used in New Hampshire’s laws relating to victims’ assistance, N.H. Rev. Stat. Ann. § 21-M:8-b(I)(a) (Office of victim/witness assistance) defines a “victim” as

a person who suffers direct or threatened physical, emotional or psychological harm as the result of the commission or the attempted commission of a crime. “Victim” also includes the immediate family of any victim who is a minor or who is incompetent, or the immediate family of a homicide victim, or the surviving partner in a civil union.

N.H. Rev. Stat. Ann. § 21-M:8-k (I)(a) (Rights of crime victims) defines a “victim” as

⁶⁵ See *supra* note 54.

a person who suffers direct or threatened physical, emotional, psychological or financial harm as a result of the commission or the attempted commission of a crime.⁶⁶ “Victim” also includes the immediate family of any victim who is a minor or who is incompetent, or the immediate family of a homicide victim, or the surviving partner in a civil union.

5.1.1 Recommendation: Amend the definition of “victim” in N.H. Rev. Stat. Ann. §§ 651:62(VI), 21-M:8-b(I)(a), and 21-M:8-k (I)(a) to expressly include conduct that violates N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons), N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses) when the person patronized is a minor under 18, and N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited).

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.*

N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire’s CSEC laws do not expressly prohibit the use of a defense based on the consent of a minor to a commercial sex act.

5.2.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire’s CSEC laws to expressly prohibit the use of a defense based on a minor’s consent to a commercial sex act.

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

N.H. Rev. Stat. Ann. § 645:2(I)(a) (Prostitution and related offenses) is age-neutral and makes it a crime if any person “[s]olicits, agrees to perform, or engages in sexual contact . . . or sexual penetration . . . in return for consideration.” Pursuant to N.H. Rev. Stat. Ann. § 645:2(IV), however, “[i]t shall be an affirmative defense to a charge under subparagraph I(a) that the defendant engaged in the conduct because he or she was the victim of trafficking in persons, as defined in RSA 633:7.” However, because a conviction under N.H. Rev. Stat. Ann. § 633:7 requires compulsion, some commercially sexually exploited children may not qualify as “a victim of trafficking in persons,” and, therefore, will not be able to assert this affirmative defense.⁶⁷

5.3.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 645:2 (Prostitution and related offenses) to make the law inapplicable to minors under the age of 18.

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

Child Identified as Abused/Neglected

Pursuant to N.H. Rev. Stat. Ann. § 169-C:3(II)(a)⁶⁸, a sexually exploited child is likely to be identified as abused or neglected. New Hampshire does not specifically use the term “caregiver” in its child welfare statutes, and if a child is identified as abused or neglected under N.H. Rev. Stat. Ann. § 169-C:3(II)(a), the definition of

⁶⁶ N.H. Rev. Stat. Ann. § 21-M:8-k(I)(b) defines “crime” as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than one year or an offense expressly designated by law to be a felony.”

⁶⁷ See *supra* Section 1.1 for discussion of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons).

⁶⁸ See *infra* section 5.5 for a full analysis of the definition of “abuse” as it relates to identification of sexually exploited children.

the person responsible for the child under N.H. Rev. Stat. Ann. § 169-C:3(XXII)⁶⁹ is not sufficiently broad to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker.

N.H. Rev. Stat. Ann. § 169-C:29 (Persons required to report) directs certain medical professionals, school personnel, law enforcement, members of the clergy, or “any other person having reason to suspect that a child⁷⁰ has been abused⁷¹ or neglected” to report their suspicions to the Department of Health and Human Services (“Department”) in accordance with N.H. Rev. Stat. Ann. § 169-C:30 (Nature and content of report), which states,

An oral report shall be made immediately by telephone or otherwise, and followed within 48 hours by a report in writing, if so requested, to the department. Such report shall, if known, contain the name and address of the child suspected of being neglected or abused and the person responsible for the child’s welfare, the specific information indicating neglect or the nature and extent of the child’s injuries (including any evidence of previous injuries), the identity of the person or persons suspected of being responsible for such neglect or abuse, and any other information that might be helpful in establishing neglect or abuse or that may be required by the department.

N.H. Rev. Stat. Ann. § 169-C:38 (Report to law enforcement authority) further states,

I. The department shall immediately by telephone or in person refer all cases in which there is reason to believe that any person under the age of 18 years has been: (a) sexually molested; (b) sexually exploited;⁷² (c) intentionally physically injured so as to cause serious bodily injury; . . . or (e) a victim of a crime, to the local law enforcement agency in the community in which the acts of abuse are believed to have occurred. . . .

IV. Law enforcement personnel or department employees who are trained caseworkers shall have the right to enter any public place, including but not limited to schools and child care agencies, for the purpose of conducting an interview with a child, with or without the consent or notification of the parent or parents of such child, if there is reason to believe that the child has been:

- (a) Sexually molested.
- (b) Sexually exploited.
- (c) Intentionally physically injured so as to cause serious bodily injury.
- (d) Physically injured by other than accidental means so as to cause serious bodily injury.

⁶⁹ See *infra* section 5.6 for a full analysis of the definition of “caregiver.”

⁷⁰ Pursuant to N.H. Rev. Stat. Ann. § 169-C:3(V), “‘Child’ means any person who has not reached his eighteenth birthday.”

⁷¹ Pursuant to N.H. Rev. Stat. Ann. § 169-C:3(II)(a)–(c), “abused child” is defined as including any child who has been “[s]exually abused,” “[i]ntentionally physically injured,” or “[p]sychologically injured so that said child exhibits symptoms of emotional problems generally recognized to result from consistent mistreatment or neglect.”

⁷² “Sexually exploited” is not defined under N.H. Rev. Stat. Ann. § 169-C:3 (Definitions), however pursuant to § 169-C:3(XXVII-a), “sexual abuse” is defined to include commercial sexual exploitation,

“Sexual abuse” means the following activities under circumstances which indicate that the child’s health or welfare is harmed or threatened with harm: the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct or any simulation of such conduct for the purpose of producing any visual depiction of such conduct; or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. With respect to the definition of sexual abuse, the term “child” or “children” means any individual who is under the age of 18 years.

- (e) A victim of a crime.
- (f) Abandoned.
- (g) Neglected.

....

I. Initial Custody

a. Authority for Initial Custody

Pursuant to N.H. Rev. Stat. Ann. § 169-C:6(II), (IV):

V. If a child is found by a child protection services worker of the department to be in imminent danger in such circumstances or surroundings and where immediate removal appears necessary to protect the child from such imminent danger, the department's child protection services worker shall contact a judge or clerk immediately for an order to remove the child. . . .

VI. The court having jurisdiction over a child who appears to be abused or neglected, and in imminent danger may issue ex parte orders pursuant to RSA 169-C:6-a, permitting the child or the alleged perpetrator to be removed from the home at the request of the department or a law enforcement officer.

Law enforcement may assume "protective custody [of a child]..." under N.H. Rev. Stat. Ann. § 169-C:6(I) (Protective custody), "...without the consent of the parents or other person legally responsible for the child's care if the child is in such circumstances or surroundings as would present an imminent danger to the child's health or life unless immediate action is taken and there is not enough time to petition for a court order."

b. Placement

N.H. Rev. Stat. Ann. § 169-C:6(II), states that if a police or juvenile probation and parole officer removes a child under N.H. Rev. Stat. Ann. § 169-C:6(I), the officer:

- (a) Shall inform the court forthwith whereupon continued protective custody pending a hearing may be ordered by the court;
- (b) May take the child to a child protection services worker of the department; or
- (c) May place the child in a foster home; if a child is placed directly in a foster home, the department shall be notified of the incident and where the child is placed within 24 hours, unless there is a physician involved and treating the child and the child is or will be taken to and admitted to a hospital; and
- (d) Shall, when the child is removed from an individual other than a parent or a person legally responsible for the child, make every reasonable effort to inform both parents or other persons legally responsible for the child's care where the child has been taken.

II. Process Following Initial Custody of Abused/Neglected Child

In accordance with N.H. Rev. Stat. Ann. § 169-C:6(II), if a police or juvenile probation and parole officer assumes protective custody of a child, the officer must inform the court.⁷³

Pursuant to N.H. Rev. Stat. Ann. § 169-C:6(IV),

⁷³ See *supra* Section 5.4 I. b.

IV. The court shall hold a hearing on the matter within 24 hours of taking the child into protective custody, Sundays and holidays excluded. Notice shall be given to both parents and all parties designated by the petitioner or the court.

III. Placement Process Pending Adjudication/Investigation

After a petition has been filed pursuant to N.H. Rev. Stat. Ann. § 169-C:7 (Petition), alleging a child to be abused or neglected, the court will hold a preliminary hearing to determine “if reasonable cause exists to believe that the child is abused or neglected.” N.H. Rev. Stat. Ann. § 169-C:15(I). Pursuant to N.H. Rev. Stat. Ann. §§ 169-C:15(III)(c), 169-C:16(I), if the court finds reasonable cause for abuse or neglect at the preliminary hearing, it may, among other things:

- (1) Allow the child to remain with the child’s parents.
- (2) Transfer legal or protective supervision to a child placing agency.
- (3) Impose a number of protective orders.

N.H. Rev. Stat. Ann. § 169-C:16(II) (Preliminary disposition) prohibits a neglected or abused child from being “placed in an institution established for the care and rehabilitation of delinquent children, the youth development center or any institution where an adult is confined.” Additionally, N.H. Rev. Stat. Ann. § 169-C:6(VII) prohibits a child taken into custody under N.H. Rev. Stat. Ann. § 169-C:6 from being securely detained.

IV. Adjudication

An adjudicatory hearing must be held within 60 days from the date the petition was filed, unless the child is in an out-of-home placement, in which case the adjudicatory hearing must be held within 30 days from the date the petition was filed, unless extraordinary circumstances exist to extend the time limit. N.H. Rev. Stat. Ann. § 169-C:15 (Preliminary Hearing).

The petitioner has the burden to prove the allegations in support of the petition by a preponderance of the evidence. N.H. Rev. Stat. Ann. § 169-C:13 (Burden of Proof).

V. Outcomes

If the court adjudicates the child to be an abused or neglect child, pursuant to N.H. Rev. Stat. Ann. § 169-C:19 (Dispositional hearing), the court may, among other things:

- (1) Order the child to remain with a parent or guardian subject to a list of conditions.
- (2) Issue an order of protection that sets out conditions of behavior for a parent or guardian.
- (3) Transfer legal custody to a relative or child placing agency.

Child Identified as Child In Need of Services

It is possible that a commercially sexually exploited child may not be routed through child protective services as abused/neglected, and may instead be treated as a Child in Need of Services.

I. Initial Custody

a. Authority for Initial Custody

N.H. Rev. Stat. Ann. § 169-D:8 II (Temporary custody) authorizes law enforcement to take a child into temporary custody if “there are reasonable grounds to believe that a child has run away from his parents,

guardian, or other custodian; or the circumstances are such as to endanger the child's health or welfare unless immediate action is taken.”

b. Placement

A child taken into custody as a child in need of services must be released to his or her parent, guardian, or custodian. If the parent, guardian, or custodian is not available, the court must be notified, and determine when and where to release the child. N.H. Rev. Stat. Ann. § 169-D:10 I (Release Prior to Initial Appearance).

Pursuant to N.H. Rev. Stat. Ann. § 169-D:10 III,

Where there are reasonable grounds to believe that the child is a runaway under RSA 169-D:2, II(b) or that the child is a child in need of services under RSA 169-D:2, II(d) and there is no shelter care/detention bed available, nor an appropriate parent, guardian, or custodian as defined in paragraph II of this section available, the court or the officer taking the child into temporary custody shall notify the department. If the child cannot be referred to an alternative to secure detention, the court shall make an order authorizing the department to place the child. The department shall then promptly arrange for placement of the child.

Rather than being placed in secure detention, a child taken into custody may be released to an alternative program pursuant to N.H. Rev. Stat. Ann. § 169-D:9-a (Use of alternative to secure detention), pending the arrival of their parent or guardian. N.H. Rev. Stat. Ann. § 169-B:2(II) (Definitions) defines “alternative to secure detention” as

any local program, approved by the court, police, probation, or the department of health and human services, which offers a less restrictive alternative to secure detention for minors. Such programs include, but are not limited to, youth attender, crisis home placement, group homes which have entered into agreements with the department of health and human services to provide such care, truant and runaway programs, and alcohol and drug detoxification programs.

No child taken into custody as a child in need of services may be released to a facility that includes construction features designed to physically restrict the movement or activities of the child. N.H. Rev. Stat. Ann. § 169-D:9-b (Prohibited Manner of Detention).

II. Process Following Initial Custody of Child In Need of Services

A petition alleging that a child is in need of services may be filed in the appropriate court by a child's parent, legal guardian or custodian; school official; or law enforcement officer.⁷⁴

Voluntary services may be provided to the child in certain circumstances pursuant to N.H. Rev. Stat. Ann. § 169-D:9 I (Pre-adjudicatory Procedure), which states:

Except in emergencies, the department, its agent, or any person or agency it designates shall determine whether voluntary service options are appropriate for the child and family. A referral for this determination may be made by any person permitted to bring a petition under RSA 169-D:5, I...

⁷⁴ See N.H. Rev. Stat. Ann. § 169-D:5 (Petition).

III. *Placement Process Pending Adjudication/Investigation:*

Pursuant to N.H. Rev. Stat. Ann. §169-D:11 (I) (Initial Appearance),

An initial appearance shall be held not less than 24 hours nor more than 7 days from the filing of a legally sufficient petition.

No child may be removed from their home unless “Clear and convincing evidence is presented to the court to show it is against the child’s best interest to remain in the home under the circumstances presented in such petition.” Pursuant to N.H. Rev. Stat. Ann. § 169-D:10 (Removal of Child From Home).

The court may issue one of several orders for release of the child pending an adjudicatory hearing, including requiring the child to be:

- (a) Retained in the custody of a parent, guardian, or custodian; or
- (b) Released in the supervision and care of a relative; or
- (c) Released to the custody of the department of health and human services for placement in a foster home, a group home, a crisis home, or a shelter care facility⁷⁵

A child who is alleged to be habitually truant, a child who repeatedly disregards the commands of his or her parents, guardian or custodian, or a child who repeatedly commits violation offenses under N.H. Rev. Stat. Ann. §169-D:2, II(c) cannot be placed out of their home. N.H. Rev. Stat. Ann. §169-D:13 I-a.

II. *Adjudication*

a. Adjudicatory/Dispositional Hearing

An adjudicatory hearing must be held within 21 days of the initial appearance. N.H. Rev. Stat. Ann. §169-D:13 II (Release Pending Adjudicatory Hearing).

For a child adjudicated a child in need of services, N.H. Rev. Stat. Ann. § 169-D:17(I) (Dispositional hearing) states that the court “shall order the least restrictive and most appropriate disposition considering the facts in the case, the investigation report, and the dispositional recommendations of the parties and counsel.” A final dispositional hearing must be held within thirty days of the adjudicatory hearing, unless good cause exists to extend. N.H. Rev. Stat. Ann. §169-D:14 V (Adjudicatory Hearing).

V. *Outcomes*

Included among the dispositions authorized under N.H. Rev. Stat. Ann. § 169-D:17(I) are the following:

- (a) Permitting the child to remain with a parent, guardian, relative or custodian, subject to such limitations and conditions as the court may prescribe . . .
.....
- (b) (1) Releasing the child in the supervision and care of a relative or suitable adult; or
(2) Releasing the child to the custody of the department of health and human services for placement in a foster home, . . . a group home, a crisis home, or a shelter care facility
.....

⁷⁵ N.H. Rev. Stat. Ann. §169-D:13 (I) (Release Pending Adjudicatory Hearing).

(d) Ordering the minor to perform up to 50 hours of uncompensated public service subject to the approval of the elected or appointed official authorized to give approval of the city or town in which the offense occurred. . . .

(e) Requiring any child to attend structured after-school or evening programs which address some of the child's compliance issues, as well as supervise the child during the time of the day in which the child most values his or her freedom and the time which is most often used to perform unruly acts. . . .

Pursuant to N.H. Rev. Stat. Ann. § 169-D:9-b (Prohibited manner of detention), "Notwithstanding any other provisions of law, no child detained under this chapter shall be held for any period of time in a public or private facility, which includes construction fixtures designed to physically restrict the movements and activities of persons in custody, including but not limited to locked rooms and buildings, fences, or other physical structures." Additionally, N.H. Rev. Stat. Ann. § 169-D:9-c (Detention in certain facilities; CHINS and juvenile delinquents) states,

I. Facilities which are not physically restricted may receive for placement minors who have been adjudicated as children in need of services⁷⁶ or minors who have been adjudicated as juvenile delinquents.

II. Physically restricted facilities shall receive for commitment and detention only those minors who have been adjudicated juvenile delinquents pursuant to RSA 169-B [Delinquent children]⁷⁷ or who are awaiting the court's disposition regarding allegations of juvenile delinquency. Physically restricted facilities which are primarily used for psychiatric treatment or evaluation shall not be limited only to such minors.

Child Identified as Delinquent

Commercially sexually exploited children may also be treated as delinquent children.

I. Initial Custody

a. Authority for Initial Custody

Pursuant to N.H. Rev. Stat. Ann. § 169-B:9(I) (Arrest or taking minor into custody), a juvenile probation and parole officer may immediately arrest or take into custody "any minor who is found violating any law, . . . or whose circumstances are such as to endanger such minor's person or welfare, unless immediate action is taken."

b. Placement

After a child is taken into custody under N.H. Rev. Stat. Ann. § 169-B:9(I), N.H. Rev. Stat. Ann. § 169-B:9-a (Use of alternatives to secure detention) and N.H. Rev. Stat. Ann. § 169-B:10 (Juvenile diversion) state that the

⁷⁶ N.H. Rev. Stat. Ann. § 169-D:2(II) defines a "child in need of services" as

a child under the age of 18 with a diagnosis of severe emotional, cognitive, or other mental health issues who engages in aggressive, fire setting, or sexualized behaviors that pose a danger to the child or others and who is otherwise unable or ineligible to receive services under RSA 169-B or RSA 169-C.

⁷⁷ N.H. Rev. Stat. Ann. § 169-B:2(IV) defines a "delinquent" as

a person who has committed an offense before reaching the age of 17 years which would be a felony or misdemeanor under the criminal code of this state if committed by an adult, and is expressly found to be in need of counseling, supervision, treatment, or rehabilitation as a consequence thereof.

child may be released to an alternative secure detention program⁷⁸ pending the arrival of a parent or custodian, released to the custody of his or her parent, guardian, or custodian, and, in some cases, may receive diversion.

II. *Process Following Initial Custody of Delinquent Child*

Any person may file a petition in the appropriate court alleging delinquency of a minor. N.H. Rev. Stat. Ann. §169-B:6 (Petition).

III. *Placement Process Pending Adjudication/Investigation:*

Pursuant to N.H. Rev. Stat. Ann. §169-D:11 (I) (Initial Appearance),

An initial appearance shall be held not less than 24 hours nor more than 7 days from the filing of a legally sufficient petition.

Pursuant to N.H. Rev. Stat. Ann. § 169-B:14(I) (Release or detention pending adjudicatory hearing), if the child does not receive diversion, the child may be placed in any of the following while awaiting an adjudicatory hearing:

- (a) Retained in the custody of a parent, guardian, or custodian; or
- (b) Released in the supervision and care of a relative or friend; or
- (c) Released to the custody of the department of health and human services for placement in a foster home, . . . a group home, a crisis home, or a shelter care facility
- (e) Detained at a facility certified by the commissioner of the department of health and human services for detention of minors pursuant to the following:
 - (1) No minor charged with delinquency shall be securely detained following arraignment unless the prosecution establishes probable cause to believe that the minor committed the alleged delinquent acts and unless the prosecution demonstrates by clear and convincing evidence the need for secure detention, based upon the criteria for secure detention specified in subparagraph (e)(2);
 - (2) A minor shall not be securely detained unless secure detention is necessary:
 - (A) To insure the presence of the juvenile at a subsequent hearing; or
 - (B) To provide care and supervision for a minor who is in danger of self-inflicted harm when no parent, guardian, custodian, or other suitable person or program is available to supervise and provide such care; or
 - (C) To protect the personal safety or property of others from the probability of serious bodily harm or other harm.

N.H. Rev. Stat. Ann. § 169-B:15 (No detention at jail) also provides, “Following arraignment no minor shall be detained in any facility where adults charged, convicted or committed for criminal offenses are simultaneously detained.”

IV. *Adjudication*

a. Adjudicatory/Dispositional Hearing

Pursuant to N.H. Rev. Stat. Ann. § 169-B-14 II (Release or Detention Pending Adjudicatory Hearing), an adjudicatory hearing must be held within 21 days of arraignment if a child is being detained, and within 30 days of arraignment if a child is not being detained.

⁷⁸ See *supra* Section 5.4 for the definition of “alternative to secure detention.”

b. Diversion

New Hampshire has established a diversionary process for a child alleged to be delinquent. Pursuant to N.H. Rev. Stat. Ann. §169-B:10 (Juvenile Diversion),

I. An officer authorized under RSA 169-B:9 to take a minor into custody may dispose of the case without court referral by releasing the minor to a parent, guardian, or custodian...

I-a. Prior to filing a delinquency petition with the court, the arresting agency or prosecutor shall screen the petition for participation in diversion...

II. At any time before or at arraignment pursuant to this chapter, a minor and the minor's family may be referred to a court-approved diversion program or other intervention program or community resource. Referral may be made by the arresting or prosecuting agency or juvenile probation and parole officer, prior to filing a petition with the court or after the filing of a petition by such agency with the court's approval, or by the court on its own, or any party's motion...

II-a. The administrative judge of the judicial branch family division shall have the authority to approve diversion referral procedures for use in all juvenile matters throughout the state. III.

Referral to diversion or other community resource after filing is appropriate if:

(a) The facts bring the case within the jurisdiction of the court;

(b) Referral of the case is in the best interest of the public and the minor; and

(c) The minor and the parents, guardian, or other custodian give knowing, informed, and voluntary consent. IV. Referral after filing shall stay the proceedings for a period not to

exceed 6 months from the date of referral, unless extended by the court for an additional period not to exceed 6 months and does not authorize the detention of the minor. V. During the period of referral, the court may require further conditions of conduct on the part of the minor and the minor's parents.

...

V. *Outcomes*

A delinquent minor may receive several dispositions including being returned to the parent, custodian, or guardian, released to a relative or friend, conditionally released for no more than five years, placed in the custody of the department of health and human services, or probation. N.H. Rev. Stat. Ann. § 169-B:19(I). If the minor is at least 16, the minor may also be placed in a "county correctional facility." N.H. Rev. Stat. Ann. § 169-B:19(III).

5.4.1 Recommendation: Enact a comprehensive protection system for domestic minor sex trafficking victims ensuring that such victims receive a protective response rather than a criminal justice response.

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

Commercial sexual exploitation is identified as a type of abuse and neglect within New Hampshire's Child Protection Act.⁷⁹ Specifically, N.H. Rev. Stat. Ann. § 169-C:3(II)(a) defines "abused child" in part as, "any child who has been . . . [s]exually abused." Pursuant to N.H. Rev. Stat. Ann. § 169-C:3(XXVII-a),

"Sexual abuse" means the following activities under circumstances which indicate that the child's health or welfare is harmed or threatened with harm: the employment, use, persuasion, inducement,

⁷⁹ N.H. Rev. Stat. Ann. §§ 169-C:1 to C:28.

enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct or any simulation of such conduct for the purpose of producing any visual depiction of such conduct; or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. With respect to the definition of sexual abuse, the term “child” or “children” means any individual who is under the age of 18 years.

5.5.1 Recommendation: Amend the definition of “abused child” in N.H. Rev. Stat. Ann. § 169-C:3(XXVII-a) (Definitions) to include minor victims of sex trafficking.

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.*

New Hampshire does not specifically use the term “caregiver” in its child welfare statutes and the definitions for the relevant terms used in N.H. Rev. Stat. Ann. § 169-C:6 (Protective custody), regarding when a child may be taken into protective custody, are likely not broad enough to include a trafficker in custody or control of a child. N.H. Rev. Stat. Ann. § 169-C:6(I) authorizes law enforcement to take a child into custody, in specified circumstances, without the consent of the child’s “parents or other person legally responsible for the child’s care.”

The Child Protection Act’s⁸⁰ definition for the term “person responsible for the welfare of a child,” also is not likely to be broad enough to include non-family traffickers. N.H. Rev. Stat. Ann. § 169-C:3(XXII) defines “a person responsible for a child’s welfare” as including the following:

[T]he child’s parent, guardian or custodian, as well as the person providing out-of-home care of the child, if that person is not the parent, guardian or custodian. For purposes of this definition, “out-of-home care” includes child day care, and any other settings in which children are given care outside of their homes.

5.6.1 Recommendation: Amend the definition of “person responsible for the welfare of a child” in N.H. Rev. Stat. Ann. § 169-C:3(XXII) (Definitions) to include any person having custody or control over 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.*

Commercially sexually exploited children may be eligible to receive crime victim compensation. N.H. Rev. Stat. Ann. § 21-M:8-h(I)(a) (Claimant eligibility; compensation) states,

- I. (a) Victims eligible for compensation are:
- (1) Any person who sustains personal injury as a result of a felony or misdemeanor;
 - ...
 - (3) Any person who is a victim of sexual abuse and is under the age of 18 at the time the claim is filed.

Although victims of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire’s CSEC laws may qualify as eligible victims, certain other requirements for receiving compensation could present difficulties. N.H. Rev. Stat. Ann. § 21-M:8-h(II) requires a claim for compensation to be filed “within 2 years of the crime,

⁸⁰ N.H. Rev. Stat. Ann. §§ 169-C:1 to C:28.

unless good cause is shown,” but does not explain what constitutes good cause. Additionally, under N.H. Rev. Stat. Ann. § 21-M:8-h(IV), if the Victims’ Assistance Commission determines that a victim was contributorily at fault, the commission may deny or reduce a victim’s award. N.H. Rev. Stat. Ann. § 21-M:8-h(V) also imposes a “\$25,000 maximum recovery per claimant per incident.”

- 5.7.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 21-M:8-h (Claimant eligibility; compensation) to create exceptions to the listed criteria for commercially sexually exploited children.

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

Limited victim-friendly criminal justice procedures are afforded specifically to victims of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons). N.H. Rev. Stat. Ann. § 633:7(III) provides a “rape shield” protection specifically for victims of N.H. Rev. Stat. Ann. § 633:7, stating that “[e]vidence of a trafficking victim’s personal sexual history or history of commercial sexual activity shall not be admissible at trial.”

Other protections afforded to victims of sexual assault may be provided to victims of N.H. Rev. Stat. Ann. § 633:7 and New Hampshire’s CSEC laws. For example, N.H. Rev. Stat. Ann. § 632-A:8 (In camera testimony) states in part, “In [sexual assault and other related] cases where the victim is under 16 years of age, the victim’s testimony shall be heard in camera unless good cause is shown by the defendant.”

N.H. Rev. Stat. Ann. § 517:13-a(I) (Videotape trial testimony authorized) allows a victim of any crime, who is under 16 years of age at the time of the crime, to give videotaped testimony, provided the court finds by a preponderance of the evidence that “[t]he child will suffer emotional or mental strain if required to testify in open court,” or “[f]urther delay will impair the child’s ability to recall and relate the facts of the alleged offense.” The videotaped testimony “shall be conducted before the judge at such a place as ordered by the court in the presence of the prosecutors, the defendant and his attorneys, and such other persons as the court allows.” N.H. Rev. Stat. Ann. § 517:13-a(II). N.H. Rev. Stat. Ann. § 517:13-a(IV) allows any witness 16 years of age or younger to have his or her parent or other appropriate adult present during the taping of the testimony, and N.H. Rev. Stat. Ann. § 517:13-a(III) provides that a witness whose testimony is videotaped under this section “shall [not] be required to appear or testify at trial” unless the court orders it for good cause.

Lastly, N.H. Rev. Stat. Ann. § 21-M:8-k(II) (Rights of crime victims) affords crime victims the following rights:

- (a) The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
- (b) The right to be informed about the criminal justice process and how it progresses.
- (c) The right to be free from intimidation and to be reasonably protected from the accused throughout the criminal justice process.
-
- (g) The right to have inconveniences associated with participation in the criminal justice process minimized.
-
- (i) The right to be informed about available resources, financial assistance, and social services.
- (j) The right to restitution
- (k) The right to be provided a secure, but not necessarily separate, waiting area during court proceedings.
-
- (m) The right of confidentiality of the victim’s address, place of employment, and other personal information.

....

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.*

N.H. Rev. Stat. Ann. § 169-B:35(I), (II) (Juvenile case and court records) states that “[a]ll case records, as defined in RSA 170-G:8-a [Record content; confidentiality; rulemaking], relative to delinquency, shall be confidential and access shall be provided pursuant to RSA 170-G:8-a.” The case records must be kept separate from other court records, and must “be withheld from public inspection but shall be open to inspection by officers of the institution where the minor is committed, juvenile probation and parole officers, a parent, a guardian, a custodian, the minor’s attorney, the relevant county, and others entrusted with the corrective treatment of the minor.” N.H. Rev. Stat. Ann. § 169-B:35(II) further provides that once the person turns 21, “all court records and individual institutional records, including police records, shall be closed and placed in an inactive file.”

5.9.1 Recommendation: Enact a provision requiring the automatic expungement of criminal records of minor victims of commercial sexual exploitation and domestic minor sex trafficking who are under the age of 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.*

Victims of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) are entitled to receive restitution from their offenders. N.H. Rev. Stat. Ann. § 633:10(I), (II) (Restitution and compensation) states,

I. A person convicted under this section shall be ordered by the court to pay restitution to the victim. Such restitution may include but not be limited to:

- (a) Any economic loss⁸¹ compensable under RSA 651:62 [Definitions], in accordance with the provisions of RSA 651:61-a through RSA 651:67; and
- (b) The value of the victim’s labor as guaranteed under the minimum wage law and overtime provisions of the Fair Labor Standards Act or the state minimum wage law, whichever is greater.

II. To the extent not included in economic loss that is compensable under paragraph I, the court may also order a person convicted under this section to pay compensation as follows:

- (a) Costs of medical and psychological treatment, including physical and occupational therapy and rehabilitation, at the court’s discretion;
- (b) Costs of necessary transportation, temporary housing, and child care, at the court’s discretion;
- (c) Return of property, cost of damage to property, or full value of property if destroyed or damaged beyond repair;
- (d) Expenses incurred by a victim and any household members or other family members in relocating away from the defendant or his or her associates, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items; and
- (e) Any and all other losses suffered by the victim as a result of an offense under this section.

Victims of other offenses may also be able to receive restitution under New Hampshire’s general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to

⁸¹ See *supra* note 54 for the definition of “economic loss.”

sentence any offender, regardless of his ability to pay, “to make restitution in an amount determined by the court.” Although restitution is not mandatory, “[i]n any case in which restitution is not ordered, the court shall state its reasons therefor on the record or in its sentencing order.” N.H. Rev. Stat. Ann. § 651:63(I).

No civil remedies are specifically provided to victims of N.H. Rev. Stat. Ann. § 633:7 or New Hampshire’s CSEC offenses.

- 5.10.1 Recommendation: Enact a law specifically providing civil causes of action for victims of commercial sexual exploitation and domestic minor sex trafficking against their traffickers.

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

Pursuant to N.H. Rev. Stat. Ann. § 625:8(I)(a), (b) (Limitations), prosecutions for felonies, including N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire’s felony CSEC offenses, must commence within 6 years of the crime. Prosecutions for N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses), a Class B misdemeanor, must be brought within 1 year of the crime. N.H. Rev. Stat. Ann. § 625:8(I)(c). Although these statutes of limitations toll “[d]uring any time when the accused is continuously absent from the state or has no reasonably ascertained place of abode or work within this state . . . [or] when a prosecution is pending against the accused in this state based on the same conduct,” no tolling is provided if the victim of the offense is a minor under the age of 18. N.H. Rev. Stat. Ann. § 625:8(VI)(a), (b).

Generally, under N.H. Rev. Stat. Ann. § 508:4 (Personal actions), actions for personal injuries must be commenced within 3 years. N.H. Rev. Stat. Ann. § 508:4(I) states, in part,

Except as otherwise provided by law, all personal actions . . . may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

Pursuant to N.H. Rev. Stat. Ann. § 508:8 (Disabilities), “An infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed.” Additionally, pursuant to N.H. Rev. Stat. Ann. § 508:4-g (Actions based on sexual assault and related offenses),

A person, alleging to have been subjected to any offense under RSA 632-A or an offense under RSA 639:2, who was under 18 years of age when the alleged offense occurred, may commence a personal action based on the incident within the later of:

- I. Twelve years of the person’s eighteenth birthday; or
 - II. Three years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.
- 5.11.1 Recommendation: Eliminate the statute of limitations for prosecutions of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire’s CSEC offenses and extend the statute of limitations for child victims to file civil claims arising from injury caused by commercial sexual exploitation.

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 or authorized.*

New Hampshire does not require or authorize law enforcement to receive training on human trafficking or domestic minor sex trafficking. N.H. Rev. Stat. Ann. § 188-F:24(I) (Police standards and training council) creates the Police Standards and Training Council which, according to N.H. Rev. Stat. Ann. § 188-F:26(III) (Powers), is responsible for establishing “minimum educational and training standards for employment as a police officer, state corrections officer, or state probation-parole officer either in permanent positions or in temporary or probationary status.” Additionally, N.H. Rev. Stat. Ann. § 188-F:27 (Education and training required) mandates that law enforcement complete a training program at a school approved by the Police Standards and Training Council, but does not specify the types of training that must be provided.

- 6.1.1 Recommendation: Amend New Hampshire law to specifically require or authorize training and education for law enforcement in the area of domestic minor sex trafficking and the commercial sexual exploitation of children to ensure law enforcement can adequately identify these crimes.

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

Single party consent to audio-taping generally is not permitted in New Hampshire. N.H. Rev. Stat. Ann. § 570-A:2 (Interception and disclosure of telecommunication or oral communications prohibited) requires the consent of all parties to the communication. N.H. Rev. Stat. Ann. § 570-A:2(I-a) states,

A person is guilty of a misdemeanor if, except as otherwise specifically provided in this chapter or without consent of all parties to the communication, the person knowingly intercepts a telecommunication or oral communication when the person is a party to the communication or with the prior consent of one of the parties to the communication, but without the approval required by RSA 570-A:2, II(d).

Pursuant to N.H. Rev. Stat. Ann. § 570-A:2(I-a)(II)(d),

An investigative or law enforcement officer in the ordinary course of the officer's duties pertaining to the conducting of investigations of organized crime,⁸² offenses enumerated in this chapter, solid waste violations under RSA 149-M:9, I and II, or harassing or obscene telephone calls to intercept a telecommunication or oral communication, when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the attorney general, the deputy attorney general, or an assistant attorney general designated by the attorney general determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. Oral authorization for the interception may be given and a written memorandum of said determination and its basis shall be made within 72 hours thereafter. The memorandum shall be kept on file in the office of the attorney general.

- 6.2.1 Recommendation: Amend New Hampshire law to allow for single-party consent to audio taping in the investigation of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire's CSEC laws without receiving authorization from the attorney general.

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

N.H. Rev. Stat. Ann. § 570-A:7 (Authorization for interception of telecommunications or oral communications) states,

The attorney general, deputy attorney general, or a county attorney, upon the written approval of the attorney general or deputy attorney general, may apply to a judge of competent jurisdiction for an order authorizing or approving the interception of telecommunications or oral communications, and such judge may grant in conformity with RSA 570-A:9 [Procedure for interception of telecommunication or oral communications], an order authorizing or approving the interception of telecommunications or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offenses as to which the application is made, when such interception may provide, or has provided, evidence of the commission of organized crime⁸³ . . . or evidence of the commission of the offenses of . . . kidnapping, . . . child pornography under RSA 649-A, computer pornography and child exploitation under RSA 649-B, . . . aggravated felonious sexual assault as defined in RSA 632-A:2, felonious sexual assault as defined in RSA 632-A:3, . . . or any conspiracy to commit any of the foregoing offenses.

Pursuant to N.H. Rev. Stat. Ann. § 570-A:9(III) (Procedure for interception of telecommunication or oral communications) a judge may enter an order approving an application

if the judge determines on the basis of the facts submitted by the applicant that:

- (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in RSA 570-A:7;
- (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
- (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

⁸² N.H. Rev. Stat. Ann. § 570-A:1(XI) defines "organized crime" as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to . . . prostitution . . . and other unlawful activities of members of such organizations."

⁸³ See *supra* note 82.

(d) There is probable cause for belief that the facilities from which, or the place where, the telecommunications or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

6.3.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 570-A:7 (Authorization for interception of telecommunications or oral communications) to allow wiretapping in investigations of offenses under N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses) when a minor is involved.

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.*

New Hampshire's human trafficking statute does not authorize the use of a decoy by law enforcement in the investigation of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons). Yet, N.H. Rev. Stat. Ann. § 649-B:4 (Certain uses of computer services prohibited) implies that law enforcement may be able to use a decoy to detect sex crimes with a minor facilitated through the Internet because it only requires that the offender believed the person was a child.⁸⁴ Additionally, N.H. Rev. Stat. Ann. § 649-B:4(III) states, "It shall not be a defense to a prosecution under this section that the victim was not actually a child so long as the person reasonably believed that the victim was a child."

New Hampshire does, however, recognize an entrapment defense pursuant to N.H. Rev. Stat. Ann. § 626:5 (Entrapment), which states,

It is an affirmative defense that the actor committed the offense because he was induced or encouraged to do so by a law enforcement official or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence against him and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. However, conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

6.4.1 Recommendation: Enact a law authorizing law enforcement to use a decoy in the investigation of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire's CSEC laws.

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

New Hampshire does not have a specific law that allows law enforcement to use the Internet to investigate buyers and traffickers. N.H. Rev. Stat. Ann. § 649-B:4 (Certain uses of computer services prohibited), may, however, provide law enforcement the ability to use the Internet to investigate buyers and traffickers. N.H. Rev. Stat. Ann. § 649-B:4(I) states that "[n]o person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to commit" sexual assault or other specified non-commercial sexual offenses. The use of the language "another person believed by the person to be a child," suggests that it may be permissible for law enforcement to be involved in the investigation of this offense. Additionally, N.H. Rev. Stat. Ann. § 649-B:4(III) states, "It shall not be a defense to a prosecution under this section that the victim was not actually a child so long as the person reasonably believed that the victim was a child."

⁸⁴ See *supra* section 2.5 for the text of N.H. Rev. Stat. Ann. § 649-B:4.

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

The reporting of missing children and rescued child victims of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) is required under New Hampshire law. N.H. Rev. Stat. Ann. § 169-E:2 (Report) directs law enforcement to accept a missing child report from the child's parents, guardian, legal custodian, or another person responsible for the child and to "take reasonable and appropriate action to locate the missing child." Additionally, N.H. Rev. Stat. Ann. § 169-E:2-a (Hotline for missing children; rulemaking) establishes a "toll-free statewide hotline for the purpose of reporting information on missing children." N.H. Rev. Stat. Ann. § 169-E:1 (Definition) defines a "missing child" as "any person under the age of 16 years missing from his normal and ordinary place of residence and whose whereabouts cannot be determined by a person responsible for the child's care."

Upon receipt of a missing child report, N.H. Rev. Stat. Ann. § 169-E:3(I) (Procedure) directs law enforcement to gather "information about the missing child and integrate it into the national crime information center computer within 12 hours following the making of the report, unless extraordinary circumstances cause a delay."

Pursuant to N.H. Rev. Stat. Ann. § 169-E:6 (Recovery of a child),

A missing child's parents, custodial parent, guardian, or legal custodian, or any other person responsible for a missing child, shall immediately notify the law enforcement agency with which they filed the missing child report whenever the child has returned to their home or to their care, custody, and control, has been released if he was the victim of an offense under RSA 633 [Interference with freedom], or has otherwise been located. Upon such notification or upon otherwise learning that a missing child has returned to the home of, or to the care, custody, and control of his parents, custodial parent, guardian, or legal custodian, or other person responsible for him, or has been released if he was the victim of an offense under RSA 633, or otherwise has been located, the law enforcement agency involved shall promptly integrate the fact that the minor is no longer a missing child into the national crime information center computer.

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