

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

2013 ANALYSIS AND RECOMMENDATIONS NEW MEXICO

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.M. Stat. Ann. § 30-52-1(A)(2)²(Human trafficking) states that knowingly “recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity”³ is a human

¹ Unless otherwise specified, all references to New Mexico statutes were taken from New Mexico Statutes Annotated (LEXIS through 1st Sess. of 51st Leg.) and all federal statutes were taken from United States Code (LEXIS through PL 113-11, approved 5/24/13). This report includes legislation enacted as of August 1, 2013.

² Here and elsewhere in this report where N.M. Stat. Ann. § 30-52-1 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 304. H.B. 304, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 5, 2013).

³ “Commercial sexual activity” is defined as “any sexual act or sexually explicit exhibition for which anything of value is given, promised to or received by any person.” N.M. Stat. Ann. § 30-52-1(G)(2).

trafficking violation. The law does not require proof of force, fraud, or coercion to induce the minor's involvement in the commercial sex act.

In contrast, the provision applicable to facilitators, N.M. Stat. Ann. § 30-52-1(A)(3), does require proof of force, fraud, or coercion, regardless of the victim's age, and states that knowingly "benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services, or commercial sexual activity" is human trafficking.

If the victim is 16–17, a conviction under N.M. Stat. Ann. § 30-52-1(A)(2) or (3), is punishable as a third degree felony by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9)⁴. If the victim is 13–15, the offense increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000, and if the victim is under 13, the offense further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(1)–(2), 31-18-15(A)(3), (A)(6), (E)(3), (E)(6). In addition to criminal penalties, H.B. 304 (1) – Chapter 200⁵ provides civil remedies for victims of trafficking discussed in detail in 5.10 and 5.11 below

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 treat CSEC as distinct crimes:

1. N.M. Stat. Ann. § 30-6A-4 (Sexual exploitation of children by prostitution) criminalizes a wide range of conduct related to the commercial sexual exploitation of a child.

Under N.M. Stat. Ann. § 30-6A-4(A), "Any person knowingly receiving any pecuniary profit as a result of a child under the age of sixteen engaging in a prohibited sexual act⁶ with another is guilty of a second degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a first degree felony." A second degree felony is punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. § 31-18-15(A)(6), (E)(6). A first degree felony is punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §31-18-15(A)(3), (E)(3).

⁴ N.M. Stat. Ann. § 31-18-15 varies the punishment level for second and third degree felonies based on whether the offense is a "sexual offense against a child." Unless the statute expressly states the offense is a "sexual offense against a child," this report assumes that the offense is not a "sexual offense against a child." This offense does not expressly state that it is a "sexual offense against a child." However, if it were considered a sexual offense against a child, a second degree felony sexual offense against a child is punishable by 15 years' imprisonment and a possible fine not to exceed \$12,500, and a third degree felony sexual offense against a child is punishable by 6 years' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(5), (A)(8), (E)(5), (E)(8). In this report, unless the statute clearly states that it is a "sexual offense against a child," we will assume that it is not.

⁵ Here and elsewhere in this report where H.B. 304 – Chapter 200, is quoted or cited, it has been updated to reflect the sections added by the passage of House Bill 304. H.B. 304, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 5, 2013).

⁶ "Prohibited sexual act" is defined as "(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadomasochistic abuse for the purpose of sexual stimulation; or (5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation." N.M. Stat. Ann. § 30-6A-2(A).

N.M. Stat. Ann. § 30-6A-4(B) states that “hiring or offering to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act” is punishable as a second degree felony by imprisonment for 9 years and a fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15(A)(6), (E)(6).

Lastly, N.M. Stat. Ann. § 30-6A-4(C) states,

Any parent, legal guardian or person having custody or control of a child under sixteen years of age who knowingly permits that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print medium⁷ depicting such an act is guilty of a third degree felony.

A third degree felony is punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §31-18-15(A)(9), (E)(9).

2. N.M. Stat. Ann. § 30-6A-3(C) (Sexual exploitation of children) states that it is illegal to “intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly.”⁸ A conviction under N.M. Stat. Ann. § 30-6A-3(C) is punishable as a third degree felony by imprisonment for 3 years and a possible fine not to exceed \$5,000; however, if the victim is under 13, the crime is a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-3(C), 31-18-15(A)(6), (A)(9), (E)(6), (E)(9).

3. Pursuant to N.M. Stat. Ann. § 30-9-1 (Enticement of child),

Enticement of child consists of:

- A. enticing, persuading or attempting to persuade a child under the age of sixteen years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [30-9-1 to 30-9-9 NMSA 1978]⁹ of the Criminal Code; or
- B. having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.

Whoever commits enticement of child is guilty of a misdemeanor.

A misdemeanor is punishable by a definite term of less than 1 year in county jail, a fine not to exceed

⁷ N.M. Stat. Ann. 30-6A-2(B) defines “visual or print medium” as,

(1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or

(2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery.

⁸ N.M. Stat. Ann. 30-6A-2(C) defines “performed publically” as an action “performed in a place that is open to or used by the public.”

⁹ Article 9 (Sexual offenses) includes, among others, N.M. Stat. Ann. § 30-9-1 (Enticement of child), § 30-9-2 (Prostitution), § 30-9-3 (Patronizing prostitutes), § 30-9-4 (Promoting prostitution), § 30-9-4.1 (Accepting earnings of a prostitute), § 30-9-8 (House of prostitution; public nuisance), § 30-9-11 (Criminal sexual penetration), § 30-9-12 (Criminal sexual contact), and § 30-9-13 (Criminal sexual contact of a minor).

\$1,000, or both. N.M. Stat. Ann. § 31-19-1(A).

4. N.M. Stat. Ann. §30-37-3.2(A) (Child solicitation by electronic communication device) states,

Child solicitation by electronic communication device¹⁰ consists of a person knowingly¹¹ and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct¹² when the perpetrator is at least four years older than the child.

Where the victim is 13–15 years old, a conviction under N.M. Stat. Ann. § 30-37-3.2(A) is punishable as a fourth degree felony by 18 months' imprisonment and a fine not to exceed \$5,000. If, however, the defendant “attends or is present at a meeting that the person arranged pursuant to the solicitation,” the crime is punishable as a third degree felony by imprisonment for 3 years and a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(1), (C)(1), 31-18-15(A)(9), (A)(10), (E)(9). Where the victim is under 13, a conviction under N.M. Stat. Ann. §30-37-3.2(A) is punishable as a third degree felony by imprisonment for 3 years and a fine not to exceed \$5,000, except that when the defendant “attends or is present at a meeting that the person arranged pursuant to the solicitation,” the crime is punishable as a second degree felony by imprisonment for 9 years and a fine not to exceed \$10,000. N.M. Stat. Ann. §§30-37-3.2(B)(2), (C)(2), 31-18-15(A)(6),(A)(9), E(6),(E)(9).

Although not specifically commercial, the following sexual offense laws could apply to CSEC in New Mexico:

1. N.M. Stat. Ann. § 30-9-11(A) (Criminal sexual penetration) defines “criminal sexual penetration,” as “the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.”

A person is guilty of criminal sexual penetration in the first degree if the victim is under 13 or the defendant, regardless of the victim's age, uses “force or coercion that results in great bodily harm or great mental anguish to the victim.” N.M. Stat. Ann. § 30-9-11(D). A conviction under N.M. Stat. Ann. § 30-9-11(D) is punishable as a first degree felony by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-9-11(D), 31-18-15(A)(3), (E)(3).

A person is guilty of criminal sexual penetration in the second degree if the act involves, among other things, “the use of force or coercion on a child thirteen to eighteen years of age.” N.M. Stat. Ann.

¹⁰ N.M. Stat. Ann. 30-37-3.2(F) defines “electronic communication device” as “a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.”

¹¹ N.M. Stat. Ann. 30-37-1(G) defines “knowingly” as,

[H]aving general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or both, of:

- (1) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant;
- (2) the age of the minor.

¹² N.M. Stat. Ann. § 30-37-1(C) defines “sexual conduct” as an “act of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast[.]”

§ 30-9-11(E)(1).¹³ A violation of N.M. Stat. Ann. § 30-9-11(E), as a second degree felony for a sexual offense against a child, is punishable by imprisonment for 15 years, with a mandatory minimum term of 3 years that may not be “suspended or deferred,” and a possible fine not to exceed \$12,500. N.M. Stat. Ann. §§ 30-9-11(E), 31-18-15(A)(5), (E)(5).

Criminal sexual penetration is a fourth degree felony when, among other things, it is “perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child” and criminal sexual penetration in the first through third degrees does not apply. N.M. Stat. Ann. § 30-9-11(G). A conviction under N.M. Stat. Ann. § 30-9-11(G) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-9-11(G), 31-18-15 (A)(10), (E)(9).

2. N.M. Stat. Ann. § 30-9-13(A) (Criminal sexual contact of a minor) defines “Criminal sexual contact of a minor” as “the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts.”¹⁴ If the victim is 13–18 years old and certain aggravating conditions are present or anytime the victim is under 13, a violation is punishable as a third degree felony for a sexual offense against a child. N.M. Stat. Ann. § 30-9-13(C).¹⁵ However, if the minor’s “intimate parts” are unclothed, the violation is punishable as a second degree felony for a sexual offense against a child. N.M. Stat. Ann. § 30-9-13(B). A violation of N.M. Stat. Ann. § 30-9-13(B) is punishable by imprisonment for 15 years, with a mandatory minimum term of 3 years that may not be “suspended or deferred,” and a possible fine not to exceed \$12,500. N.M. Stat. Ann. §§ 30-9-13(B), 31-18-15(A)(5), (E)(5). A violation of N.M. Stat. Ann. § 30-9-13(C) is punishable by imprisonment for 6 years and possible a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-9-13(C), 31-18-15(A)(8), (E)(8).
3. Lastly, criminal sexual contact is a fourth degree felony if, among other things, force or coercion was used on a 13–18 year old victim and none of the specifications listed in N.M. Stat. Ann. § 30-9-13(B), (C) apply. N.M. Stat. Ann. § 30-9-13(D). A violation of N.M. Stat. Ann. § 30-9-13(D) is punishable by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(10), (E)(9).

¹³ N.M. Stat. Ann. § 30-9-10(A) (Definitions) defines “force or coercion” for purposes of Sections 30-9-10–30-9-16, in part as

- (1) the use of physical force or physical violence;
- (2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;
- (3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;

...
¹⁴ “[I]ntimate parts” means the primary genital area, groin, buttocks, anus or breast.” N.M. Stat. Ann. § 30-9-13(A).

¹⁵ The conditions listed in N.M. Stat. Ann. § 30-9-13(C)(2) include when

- (a) the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit;
- (b) the perpetrator uses force or coercion that results in personal injury to the child;
- (c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or
- (d) the perpetrator is armed with a deadly weapon.

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

N.M. Stat. § 30-9-2 (Prostitution) does not refer to § 30-52-1 (Human trafficking) when the person charged is minor.

- 1.3.1 Recommendation: Amend N.M. Stat. Ann. § 30-9-2 (Prostitution) when the person charged is a minor, to refer to N.M. Stat. Ann. § 30-52-1 (Human trafficking) to ensure that CSEC victims are properly identified as trafficking victims.

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.*

N.M. Stat. Ann. § 30-42-4 (Prohibited activities; penalties), New Mexico’s racketeering statute, provides in part,

A. It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

B. It is unlawful for any person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, any interest in or control of any enterprise. . . .

C. It is unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of the enterprise’s affairs by engaging in a pattern of racketeering activity. . . .

. . . .

N.M. Stat. Ann. § 30-42-3(D) defines “pattern of racketeering activity” as,

[E]ngaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of the incidents occurred after February 28, 1980 and the last incident occurred within five years after the commission of a prior incident of racketeering.

N.M. Stat. Ann. § 30-42-3(A)(15) defines “racketeering” as “any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving,” certain listed offenses, including a violation of N.M. Stat. Ann. § 30-9-4 (Promoting prostitution), which does not expressly address prostituted minors.

A violation of N.M. Stat. Ann. § 30-42-4(A)–(C) (Prohibited activities; penalties) constitutes a second degree felony and carries a fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-42-4(A)–(C), 31-18-15(E)(5). A defendant who violates N.M. Stat. Ann. § 30-42-4 may be liable to “[a] person who sustains injury to his person, business or property” for three times the actual damages. N.M. Stat. Ann. § 30-42-6(A). Additionally, a defendant who violates N.M. Stat. Ann. § 30-42-4(A)–(D)¹⁶ will be required to

¹⁶ N.M. Stat. Ann. § 30-42-4(D) states, “It is unlawful for any person to conspire to violate any of the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony.”

forfeit assets under N.M. Stat. Ann. § 30-42-4(E), which states that a violator “shall forfeit to the state of New Mexico:

(1) any interest acquired or maintained in violation of the Racketeering Act [30-42-1 NMSA 1978]; and

(2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise that he has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act [30-42-1 NMSA 1978].”

Legal Components:

- 2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
- 2.3 *Solicitation laws differentiate buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
- 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
- 2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*

Legal Analysis:

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

N.M. Stat. Ann. § 30-52-1(A)(2) can apply to buyers of sex with minors following federal precedent through the term “obtain.”¹⁷ N.M. Stat. Ann. § 30-52-1(A)(2)¹⁸ (Human trafficking) prohibits a person from “recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity.”

In addition, the term “soliciting” in N.M. Stat. Ann. § 30-52-1(A)(2) may also be used to apply the statute to buyers of sex with a victim of domestic minor sex trafficking.

- 2.1.1 **Recommendation:** Amend N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) to include those who purchase sex with a minor to apply the human trafficking statute to the conduct of buyers.

¹⁷ 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.

¹⁸ See *supra* note 2.

2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*¹⁹

N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) states that “hiring or offering to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act”²⁰ is a second degree felony, punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-5(A)(6), (E)(6).

N.M. Stat. Ann. § 30-9-1(B) (Enticement of child) may be used to prosecute buyers “having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [Sexual offenses] of the Criminal Code.”²¹ A conviction under N.M. Stat. Ann. § 30-9-1 is punishable as a misdemeanor by a definite term of less than 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A).

Several sexual offenses could be used to prosecute certain buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child and do not refer to the human trafficking statute to bring these criminal offenses within the ambit of human trafficking under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking).²²

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

New Mexico differentiates between buying sex with an adult and buying sex with minors who are 14 or 15 by making each a separate crime. Under N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution), buying sex with a minor age 14–15 years old is a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-5(A)(6), (E)(6). Although no statute expressly prohibits patronizing a prostituted child under the age of 14, it is likely that N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor) would be used to prosecute such cases.

In contrast, hiring a person 16 or older to perform an act of prostitution under N.M. Stat. Ann. § 30-9-3 (Patronizing prostitutes) is a petty misdemeanor punishable by up to 6 months in county jail, a fine not to exceed \$500, or both, unless the buyer has a prior conviction, in which case it is a misdemeanor punishable by less than 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-3, 31-19-1(A), (B).

- 2.3.1 Recommendation: Close the gap between N.M. Stat. Ann. § 30-6A-4(B) and § 30-9-11(D)(1) and § 30-9-13(B)(1) that leaves children who are 13 years old and younger unprotected, except when there is force or coercion under certain provisions in § 30-9-13 and § 30-9-11 that apply to minors aged 13-18.

¹⁹ See discussion of the relevant text of the statutes listed in this section *supra* Section 1.2.

²⁰ See *supra* note 6 for the definition of “prohibited sexual act.”

²¹ See *supra* note 9 for a list of offenses included in Article 9.

²² See discussion of relevant provisions *supra*, Section 1.2 for a full description of the sexual offense laws that may apply to certain buyers.

2.4 Penalties for buyers of commercial sex acts with minors are as high as federal penalties.²³

A conviction under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) if the victim is 16–17, is punishable as a third degree felony by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9). If the victim is 13–15 years old, human trafficking is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(6), (E)(6). If the victim is under 13, the violation further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) is a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15 (A)(6), (E)(6). N.M. Stat. Ann. § 30-6A-3(A) (Sexual exploitation of children) is a fourth degree felony punishable by 18 months' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(10), (E)(9). N.M. Stat. Ann. § 30-9-1 (Enticement of child) is a misdemeanor punishable by a definite term of less than 1 year in county jail, a possible fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A). In contrast, a buyer convicted of N.M. Stat. Ann. § 30-9-3 (Patronizing prostitutes), a petty misdemeanor, may be punished for a first offense by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. §§ 30-9-3, 31-19-1(B).

A buyer who habitually commits any of the above stated noncapital felonies faces enhanced penalties pursuant to N.M. Stat. Ann. § 31-18-17 (Habitual offenders; alteration of basic sentence). A defendant's sentence is increased 1 year if he has 1 prior felony conviction,²⁴ 4 years if he has 2 prior felony convictions, and 8 years if he has 3 prior felony convictions. N.M. Stat. Ann. § 31-18-17(A)–(C). In all three cases, the prior felonies had to be “parts of separate transactions or occurrences.” N.M. Stat. Ann. § 31-18-17(A)–(C). The 1 year enhancement can be suspended or deferred if “the court makes a specific finding that the prior felony conviction and the instant felony conviction are both for nonviolent felony offenses²⁵ and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling reasons, stated on the record, for departing from the sentence imposed pursuant to this subsection.” N.M. Stat. Ann. § 31-18-17(A). The other two enhancements “shall not be suspended or deferred.” N.M. Stat. Ann. § 31-18-17(B), (C).

²³ See discussion of the relevant text of the statutes listed in this section *supra* Section 1.2.

²⁴ N.M. Stat. Ann. § 31-18-17(D) defines “prior felony conviction” as

(1) a conviction, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for a prior felony committed within New Mexico whether within the Criminal Code [30-1-1 NMSA 1978] or not, but not including a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978; or

(2) a prior felony, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for which the person was convicted other than an offense triable by court martial if:

(a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;

(b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or

(c) the offense would have been classified as a felony in this state at the time of conviction.

²⁵ “As used in this section, ‘nonviolent felony offense’ means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense.” N.M. Stat. Ann. § 31-18-17(E).

Additionally, the base sentences discussed throughout this report will be increased to life imprisonment subject to parole “[w]hen a defendant is convicted of a second violent sexual offense,²⁶ and each violent sexual offense conviction is part of a separate transaction or occurrence, and at least the second violent sexual offense conviction is in New Mexico.” N.M. Stat. Ann. § 31-18-25(A). If the victim of both offenses was under 13 at the time of the offense, the enhanced punishment is “life imprisonment without the possibility of parole.” N.M. Stat. Ann. § 31-18-25(B).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense²⁷ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,²⁸ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²⁹

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.*

Although not limited in application to commercial sex acts, the use of the Internet to solicit sexual contact with a child under 16 years of age is illegal under N.M. Stat. Ann. § 30-37-3.2(A) (Child solicitation by electronic communication device), which states that it is a crime to “knowingly and intentionally solicit[] a child under sixteen years of age, by means of an electronic communication device,³⁰ to engage in sexual intercourse, sexual

²⁶ “Violent sexual offense” is defined in N.M. Stat. Ann. § 31-18-25(F) as “(1) criminal sexual penetration in the first degree, as provided in Subsection C [D] of Section 30-9-11 NMSA 1978; or (2) criminal sexual penetration in the second degree, as provided in Subsection D [E] of Section 30-9-11 NMSA 1978.”

²⁷ 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).

²⁸ 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).

²⁹ 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).

³⁰ “Electronic communication device” is defined in N.M. Stat. Ann. § 30-37-3.2(F) as “a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.”

contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.”

If the victim is 13–15, a conviction under N.M. Stat. Ann. § 30-37-3.2(B)(1) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(1), 31-18-15(A)(10), (E)(9). If the victim is under 13, a violation of N.M. Stat. Ann. § 30-72-3.2(B)(2) increases to a third degree felony punishable by imprisonment for 3 years and a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(2), 31-18-15(A)(9), (E)(9). However, if the buyer “also appears for, attends or is present at a meeting that the person arranged pursuant to the solicitation,” a violation of N.M. Stat. Ann. § 30-37-3.2(C)(1) where the victim is 13–15 years old increases to a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000, and where the victim is under 13, a violation of N.M. Stat. Ann. § 30-37-3.2(C)(2) increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-37-3.2(C), 31-18-15(A)(6), (A)(9), (E)(6), (E)(9).

2.5.1 Recommendation: Amend N.M. Stat. Ann. § 30-37-3.2 to apply to the electronic solicitation of all minors under 18.

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

Nothing in N.M. Stat. Ann. § 30-52-1(A)(2)³¹ (Human trafficking), § 30-6A-4(B) (Sexual exploitation of children by prostitution), § 30-6A-3(A) (Sexual exploitation of children), or § 30-9-1 (Enticement of child), expressly prohibits a defendant from using the defense of mistake of age.

2.6.1 Recommendation: Amend N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution), § 30-6A-3(A) (Sexual exploitation of children), § 30-9-1 (Enticement of child), and § 30-52-1(A)(2) (Human trafficking) to expressly prohibit the use of the defense of mistake of age.

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

Penalties under N.M. Stat. Ann. § 30-52-1(A)(2)³² (Human trafficking) vary based on the age of the minor victim. When the minor is 16–17 years old, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15 (A)(9), (E)(9). When the minor is 13–15 years old, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15 (A)(6), (E)(6). When the minor is under 13, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Buyer-applicable CSEC statutes do not criminalize purchasing a commercial sex act with a minor over 16. Specifically, N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) only applies when the victim is 14–15 years old, and a violation is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(6), (E)(6). Similarly, N.M. Stat. Ann. § 30-9-1 (Enticement of child) only applies if the victim is under 16, and a violation is a misdemeanor punishable by up to 1 year in county jail, a fine not to

³¹ See *supra* note 2.

³² See *supra* note 2.

exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A). The statute that could be used to prosecute buyers of commercial sex with children 16–17 years old would likely be N.M. Stat. Ann. § 30-9-3 (Patronizing Prostitutes). A first violation of N.M. Stat. Ann. § 30-9-3 is generally punishable as a petty misdemeanor by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. § 31-19-1(A), (B).

2.7.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1(C) (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-9-1 (Enticement of child) to provide substantial base penalties for all violations against minors under the age of 18.

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

Buyers convicted under N.M. Stat. Ann. § 30-52-1(A)³³ (Human trafficking), New Mexico’s CSEC laws and sexual offense laws may be required to pay fines ranging from \$500–\$15,000. Under N.M. Stat. Ann. § 30-52-1(C) (Human trafficking), a buyer may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the age of the victim. N.M. Stat. Ann. § 30-52-1(C), 13-18-15(E)(3),(6),(9). A buyer convicted of violating N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) may be required to pay a fine of \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15(E) (6). A buyer convicted of violating N.M. Stat. Ann. § 30-9-1 (Enticement of child) may be required to pay a fine of \$1,000. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A), 31-18-15(E)(9). In the absence of force or other listed circumstances, a buyer convicted of violating N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) may be required to pay a fine not to exceed \$5,000 if the minor is 13–16 or \$15,000 if the minor is under 13. N.M. Stat. Ann. §§ 30-9-11(D)(1), (G)(1), 31-18-15(E)(3), (E)(9). Also in the absence of force or other listed circumstances, a buyer convicted of violating N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor) may be required to pay a fine not to exceed \$12,500 if the minor is under 13 and unclothed. N.M. Stat. Ann. §§ 30-9-13(B)(1), 31-18-15(E)(5).

Under N.M. Stat. Ann. § 30-52-1(A) (Human trafficking), the buyer will be required “to make restitution³⁴ to the victim³⁵ for the gross income or value of the victim’s labor or services and any other actual damages³⁶ in accordance with Section 31-17-1 NMSA 1978 [Victim restitution].” N.M. Stat. Ann. § 30-52-1(F).

2.8.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1 (Human trafficking), § 30-6A-3 (Sexual exploitation of children), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-9-1 (Enticement of child) to require mandatory minimum fines and asset forfeiture in connection with these offenses.

³³ See *supra* note 2.

³⁴ “Restitution” is defined in N.M. Stat. Ann. § 31-17-1(4) as “full or partial payment of actual damages to a victim.”

³⁵ “Victim” is defined in N.M. Stat. Ann. § 31-17-1(1) as “any person who has suffered actual damages as a result of the defendant’s criminal activities.”

³⁶ “Actual damages” is defined in N.M. Stat. Ann. § 31-17-1(2) as “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or events, except punitive damages and damages for pain, suffering, mental anguish and loss of consortium. Without limitation, ‘actual damages’ includes damages for wrongful death.”

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

N.M. Stat. Ann. § 30-6A-3(A) (Sexual exploitation of children) criminalizes the possession of child pornography, stating,

It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.

...

A violation of N.M. Stat. Ann. § 30-6A-3(A) is punishable as a fourth degree felony by 18 months' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(10), (E)(9).

In comparison, a federal conviction for possession of child pornography³⁷ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³⁸ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³⁹

2.9.1 Recommendation: Amend N.M. Stat. Ann. § 30-6A-3(A) to criminalize the buying of child pornography and raise the penalty for both crimes to parallel the federal penalties.

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

Pursuant to N.M. Stat. Ann. § 29-11A-4(A)⁴⁰ (Registration of sex offenders; information required; verification; criminal penalty for noncompliance), “A sex offender residing in this state shall register with the county sheriff

³⁷ 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).

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

³⁹ 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).

⁴⁰ Here and elsewhere in this report where N.M. Stat. Ann. § 29-11A-4 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 570. H.B. 570, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 3, 2013).

for the county in which the sex offender resides.” N.M. Stat. Ann. § 29-11A-3(H)⁴¹ defines “sex offender” to include certain persons who have been convicted of a “sex offense.” N.M. Stat. Ann. § 29-11A-3(I) (Definitions) defines “sex offense” to include the following crimes:

- (1) aggravated criminal sexual penetration or criminal sexual penetration in the first, second, third or fourth degree, as provided in Section 30-9-11 NMSA 1978;
- ...
- (3) criminal sexual contact of a minor in the second, third or fourth degree, as provided in Section 30-9-13 NMSA 1978;
- (4) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;
- (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;

- (6) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with the intent to inflict a sexual offense;
- (7) false imprisonment, as provided in Section 30-4-1 NMSA 1978, when committed with the intent to inflict a sexual offense;
- ...
- (9) enticement of child, as provided in Section 30-9-1 NMSA 1978;
- ...
- (11) child solicitation by electronic communication device, as provided in Section 30-37-3.2 NMSA 1978, for convictions occurring on or after July 1, 2013⁴²;
- (12) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978; or
- (13) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (10) of this subsection, as provided in Section 30-28-1 NMSA 1978.⁴³

N.M. Stat. Ann. § 29-11A-3(I) does not, however, include violations of N.M. Stat. Ann. § 30-52-1⁴⁴ (Human trafficking) in its definition of “sex offense.”

- 2.10.1 Recommendation: Amend N.M. Stat. Ann. § 29-11A-3(I) to include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking).

⁴¹ Here and elsewhere in this report where N.M. Stat. Ann. § 29-11A-3 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 570. H.B. 570, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 3, 2013).

⁴² See *supra* note 41.

⁴³ N.M. Stat. § 30-28-1 (Attempt to commit a felony) states in part, “Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.”

⁴⁴ See *supra* note 2.

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.*⁴⁵

Traffickers convicted under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), if the victim is 16–17 years old, may be convicted of a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9). If the victim is 13–15, the penalty increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(6), (E)(6). If the victim is under 13, the penalty further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Traffickers may also be prosecuted under N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution). If the minor is 13–15, a violation of N.M. Stat. Ann. § 30-6A-4(A) is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(6), (E)(6). However, if the child is under 13, the penalty increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(3), (E)(3).

N.M. Stat. Ann. § 30-9-1 (Enticement of a child) could also be used to prosecute traffickers. A violation of N.M. Stat. Ann. § 30-9-1 is a misdemeanor punishable by a definite term of less than 1 year in county jail, a possible fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(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 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.

- 3.1.1 Recommendation: Amend the definition of “racketeering” in N.M. Stat. Ann. § 30-42-3(A) to

⁴⁵ See discussion of the relevant text of the statutes listed in this section *supra* Section 1.2.

⁴⁶ See *supra* note 27.

include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking of a minor), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-37-3.2 (Child solicitation by electronic communication device), and § 30-6A-3 (Sexual exploitation of children).

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

N.M. Stat. Ann. § 30-6A-3(C)–(E) (Sexual exploitation of children) criminalize the creation and manufacturing of child pornography. N.M. Stat. Ann. § 30-6A-3(C) states,

It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly. A person who violates the provisions of this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony.

N.M. Stat. Ann. § 30-6A-3(D) states,

It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a second degree felony.

Second degree felonies are punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. § 31-18-15(A)(6), (E)(6). A third degree felony is punishable by imprisonment for 3 years and a possible fine not to exceed of \$5,000. N.M. Stat. Ann. §31-18-15(A)(9), (E)(9).

N.M. Stat. Ann. § 30-6A-3(E) states,

It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. . . .

A violation of N.M. Stat. Ann. § 30-6A-3(E) is punishable as a fourth degree felony by 18 months' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(E), 31-18-15(A)(10), (E)(9).

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 offense⁴⁷ against a minor. Additionally, a federal conviction for distribution of child pornography⁴⁸

⁴⁷ See *supra* note 27.

⁴⁸ 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 \$250,000.⁴⁹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁵⁰

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.*

While not limited to commercial sex acts, the use of the Internet to solicit sexual contact with a child under 16 is illegal under N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device). N.M. Stat. Ann. § 30-37-3.2(A) applies to the act of “knowingly and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device,⁵¹ to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.”

3.3.1 Recommendation: Amend N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device) to apply to the electronic solicitation of all minors under 18.

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

Traffickers convicted of committing an offense related to their involvement in domestic minor sex trafficking face a number of financial penalties, including fines, restitution, forfeiture and civil damages.

Traffickers convicted under N.M. Stat. Ann. § 30-52-1⁵² (Human trafficking) and New Mexico’s CSEC laws may be required to pay fines ranging from \$1,000–\$15,000. Specifically, a trafficker convicted under N.M. Stat. Ann. § 30-52-1(C) may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-52-1(C), 13-18-15(E)(3), (E)(6), (E)(9). A trafficker convicted of violating N.M. Stat. Ann. § 30-6A-4 (Sexual exploitation of children by prostitution) may be required to pay a fine of \$10,000–\$15,000 depending on the age of the victim. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(E)(3),(6). A trafficker convicted of N.M. Stat. Ann. § 30-9-1 (Enticement of child) may be required to pay a fine not to exceed \$1,000. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A), 31-18-15(E)(9).

Traffickers may also be required “to make restitution⁵³ to the victim⁵⁴ for the gross income or value of the victim’s labor or services and any other actual damages⁵⁵ in accordance with Section 31-17-1 NMSA

⁴⁹ 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).

⁵⁰ 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).

⁵¹ *See supra* note 10 for the definition of “electronic communication device.”

⁵² *See supra* note 2.

⁵³ *See* the definition of “restitution” *supra* note 34.

⁵⁴ *See* definition of “victim” *supra* note 35.

1978 [Victim restitution], which states “It is the policy of this state that restitution be made by each violator . . . to the victims of his criminal activities to the extent that the defendant is reasonably able to do so.” N.M. Stat. Ann. § 30-52-1(F). Restitution is mandatory for traffickers who violate N.M. Stat. Ann. §30-52-1(F) (Human trafficking), which states,

A person convicted of human trafficking shall, in addition to any other punishment, be ordered to make restitution to the victim for the gross income or value of the victim's labor or services and any other actual damages in accordance with Section 31-17-1 NMSA 1978

Traffickers may face forfeiture of property under the nuisance laws. N.M. Stat. Ann. § 30-8-8.1(B) (Abatement of house of prostitution) provides that “two or more convictions of any person or persons occurring at least one week apart within a period of one year for violation of either Section 30-9-2 [Prostitution] or 30-9-3 [Patronizing prostitutes] NMSA 1978 arising out of conduct engaged in at the place described in an abatement action creates a presumption that the place is a house of prostitution. However, this presumption shall not arise unless the person against whom the abatement action is brought is shown to have had actual knowledge or to have received written notice from law enforcement officials of the convictions upon which the presumption is based.” Pursuant to N.M. Stat. Ann. § 30-8-8.1(C),

If, in an abatement action brought under Section 30-8-8 [Abatement of a public nuisance] NMSA 1978, a binding admission is made by the defendant or the court concludes that a house of prostitution exists at the location alleged, the court may, as part of its judgment:

- (1) direct the removal from the house of prostitution all movable personal property used in conducting the house of prostitution and shall direct the sale of that property in the same manner as personal property is sold when seized under a writ of execution; and
- (2) order the closing of the house of prostitution for a period of one year and prohibit any person entering it except under conditions specified in the order.

- 3.4.1 Recommendation: Amend New Mexico’s human trafficking and CSEC laws to provide for mandatory minimum fines and asset forfeiture in connection with these offenses.

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

Pursuant to N.M. Stat. Ann. § 29-11A-4(A) (Registration of sex offenders; information required; Verification; criminal penalty for noncompliance), “A sex offender residing in this state shall register with the county sheriff for the county in which the sex offender resides.” The sex offender must register within 5 days of arriving in the state and provide detailed registration information pursuant to N.M. Stat. Ann. 29-11-A-4(B).⁵⁶ N.M. Stat. Ann. § 29-11A-3(H)⁵⁷ defines “sex offender” to include certain persons who have been convicted of a “sex offense.” Pursuant to N.M. Stat. Ann. § 29-11A-3(I) (Definitions), the definition of “sex offense” includes the following crimes:

- (4) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;
- (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;

⁵⁵ See definition of “actual damages” *supra* note 36.

⁵⁶ Here and elsewhere in this report where N.M. Stat. Ann. § 29-11A-4 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 570. H.B. 570, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 3, 2013)..

⁵⁷ Here and elsewhere in this report where N.M. Stat. Ann. § 29-11A-3 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 570. H.B. 570, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 3, 2013)..

- (6) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with the intent to inflict a sexual offense ;
- (7) false imprisonment, as provided in Section 30-4-3 NMSA 1978, when committed with the intent to inflict a sexual offense ;
- ...
- (9) enticement of child, as provided in Section 30-9-1 NMSA 1978;
- ...
- (11) child solicitation by electronic communication device, as provided in Section 30-37-3.2 NMSA 1978, for convictions occurring on or after July 1, 2013⁵⁸;
- (12) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978; or
- (13) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (10) of this subsection, as provided in Section 30-28-1 NMSA 1978;

N.M. Stat. Ann. § 29-11A-3(I) does not, however, include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking) in its definition of “sex offense.”

- 3.5.1 Recommendation: Amend N.M. Stat. Ann. § 29-11A-3(I) to include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking) when the victim is a minor, in its definition of “sex offense” for purposes of requiring registration as a sex offender

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

A violation of N.M. Stat. Ann. § 30-52-1 (Human Trafficking) is not explicitly included as grounds under N.M. Stat. Ann. § 32A-4-28(B) (Termination of parental rights; adoption decree) for authorizing the termination of parental rights, although it appears to fall under the definition of “abused child.” Pursuant to N.M. Stat. Ann. § 32A-4-28(B),⁵⁹

The court shall terminate parental rights with respect to a child when:

- (1) there has been an abandonment of the child by his parents;
- (2) the child has been a neglected or abused⁶⁰ child as defined in the Abuse and Neglect Act [32A-4-1 NMSA 1978] and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. The court may find in some cases that efforts by the department or another agency are unnecessary, when:

⁵⁸ See *supra* note 56.

⁵⁹ N.M. Stat. Ann. § 32A-4-28(A) states, “In proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated.”

⁶⁰ An “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B) as including one “who has suffered sexual abuse or sexual exploitation inflicted by the child’s parent, guardian or custodian.” “Sexual abuse” includes, but is not limited to criminal sexual contact, incest or criminal sexual penetration, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(G). “Sexual exploitation” is defined as including “(1) allowing, permitting or encouraging a child to engage in prostitution; (2) allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or (3) filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(H).

- (a) there is a clear showing that the efforts would be futile; or
- (b) the parent has subjected the child to aggravated circumstances;⁶¹ or

....

⁶¹ N.M. Stat. Ann. § 32A-4-2(C) defines “aggravated circumstances” as,

[T]hose circumstances in which the parent, guardian or custodian has:

- (1) attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child’s sibling;
- (2) attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;
- (3) attempted, conspired to subject or has subjected the child to torture, chronic abuse or sexual abuse; or
- (4) had parental rights over a sibling of the child terminated involuntarily.

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.*

Although it is not limited to minor victims, N.M. Stat. Ann. § 30-52-1(A)(3)⁶² (Human trafficking) forbids “benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services or commercial sexual activity.”⁶³ Facilitators convicted under N.M. Stat. Ann. § 30-52-1(A)(3), if the victim is 16 or older, will be guilty of a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(9), (E)(9). If the victim is 13–15 the penalty increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(6), (E)(6). If the victim is under 13, the penalty further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Facilitators may also be prosecuted under N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution).⁶⁴ If the minor is 13–15 years old, a violation of N. M. Stat. Ann. §30-6A-4(A) is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A),31-18-15(A)(6), (E)(6). However, if the child is under 13, the violation increases to first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(3), (E)(3).

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

Facilitators convicted of an offense related to their involvement in domestic minor sex trafficking face a number of financial penalties, including fines, restitution, forfeiture and civil damages.

Facilitators convicted under N.M. Stat. Ann. § 30-52-1 (Human trafficking) and New Mexico’s CSEC laws may be required to pay fines ranging from \$1,000–\$15,000. Specifically, a facilitator convicted under N.M. Stat. Ann. § 30-52-1(C) may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-52-1(C), 13-18-15(E)(3), (E)(6), (E)(9). A facilitator convicted of violating N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by

⁶² See *supra* note 2.

⁶³ See definition of “commercial sexual activity” *supra* note 3.

⁶⁴ See discussion of N.M. Stat. Ann. § 30-6A-4 *supra* Section 1.2.

prostitution) may be required to pay a fine not to exceed \$10,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(E)(3), (E)(6).

A facilitator convicted of violating N.M. Stat. Ann. § 30-52-1(A)(3) shall also be required “to make restitution⁶⁵ to the victim⁶⁶ for the gross income or value of the victim’s labor or services and any other actual damages⁶⁷ in accordance with Section 31-17-1 NMSA 1978 [Victim restitution].” N.M. Stat. Ann. § 30-52-1(F). A facilitator convicted of violating N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution) may be required to pay restitution pursuant to N.M. Stat. Ann. § 31-17-1, which states “It is the policy of this state that restitution be made by each violator of the Criminal Code . . . to the victims of his criminal activities to the extent that the defendant is reasonably able to do so.”

Facilitators who allow their property to be used for commercial sexual exploitation of minors may face forfeiture of personal property under the nuisance laws. N.M. Stat. Ann. § 30-8-8.1(B) (Abatement of house of prostitution) provides that “two or more convictions of any person or persons occurring at least one week apart within a period of one year for violation of either Section 30-9-2 [Prostitution] or 30-9-3 [Patronizing prostitutes] NMSA 1978 arising out of conduct engaged in at the place described in an abatement action creates a presumption that the place is a house of prostitution. However, this presumption shall not arise unless the person against whom the abatement action is brought is shown to have had actual knowledge or to have received written notice from law enforcement officials of the convictions upon which the presumption is based.” Pursuant to N.M. Stat. Ann. § 30-8-8.1(C),

If, in an abatement action brought under Section 30-8-8 [Abatement of a public nuisance] NMSA 1978, a binding admission is made by the defendant or the court concludes that a house of prostitution exists at the location alleged, the court may, as part of its judgment:

- (1) direct the removal from the house of prostitution all movable personal property used in conducting the house of prostitution and shall direct the sale of that property in the same manner as personal property is sold when seized under a writ of execution; and
- (2) order the closing of the house of prostitution for a period of one year and prohibit any person entering it except under conditions specified in the order.

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

There is no specific provision in the New Mexico code prohibiting child sex tourism.

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

4.4 *Promoting and selling child pornography is illegal.*

N.M. Stat. Ann. § 30-6A-3(B) and (F) criminalize the distribution of child pornography. N.M. Stat. Ann. § 30-6A-3(B) states in part,

It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the

⁶⁵ See the definition of “restitution” *supra* note 34

⁶⁶ See definition of “victim” *supra* note 35.

⁶⁷ See definition of “actual damages” *supra* note 36.

obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.

Similarly, N.M. Stat. Ann. § 30-6A-3(F) states,

It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. . . .

A violation of either N.M. Stat. Ann. § 30-6A-3(B) or (F) is a third degree felony punishable by imprisonment for 3 years and a possible fine of \$5,000. N.M. Stat. Ann. §§ 30-6A-3(B), (F), 31-18-15(A)(9), (E)(9).

4.4.1 Recommendation: Amend N.M. Stat. Ann. § 30-6A-3(B) and (F) to expressly criminalize the promotion and sale of child pornography.

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.*

N.M. Stat. Ann. § 30-52-2(B) (Human trafficking; benefits and services for human trafficking victims) defines a human trafficking victim as “a person subjected to human trafficking by a person charged in New Mexico with the crime of human trafficking.” Since the crime of human trafficking includes “recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity,” a child subjected to this action would be considered a victim for purposes of N.M. Stat. Ann. § 30-52-2. N.M. Stat. Ann. § 30-52-1(A)(2)⁶⁸.

N.M. Stat. Ann. § 30-52-2(A)⁶⁹ also recognizes the victim status of trafficking victims by stating, “human trafficking victims found in the state shall be eligible for benefits and services from the state until the victim qualifies for benefits and services authorized by the federal Victims of Trafficking and Violence Protection Act of 2000 [Pub. L. No. 106-386, § 2002];” However, this provision of benefits is not

⁶⁸ See *supra* note 2.

⁶⁹ Here and elsewhere in this report where N.M. Stat. Ann. § 30-52-2 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 304. H.B. 304, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 3, 2013).

unconditional. The statute allows access to benefits only if “the victim cooperates in the investigation or prosecution of the person charged with the crime of human trafficking. Benefits and services shall be provided to eligible human trafficking victims as quickly as can reasonably be arranged regardless of immigration status.”

Additionally, N.M. Stat. Ann. § 31-17-1(A)(1) (Victim restitution) defines “victim” as “any person who has suffered actual damages⁷⁰ as a result of the defendant’s criminal activities.” “Criminal activities” includes “any crime for which there is a plea of guilty or verdict of guilty, upon which a judgment may be rendered and any other crime committed after July 1, 1977 which is admitted or not contested by the defendant.” N.M. Stat. Ann. § 31-17-1(A)(3).

For purposes of Chapter 31, Article 22 (Crime Victims Reparations), a “victim” is defined in part in N.M. Stat. Ann. § 31-22-3(I) as

- (1) a person in New Mexico who is injured or killed by any act or omission of any other person that is a crime enumerated in Section 31-22-8⁷¹ [Crimes enumerated] NMSA 1978; [or]
- (2) a resident of New Mexico who is injured or killed by such a crime occurring in a state other than New Mexico if that state does not have an eligible crime victims compensation program; . . .
-

The crimes enumerated in N.M. Stat. Ann. § 31-22-8⁷² include human trafficking but not CSEC offenses. N.M. Stat. Ann. § 31-22-8 (A) (10), (11), (16). The statute does include include §30-9-11 (criminal sexual penetration), and § 30-9-13 (criminal sexual contact of a minor). . (16) However, the requirement of a showing of injury or death may preclude some victims of these latter crimes from obtaining reparations.

Lastly, for the purposes of New Mexico’s Victims of Crime Act, in New Mexico’s criminal procedure chapter, a “victim” is defined in part as “an individual against whom a criminal offense is committed.” N.M. Stat. Ann. § 31-26-3(F). The definition of “criminal offense” includes violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor). N.M. Stat. Ann. § 31-26-3(B)(11), (12).

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.*

Many of the trafficking and CSEC statutes neither expressly state that consent is a defense nor do they expressly prohibit raising such a defense. These statutes include N.M. Stat. Ann. § 30-52-1⁷³ (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-6A-3 (Sexual exploitation of children).

⁷⁰ See *supra* note 36 for the definition of “actual damages.”

⁷¹ “Injury” is defined in N.M. Stat. Ann. § 31-22-3(F) as “actual bodily harm or disfigurement and includes pregnancy and extreme mental distress.” Also, the same section defines “extreme mental distress” as “a substantial personal disorder of emotional processes, thought or cognition that impairs judgment, behavior or ability to cope with the ordinary demands of life.”

⁷² Here and elsewhere in this report where N.M. Stat. Ann. § 31-22-8 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 304. H.B. 304, 2013 Reg. Sess., Leg. Sess. (N.M. 2013) (enacted Apr. 5, 2013).

⁷³ See *supra* note 2.

- 5.2.1. Recommendation: Amend N.M. Stat. Ann. § 30-52-1 (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), and § 30-6A-3 (Sexual exploitation of children), to expressly provide that a minor’s consent to a commercial sex act is no defense to the crime.

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

N.M. Stat. Ann. § 30-9-2 (Prostitution) is age-neutral, stating, “Whoever commits prostitution is guilty of a petty misdemeanor.” N.M. Stat. Ann. § 30-9-2 further states that “[p]rostitution consists of knowingly engaging in or offering to engage in a sexual act for hire.” A minor charged with the petty misdemeanor of prostitution may be punished by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. §§ 30-9-2, 31-19-1(B). Moreover, if the minor has a prior conviction, a violation would be a misdemeanor punishable by a definite term of up to 1 year in county jail, a fine of \$1,000, or both. N.M. Stat. Ann. §§ 30-9-2, 31-19-1(A). But, a human trafficking victim pursuant to § 30-52-1 (E)⁷⁴ may not be charged as an accessory to the crime of human trafficking or with crimes committed as a result of coercion by the trafficker.

- 5.3.1 Recommendation: Amend N.M. Stat. Ann. § 30-9-2. to make minors expressly immune from prosecution for prostitution and identify all minors engaged in prostitution as victims of human trafficking under N.M. Stat. Ann. § 30-52-1 (Human trafficking).

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.*

Domestic minor sex trafficking victims may be provided with services by being certified as a victim of human trafficking, or they may be taken into custody through either the juvenile justice system or through the child protection system.

Child Certified as a Victim of Human Trafficking

A minor certified as a victim of human trafficking has access to services through an alternative process that does not necessitate taking the child into custody, or make physical placement of the child mandatory.

I. Initial Custody

a. Authority for Initial Custody

Domestic minor sex trafficking victims in New Mexico do not need to be taken into custody to access social services. N.M. Stat. Ann. § 30-52-2(A) states, “[h]uman trafficking victims found in the state shall be eligible for benefits and services from the state until the victim qualifies for benefits and services authorized by the federal Victims of Trafficking and Violence Protection Act of 2000; provided that the victim cooperates in the investigation or prosecution of the person charged with the crime of human trafficking.” However, N.M. Stat. Ann. § 30-52-2(D) provides that a victim can continue to receive services if a court finds that he or she is unable to cooperate, and that “[a] victim who is younger than eighteen years of age is eligible for benefits and services without a finding by the court” that the victim is unable to cooperate.

⁷⁴ See *supra* note 2.

b. Placement

In order to receive services under this statute, law enforcement must “certify to the human services department and the children, youth and families department that a person is a victim of human trafficking.” N.M. Stat. Ann. § 30-52-2(C).

II. Process Following Initial Custody of Abused/Neglected Child

While this process does not require actual physical custody or placement of the child, once certified as a trafficking victim, the minor shall be provided benefits and services “as quickly as can reasonably be arranged regardless of immigration status and shall include, when appropriate to a particular case:

- (1) case management;
- (2) emergency temporary housing
- (3) health care;
- (4) mental health counseling;
- (5) drug addiction screening and treatment;
- (6) language interpretation, translation services and English language instruction;
- (7) job training, job placement assistance and post-employment services for job retention;
- (8) child care;
- (9) advocacy services;
- (10) state-funded cash assistance;
- (11) food assistance;
- (12) services to assist the victim and the victim's family members; and
- (13) other general assistance services and benefits as determined by the children, youth and families department or the human services department.

III. Placement Process Pending Adjudication/Investigation

This section is not applicable to this process. Once certified as a victim of human trafficking by law enforcement, no further adjudication is required.

IV. Adjudication

This section is not applicable to this process. Once certified as a victim of human trafficking by law enforcement, no further adjudication is required.

V. Outcomes

Outcomes under this section will depend on the needs of individual survivors, since benefits and services will be provided depending on what is “appropriate to a particular case.” N.M. Stat. Ann. § 30-52-2(A).

Child Identified as Abused/Neglected⁷⁵

VI. *Initial Custody*

a. Authority for Initial Custody

A child protection response may be provided to domestic minor sex trafficking victims who are considered abused or neglected. As used in Chapter 32A, Article 4 (Child Abuse and Neglect), an “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B) as a child

- (1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child’s parent, guardian or custodian;
- (2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child’s parent, guardian or custodian;
- (3) who has suffered sexual abuse⁷⁶ or sexual exploitation⁷⁷ inflicted by the child’s parent, guardian or custodian;
- (4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child’s life or health; or
- (5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

N.M. Stat. Ann. § 32A-4-2(E) defines “neglected child” in part, as “a child . . . (3) who has been physically or sexually abused, when the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;”

Under N.M. Stat. Ann. § 32A-4-6(A) (Taking into custody; penalty), A child may be held or taken into custody:

- (1) by a law enforcement officer when the officer has evidence giving rise to reasonable grounds to believe that the child is abused or neglected and that there is an immediate threat to the child’s safety; provided that the law enforcement officer contacts the department to enable the department to conduct an on-site safety assessment to determine whether it is appropriate to take the child into immediate custody, except that a child may be taken into custody by a law enforcement officer without a protective services assessment being conducted if:
 - (a) the child’s parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child’s sibling;
 - (b) the child’s parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;
 - (c) the child has been abandoned;
 - (d) the child is in need of emergency medical care;
 - . . . ; or
 - (f) the child is in imminent risk of abuse.

⁷⁵ Pursuant to N.M. Stat. Ann. § 32A-4-2(B), a sexually exploited child is likely to be identified as abused or neglected. If a child is identified as abused or neglected under N.M. Stat. Ann. § 32A-4-2(B), the definition of custodian under N.M. Stat. Ann. § 32A-1-4(E) (Definitions)] is sufficiently broad to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker.

⁷⁶ See *supra* note 60.

⁷⁷ See *supra* note 60.

b. Placement

N.M. Stat. Ann § 32A-4-7(A) (Release or delivery from custody) requires that a child taken into custody be released to his or her “parent, guardian or custodian” and given a “verbal counsel or warning as may be appropriate” or delivered “to the department” or a medical facility if the child needs treatment. Under N.M. Stat. Ann § 32A-4-7(B), “When an alleged neglected or abused child is delivered to the department, a department caseworker shall review the need for placing the child in custody and shall release the child from custody unless custody is appropriate or has been ordered by the court.”

N.M. Stat. Ann. § 32A-4-8 (Place of temporary custody) states,

Unless a child alleged to be neglected or abused is also alleged or adjudicated delinquent, the child shall not be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children, but may be placed in the following community-based shelter-care facilities:

- A. with a relative of the child who is willing to guarantee to the court that the child will not be returned to the alleged abusive or neglectful parent, guardian or custodian without the prior approval of the court;
- B. a licensed foster home or any home authorized under the law for the provision of foster care, group care or use as a protective residence;
- C. a facility operated by a licensed child welfare services agency; or
- D. a facility provided for in the Children's Shelter Care Act [32A-9-1 N.M. Stat. Ann. 1978].

II. Process Following Initial Custody of Abused/Neglected Child

A custody hearing must be held within 10 days of the filing of a petition for temporary custody, and the child must be returned to his or her parents or guardian unless, among other things, “the child is in immediate danger from the child’s surroundings, and removal from those surroundings is necessary for the child’s safety or well-being” or “the child will be subject to injury by others if not placed in the custody of the department.” N.M. Stat. Ann. § 32A-4-18(A), (C)(2)–(3).

III. Placement Process Pending Adjudication/Investigation

Pursuant to N.M. Stat. Ann. § 32A-4-18(D) & (F):

D. At the conclusion of the custody hearing, if the court determines that probable cause exists pursuant to Subsection C of this section, the court may:

- (1) return legal custody of the child to the child's parent, guardian or custodian upon such conditions as will reasonably ensure the safety and well-being of the child, including protective supervision by the department; or
- (2) award legal custody of the child to the department.

F. At the conclusion of the custody hearing, if the court determines that probable cause does not exist pursuant to Subsection C of this section, the court shall:

- (1) retain jurisdiction and, unless the court permits otherwise, order that the respondent and child remain in the jurisdiction of the court pending the adjudication;
- (2) return legal custody of the child to the child's parent, guardian or custodian with conditions to provide for the safety and well-being of the child; and
- (3) order that the child's parent, guardian or custodian allow the child necessary contact with the child's guardian ad litem or attorney.

IV. Adjudication

Pursuant to N.M. Stat. Ann. § 32A-4-19(B):

Prior to the adjudicatory hearing, all parties to the hearing shall attend a mandatory meeting and attempt to settle issues attendant to the adjudicatory hearing and develop a proposed treatment plan that serves the child's best interest.

Pursuant to N.M. Stat. Ann. § 32A-4-19(A):

The adjudicatory hearing in a neglect or abuse proceeding shall be commenced within sixty days after the date of service on the respondent.

Pursuant to N.M.Stat. Ann. § 32A-4-19(D):

When the adjudicatory hearing on any petition is not commenced within the time period specified in Subsection A of this section or within the period of any extension granted, the petition shall be dismissed with prejudice.

V. Outcomes

In making its disposition judgment, if the court finds the child to be abused or neglected, pursuant to N.M. Stat. Ann. § 32A-4-22(B), the court may

- (1) permit the child to remain with the child's parent, guardian or custodian, subject to those conditions and limitations the court may prescribe;
- (2) place the child under protective supervision of the department; or
- (3) transfer legal custody of the child to any of the following:
 - (a) the noncustodial parent, if it is found to be in the child's best interest;
 - (b) an agency responsible for the care of neglected or abused children; or
 - (c) a child-placement agency willing and able to assume responsibility for the education, care and maintenance of the child and licensed or otherwise authorized by law to receive and provide care for the child.

N.M.Stat. Ann. § 32A-4-22(C) adds that, "If a child is found to be neglected or abused, in its dispositional judgment the court shall also order the department to implement and the child's parent, guardian or custodian to cooperate with any treatment plan approved by the court. Reasonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety. The court may determine that reasonable efforts are not required to be made when the court finds that:

- (1) the efforts would be futile; or
- (2) the parent, guardian or custodian has subjected the child to aggravated circumstances."

N.M. Stat. Ann. § 32A-4-22(F) further specifies that "[u]nless a child found to be neglected or abused is also found to be delinquent, the child shall not be confined in an institution established for the long-term care and rehabilitation of delinquent children."

Child Identified as Child in Need of Services

I. Initial Custody

a. Authority for Initial Custody

Domestic minor sex trafficking victims who are truant from school or who have run away from home also may receive a protective response under the provisions of New Mexico's Family in Need of Court-Ordered Services Act, N.M. Stat. Ann. § 32A-3B et. seq. Specifically, N.M. Stat. Ann. § 32A-3B-3(A) (Protective custody; interference with protective custody; penalty) provides,

A child may be taken into protective custody by a law enforcement officer without court order when the officer has reasonable grounds to believe that:

- (1) the child has run away from the child's parent, guardian or custodian;
- (2) the child without parental supervision is suffering from illness or injury;
- (3) the child has been abandoned; or
- (4) the child is endangered by his surroundings and removal from those surroundings is necessary to ensure the child's safety.

b. Placement

Once taken into custody pursuant to N.M. Stat. Ann. § 32A-3B-3(A) (Protective custody; interference with protective custody; penalty), pursuant to N.M. Stat. Ann. § 32A-3B-6 (Place of custody),

Unless a child from a family in need of services who has been placed in department custody is also alleged or adjudicated delinquent, the child shall not be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children, but may be placed in the following community-based shelter-care facilities:

- A. a licensed foster-care home or any home authorized under the law for the provision of foster care, group care or use as a protective residence;
- B. a facility operated by a licensed child welfare services agency;
- C. a facility provided for in the Children's Shelter Care Act [32A-9-1 NMSA 1978]; or
- D. in a home of a relative of the child, when the relative provides the court with a sworn statement that the relative will not return the child to the dangerous surroundings that prompted protective custody for the child.

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

Pursuant to N.M. Stat. Ann. § 32A-3B-7(A) (Protective custody hearing; time limitations):

When a child of an alleged family in need of court-ordered services is taken into protective custody by the department or the department petitions the court for protective custody of the child, a custody hearing shall be held within ten days from the date the petition is filed to determine if the child should remain with the family or be placed in the custody of the department pending adjudication. Upon written request of the respondent, the hearing may be held earlier, but in no event shall the hearing be held sooner than two days after the date the petition was filed.

III. Placement Process Pending Adjudication/Investigation

Pursuant to N.M. Stat. Ann. § 32A-3B-7(C)-(D) (Protective custody hearing; time limitations):

- (C) When the custody hearing is conducted, the court shall release the child to his parent, guardian or custodian unless probable cause exists to believe that:
 - (1) the child is in immediate danger from his surroundings and the child's removal from those surroundings is necessary for his safety or well-being;
 - (2) the child will be subject to injury by others if not placed in the protective custody of the department; or
 - (3) a parent, guardian or custodian of the child or any other person is unable or unwilling to provide adequate supervision and care for the child.
- (D) At the conclusion of the protective custody hearing, if the court determines that protective custody pending adjudication is appropriate, the court may:
 - (1) award custody of the child to the department; or
 - (2) return the child to the child's parent, guardian or custodian, subject to conditions that will reasonably assure the safety and well-being of the child.

IV. Adjudication

Pursuant to N.M. Stat. Ann. § 32A-3B-12(A) & (C) (Adjudicatory hearing; time limitations):

- (A) An adjudicatory hearing for an alleged family in need of court-ordered services shall be commenced within sixty days after the date of service on the respondent. . . .
- ...
- (C) If the adjudicatory hearing is not commenced within the time limits specified in this section or within the period of any extension of those time limits, the petition shall be dismissed with prejudice.

V. Outcomes

Pursuant to N.M. Stat. Ann § 32A-3B-16(B)-(C) (Dispositional judgment):

- (B) When there is an adjudication regarding a family in need of court-ordered services, the court shall enter judgment and make any of the following dispositions:
 - (1) permit the child to remain with the child's parent, guardian or custodian, subject to conditions and limitations the court may prescribe;
 - (2) place the child under the protective supervision of the department;
 - (3) transfer legal custody of the child to:
 - (a) the department;
 - (b) an agency responsible for the care of neglected or abused children; or
 - (c) the child's noncustodial parent, if that is found to be in the child's best interests; or
 - (4) if the evidence indicates that the child's educational needs are not being met, the local education agency may be joined as a party and directed to assess the child's needs within forty-five days, attempt to meet the child's educational needs and document its efforts to meet the child's educational needs.
- C. Unless a child of an adjudicated family in need of court-ordered services is also found to be a delinquent child, the child shall not be confined in an institution established for the long-term care and rehabilitation of delinquent children or in a facility for the detention of alleged delinquent children.

Child Identified as Delinquent

I. Initial Custody

a. Authority for Initial Custody

Domestic minor sex trafficking victims may also be treated as delinquent children. N.M. Stat. Ann. § 32A-2-3(B) defines a “delinquent child” as “a child who has committed a delinquent act.” A “delinquent act” is defined in part as “an act committed by a child that would be designated as a crime under the law if committed by an adult” N.M. Stat. Ann. § 32A-2-3(A).

Under N.M. Stat. Ann. § 32A-2-9 (Taking into custody), “[a] child may be taken into custody,” among other ways, “pursuant to the laws of arrest for commission of a delinquent act.” Once a delinquent child is taken into custody, N.M. Stat. Ann. § 32A-2-10(A) (Release or delivery from custody) states that the person who took the child into custody must “with all reasonable speed” release the child to his or her parents or a guardian with a verbal warning if appropriate or a written promise by the parents to bring the child to court, or take the child to a detention facility, a medical facility, an evaluation facility, or another center or organization.

b. Placement

Under New Mexico’s Children’s Shelter Care Act, N.M. Stat. Ann. § 32A-9 et. seq., an alleged or actual child in need of supervision⁷⁸ or an alleged delinquent child when “there is no probable cause to believe that the child will injure others or himself, run away or be taken away so as to be unavailable for proceedings of the court or its officers” may “be placed in a community-based shelter-care facility.” N.M. Stat. Ann. § 32A-9-6.

Pursuant to § 32A-2-10(C), “A child under the age of eleven shall not be held in detention.” Additionally, pursuant to N.M. Stat. Ann. § 32A-2-10(B), when a child is

delivered to a place of detention or organization recognized as an alternative to secure detention, as provided in Section 32A-2-12 NMSA 1978, only a department employee or a trained county detention professional designated by the department may place the child in detention or with a center or organization recognized as an alternative to secure detention in accordance with the criteria for detention set forth in Section 32A-2-11 NMSA 1978. If the criteria for detention of an alleged delinquent child are not met, the child shall be released from custody.

Pursuant to N.M. Stat. Ann. § 32A-2-10. (Release or delivery from custody), a person taking a child into custody shall, with all reasonable speed:

- (1) release the child to the child's parent, guardian or custodian or an adult authorized by the child's parent, guardian or custodian and issue verbal counsel or warning as may be appropriate;
- (2) release the child to the child's parent, guardian or custodian or an adult authorized to sign on behalf of the child's parent, guardian or custodian upon written promise to bring the child before the court when requested by the court. If the parent, guardian or custodian or an adult authorized to sign on

⁷⁸ N.M. Stat. Ann. § 32A-9-3(C) defines a “child in need of supervision” as

- [A] child found by the children’s court or family court division of the district court to:
- (1) have committed an offense applicable only to children or not classified as criminal; and
 - (2) be in need of care or rehabilitation.

behalf of the child's parent, guardian or custodian fails, when requested, to bring the child before the court as promised, the court may order the child taken into custody and brought before the court;

- (3) deliver the child to a place of detention as provided in Section 32A-2-12 NMSA 1978;
- (4) deliver the child to a medical facility, if available, if the child is believed to be suffering from a serious illness that requires prompt treatment or prompt diagnosis;
- (5) deliver the child to an evaluation facility, if available, if the person taking the child into custody has reasonable grounds to believe the child presents a likelihood of serious harm to the child's self or others or is suffering from some other serious mental condition or illness that requires prompt treatment or prompt diagnosis; or
- (6) deliver the child to a center or organization that the court or the department recognizes as an alternative to secure detention.

II. Process Following Initial Custody

When a child taken into custody is not released, “a judicial determination of probable cause” must be made within 48 hours, unless the child was arrested “pursuant to the Children’s Court Rules,” and a petition must be filed within 24 hours, and a detention hearing must occur within 24 hours after filing. N.M. Stat. Ann. 32A-2-13(A).

II. Placement Process Pending Adjudication/Investigation

Pursuant to N.M. Stat. Ann. § 32A-2-11(A) (Criteria for detention of children),

Unless ordered by the court pursuant to the provisions of the Delinquency Act, a child taken into custody for an alleged delinquent act shall not be placed in detention unless a detention risk assessment instrument is completed and a determination is made that the child:

- (1) poses a substantial risk of harm to himself;
- (2) poses a substantial risk of harm to others; or
- (3) has demonstrated that he may leave the jurisdiction of the court.

Pursuant to N.M. Stat. Ann. § 32A-2-12(A) (Placement or detention), a child alleged to be delinquent may also “be placed or detained” in

- (1) a licensed foster home or a home otherwise authorized under the law to provide foster or group care;
- (2) a facility operated by a licensed child welfare services agency;
- (3) a shelter-care facility provided for in the Children’s Shelter Care Act [32A-9-1 NMSA 1978] that is in compliance with all standards, conditions and regulatory requirements and that shall be considered a temporary placement subject to judicial review within thirty days of placement;
- (4) a detention facility certified by the department for children alleged to be delinquent children;
- (5) any other suitable place, other than a facility for the long-term care and rehabilitation of delinquent children to which children adjudicated as delinquent may be confined pursuant to Section 32A-2-19 NMSA 1978, designated by the court and that meets the standards for detention facilities pursuant to the Children’s Code [32A-1-1 NMSA 1978] and federal law; or
- (6) the child’s home or place of residence, under conditions and restrictions approved by the court.

Pursuant to N.M. Stat. Ann. § 32A-2-13(F), “If the judge or special master finds that detention of the child is not appropriate under the criteria established by the Children’s Code,” the child shall be released and possibly subjected to certain conditions; specifically, the judge or special master may

- (1) place the child in the custody of a parent, guardian or custodian or under the supervision of an agency agreeing to supervise the child;
- (2) place restrictions on the child's travel, association with other persons or place of abode during the period of the child's release; or
- (3) impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children established by the Children's Code [32A-1-1 NMSA 1978], including a condition requiring that the child return to custody as required.

III. *Adjudication*

a. Adjudicatory/Dispositional Hearing

Pursuant to N.M. Stat. Ann. § 32A-2-15. (Time limitations on delinquency adjudicatory hearing):

The adjudicatory hearing in a delinquency proceeding shall be held in accordance with the time limits set forth in the Children's Court Rules and Forms.

Pursuant to N.M.R.A. RULE 10-243. (Adjudicatory hearing; time limits):

(A) If the child is in detention, the adjudicatory hearing shall be commenced within thirty (30) days from whichever of the following events occurs latest:

- (1) the date the petition is served on the child;
- (2) the date the child is placed in detention;
- (3) if an issue is raised concerning the child's competency to participate at the adjudicatory hearing, the date an order is entered finding the child is competent to participate at the adjudicatory hearing. . . .

(B) Child Not in Detention. If the child is not in detention, or has been released from detention prior to the expiration of the time limits set forth in this rule for a child in detention, the adjudicatory hearing shall be commenced within one-hundred twenty (120) days from whichever of the following events occurs latest:

- (1) the date the petition is served on the child;
- (2) if an issue is raised concerning the child's competency to participate at the adjudicatory hearing, the date an order is entered finding the child is competent to participate at the adjudicatory hearing . . .

IV. *Outcomes*

Under N.M. Stat. Ann. § 32A-2-19(B) (Disposition of an adjudicated delinquent offender), for a child found to be delinquent, in its dispositional order, the court may order any of the following:

(1) transfer legal custody to the department, an agency responsible for the care and rehabilitation of delinquent children, which shall receive the child at a facility designated by the secretary of the department as a juvenile reception facility. The department shall thereafter determine the appropriate placement, supervision and rehabilitation program for the child. The judge may include recommendations for placement of the child. Commitments are subject to limitations and modifications set forth in Section 32A-2-23 NMSA 1978 [Limitations on dispositional judgments; modification; termination or extension of court orders]. The types of commitments include:

- (a) a short-term commitment of one year in a facility for the care and rehabilitation of adjudicated delinquent children. No more than nine months shall be served at the facility and no less than ninety days shall be served on supervised release, unless: 1) a petition to extend the commitment

has been filed prior to the commencement of supervised release; 2) the commitment has been extended pursuant to Section 32A-2-23 NMSA 1978; or 3) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978 [Parole revocation; procedures];

(b) a long-term commitment for no more than two years in a facility for the care and rehabilitation of adjudicated delinquent children. No more than twenty-one months shall be served at the facility and no less than ninety days shall be served on supervised release, unless: 1) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978; or 2) the commitment is extended pursuant to Section 32A- 2-23 NMSA 1978;

...

(2) place the child on probation under those conditions and limitations as the court may prescribe;

(3) place the child in a local detention facility that has been certified in accordance with the provisions of Section 32A-2-4 NMSA 1978 [Detention facilities; standards; reports; appeals] for a period not to exceed fifteen days within a three hundred sixty-five day time period;

....

N.M. Stat. Ann. § 32A-2-19(D) further specifies that “[a] child found to be delinquent shall not be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.”

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

Sexual exploitation is covered by the definitions of an abused child and a neglected child as used in New Mexico’s Children’s Code. As used in Chapter 32A, Article 4 (Child Abuse and Neglect), an “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B) as a child

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child’s parent, guardian or custodian;

(2) who has suffered physical abuse, emotional abuse, or psychological abuse inflicted or caused by the child’s parent, guardian or custodian;

(3) who has suffered sexual abuse⁷⁹ or sexual exploitation⁸⁰ inflicted by the child’s parent, guardian or custodian;

(4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child’s life or health; or

(5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

Similarly, N.M. Stat. Ann. § 32A-4-2(E) defines a “neglected child” in part, as a child “(3) who has been physically or sexually abused, when the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;”

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.*

N.M. Stat. Ann. § 32A-1-4(E) (Definitions) defines a “custodian” as “an adult with whom the child lives who is not a parent or guardian⁸¹ of the child.” The definition of “custodian” in N.M. Stat. Ann. § 32A-1-4(E) could be

⁷⁹ See *supra* note 60 for the definition of “sexual abuse.”

⁸⁰ See *supra* note 60 for the definition of “sexual exploitation.”

broad enough to cover situations in which a trafficker is in possession of a child for purposes of New Mexico's Children's Code.

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.*

Only victims of certain enumerated crimes, including N.M. Stat. Ann. § 31-22-8 (A) (16) (Human trafficking), § 30-9-11 (Criminal sexual penetration), and § 30-9-13 (Criminal sexual contact of a minor) who have been "injured⁸² or killed by any act or omission of any other person coming within the criminal jurisdiction of the state" may receive reparations. N.M. Stat. Ann. §§ 31-22-7(A), 31-22-8(A)(10)–(11). CSEC crimes are not specifically listed as offenses for which victims are eligible to receive awards pursuant to New Mexico's Crime Reparation Act.

Therefore, to the extent domestic minor sex trafficking victims qualify as victims of N.M. Stat. Ann. § 31-22-8 (A) (16) (Human trafficking), § 30-9-11 (Criminal sexual penetration), or § 30-9-13 (Criminal sexual contact of a minor), they may be eligible for compensation; however, several other factors could present difficulties for victims of domestic minor sex trafficking. Specifically, in determining whether to award reparations, "The commission shall consider the behavior of the victim and whether, because of provocation or otherwise, the victim bears responsibility for the crime that caused his injury . . . and shall reduce the amount of reparation in accordance with its assessment of the degree of responsibility attributable to the victim." N.M. Stat. Ann. § 31-22-7(C).

No award may be made to a victim "unless the commission finds that . . . the claimant or victim fully cooperated with the appropriate law enforcement agencies" N.M. Stat. Ann. § 31-22-7(D)(3). Pursuant to § 30-52-2 (A) a human trafficking victim can be eligible for benefits and services by the state until TVPA benefits are authorized "provided that the victim cooperates in the investigation and prosecution of the person charged with the crime of human trafficking." Additionally, to be eligible for a reparation award, a victim must file an application for an award within 2 years of the date the injury occurs and must report the crime to law enforcement within 30 days after the occurrence of the crime, unless the crime is sexual assault, in which case the victim has 180 days, or if the crime is N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) or N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor), in which case victims have 2 years from the earlier of the date they turn 18 or the date the crime is reported to law enforcement. N.M. Stat. Ann. § 31-22-14(A), (F)(1). Nothing expressly exempts domestic minor sex trafficking victims from any of these requirements.

- 5.7.1 Recommendation: Amend N.M. Stat. Ann. § 31-22-8 (Crimes enumerated), § 31-22-7 (Eligibility for reparation) and § 31-22-14 (Limitations on award; collateral recovery; preliminary award) to make victims of N.M. Stat. Ann. § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-6A-3 (Sexual exploitation of children), § 30-9-1 (Enticement of child), and § 30-37-3.2 (Child solicitation by electronic communication device) expressly eligible for victims compensation and exempt these categories of victims, as well as human trafficking victims, from the ineligibility factors.

⁸¹ N.M. Stat. Ann. § 32A-1-4(I) defines "guardian" as "a person appointed as a guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law."

⁸² See *supra* note 71.

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

Several victim-friendly criminal justice procedures and protections are afforded to minor victims of commercial sexual exploitation or related offenses.

New Mexico law provides special protections for victims of sexual offenses. For example, N.M. Stat. Ann. § 30-9-16 (Testimony; limitations; in camera hearing) establishes limitations on the type of evidence that can be admitted in court. Specifically, in prosecutions for certain offenses, including N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor), “evidence of the victim’s past sexual conduct, opinion evidence of the victim’s past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.” N.M. Stat. Ann. § 30-9-16(A).⁸³

Additionally, pursuant to N.M. Stat. Ann. § 30-9-17(A), in a prosecution for N.M. Stat. Ann. § 30-9-11 or § 30-9-13, where the victim is under 16,

[T]he district court may, for a good cause show, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence [Rule 11-611 NMRA]. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

Pursuant to N.M. Dist. Ct. R. Cr. P. § 5-504 (Videotaped depositions; testimony of certain minors who are victims of sexual offenses), such videotape testimony may be taken “upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm.” Under subsections (B) and (C),

B. At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to Paragraph A of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

⁸³ N.M. Stat. Ann. § 30-9-16(C) states,

C. If the evidence referred to in Subsection A or B of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. Additional use at trial. In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph N of Rule 5-503 NMRA.

However, prostituted children may receive less protection when they or their offender are charged with violations of N.M. Stat. Ann. § 30-9-2 (Prostitution), § 30-9-3 (Patronizing prostitutes), or § 30-9-4 (Promoting prostitution). Pursuant to N.M. Stat. Ann. § 30-9-6 (Testimony of witnesses to prostitution and lewdness), in any hearing or trial dealing with a violation of the aforementioned offenses,

[N]o person shall be excused from giving testimony or producing documentary or other evidence material to such investigation, proceeding, preliminary hearing or trial on the ground that the testimony or evidence required of him is incriminating evidence; provided that, any person who is so subpoenaed and ordered to testify or produce evidence concerning such crimes shall be immune to prosecution or conviction for any violation of such crimes about which he may testify.

5.8.1 Recommendation: Amend N.M. Stat. Ann. § 30-9-16 and § 30-9-17 to include N.M. Stat. Ann. § 30-52-1 (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-37-3.2 (Child solicitation by electronic communication device), § 30-6A-3 (Sexual exploitation of children), and § 30-9-1 (Enticement of child) as offenses for which minor victims may receive victim-friendly criminal justice procedures.

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.*

New Mexico law allows for the expungement of juvenile records, as long as certain conditions are met. N.M. Stat. Ann. § 32A-3B-21(A) (Expungement of records) provides,

On motion by or on behalf of an individual who has been the subject of a petition filed under the Children's Code [32A-1-1 NMSA 1978], or on the court's own motion, the court shall vacate its findings, orders and judgments on the petition, and order the legal and social files and records of the court, the department and any other agency in the case expunged . . . if the court finds that:

(1) two years have elapsed since the final release of the individual from legal custody and supervision or two years have elapsed since the entry of any other judgment not involving legal custody or supervision; and

(2) the individual has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or found delinquent by a court, and no proceeding is pending seeking such a conviction or finding.

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.*

N.M. Stat. Ann. § 30-52-1⁸⁴ (Human trafficking) expressly authorizes human trafficking victims to

⁸⁴ See *supra* note 2.

receive restitution from their offenders. Specifically, N.M. Stat. Ann. § 30-52-1(F) provides, “A person convicted of human trafficking shall, in addition to any other punishment, be ordered to make restitution to the victim for the gross income or value of the victim’s labor or services and any other actual damages in accordance with Section 31-17-1 NMSA 1978 [Victim Restitution].”

Minor victims of other CSEC crimes also may be eligible to receive restitution, pursuant to N.M. Stat. Ann. § 31-17-1(B), which states,

If the trial court exercises either of the sentencing options under Section 31-20-6 NMSA 1978 [Conditions of order deferring or suspending sentence], the court shall require as a condition of probation or parole that the defendant, in cooperation with the probation or parole officer assigned to the defendant, promptly prepare a plan of restitution, including a specific amount of restitution to each victim and a schedule of restitution payments. . . .

Pursuant to N.M. Stat. Ann. § 31-26-4(H) (Victim’s rights), victims of violations of N.M. Stat. Ann. § 30-9-11 and § 30-9-13 are expressly afforded the right to receive restitution. However, a victim may only exercise this right if the victim reports the crime to law enforcement within 5 days of the occurrence or discovery of the offense, “unless the district attorney determines that the victim had a reasonable excuse for failing to do so,” and the victim cooperates completely with the “reasonable requests made by law enforcement agencies and the district attorneys.” N.M. Stat. Ann. § 31-26-5(A), (C).⁸⁵

In addition to restitution available through the criminal process, H.B. 304 (1) allows a human trafficking victim to bring a civil action “in any court of competent jurisdiction against an alleged human trafficker for actual damages, compensatory damages, punitive damages, injunctive relief or any other appropriate relief. Where the court finds that a defendant’s actions were willful and malicious, the court may award treble damages to the plaintiff.”⁸⁶

Civil remedies are available to victims of childhood sexual abuse⁸⁷ for “personal injury caused by childhood sexual abuse.” N.M. Stat. Ann. § 37-1-30. Additionally, victims whose offenders are convicted of violating New Mexico’s racketeering statute, N.M. Stat. Ann. § 30-42-4 (Prohibited activities; penalties) may have a civil cause of action for treble damages. N.M. Stat. Ann. § 30-42-6(A) (Racketeering; civil remedies) provides, “A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three times the actual damages proved and the costs of the suit, including reasonable attorney’s fees.”

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.

Civil actions for the other trafficking and CSEC offenses listed in this report are not expressly limited by statute in Chapter 37, Article 1 (Limitations of actions). Nevertheless, N.M. Stat. Ann. § 37-1-10

⁸⁵ For the purposes of Chapter 31, Article 26 (Victims of Crime), a “victim” is defined in part as “an individual against whom a criminal offense is committed.” N.M. Stat. Ann. § 31-26-3(F). The definition of “criminal offense” includes violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor). N.M. Stat. Ann. § 31-26-3(B)(11), (12).

⁸⁶ See *supra* note 5.

⁸⁷ “Childhood sexual abuse” is defined in N.M. Stat. Ann. § 37-1-30(B) as including violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration), § 30-9-13 (Criminal sexual contact of a minor), § 30-6A-3 (Sexual exploitation of children), and § 30-6A-4 (Sexual exploitation of children by prostitution).

(Minors; incapacitated persons) generally tolls the applicable statute of limitation for minors until “one year from and after the termination of such incapacity.” In addition, H.B. 304 (1) (B) specifically addresses victims of human trafficking. Civil actions may be filed within ten years from the date on which, (1) the defendant’s human trafficking actions occurred; or (2) the victim attains eighteen years of age if the victim was a minor when the defendant’s actions occurred.⁸⁸

There is no statute of limitations applies to a “first degree violent felony.” N.M. Stat. Ann. § 30-1-8(I). Generally, a 6-year statute applies to second degree felonies, a 5-year statute applies to third or fourth degree felonies, a 2-year statute applies to misdemeanors, a 1-year statute applies to petty misdemeanors, and a 3-year limitation applies to crimes not included in the Criminal Code or where a limitation is not provided. N.M. Stat. Ann. § 30-1-8(A)–(D), (H).

For minor victims of N.M. Stat. Ann §30-6-1 (Abandonment or abuse of a child), N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration), and N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor), however, the statute of limitations for criminal actions tolls “until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first.” N.M. Stat. Ann. § 30-1-9.1

A victim seeking civil damages for childhood sexual abuse is subject to the statute of limitations provided in N.M. Stat. Ann. § 37-1-30(A) (Action for damages due to childhood sexual abuse; limitation on actions), which states,

An action for damages based on personal injury caused by childhood sexual abuse⁸⁹ shall be commenced by a person before the latest of the following dates:

- (1) the first instant of the person’s twenty-fourth birthday; or
- (2) three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person, as established by competent medical or psychological testimony.

- 5.11.1 Recommendation: Enact a law under Article 1 (Limitations of actions) eliminating the statute of limitations for human trafficking and CSEC offenses.

⁸⁸ See *supra* note 5.

⁸⁹ See *supra* note 60.

Legal Components:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
- 6.4 *Using a law enforcement 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.*

N.M. Stat. Ann. § 30-52-3 (Temporary provision; task force to combat human trafficking; membership; duties (Effective until July 1, 2016)) expressly establishes a task force to combat trafficking and directs the task force to, among other things, “develop and conduct training for law enforcement personnel and victims services providers to identify victims of human trafficking.” N.M. Stat. Ann. § 30-52-3(B)(4). However, the task force is not permanent and will terminate on July 1, 2016. N.M. Stat. Ann. § 30-52-3(F). In addition, N.M. Stat. Ann. § 29-11-5(A) (Sexual crimes prosecution and treatment program) provides for the development of:

[A] statewide comprehensive plan to train law enforcement officers and criminal justice and medical personnel in the ability to deal with sexual crimes; to develop strategies for prevention of such crimes; to provide assistance in the assembly of evidence for the facilitation of prosecution of such crimes; and to provide medical and psychological treatment to victims of such crimes.

This plan shall include, but not be limited to:

- (1) education and training of law enforcement officers and criminal justice and medical personnel;
- (2) collection, processing and analysis of evidence which facilitates prosecution of suspects of sexual crimes; and
- (3) medical and psychological treatment of victims of such crimes.

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

Single-party consent to audio-taping is permitted in New Mexico. N.M. Stat. Ann. § 30-12-1(C) (Interference with communications; exception) permits single-party consent to audio-taping by stating, “[i]nterference with communications consists of knowingly and without lawful authority: . . . (C) reading, interrupting, taking or copying any message, communication or report intended for another by telegraph or telephone without the consent of a sender or intended recipient thereof.” No interference with communications occurs where the interference is done “by a person acting under color of law in the investigation of a crime, where such person is a party to the communication, or one of the parties to the communication has given prior consent to such interception, monitoring or recording of such communication.” N.M. Stat. Ann. 30-12-1(E)(3).

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

Under N.M. Stat. Ann. § 30-12-2(A) (Grounds for order of interception), the attorney general and the district attorney have express authority to seek an order for wiretapping in investigations related to N.M. Stat. Ann. § 30-9-11(A) (Criminal sexual penetration). Pursuant to N.M. Stat. Ann. § 30-12-2,

An ex parte order for wiretapping, eavesdropping or the interception of any wire or oral communication may be issued by any judge of a district court upon application of the attorney general or a district attorney, stating that there is probable cause to believe that:

A. evidence may be obtained of the commission of:

(1) the crime of murder, kidnapping, extortion, robbery, trafficking or distribution of controlled substances or bribery of a witness;

(2) the crime of burglary, aggravated burglary, criminal sexual penetration, arson, mayhem, receiving stolen property or commercial gambling, if punishable by imprisonment for more than [1] year; or

....

(B) the communication, conversation or discussion is itself an element of any of the above specified crimes.

N.M. Stat. Ann. § 30-12-8(A) (Use of contents as evidence; disclosure; motion to suppress) allows the use of wiretapping and resulting evidence in court only where,

[E]ach party, not less than ten days before the trial, hearing or proceeding has been furnished with a copy of the court order and accompanying application, under which interception was authorized or approved. This ten-day period may be waived by the court if it finds that it was not possible to furnish the party with such information ten days before the trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving such information.

6.3.1 Recommendation: Amend N.M. Stat. Ann. § 30-12-2(A) (Grounds for order of interception) to permit the use of electronic surveillance in investigations involving human trafficking and CSEC offenses.

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 Mexico's human trafficking law and CSEC laws do not contain language indicating the availability of decoys as an investigative technique or prohibiting a defense to prosecution based on the person not in fact being a minor. However, N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device) allows law enforcement officers to use a police officer as a decoy. N.M. Stat. Ann. § 30-37-3.2(D) states that "[i]n a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age." Additionally, N.M. Stat. Ann. § 30-9-3 (Patronizing prostitutes) does state in part that "[p]atronizing prostitutes consists of . . . knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another," implying that if the buyer believes a law enforcement decoy to be a prostitute the buyer would still violate the provision. However, this limits law enforcement to charging this crime even when the person believed to be a prostitute is a minor.

6.4.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-6A-3(C) (Sexual exploitation

of children), and § 30-9-1 (Enticement of child) to provide that the minor may be “believed to be a minor” thereby allowing for a decoy investigation and prevent a defense based on the minor not in fact being a minor.

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

N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device) allows law enforcement officers to conduct investigations through use of the Internet. N.M. Stat. Ann. § 30-37-3.2(D) states that “[i]n a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age.”

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

N.M. Stat. Ann. § 29-15-7(A) (Law enforcement requirements; missing person reports; unidentified human remains) states,

A law enforcement agency shall accept without delay and without exception for any reason any report of a missing person and, no later than two hours after receiving a missing person report or additional or supplemental information for the report, shall:

- (1) start an appropriate investigation to determine the present location of the missing person and to determine whether the missing person is an endangered person;
- (2) provide to the clearinghouse all information the law enforcement agency has relating to an investigation regarding or the location or identification of a missing person;
- (3) enter the name of the missing person into the clearinghouse and the national crime information center missing person file; and
- (4) if the missing person is determined to be an endangered person, notify the department of public safety in accordance with procedures prescribed by the department.

Additionally, under N.M. Stat. Ann. § 29-15-7.1 (Missing child reports; law enforcement agencies; duties; registrar),

Upon receiving a report of a child believed to be missing, a law enforcement agency shall:

- (1) no later than two hours after receiving the report, enter identifying and descriptive information about the child into the national crime information center computer. . . . ; and
- (2) notify the state registrar within twenty-four hours, by telephone, facsimile or electronic transmission, of the missing child. Within three days of this initial notification, the law enforcement agency shall make a written notification in a manner and form prescribed by the state registrar.

B. Immediately after a missing child is located, the law enforcement agency that located or returned the missing child shall notify the law enforcement agency having jurisdiction over the investigation, and the originating agency shall clear the entry from the national crime information center computer and shall, within twenty-four hours, notify the state registrar in writing that the missing child has been located.

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