

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2014 ANALYSIS AND RECOMMENDATIONS CALIFORNIA

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

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

California's human trafficking law directly addresses sex trafficking and does not require proof of the use of force, fraud, or coercion in the commission of the crime against minors. Cal. Penal Code § 236.1 (Human trafficking defined; punishment) states, in relevant part:

(a) Any person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services,<sup>2</sup> is guilty of human trafficking

<sup>1</sup> Unless otherwise specified, all references to California statutes were taken from Deering's California Codes Annotated (LEXIS through Ch. 689 of the 2014 Session and Propositions 41 & 42 approved June 2014) and all federal statutes were taken from United States Code (LEXIS through PL 113-165, approved 9/19/14). This report includes legislation enacted as of August 1, 2014.

<sup>2</sup> Cal. Penal Code § 236.1(e) defines "forced labor or services" as "labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person."

(b) Any person who deprives or violates the personal liberty of another with the intent to effect or maintain a violation of Section 266 [Procurement], 266h [Pimping], 266i [Pandering], 266j [Procurement of child under age 16 for lewd or lascivious acts] , 267 [Abduction of minor for prostitution], 311.1 [Sent or brought into state for sale or distribution; possessing, preparing, publishing, producing, developing, or printing within state; matter depicting sexual conduct by minor] , 311.2 [Sending or bringing into state for sale or distribution; printing, exhibiting, distributing, exchanging, or possession within state; matter depicting sexual conduct by minor], 311.3 [Sexual exploitation of a child], 311.4 [Employment or use of minor to perform prohibited acts], 311.5 [Advertising or promoting sale or distribution; solicitation], 311.6 [Participation in, or production or presentation of, obscene live conduct in public place], or 518 [Definition – extortion] is guilty of human trafficking.

(c) Any person who causes, induces, or persuades<sup>3</sup>, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act<sup>4</sup>, with the intent to effect or maintain a violation of Section 266 [Procurement], 266h [Pimping], 266i [Pandering], 266j [Procurement of child under age 16 for lewd or lascivious acts] , 267 [Abduction of minor for prostitution], 311.1 [Sent or brought into state for sale or distribution; possessing, preparing, publishing, producing, developing, or printing within state; matter depicting sexual conduct by minor] , 311.2 [Sending or bringing into state for sale or distribution; printing, exhibiting, distributing, exchanging, or possession within state; matter depicting sexual conduct by minor], 311.3 [Sexual exploitation of a child], 311.4 [Employment or use of minor to perform prohibited acts], 311.5 [Advertising or promoting sale or distribution; solicitation], 311.6 [Participation in, or production or presentation of, obscene live conduct in public place], or 518 [Definition –extortion] is guilty of human trafficking.

A conviction under Cal. Penal Code § 236.1(a) (Human trafficking defined; punishment) is punishable as a felony<sup>5</sup> by imprisonment in a state prison for 5, 8, or 12 years<sup>6</sup> and a possible fine not to exceed \$500,000. Cal. Penal Code § 236.1(a).

A conviction under Cal. Penal Code § 236.1(b) (Human trafficking defined; punishment) is punishable as a felony by imprisonment in a state prison for 8, 14, or 20 years, and a possible fine not to exceed \$500,000.

If the victim is under the age of 18, a conviction under Cal. Penal Code § 236.1(c) is punishable by imprisonment for 5, 8, or 12 years and a possible fine not to exceed \$500,000. Cal. Penal Code §236.1(c)(1). However, if the offense involves force, fear, fraud, deceit, coercion, violence,

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<sup>3</sup> Cal. Penal Code § 236.1(d) states that “[i]n determining whether a minor was caused, induced, or persuaded to engage in a commercial sex act, the totality of the circumstances, including the age of the victim, his or her relationship to the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be considered.”

<sup>4</sup> Cal. Penal Code § 236.1(h)(2) defines “commercial sex act” to mean “sexual conduct on account of which anything of value is given or received by any person.”

<sup>5</sup> Cal. Penal Code § 17(a) defines “felony” as “a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.”

or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term.

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duress, menace, or threat of unlawful injury, then a conviction is punishable by imprisonment for 15 years to life, and a possible fine not to exceed \$500,000. Cal Penal Code §236.1(c)(2).

A person convicted under Cal. Penal Code § 236.1 (Human trafficking defined; punishment) is also subject to penalty and fine enhancements specific to human trafficking. Cal. Penal Code § 236.4<sup>7</sup> (Conviction of human trafficking violation; additional fines and penalties) establishes that a person in violation of Cal. Penal Code § 236.1 is subject to an additional fine not to exceed \$1,000,000. Further, a person in violation of Cal. Penal Code § 236.1 who inflicts great bodily injury on a victim shall be punished by an additional term of imprisonment in the state prison for 5, 7, or 10 years. Cal. Penal Code § 236.4(a), (b).

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.*

California has several statutes specifically criminalizing CSEC, including the following:

1. Cal. Penal Code § 266 (Procurement) makes it a crime if a person

inveigles or entices any unmarried female, of previous chaste character,<sup>8</sup> under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; [or] . . . aids or assists in such inveiglement or enticement; [or] . . . by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man . . . .

A conviction under Cal. Penal Code § 266 is punishable as either a misdemeanor or felony.<sup>9</sup> A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to

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<sup>7</sup> Cal. Penal Code § 236.4 (Conviction of human trafficking violation; additional fines and penalties) states that

(a) Upon the conviction of a person of a violation of Section 236.1, the court may, in addition to any other penalty, fine, or restitution imposed, order the defendant to pay an additional fine not to exceed one million dollars (\$1,000,000). In setting the amount of the fine, the court shall consider any relevant factors, including, but not limited to, the seriousness and gravity of the offense, the circumstances and duration of its commission, the amount of economic gain the defendant derived as a result of the crime, and the extent to which the victim suffered losses as a result of the crime.

<sup>8</sup> The California Supreme Court has stated that whether a victim under the age of 18 is of “previous chaste character” is “a question for the jury.” *People v. Elliott*, 51 P. 955 (Cal. 1898).

<sup>9</sup> Under California law, whether a crime is a felony or misdemeanor is determined by the type and place of punishment. Cal. Penal Code § 17(a), (b). A felony is any crime punished by death, imprisonment in a state prison, or imprisonment in a county jail under Cal. Penal Code § 1170(h), while a misdemeanor is any crime punished by a fine, imprisonment in a county jail, or both. Cal. Penal Code § 17(a); *see also infra* note 43 discussing the test concerning when a crime is a felony or misdemeanor. Several California statutes, however, include a choice of punishments that, depending on which punishment is imposed, determine whether a conviction is a misdemeanor or a felony. *See, e.g.*, Cal. Penal Code §§ 266, 261.5(c), (d). These statutes have been termed “wobblers.” *E.g.*, *People v. Mauch*, 77 Cal. Rptr. 3d 751, 754 (Cal. Ct. App. 2008) (stating that Cal. Penal Code § 17(b) “only applies to offenses, known as ‘wobblers’”). Specifically, Cal. Penal Code § 17(b) states,

(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of [Cal. Penal Code § 1170(h)], or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

exceed \$2,000, or both. Cal. Penal Code §§ 266, 17(b). A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years<sup>10</sup> and a possible fine not to exceed \$2,000. Cal. Penal Code §§ 18(a), 266. First time convictions, for either a misdemeanor or felony, are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

2. Cal. Penal Code § 266h(b) (Pimping) states,

Any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, when the prostitute is a minor, is guilty of pimping a minor . . . .

If the victim is a minor 16 years of age or older, a conviction under Cal. Penal Code § 266h(b) is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000.<sup>11</sup> Cal. Penal Code §§ 266h(b)(1), 672. If the minor is under 16, however, a

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- (1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.
  - (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.
  - (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.
  - (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.
  - (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

In addition to interpreting the statutory language, California Judges Benchguide 74 was used for clarifying which statutes fall under the "wobbler" category. JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA JUDGES BENCHGUIDE 74, SENTENCING GUIDELINES FOR COMMON MISDEMEANORS AND INFRACTIONS (2011), *available at* <http://www2.courtinfo.ca.gov/prottem/pubs/bg74.pdf> (listing misdemeanor statutes and indicating "wobbler" status with an asterisk).

<sup>10</sup> Cal. Penal Code § 18 (Punishment of felony not otherwise prescribed) provides,

- (a) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.
- (b) Every offense which is prescribed by any law of the state to be a felony punishable by imprisonment or by a fine, but without an alternate sentence to the county jail for a period not exceeding one year, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

<sup>11</sup> Cal. Penal Code § 672 (Conviction of crime for which no fine prescribed) states,

Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one

conviction under Cal. Penal Code § 266h(b) is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

3. Cal. Penal Code § 266i(a) (Pandering) makes it a crime if a person

- (1) Procures another person for the purpose of prostitution.
- (2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute.
- (3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state.
- (4) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate.
- (5) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution.
- (6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution.

If the person procured is a minor 16 or older, a conviction under Cal. Penal Code § 266i(a) is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266i(b)(1), 672. If the person procured is a minor under 16, however, a conviction is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266i(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

4. Cal. Penal Code § 267 (Abduction of minor for prostitution) makes it a crime when a person “takes away any other person under the age of 18 years from the father, mother, guardian, or other person having the legal charge of the other person, without their consent, for the purpose of prostitution.” A conviction under Cal. Penal Code § 267 is punishable as a felony by imprisonment in a state prison for 16 months, 2 years, or 3 years and a fine not to exceed \$2,000.<sup>12</sup> Cal. Penal Code §§ 267, 18(a). The court may also order an additional fine not to exceed \$20,000. Cal. Penal Code § 266k(b).
5. Cal. Penal Code § 311.4(b) (Employment of minor in sale or distribution of obscene matter or production of pornography) states that a crime is committed by

[e]very person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years, or any parent or guardian of a minor under the age of 18 years under his or her control who knowingly permits the minor, to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide,

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thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.

<sup>12</sup> See *supra* note 10 discussing penalties applicable to a felony under Cal. Penal Code § 18.

photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film, filmstrip, or a live performance involving, sexual conduct by a minor under the age of 18 years alone or with other persons or animals, for commercial purposes . . . .

A conviction under Cal. Penal Code § 311.4(b) is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.4(b), 672.

Several other laws, while not expressly commercial in nature, may also apply in cases involving the commercial sexual exploitation of a child. These include the following:

1. Cal. Penal Code § 266j (Procurement of child) provides,

Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288,<sup>13</sup> or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person . . . .

A conviction under Cal. Penal Code § 266j is punishable as a felony by imprisonment for 3, 6, or 8 years in a state prison and a fine not to exceed \$15,000. Cal. Penal Code § 266j. The court may also order an additional fine not to exceed \$20,000. Cal. Penal Code § 266k(b).

2. Cal. Penal Code § 261(a)–(c) (Rape; “duress”; “menace”) states,

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

. . . .

(2) Where it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

. . . .

(b) As used in this section, “duress” means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(c) As used in this section, “menace” means any threat, declaration, or act which shows an intention to inflict an injury upon another.

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<sup>13</sup> Cal. Penal Code § 288(a) states,

Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

A conviction under Cal. Penal Code § 261(a)–(c) generally is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$70, if the offender is able to pay. Cal. Penal Code §§ 17(a), 264(a), (b). An additional mandatory fine not to exceed \$5,000 also applies if the rape victim is a minor under 14 years of age. Cal. Penal Code § 294(b) (Restitution fine to be imposed on conviction of violation of specified offenses against children). Convictions under Cal. Penal Code § 261(a)(2), however, result in longer prison terms if the victim is a minor. Specifically, if the victim is younger than 14 years of age, a conviction is punishable by imprisonment in a state prison for 9, 11, or 13 years, but if the victim is a minor 14 years of age or older, a conviction is punishable by imprisonment for 7, 9, or 11 years. Cal. Penal Code § 264(c).

3. Cal. Penal Code § 261.5 (Unlawful sexual intercourse with a minor; misdemeanor or felony violation; civil penalties) states,

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a “minor” is a person under the age of 18 years and an “adult” is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 [Determinate sentencing; sentence recall; medical release].<sup>14</sup>

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

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<sup>14</sup> Cal. Penal Code § 1170(h) (Determinate sentencing; sentence recall; medical release) (Operative until Jan. 1, 2014) states,

(1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 [Limitation of plea bargaining] [Operative until Jan. 1, 2014] or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5 [Enhancement of prison terms for new offenses], (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 [Pattern of related felony conduct] is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

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A conviction under Cal. Penal Code § 261.5(b) is punishable as a misdemeanor by imprisonment in a county jail up to 6 months, a fine not to exceed \$1,000, or both. Cal. Penal Code §§ 261.5(b), 19. A conviction under Cal. Penal Code § 261.5(c) or (d) is punishable as either a misdemeanor or felony. A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year and a possible fine not to exceed \$1,000. Cal. Penal Code §§ 261.5(c), (d), 672. A felony conviction under Cal. Penal Code § 261.5(c) is punishable by imprisonment in a county jail for 16 months, 2 years, or 3 years and a possible fine not exceeding \$10,000. Cal. Penal Code §§ 261.5(c), 1170(h)(1), 672. A felony conviction under Cal. Penal Code § 261.5(d) is punishable by imprisonment in a county jail for 2, 3, or 4 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 261.5(d), 1170(h)(2), 672. Additionally, for any conviction under this statute, the court may assess an additional fine not to exceed \$70, if the defendant is able to pay. Cal. Penal Code § 261.5(e)(3).

4. Cal. Penal Code § 269(a) (Aggravated sexual assault of child) provides,

Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child:

- (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.
- (2) Rape or sexual penetration, in concert, in violation of Section 264.1.
- (3) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.
- (4) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.
- (5) Sexual penetration, in violation of subdivision (a) of Section 289.

A conviction under Cal. Penal Code § 269(a) is punishable as a felony by imprisonment of 15 years to life in a state prison and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 269(b), 672. Cal. Penal Code § 269(c) further provides that “[t]he court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6 [Enhancement and fine for prior conviction or prior term for sex offense].”

5. Cal. Penal Code § 288(a) (Lewd or lascivious acts involving children) makes it a crime for

any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . . .

A conviction under Cal. Penal Code § 288(a) is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288(a), 672. If the defendant uses “force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person,” however, a conviction is punishable by imprisonment in a state prison for 5, 8, or 10 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288(b)(1), 672. If the defendant personally inflicted “bodily harm”<sup>15</sup> on the victim during the commission of Cal. Penal Code § 288(a), the term of imprisonment is extended to life with the possibility of parole. Cal. Penal Code § 288(i)(1). Furthermore, if the victim is 14 or 15 years old and the defendant “is at least 10 years older than the child,” a conviction is punishable as either a

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<sup>15</sup> For the purposes of Cal. Penal Code § 288(a), “bodily harm” is defined as “any substantial physical injury resulting from the use of force that is more than the force necessary to commit the offense.” Cal. Penal Code § 288(i)(3).



misdemeanor by imprisonment in a county jail up to 1 year and a possible fine not to exceed \$1,000, or a felony by imprisonment in a state prison for 1, 2, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288(c)(1), 17(b), 672. Other enhancement provisions may also apply.<sup>16</sup> Lastly, if the victim was under 14 years of age, “[a]ny person convicted of . . . [Cal. Penal Code § 288] shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, as to the mental condition of that person.” Cal. Penal Code § 288.1 (Sentencing for crime against child).

6. Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) makes it a crime if a person

contacts or communicates with<sup>17</sup> a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section. . . 261 [Rape; “duress”; “menace”], 264.1 [Punishment for aiding or abetting rape], . . . 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; Defenses; Exemption of carrier, broadcaster, or transmitter], 289 [Penetration by foreign object], 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], 311.2 [Production, distribution, or exhibition of obscene matter], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] or 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony] involving the minor . . . .

A conviction under Cal. Penal Code § 288.3(a) is punishable as a felony “by imprisonment in the state prison for the term prescribed for an attempt<sup>18</sup> to commit the intended offense” and a fine not to

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<sup>16</sup> A person convicted under Cal. Penal Code § 288 “shall receive a five-year enhancement for a prior conviction” under Cal. Penal Code § 261, § 262, § 264.1, § 269, § 285, § 286, § 288, § 288a, § 288.5 or § 289. Cal. Penal Code § 667.51(a), (b). If, however, the defendant has more than one prior conviction for any of the previously listed offenses, a conviction under Cal. Penal Code § 288 or § 288.5 is punishable by imprisonment in a state prison for 15 years to life. Cal. Penal Code § 667.51(c). Furthermore, a defendant convicted of a felony under Cal. Penal Code § 288(a), or (c)(1) is subject to an additional one-year term of imprisonment in a state prison if “the offense was committed with a minor for money or other consideration.” Cal. Penal Code § 675(a).

<sup>17</sup> Cal. Penal Code § 288.3(b) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) defines “contacts or communicates with” as including “direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.”

<sup>18</sup> Cal. Penal Code § 664 (Punishment for unsuccessful attempt to commit crime) states,

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

- (a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment pursuant to subdivision (h) of Section 1170, the person guilty of the attempt shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. . . .
- (b) If the crime attempted is punishable by imprisonment in a county jail, the person guilty of the attempt shall be punished by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense attempted.
- (c) If the offense so attempted is punishable by a fine, the offender convicted of that attempt shall be punished by a fine not exceeding one-half the largest fine which may be imposed

exceed \$10,000. Cal. Penal Code § 288.3(a), 17(a), 672. Subsequent convictions under this statute are punishable by “an additional and consecutive term of imprisonment in the state prison for five years.” Cal. Penal Code § 288.3(c).

7. Cal. Penal Code § 288.4(a)(1) (Arrangement of meeting with minor for purpose of engaging in certain lewd and lascivious behavior; punishment) makes it a crime if a person

motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor or a person he or she believes to be a minor for the purpose of exposing his or her genitals or pubic or rectal area, having the child expose his or her genitals or pubic or rectal area, or engaging in lewd or lascivious behavior . . . .

A conviction under Cal. Penal Code § 288.4(a)(1) is punishable as a misdemeanor by imprisonment in a county jail up to 1 year, a fine not to exceed \$5,000, or both.<sup>19</sup> Cal. Penal Code §§ 288.4(a)(1), 17(a). If, however, the defendant “goes to the arranged meeting place at or about the arranged time,” a conviction is punishable as a felony by imprisonment in a state prison for 2, 3, or 4 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.4(b), 17(a), 672. First time convictions are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

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

Neither of California’s prostitution related statutes, Cal. Penal Code § 647(b)<sup>20</sup> (Disorderly conduct; restrictions on probation) and § 653.22(a) (Loitering with intent to commit prostitution; determination of intent), refer to § 236.1, the human trafficking statute, when a minor is involved in prostitution.

- 1.3.1 Recommendation: Amend Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) and § 653.22(a) (Loitering with intent to commit prostitution; determination of intent) when a minor is involved in prostitution, to refer to Cal. Penal Code § 236.1 (Human trafficking defined; punishment) to ensure that commercially sexually exploited minors 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.*

Cal. Penal Code §§ 186–186.8 (California Control of Profits of Organized Crime Act) requires forfeiture of assets derived from a pattern of criminal profiteering activity but does not makes it a separate crime to engage in a pattern of criminal profiteering activity. “Criminal profiteering activity” is defined in Cal. Penal Code § 186.2 and includes the following:

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upon a conviction of the offense attempted.  
(d) If a crime is divided into degrees, an attempt to commit the crime may be of any of those degrees, and the punishment for the attempt shall be determined as provided by this section.  
. . . .

<sup>19</sup> If the defendant has “a prior conviction for an offense listed in subdivision (c) of Section 290,” a conviction under this statute is as punishable a felony by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.4(a)(2), 17(a), 18(a), 672.

<sup>20</sup> Here and elsewhere in this report that Cal. Penal Code § 647 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1304, 2014 (effective January 1, 2015).

(3) Child pornography or exploitation, as defined in subdivision (b) of Section 311.2, or Section 311.3 or 311.4, which may be prosecuted as a felony.

....

(9) Kidnapping, as defined in Section 207.

....

(12) Pimping and pandering, as defined in Section 266.

....

(19) Any of the offenses contained in Chapter 7.5 (commencing with Section 311) of Title 9, relating to obscene matter, or in Chapter 7.6 (commencing with Section 313) of Title 9, relating to harmful matter that may be prosecuted as a felony.

....

(25) Conspiracy to commit any of the crimes listed above, as defined in Section 182.

....

(28) Human trafficking, as defined in Section 236.1.

(29) Any crime in which the perpetrator induces, encourages, or persuades a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.

(30) Any crime in which the perpetrator, through force, fear, coercion, deceit, violence, duress, menace, or threat of unlawful injury to the victim or to another person, causes a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.

....

(33) Abduction or procurement by fraudulent inducement for prostitution, as defined in Section 266a.

A pattern of criminal profiteering activity is defined in Cal. Penal Code §186.2 and means “engaging in at least two incidents of criminal profiteering, as defined by this chapter, that meet the following requirements:

(A) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics.

(B) Are not isolated events.

(C) Were committed as a criminal activity of organized crime.

Following a conviction of a criminal profiteering offense, the offender is subject to mandatory asset forfeiture pursuant to Cal. Penal Code §§ 186.3-186.5. Cal. Penal Code 186.3 states,

(a) In any case in which a person is alleged to have been engaged in a pattern of criminal profiteering activity, upon a conviction of the underlying offense, the assets listed in subdivisions (b) and (c) shall be subject to forfeiture upon proof of the provisions of subdivision (d) of Section 186.5.

(b) Any property interest whether tangible or intangible, acquired through a pattern of criminal profiteering activity.

(c) All proceeds of a pattern of criminal profiteering activity, which property shall include all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity.

Cal. Penal Code § 186.4 states,

(a) The prosecuting agency shall, in conjunction with the criminal proceeding, file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense, which shall allege that the defendant

has engaged in a pattern of criminal profiteering activity, including the acts or threats chargeable as crimes and the property forfeitable pursuant to Section 186.3.

**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.*

Cal. Penal Code § 236.1 (Human trafficking defined; punishment) does not apply to buyers who purchase sex with a minor. Cal. Penal Code § 236.1 does not prohibit the act of purchasing a commercial sex act. Moreover, Cal. Penal Code § 236.1(a) does not include in its list of predicate crimes the statute most applicable to buyers: § 647(b) (Disorderly conduct; restrictions on probation).<sup>21</sup>

- 2.1.1 Recommendation: Amend Cal. Penal Code § 236.1(a)-(c) (Human trafficking defined; punishment) to include a violation of and § 647(b) (Disorderly conduct; restrictions on probation) when the victim is a minor, without regard to the use of force, fraud or coercion.

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

California does not have a law specifically prohibiting the buying of sex with a minor.<sup>22</sup> Buyers may, however, be prosecuted under California’s general age-neutral solicitation statute. Cal. Penal Code § 647(b)<sup>23</sup> (Disorderly conduct; restrictions on probation) states,

<sup>21</sup> See *infra* Section 2.2 for the substantive provision of Cal. Penal Code § 647(b) (Disorderly conduct; Restrictions on probation).

<sup>22</sup> Caselaw interpreting Cal. Penal Code § 266i(a) (Pandering) precludes application of this CSEC offense to buyers. In *People v. Dixon*, 191 Cal.App.4th 1154 (2011), the defendant was charged with pandering for soliciting sex with a 17-year old via text message by offering her over \$200. *Id.* at 1156. The defendant was convicted as “a person who ‘[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute’ (§ 266i, subd. (a)(2).)” *Id.* The court agreed with the defendant on appeal that “‘a person who seeks sex for himself, and uses the money as an inducement, is not a panderer.’” *Id.* The court followed the reasoning of California’s Supreme Court that defined a panderer “in a similar context . . . [as] one “‘who procures the gratification of the passion of lewdness for another.’” (*People v. Roderigas* (1874) 49 Cal. 9, 11). *Id.* The court further noted: “As to the sexual desires of others, ‘pandering’ means the business of recruiting a prostitute,

[E]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

....

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution.<sup>24</sup> A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. An agreement to engage in an act of prostitution shall not constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. . . .

A conviction under this statute is punishable as a misdemeanor by imprisonment in a county jail up to 6 months, a fine not to exceed \$1,000, or both. Cal. Penal Code §§ 647(b), 672, 19. Second convictions under Cal. Penal Code § 647(b) are subject to a mandatory minimum of 45 days in a county jail, while subsequent convictions are subject to a mandatory minimum of 90 days in a county jail. Cal. Penal Code § 647(k). In instances where a “violation of subdivision (b) . . . was committed within 1,000 feet of a private residence and with the use of a vehicle,” the court may also suspend a buyer’s driver’s license up to 30 days.<sup>25</sup> Cal. Penal Code § 647(k). For any conviction under this statute, the court may also order an additional fine not to exceed \$70, if the defendant is able to pay. Cal. Penal Code § 647.1.

2.2.1 Recommendation: Amend Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) to impose enhanced penalties where a person solicits or pays for sex with a minor under the age of 18.

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

Cal. Penal Code § 647(b)<sup>26</sup> (Disorderly conduct; restrictions on probation) does not differentiate between the buying of sex with an adult or a minor.<sup>27</sup>

2.3.1 Recommendation: Amend Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) to expressly prohibit soliciting a minor under the age of 18.

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

A conviction under Cal. Penal Code § 647(b)<sup>28</sup> (Disorderly conduct; restrictions on probation)<sup>29</sup> is punishable as a misdemeanor by imprisonment in a county jail up to 6 months, a fine not to exceed

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finding a place of business for a prostitute, or soliciting customers for a prostitute. (Black's Law Dict. (7th ed. 1999) p. 1135; see *United States v. Williams* (2008) 553 U.S. 285, 308, fn. 1 [170 L.Ed.2d 650, 672, fn. 1, 128 S.Ct. 1830].)” *Id.* at 1159-1160.

<sup>23</sup> See *supra* note 20.

<sup>24</sup> Cal. Penal Code § 647(b) defines “prostitution” as “any lewd act between persons for money or other consideration.”

<sup>25</sup> Cal. Penal Code § 647(k) states,

In lieu of the suspension, the court may order a person’s privilege to operate a motor vehicle restricted, for not more than six months, to necessary travel to and from the person’s place of employment or education. If driving a motor vehicle is necessary to perform the duties of the person’s employment, the court may also allow the person to drive in that person’s scope of employment.

<sup>26</sup> See *supra* note 20.

<sup>27</sup> See *supra* Section 2.2 for the substantive provisions of Cal. Penal Code § 647(b) and § 266e.

\$1,000, or both. Cal. Penal Code §§ 647(b), 19. Second convictions under Cal. Penal Code § 647(b) are subject to a mandatory minimum of 45 days in a county jail, while subsequent convictions are subject to a mandatory minimum of 90 days in a county jail. Cal. Penal Code § 647(k). When a “violation of subdivision (b) . . . was committed within 1,000 feet of a private residence and with the use of a vehicle,” the court may also suspend the buyer’s driver’s license up to 30 days.<sup>30</sup> Cal. Penal Code § 647(k). For any conviction under Cal. Penal Code § 647(b), the court may also order an additional fine not to exceed \$70, if the defendant is able to pay. Cal. Penal Code § 647.1.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>31</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>32</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>33</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>34</sup>

2.4.1 Recommendation: Amend Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) to expressly classify and punish the crime as a felony when commercial sex is purchased with a minor under the age of 18 and to raise the penalties to reflect the seriousness of this crime.

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.*

Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) makes it a crime if a person

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<sup>28</sup> See *supra* note 20.

<sup>29</sup> See *supra* Section 2.2 for the substantive provisions of Cal. Penal Code § 647(b).

<sup>30</sup> See *supra* note 25.

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

<sup>32</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as:

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

<sup>33</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>34</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

contacts or communicates with<sup>35</sup> a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 261 [Rape; “duress”; “menace”], 264.1 [Punishment for aiding or abetting rape], . . . 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; Defenses; Exemption of carrier, broadcaster, or transmitter], 289 [Penetration by foreign object], 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], 311.2 [Production, distribution, or exhibition of obscene matter], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] or 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony] involving the minor . . . .

A conviction under Cal. Penal Code § 288.3(a) is punishable as a felony by “imprisonment in the state prison for the term prescribed for an attempt<sup>36</sup> to commit the intended offense” and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.3(a), 17(a), 672. Subsequent convictions under this statute are punishable by “an additional and consecutive term of imprisonment in the state prison for five years.” Cal. Penal Code § 288.3(c).

- 2.5.1 Recommendation: Amend Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) to include a buyer’s use of the Internet with intent to violate Cal. Penal Code § 236.1(a) (Human trafficking defined; punishment) or § 647(b) (Disorderly conduct; restrictions on probation).

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

Cal. Penal Code § 647(b)<sup>37</sup> (Disorderly conduct; Restrictions on probation) is an age-neutral solicitation law, making the age of the person with whom sex is purchased irrelevant for a conviction. As a result, a mistake of age defense is inapplicable to buyers convicted under this statute. Additionally, Cal. Penal Code § 288.3 (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) does not expressly prohibit or permit a mistake of age defense. Instead, Cal. Penal Code § 288.3(a) only applies if an offender “knows or reasonably should know that the person is a minor,” which indicates that a mistake of age defense is permissible.

- 2.6.1 Recommendation: Amend Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) to specifically state there is no age mistake defense permitted for a buyer of commercial sex acts with any minor under 18.

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<sup>35</sup> *Supra* note 17.

<sup>36</sup> *Supra* note 18.

<sup>37</sup> *See supra* note 20.



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

Because Cal. Penal Code § 647(b)<sup>38</sup> (Disorderly conduct; restrictions on probation) is an age-neutral solicitation law, the same penalties apply to a buyer regardless of the age of the person solicited.<sup>39</sup>

2.7.1 Recommendation: Amend Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) to impose enhanced penalties for any offense where a person solicits or pays for sex with a minor 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 Cal. Penal Code § 647(b)<sup>40</sup> (Disorderly conduct; restrictions on probation)<sup>41</sup> are subject to a possible fine not to exceed \$1,000. Cal. Penal Code §§ 647(b), 19.

Buyers also are subject to penalty assessments. Courts are directed to order a person convicted of any crime in California to pay a penalty assessment. Cal. Penal Code § 1202.4(a)(2) states, “Upon a person being convicted of any crime in the State of California, the court shall order the defendant to pay a fine in the form of a penalty assessment in accordance with Section 1464 [Penalty assessment; distribution of funds].” The state penalty assessment is \$10 for every \$10, or fraction of \$10, on “every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.” Cal. Penal Code § 1464(a)(1). Penalty assessments do not apply to restitution fines. Cal. Penal Code § 1464(a)(3)(A).

Additionally, convicted buyers are also subject to a restitution fine. Pursuant to Cal. Penal Code § 1202.4(b)<sup>42</sup> (Restitution; amount; hearing and court order; financial disclosure), “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” Although the final amount of a restitution fine falls within the court’s discretion, it must be between \$120–\$1,000 for a misdemeanor conviction and \$240–\$10,000 for a felony conviction. Cal. Penal Code § 1202.4(b)(1).

Cal. Penal Code § 1202.4(f) requires a convicted defendant to make restitution to a victim who “has suffered economic loss as a result of the defendant’s conduct,” for either “the amount of loss claimed by the victim or victims or any other showing to the court,” and “[i]f the amount of loss cannot be ascertained at the time of sentencing,” the court shall order that the amount be “determined at the direction of the court.”

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<sup>38</sup> See *supra* note 20.

<sup>39</sup> See *supra* Section 2.2 for the substantive provisions of Cal. Penal Code § 647(b) and § 266e.

<sup>40</sup> See *supra* note 20.

<sup>41</sup> See *supra* Section 2.2 for the substantive provisions of Cal. Penal Code § 647(b).

<sup>42</sup> Pursuant to § 1204(b)(1), these minimums will increase over the course of 2012-2014 as follows:

The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, and shall not be less than one hundred twenty dollars (\$120) starting on January 1, 2012, one hundred forty dollars (\$140) starting on January 1, 2013, and one hundred fifty dollars (\$150) starting on January 1, 2014, and not more than one thousand dollars (\$1,000), if the person is convicted of a misdemeanor.

Additionally, under Cal. Penal Code § 312.3(a) (Forfeiture and destruction of matter depicting minors engaging in or simulating sexual conduct), to the extent that “[m]atter that depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct as defined in Section 311.4,” comes into “the possession of any city, county, city and county, or state official or agency” it will be “subject to forfeiture.” No specific procedure for effecting the forfeiture is authorized.

Buyers may also face forfeiture of property used in connection with prostitution offenses under the Red Light Abatement Law at Cal. Penal Code § 11225–11235. Pursuant to Cal. Penal Code § 11225(a), “[e]very building or place used for the purpose of . . . lewdness, assignation, or prostitution, and every building or place in or upon which . . . lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.” Pursuant to Cal. Penal Code. § 11230(a)(1), “If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released.”

2.8.1 Recommendation: Amend the forfeiture provisions of the Red Light Abatement Law at Cal. Penal Code § 11225–11235 to include forfeiture provisions for human trafficking and CSEC crimes.

2.8.2 Recommendation: Amend Cal. Penal Code § 236.1(a)-(c) (Human trafficking defined; punishment) to include violations of Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) when the victim is a minor, without regard to the use of force, fraud or coercion, and impose substantial financial penalties.

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

Cal. Penal Code § 311.11(a) (Possession or control of child pornography; persons previously guilty of felony) makes it a crime for any person to possess child pornography. Specifically, Cal. Penal Code § 311.11(a) states,

Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony . . . .

A conviction under Cal. Penal Code § 311.11(a) is punishable<sup>43</sup> as either a misdemeanor or felony. Cal. Penal Code § 17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to

<sup>43</sup> Although Cal. Penal Code § 311.11(a) specifically states that a violation is a felony, it is also possible for a violation to be a misdemeanor. *See People v. Sacramento Butchers’ Protective Ass’n*, 107 P. 712, 720 (Cal. Ct. App. 1910) (stating, “[I]n the determination whether a certain offense is a felony or a misdemeanor, no material aid is necessarily afforded by the mere characterization of the prohibited and penalized act as either the one or the other, since the nature and extent and mode of the punishment prescribed . . . is the sole test. For illustration, if a statute should denounce a certain act as a felony, but limited the power of punishment . . . to imprisonment in the county

exceed \$2,500, or both. Cal. Penal Code 17(b). A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 18(a), 672. Buyers who have a prior conviction under Cal. Penal Code § 311.11(a), “an offense requiring registration under the Sex Offender Registration Act, or an attempt to commit any of the above-mentioned offenses,” are guilty of a felony punishable by imprisonment in state prison for 2, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.11(b), 672. First time convictions, for either a misdemeanor or a felony, are also subject to an additional mandatory fine of \$300 while subsequent offenses are subject to an additional mandatory fine of \$500, unless the defendant is unable to pay. Cal. Penal Code §§ 290.3(a), 290(c).

A buyer who “exchanges” child pornography may be prosecuted under Cal. Penal Code § 311.3(a) (Sexual exploitation of child), which provides,

A person is guilty of sexual exploitation of a child if he or she knowingly develops, duplicates, prints, or exchanges any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip that depicts a person under the age of 18 years engaged in an act of sexual conduct.<sup>44</sup>

A first time conviction under Cal. Penal Code § 311.3(a) is punishable as a misdemeanor by imprisonment in a county jail up to 1 year, a fine not to exceed \$2,000, or both. Cal. Penal Code §§ 311.3(d), 17(a). A conviction for a buyer who has a prior conviction under Cal. Penal Code §§ 311.1–311.11, however, is punishable as a felony by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.3(d), 17(a), 18(a), 672. First time convictions are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

Additionally, violations of § 311.3 (Sexual exploitation of child) are now predicate offenses to the sex trafficking law under § 236.1(b) and (c) (Human trafficking defined; punishment) which are a felonies punishable by imprisonment in the state prison for 8, 14, or 20 years, or 5, 8, or 12 years, respectively, and a fine of not more than five hundred thousand dollars (\$500,000).<sup>45</sup> Cal. Penal Code §236.1(b) and (c)(1).

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jail . . . or a fine . . . , or by both such fine and imprisonment, it would readily appear, notwithstanding its designation by the statute as a felony, that, from the nature of the punishment prescribed, the act so denounced and designated could be nothing more than an ordinary misdemeanor . . . .”) (citations omitted).

<sup>44</sup> Cal. Penal Code § 311.3(b) defines “sexual conduct” as the following:

- (1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.
- (2) Penetration of the vagina or rectum by any object.
- (3) Masturbation for the purpose of sexual stimulation of the viewer.
- (4) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.
- (5) Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer.
- (6) Defecation or urination for the purpose of sexual stimulation of the viewer.

In comparison, a federal conviction for possession of child pornography<sup>46</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>47</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>48</sup>

2.9.1 Recommendation: Amend Cal. Penal Code § 311.11(a) (Possession or control of child pornography; persons previously guilty of felony) and § 311.3 (Sexual exploitation of child) to increase the penalties for possession of child pornography to the level of federal penalties to provide consistent punishment for and deterrent to this crime.

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

Pursuant to Cal. Penal Code § 290(c) (Sex offender registration act; persons required to register) persons required to register as sex offenders include those convicted under

subdivision (b) and (c) of Section 236.1 [human trafficking]...paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261 [Rape; “duress”; “menace”], . . . 266c [Inducing consent to sexual act by fraud or fear], . . . 269 [Aggravated sexual assault of child], 285 [Incest], 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.3 [Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation], 288.4 [Arrangement of meeting with minor for purpose of engaging in certain lewd and lascivious behavior; punishment], 288.5 [Continuous sexual abuse of child], 288.7 [Sexual acts with child 10 years old or younger; punishment as felony], 289 [Penetration by foreign object], . . . 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony], or 647.6 [Annoying or molesting children; punishment; probation], . . . any offense involving lewd or lascivious conduct under Section 272 [Contributing to delinquency of minor; luring minor under 14 away from home], or any felony violation of Section 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; defenses; exemption of carrier, broadcaster, or transmitter]; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

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<sup>46</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>47</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>48</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

Buyers convicted under Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) are not required to register under Cal. Penal Code § 290(c) (Sex offender registration act; persons required to register).

- 2.10.1 Recommendation: Amend Cal. Penal Code § 290(c) (Sex offender registration act; persons required to register) to require buyers convicted under Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) to register as sex offenders if the victim is a minor under the age of 18.

***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.*
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***Legal Analysis:***

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

A conviction under Cal. Penal Code § 236.1(a) (Human trafficking defined; punishment) is punishable as a felony by imprisonment in a state prison for 5, 8 or 12 years and a fine not to exceed \$500,000. Cal. Penal Code §§ 236.1(a). A conviction under Cal. Penal Code § 236.1 (b) for sex trafficking “shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than five hundred thousand dollars (\$500,000).” However, if the offense involves a commercial sex act<sup>49</sup> and the victim is under the age of 18, then a conviction is punishable by imprisonment for 5, 8, or 12 years and a fine which will generally not exceed \$500,000. Cal. Penal Code § 236.1(c)(1). If the offense is achieved through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, the conviction is punishable by fifteen years to life and a fine which will generally not exceed five hundred thousand dollars (\$500,000). Cal. Penal Code § 236.1 (c)(2). Further, a person in violation of Cal. Penal Code § 236.1 who inflicts great bodily injury on a victim shall be punished by an additional term of imprisonment in the state prison for 5, 7, or 10 years. Cal. Penal Code § 236.4(b).

Additionally, certain crimes for which a trafficker may be convicted are predicate offenses under Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 266 (Procurement), § 266h(b) (Pimping), and § 266j (Procurement of child), are expressly referred to in Cal. Penal Code § 236.1, therefore the fines and penalties under the human trafficking statute are applicable.

If the victim is an “unmarried, chaste female” who is under the age of 18, a trafficker may be convicted under Cal. Penal Code § 266 (Procurement). A conviction under Cal. Penal Code § 266 is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$2,000, or both. Cal. Penal Code § 266. A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$2,000. Cal. Penal Code §§ 18(a), 266. First time convictions, for either a misdemeanor or felony, are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

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<sup>49</sup> For purposes of Cal. Penal Code § 236.1(g), Cal. Penal Code § 236.1(g)(2) defines “commercial sex act” as “any sexual conduct on account of which anything of value is given or received by any person.”

Additionally, traffickers may be convicted under Cal. Penal Code § 266h(b) (Pimping) or Cal. Penal Code § 266i(a) (Pandering).<sup>50</sup> If the victim is a minor 16 years of age or older, a conviction under either of these statutes is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(1), 266i(b)(1), 672. However, if the victim is under 16 years of age, a conviction under either of these statutes is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(2), 266i(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

If the victim is under 16 years of age, a trafficker may also be convicted for a felony under Cal. Penal Code § 266j (Procurement of child),<sup>51</sup> punishable by imprisonment in a state prison for 3, 6, or 8 years and a fine not to exceed \$15,000. Cal. Penal Code § 266j. If the crime involves a minor under the age of 18, traffickers may be convicted under Cal. Penal Code § 267 (Abduction of minor for prostitution),<sup>52</sup> a felony punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a fine not to exceed \$2,000. Cal. Penal Code §§ 267, 18(a). For convictions under either of these statutes, the court may also order an additional fine not to exceed \$20,000. Cal. Penal Code § 266k(b).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>53</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>54</sup> against a minor.

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

Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct) prohibits the distribution of child pornography. A violation of Cal. Penal Code § 311.1(a) occurs when a person

knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops, duplicates, or prints any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or to exhibit to, or to exchange with, others, or who offers to distribute, distributes, or exhibits to, or exchanges with, others, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] . . . .

A conviction under Cal. Penal Code § 311.1(a) is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$1,000, or both. Cal. Penal Code § 311.1(a). A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to

<sup>50</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 266h and § 266i.

<sup>51</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 266j.

<sup>52</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 267.

<sup>53</sup> See *supra* note 31.

<sup>54</sup> See *supra* note 32.

exceed \$10,000. Cal. Penal Code §§ 311.1(a), 17(a), 18(a). Also, offenders convicted of a first offense are subject to an additional \$300 fine, and those convicted of any subsequent offense are subject to a \$500 fine, if the offender is able to pay. Cal. Penal Code §§ 290.3, 290(c).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>55</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>56</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>57</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>58</sup>

3.2.1 Recommendation: Amend Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct) to increase the penalties for distribution of child pornography to the level of federal penalties to create consistent punishment for and deterrent to this crime.

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.*

Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) makes it a crime if a person

contacts or communicates with<sup>59</sup> a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 261 [Rape; “duress”; “menace”], 264.1 [Punishment for aiding or abetting rape], . . . 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; defenses; exemption of carrier, broadcaster, or transmitter], 289 [Penetration by foreign object], 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], 311.2 [Production, distribution, or exhibition of obscene

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<sup>55</sup> See *supra* note 32.

<sup>56</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>57</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>58</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>59</sup> See *supra* note 17.



matter], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] or 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony] involving the minor . . . .

A first conviction under Cal. Penal Code § 288.3(a) is a felony punishable by “imprisonment in the state prison for the term prescribed for an attempt<sup>60</sup> to commit the intended offense” and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.3(a), 17(a), 672. Subsequent convictions are punishable by “an additional and consecutive term of imprisonment in the state prison for five years.” Cal. Penal Code § 288.3(c).

3.3.1 Recommendation: Amend Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) to prohibit use of the Internet to commit Cal. Penal Code § 266 (Procurement), § 266h(b) (Pimping) or § 266i(a) (Pandering).

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

Traffickers are subject to fines up to \$500,000, with a potential enhancement of up to \$1,000,000. Cal. Penal Code § 236.1(a)-(c)(2). Specifically, traffickers convicted under Cal. Penal Code § 236.1 (Human trafficking defined; punishment),<sup>61</sup> if the trafficking involves a commercial sex act with a minor under the age of 18, are subject to a fine not to exceed \$500,000. Cal. Penal Code § 236.1(c). Because Cal. Penal Code § 236.1 references CSEC crimes, traffickers convicted under Cal. Penal Code § 266 (Procurement),<sup>62</sup> § 266j (Procurement of a child), § 266h(b) (Pimping), § 267 (Abduction of minor for prostitution)<sup>63</sup> or § 266i(a) (Pandering)<sup>64</sup> are subject to a fine which will generally not exceed \$500,000. Cal. Penal Code § 236.1 (a)-(c). The court may also order a person convicted under Cal. Penal Code § 236.1 to pay an additional fine of \$1,000,000. Cal. Penal Code § 236.4. Traffickers convicted under Cal. Penal Code § 266f (Selling prostitute) are subject to a possible fine not to exceed \$10,000.

Traffickers convicted under Cal. Penal Code § 266j (Procurement of child)<sup>65</sup> are subject to a fine not to exceed \$15,000. Cal. Penal Code § 266j. Traffickers convicted under Cal. Penal Code § 267 (Abduction of minor for prostitution) face imprisonment in a state prison for 16 months, 2 years, or 3 years and a fine not to exceed \$2,000.<sup>66</sup> Cal. Penal Code §§ 267, 18(a). The court may also order an additional fine not to exceed \$20,000. The court may also order a trafficker convicted under Cal. Penal Code § 266j or § 267 to pay an additional fine not to exceed \$20,000. Cal. Penal Code § 266k(b).

Traffickers are also subject to penalty assessments. Courts are directed to order a person convicted of any crime in California to pay a penalty assessment. Cal. Penal Code § 1202.4(a)(2) states, “Upon a person being convicted of any crime in the State of California, the court shall order the defendant to pay a fine in the form of a penalty assessment in accordance with Section 1464.” The state penalty assessment is \$10 for every \$10, or fraction of \$10, on “every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.” Cal. Penal Code § 1464(a)(1). Penalty assessments do not apply to restitution fines. Cal. Penal Code § 1464(a)(3)(A).

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<sup>60</sup> See *supra* note 18.

<sup>61</sup> See *supra* Section 1.1 for the substantive provisions of Cal. Penal Code § 236.1.

<sup>62</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 266.

<sup>63</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 267.

<sup>64</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 266h and § 266i.

<sup>65</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 266j.

<sup>66</sup> See *supra* note 10 discussing penalties applicable to a felony under Cal. Penal Code § 18.

Additionally, convicted traffickers are also subject to a mandatory restitution fine. Pursuant to Cal. Penal Code § 1202.4(b) (Restitution; amount; hearing and court order; financial disclosure), “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” Although the final amount of a restitution fine ultimately falls within the court’s discretion, it must be between \$120–\$1,000 for a misdemeanor conviction and \$240–\$10,000 for a felony conviction. Cal. Penal Code § 1202.4(b)(1).

Lastly, traffickers convicted under Cal. Penal Code § 236.1 (Human trafficking defined; Punishment) are expressly required to make restitution to their victim. Cal. Penal Code § 1202.4(q) states,

Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, order the defendant to pay restitution to the victim in any case in which a victim has suffered economic loss as a result of the defendant’s conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim’s labor as guaranteed under California law, or the actual income derived by the defendant from the victim’s labor or services or any other appropriate means to provide reparations to the victim.

Regarding other trafficking convictions, Cal. Penal Code § 1202.4(f) requires a convicted defendant to make restitution to a victim who “has suffered economic loss as a result of the defendant’s conduct,” for either “the amount of loss claimed by the victim or victims or any other showing to the court.” Where “the amount of loss cannot be ascertained at the time of sentencing,” the court shall order the amount to “be determined at the direction of the court.”

Traffickers may face forfeiture of property used in connection with prostitution offenses under the Red Light Abatement Law at Cal. Penal Code § 11225–11235. Pursuant to Cal. Penal Code § 11225(a), “[e]very building or place used for the purpose of . . . lewdness, assignation, or prostitution, and every building or place in or upon which acts of . . . lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.” Pursuant to Cal. Penal Code § 11230(a)(1), “If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released.”

- 3.4.1 Recommendation: Amend the forfeiture provisions of the Red Light Abatement Law at Cal. Penal Code § 11225–11235 to include forfeiture provisions for human trafficking and CSEC crimes.
- 3.4.1 Recommendation: Amend Cal. Penal Code § 1202.4(b) (Restitution; amount; hearing and court order; financial disclosure) to provide mandatory restitution for victims of trafficking and CSEC crimes without requiring suffering “economic loss as a result of the defendant’s conduct.”

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

Pursuant to Cal. Penal Code § 290(c) (Sex offender registration act; persons required to register), traffickers are required to register as sex offenders if they have been convicted under any of the following:

[Cal. Penal Code §] subdivision (b) and (c) of Section 236.1 [Human trafficking defined; punishment], 266 [Procurement], or 266c [Inducing consent to sex act by fraud or fear], subdivision (b) of Section 266h [Pimping], subdivision (b) of Section 266i [Pandering], Section 266j [Procurement of child], 267 [Abduction of minor for prostitution], . . . 288.3 [Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation], . . . 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], subdivision (b), (c), or (d) of Section 311.2 [Production, distribution, or exhibition of obscene matter], Section 311.3 [Sexual exploitation of child], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography], 311.10 [Advertisement of obscene matters depicting minors], . . . any offense involving lewd or lascivious conduct under Section 272 [Contributing to delinquency of minor; luring minor under 14 away from home], or any felony violation of Section 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; defenses; exemption of carrier, broadcaster, or transmitter]; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who . . . has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

In addition, Cal. Penal Code § 290.015<sup>67</sup> (Release from incarceration; registration requirement) requires all registered sex offenders to provide a list of Internet identifiers (email, user names, screen names or similar identifiers) and a list of Internet Service Providers. Cal Pen. Code 290.014 (b) states,

If any person who is required to register pursuant to the Act adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 24 hours. The law enforcement agency or agencies shall make this information available to the Department of Justice. Each person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.

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<sup>67</sup> Immediately following passage of the CASE Act, Section 290 was challenged in the United States District Court for the Northern District of California in an action filed by the American Civil Liberty Union on behalf of current and future sex offenders in California. The complaint specifically challenged the requirement for sex offenders to disclose, upon release from incarceration, all Internet identifiers, service providers used, and a statement obliging the offender to update this information. On November 7, 2012, the Court granted a temporary restraining order for section 290.14(b) and 290.015(a)(4)-(6) and, after finding that the Plaintiff was likely to succeed on the merits, the Court granted a preliminary injunction on January 11<sup>th</sup>, 2013. *See* Order granting preliminary injunction at 1, John Doe, v. Harris, 2013 U.S. Dist. (N.D. Cal. November. 7, 2012) (No. C12-5713-TEH). *See also* Order granting temporary restraining order at 1, John Doe, v. Harris, 2013 U.S. Dist. (N.D. Cal. Jan. 11, 2013) (No. C12-5713-TEH).

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.*

California has several provisions that allow for the termination of parental rights. A parent's conviction under Cal. Penal Code § 236.1 (Human trafficking defined; Punishment) or any of California's CSEC laws, however, is not expressly provided as a ground for authorizing the termination of parental rights. Instead, parental rights may be terminated when a parent is convicted of a felony and other requirements are met.

If a child is found to be a dependent child,<sup>68</sup> the juvenile court may terminate parental rights pursuant to Cal. Welf. & Inst. Code § 366.26(c)(1) (Procedures for conducting hearings to terminate parental rights, determine adoption of, or guardianship of, children adjudged dependent children of juvenile court),<sup>69</sup> which states,

If the court determines, based on the assessment provided . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 [Family reunification services] that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months, or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights. . . .

For children other than those adjudged dependent children, Cal. Fam. Code § 7820 (Proceeding to declare minor free from parental custody and control) authorizes petitioners to bring "[a] proceeding . . . for the purpose of having a child under the age of 18 years declared free from the custody and control of either or both parents if the child comes within any of the descriptions set out in [chapter 2 (Circumstances where proceeding may be brought)]." Cal. Fam. Code § 7803 (Effect of declaration) provides that "[a] declaration of freedom from parental custody and control pursuant to this part terminates all parental rights and responsibilities with regard to the child."

Parents convicted of a felony are also subject to losing their parental rights. Cal. Fam. Code § 7825 (Parent convicted of felony) states,

(a) A proceeding under this part may be brought where both of the following requirements are satisfied:

- (1) The child is one whose parent or parents are convicted of a felony.
- (2) The facts of the crime of which the parent or parents were convicted are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child. In making a determination pursuant to this section, the court may consider the parent's criminal record prior to the felony conviction to the extent that the criminal record demonstrates a pattern of behavior substantially related to the welfare of the child or the parent's ability to exercise custody and control regarding his or her child.

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<sup>68</sup> See *infra* Section 5.4 for the laws relevant to adjudicating a child dependent.

<sup>69</sup> The provisions of Cal. Welf. & Inst. Code § 366.26 discussed herein are effective both until and after January 1, 2014 unless otherwise noted.

(b) The mother of a child may bring a proceeding under this part against the father of the child, where the child was conceived as a result of an act in violation of Section 261 [Rape; “duress”; “menace”] of the Penal Code, and where the father was convicted of that violation. For purposes of this subdivision, there is a conclusive presumption that the father is unfit to have custody or control of the child.

- 3.6.1 Recommendation: Amend Cal. Welf. & Inst. Code § 366.26 (Procedures for conducting hearings to terminate parental rights, determine adoption of, or guardianship of, children adjudged dependent children of juvenile court) and Part 4 (Freedom from parental custody and control) of California’s Family Code to expressly provide that a parent’s conviction under Cal. Penal Code § 236.1 (Human trafficking defined; punishment) or any of California’s CSEC laws is grounds for terminating parental rights.

***Legal Components:***

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

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

Cal. Penal Code § 236.1 (Human trafficking defined; punishment) does not specifically include assisting, enabling or benefitting financially from human trafficking as prohibited conduct. However, since facilitators may be convicted under several CSEC laws that constitute predicate offenses under Cal. Penal Code § 236.1(c), which specifically addresses domestic minor sex trafficking, facilitators may face liability under the human trafficking law if they “cause[], induce[], or persuade[], or attempt[] to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act.”

Otherwise, if not prosecuted under Cal. Penal Code § 236.1, facilitators may still face prosecution under CSEC laws. Cal. Penal Code § 266 (Procurement) may be used to prosecute a facilitator who “aids or assists in” the “inveiglement or enticement” of “any unmarried female, of previous chaste character, under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution.” A conviction under Cal. Penal Code § 266 is punishable as either a misdemeanor or a felony.<sup>70</sup> If convicted of a misdemeanor, the offender is subject to imprisonment of up to 1 year in a county jail, a fine not to exceed \$2,000, or both. Cal. Penal Code §§ 266, 17(b). If convicted of a felony, an offender is subject to imprisonment in the state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266, 18(a), 672.

A facilitator may be convicted under Cal. Penal Code § 266h(b) (Pimping) if the facilitator, “knowing another person is a prostitute, lives or derives support or maintenance in whole or in part . . . from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed.” If the prostitute is a minor 16 or older, a conviction under Cal. Penal Code § 266h(b) is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(1), 672. If the prostitute is a minor under 16 years of age, however, a conviction is punishable by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

Additionally, a facilitator may be convicted under Cal. Penal Code § 266j (Procurement of child) if the facilitator “intentionally . . . transports, provides, or makes available, or . . . offers to . . . transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or

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<sup>70</sup> See *supra* note 9.

lascivious act as defined in Section 288.”<sup>71</sup> A conviction under Cal. Penal Code § 266j is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a fine not to exceed \$15,000. Cal. Penal Code § 266j. The court may also order an additional fine not to exceed \$20,000. Cal. Penal Code § 266k(b).

- 4.1.1 Recommendation: Amend Cal. Penal Code § 236.1(a) (Human trafficking defined; punishment) to include assisting, enabling, or financially benefitting from child sex trafficking as prohibited conduct under the human 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.*

Facilitators are subject to fines up to \$500,000. Cal. Penal Code § 236.1(a), (b), (c)(1) and (2). Specifically, when the victim is a minor, facilitators convicted of trafficking involving a commercial sex act under Cal. Penal Code § 236.1 (Human trafficking defined; punishment), are subject to are subject to a fine which will generally not exceed \$500,000. Cal. Penal Code § 236.1(c)(1). When the victim is a minor and the offense involves a commercial sex act achieved by force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, facilitators are subject to a fine not to exceed \$500,000. The court may also order a person convicted under Cal. Penal Code § 236.1 to pay an additional fine of \$1,000,000. Cal. Penal Code § 236.4.

Additionally, certain crimes for which a facilitator may be convicted are predicate offenses under Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 266<sup>72</sup> (Procurement), § 266h(b) (Pimping), and § 266j<sup>73</sup> (Procurement of child), are expressly referred to in Cal. Penal Code § 236.1 (Human trafficking defined; punishment), therefore the fines and penalties under the human trafficking statute are applicable.

Facilitators convicted under Cal. Penal Code § 266 (Procurement) are subject to a possible fine not to exceed \$2,000 if punished as a misdemeanor or a fine not to exceed \$10,000 if punished as a felony, while those convicted under Cal. Penal Code § 266h(b) (Pimping) are subject to a fine not to exceed \$10,000, as well as a possible additional fine not to exceed \$5,000. Cal. Penal Code §§ 17(a), 266h(b), 672, 266k(a). Lastly, facilitators convicted under Cal. Penal Code § 266j (Procurement of child) are subject to a fine not to exceed \$15,000, and a possible additional fine up to \$20,000. Cal. Penal Code §§ 266j, 266k(b). Facilitators convicted of any of these crimes may also be ordered to pay a state penalty and additional restitution fines.<sup>74</sup> Cal. Penal Code §§ 1202.4(b), (c), 1464(a)(1).

Courts are mandated to order any person convicted of a crime in California to pay restitution. Facilitators convicted under Cal. Penal Code § 236.1 (Human trafficking defined; punishment) are expressly required to make restitution to their victims. Cal. Penal Code § 1202.4(q) (Restitution; amount; hearing and court order; financial disclosure) states,

Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, order the defendant to pay restitution to the victim in any case in which a victim has suffered economic loss as a result of the defendant’s conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the

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<sup>71</sup> See *supra* note 13.

<sup>72</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 266.

<sup>73</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 266j.

<sup>74</sup> See *supra* Section 2.8 for provisions regarding state penalty assessments and restitution fines.

offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services or any other appropriate means to provide reparations to the victim.

Regarding other trafficking convictions, Cal. Penal Code § 1202.4(f) requires a convicted defendant, presumably including facilitators, to make restitution to a victim who "has suffered economic loss as a result of the defendant's conduct," for "the amount of loss claimed by the victim or victims or any other showing to the court," and "[i]f the amount of loss cannot be ascertained at the time of sentencing," the court's restitution order shall provide that "the amount shall be determined at the direction of the court."

Facilitators may face forfeiture of property used in connection with prostitution offenses under the Red Light Abatement Law at Cal. Penal Code § 11225–11235. Pursuant to Cal. Penal Code § 11225(a), "[e]very building or place used for the purpose of . . . lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance." Pursuant to Cal. Penal Code § 11230(a)(1), "If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released."

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

There is no specific provision in California's laws 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 or prostitution of a minor under the age of 18, if the offer or sale occurs in California or the travel occurs or is to occur in California.

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

Cal. Penal Code § 311.10(a) (Advertisement of obscene matters depicting minors) makes it illegal for a person to advertise "for sale or distribution any obscene matter knowing that it depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4."<sup>75</sup> A conviction under this statute is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$50,000, or both. Cal. Penal Code §§ 311.10(a), 17(b). A felony conviction is punishable by imprisonment in a state prison for 2, 3, or 4 years and a possible fine not to exceed \$50,000. Cal. Penal Code § 311.10(a). First time convictions are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

Additionally, Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging sexual conduct)<sup>76</sup> makes distributing child pornography a specific crime. A conviction under this statute is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to

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<sup>75</sup> See *supra* Section 1.2 for the substantive provisions of Cal. Penal Code § 311.4.

<sup>76</sup> See *supra* Section 3.2 for the substantive provisions of Cal. Penal Code § 311.1(a).



exceed \$1,000, or both. Cal. Penal Code §§ 311.1(a), 17(b). A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.1(a), 17(a), 18(a).

- 4.4.1 Recommendation: Amend Cal. Penal Code § 311.10(a) (Advertisement of obscene matters depicting minors) and Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging sexual conduct) to increase penalties in order to align with federal penalties.

**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.*

Under Cal. Const., Art I, § 28(e) (Victims’ bill of rights), “a ‘victim’ is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act.”

For purposes of the California Evidence Code’s provisions related to the Human Trafficking Caseworker-Victim Privilege, Cal. Evid. Code § 1038.2(a) (Definitions) defines a “victim” as “any person who is a ‘trafficking victim’ as defined in Section 236.1 [Human trafficking defined; punishment].”<sup>77</sup>

For purposes of compensation from the Restitution Fund, Cal. Gov’t Code § 13951(g) (Definitions) defines a “victim” as “an individual who sustains injury or death as a direct result of a crime as specified in subdivision (e) of Section 13955 [Eligibility requirements].”<sup>78</sup> This definition is also adopted by reference in Cal. Penal Code § 1202.4(k)(4) for purposes of restitution orders paid by the defendant. Cal. Penal Code § 1202.4(k)(4) states,

<sup>77</sup> See *supra* Section 1.1 for the substantive provisions of Cal. Penal Code § 236.1.

<sup>78</sup> Cal. Govt. Code § 13955(e)(1) states that one of the eligibility requirements for compensation is that “the injury or death was a direct result of a crime.”

(k) For purposes of this section, “victim” shall include all of the following:

....

(4) Any person who is eligible to receive assistance from the Restitution Fund pursuant to Chapter 5 (commencing with Section 1390) of Part 4 of Division 3 of Title 2 of the Government Code.

For purposes of accessing multidisciplinary services through family justice centers, Cal. Penal Code § 13750(c)(6) defines “[v]ictim of crime,” “crime victim,” and “victim” as “a victim of domestic violence, officer-involved domestic violence, sexual assault, elder or dependent adult abuse, stalking, cyberstalking, cyberbullying, or human trafficking.”

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.*

Cal. Penal Code § 236.1(e) (Human trafficking defined; punishment) expressly states that “consent by a victim of human trafficking who is a minor at the time of the commission of the offense is not a defense to a criminal prosecution under this section.” Cal. Penal Code 236.1 (e).

The minor’s consent is not a defense to prosecution under Cal. Penal Code § 266i(b) (Pandering)<sup>79</sup> or § 267 (Abduction of minor for prostitution).<sup>80</sup> While not specifically a CSEC law, consent is not a defense for prosecutions under Cal. Penal Code § 266f (Selling prostitute).<sup>81</sup>

However, Cal. Penal Code § 266 (Procurement), § 266h(b) (Pimping), § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging sexual conduct), § 311.3(a) (Sexual exploitation of child), and § 311.4 (Employment of minor in sale or distribution of obscene matter or production of pornography) do not expressly state that a minor’s consent to a commercial sex act or conduct is not a defense to the crime.

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

Cal. Penal Code § 647(b)<sup>82</sup> (Disorderly conduct; restrictions on probation) is age-neutral, stating,

[E]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

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<sup>79</sup> See *People v. Hobson*, 63 Cal. Rptr. 320, 322–23 (Ct. App. 1967) (“Section 266i of the Penal Code has been construed to encompass any place where prostitution is allowed or encouraged. . . . A woman’s consent to becoming a prostitute is immaterial.”).

<sup>80</sup> Although Cal. Penal Code § 267 states that the crime occurs where a person “takes away any other person under the age of 18 years from the father, mother, guardian, or other person having the legal charge of the other person, without their consent, for the purpose of prostitution,” the requirement that the person be taken “without their consent” appears to refer to the consent of the parent and not the minor’s consent. See *People v. Fowler*, 25 P. 1110, 1110 (1891) (“The gist of the offense is the taking away of the child against the will of the person having lawful charge of her, for the purpose of prostitution.”); *People v. Lewis*, 75 P. 189, (1904) (affirming a conviction under Cal. Penal Code § 267 due to the determination that the victim’s father did not give his consent).

<sup>81</sup> Cal. Penal Code § 266f (Selling prostitute) states that “[e]very person who sells any person or receives any money or other valuable thing for or on account of his or her placing in custody, for immoral purposes, any person, whether with or without his or her consent, is guilty of a felony.” A conviction under this statute is punishable as a felony by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266f, 672.

<sup>82</sup> See *supra* note 20.

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.

First convictions under this statute are punishable as misdemeanors by imprisonment in a county jail up to 6 months, a fine not to exceed \$1,000, or both. Cal. Penal Code §§ 647(b), 672, 19. Second convictions under Cal. Penal Code § 647(b) are subject to a mandatory minimum of 45 days in a county jail, while subsequent convictions are subject to a mandatory minimum of 90 days in a county jail. Cal. Penal Code § 647(k). If a “violation of subdivision (b) . . . was committed within 1,000 feet of a private residence and with the use of a vehicle,” the court may also suspend a buyer’s driver’s license up to 30 days.<sup>83</sup> Cal. Penal Code § 647(k). For any conviction under this statute, the court may also order an additional fine not to exceed \$70, if the defendant is able to pay. Cal. Penal Code § 647.1.

Cal. Penal Code § 653.22(a) (Loitering with intent to commit prostitution; determination of intent) is also age-neutral. That section states, “It is unlawful for any person to loiter in any public place with the intent to commit prostitution. This intent is evidenced by<sup>84</sup> acting in a manner and under circumstances which openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution.”

5.3.1 Recommendation: Amend Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) and § 653.22(a) (Loitering with intent to commit prostitution; determination of intent) to make minors under 18 immune from prosecution for prostitution offenses.

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.*

Commercially sexually exploited children may be treated as dependent children or wards under California law.

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<sup>83</sup> See *supra* note 25.

<sup>84</sup> Cal. Penal Code § 653.22(b) states,

Among the circumstances that may be considered in determining whether a person loiters with the intent to commit prostitution are that the person:

- (1) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution.
- (2) Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution.
- (3) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, or any other offense relating to or involving prostitution, within five years of the arrest under this section.
- (4) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists, indicative of soliciting for prostitution.
- (5) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision, with the exception of paragraph (3), or in any other behavior indicative of prostitution activity.

## Child Identified as Dependent<sup>85</sup>

### I. Initial Custody

#### a. Authority for Initial Custody

Under Cal. Penal Code § 11166(a) (Duty to report; mandated reporters; punishment for violation), mandated reporters<sup>86</sup> must immediately report reasonably suspected<sup>87</sup> or known child abuse to a specified agency.<sup>88</sup> After a child abuse complaint is made and investigated, the agency that received the report will “forward to the Department of Justice a report in writing of every case it investigates of known or

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<sup>85</sup>A legislative finding listed within Cal. Welf. & Inst. Code § 300(b)(2) states,

The Legislature finds and declares that a child who is sexually trafficked, as described in Section 236.1 of the Penal Code, or who receives food or shelter in exchange for, or who is paid to perform, sexual acts described in Section 236.1 or 11165.1 of the Penal Code, and whose parent or guardian failed to, or was unable to, protect the child, is within the description of this subdivision, and that this finding is declaratory of existing law. These children shall be known as commercially sexually exploited children.

Cal. Welf. & Inst. Code § 16524.7 establishes a Commercially Sexually Exploited Children Program administered by the State Department of Social Services that allocates funding to counties that have elect into the program. “Funds provided to the counties electing to participate in the program shall be used for prevention activities, intervention activities, and services to children who are victims, or at risk of becoming victims, of commercial sexual exploitation.” Cal. Welf. & Inst. Code § 16524.7(4). Participating counties must submit plans

indicating the county’s collaboration with county partner agencies and children-focused entities, which shall include the formation of a multidisciplinary team to serve children pursuant to this chapter. A multidisciplinary team serving a child pursuant to this chapter shall include, but is not limited to, appropriate staff from the county child welfare, probation, mental health, substance abuse disorder, and public health departments. Staff from a local provider of services to this population, local education agencies, and local law enforcement, and survivors of commercial sexual exploitation and trafficking may be included on the team.

Additionally, pursuant to Cal. Welf. & Inst. Code § 16524.8, participating counties

receiv[ing] funds from the commercially sexually exploited children program pursuant to this chapter shall develop an interagency protocol to be utilized in serving sexually exploited children. the county protocol shall be developed by a team led by a representative of the county human services department and shall include representatives from each of the following agencies:

- (1) The county probation department.
- (2) The county mental health department.
- (3) The county public health department.
- (4) The juvenile court in the county.

Here and elsewhere in this report that Cal. Welf. & Inst. Code §§ 300, 16524.7 and 16524.8 are quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 855, 2014 (effective June 20, 2014).

<sup>86</sup> Under Cal. Penal Code § 11165.7 (“Mandated reporter”; training), “mandated reporters” include several individuals such as school staff and employees, social workers, counselors, religious personnel, law enforcement, and physicians.

<sup>87</sup> Cal. Penal Code § 11166(a)(1) explains that “‘reasonable suspicion’ means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect.”

<sup>88</sup> Pursuant to Cal. Penal Code § 11165.9 (Reports to authorities), specified agencies include “any police department or sheriff’s department, not including a school district police or security department, county probation department, if designated by the county to receive mandated reports, or the county welfare department.”

suspected child abuse or severe neglect that is determined to be substantiated, other than cases coming within subdivision (b) of Section 11165.2.” Cal. Penal Code § 11169(a). The appropriate law enforcement agency will investigate the allegations and “shall inform the person required or authorized to report of the results of the investigation and of any action the agency is taking with regard to the child or family.” Cal. Penal Code §§ 11169(a), 11170(b)(2).

Cal. Welf. & Inst. Code § 305(a) (Peace officer’s taking minor into temporary custody without warrant) authorizes a law enforcement officer to take a child into temporary custody without a warrant if

the officer has reasonable cause for believing that the minor is a person described in Section 300, and, in addition, that the minor has an immediate need for medical care, or the minor is in immediate danger of physical or sexual abuse, or the physical environment or the fact that the child is left unattended poses an immediate threat to the child’s health or safety.

Alternatively, Cal. Welf. & Inst. Code § 306(a)(1) (Authority of social worker to take temporary custody of minor) authorizes a “social worker in any county welfare department” to “[r]eceive and maintain” custody of a minor who is delivered by a peace officer and who is described in § 300. Cal. Welf. & Inst. Code § 306(a)(2) allows a social worker to take a child into temporary custody if the child “has been declared a dependent child of the juvenile court under Section 300” or the social worker has reasonable cause to believe the child meets the criteria of Cal. Welf. & Inst. Code § 300(b) or (g) and to believe that the child “is in immediate danger of physical or sexual abuse or the physical environment poses an immediate threat to the child’s health or safety.” A social worker, however, is expressly required to “consider whether the child can remain safely in his or her residence” before taking the child into temporary custody. Cal. Welf. & Inst. Code § 306(b). A social worker who takes a child into custody under Cal. Welf. & Inst. Code § 306 must “immediately investigate the circumstances of the child and the facts surrounding the child’s being taken into custody and attempt to maintain the child with the child’s family through the provision of services.” Cal. Welf. & Inst. Code § 309(a). If the social worker does not release the child, “the child shall be deemed detained for purposes of [Chapter 2 (Juvenile court law)].” Cal. Welf. & Inst. Code § 309(c).

#### b. Placement

After taking a child into custody pursuant to Cal. Welf. & Inst. Code § 305, a law enforcement officer may release the child, order the child and the child’s parents to appear before a probation officer, or “deliver the minor into the custody of the probation officer.” Cal. Welf. & Inst. Code § 307.

Alternatively, pursuant to Cal. Welf. & Inst. Code § 307.5 (Delivery of minor to community service program for abused or neglected children), if a law enforcement officer “deems that it is in the best interest of the minor and the public,” the officer may “take the minor to a community service program for abused or neglected children.” Cal. Welf. & Inst. Code § 307.5.

## II. Process following initial custody

Verified cases of abuse will lead to the involvement of the juvenile court, which, pursuant to Cal. Welf. & Inst. Code § 300 (Persons subject to jurisdiction of juvenile court), has jurisdiction over dependent children. Cal. Welf. & Inst. Code § 300(d) states,

Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

. . . .

(d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 [“Sexual abuse”; “sexual assault”; “sexual exploitation”] of the Penal Code, by his or her parent or guardian or a member of his or her household, or the

parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.

### III. Placement process pending adjudication/investigation

When a child is delivered to the probation officer's custody and the "probation officer determines that the minor shall be retained in custody," the probation officer "must immediately file a petition pursuant to Section 332 [Petition to commence proceedings in juvenile court; verification; contents] with the clerk of the juvenile court who shall set the matter for hearing on the detention hearing calendar." Cal. Welf. & Inst. Code § 311(a). A detention hearing must be held "as soon as possible, but in any event before the expiration of the next judicial day after a petition to declare the minor a dependent child has been filed." Cal. Welf. & Inst. Code § 315. If no petition is filed, the child must be released within 48 hours of being taken into custody. Cal. Welf. & Inst. Code § 313(a).

If a dependent child is removed from the custody of the child's parent or guardian under Cal. Welf. & Inst. Code § 361 (Limitations on control of parent or guardian; appointment of responsible adult or surrogate parent to make educational decisions; voluntary relinquishment; when child may be taken from custody of parents; efforts to prevent removal; required findings), the court may place the child with the child's noncustodial parent, a relative or nonrelative extended family member as defined in Cal. Welf. & Inst. Code § 362.7, a community care facility, or in foster care. Cal. Welf. & Inst. Code § 361.2(e)(1)–(6). Additionally, both Cal Welf.& Inst. Code § 2019 (Shelters for abused and neglected children) and § 2010 (Availability of funds) mandate that funds be provided to youth shelters for abused and neglected children.

Additionally, under Cal. Welf. & Inst. Code § 361.2(a), if a dependent child is removed from a home and the child has a parent with whom the child was not living "at the time that the events or conditions arose that brought the child within the provisions" of this section, the court must first consider if the child can be placed in the custody of that parent, "unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

Pursuant to Cal. Welf. & Inst. Code § 361.2(e), a dependent child is removed from the home the following placements may be ordered pending adjudication:

- (1) The home of a noncustodial parent as described in subdivision (a), regardless of the parent's immigration status.
- (2) The approved home of a relative, regardless of the relative's immigration status.
- (3) The approved home of a nonrelative extended family member as defined in Section 362.7.
- (4) A foster home in which the child has been placed before an interruption in foster care, if that placement is in the best interest of the child and space is available.
- (5) A suitable licensed community care facility.
- (6) With a foster family agency to be placed in a suitable licensed foster family home or certified family home which has been certified by the agency as meeting licensing standards.
- (7) A home or facility in accordance with the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

### IV. Adjudication or referral to alternate process

#### a. Diversion or alternate process

Special protections are afforded to runaway youth who are often at high risk of commercial sexual exploitation. Pursuant to Cal. Welf. & Inst. Code § 1788(a)–(c) (Services to be provided by projects), "[e]ach Runaway Youth and Families in Crisis Project" must include a number of protective

services, such as food and temporary shelter, counseling, health care, family crisis resolution services, and transitional living services.

## V. Outcomes

Pursuant to Cal. Welf. & Inst. Code § 361.2(e),

When the court orders removal pursuant to Section 361, the court shall order the care, custody, control, and conduct of the child to be under the supervision of the social worker who may place the child in any of the following:

- (1) The home of a noncustodial parent as described in subdivision (a), regardless of the parent's immigration status.
- (2) The approved home of a relative, regardless of the relative's immigration status
- (3) The approved home of a nonrelative extended family member as defined in Section 362.7.
- (4) A foster home in which the child has been placed before an interruption in foster care, if that placement is in the best interest of the child and space is available.
- (5) A suitable licensed community care facility.
- (6) With a foster family agency to be placed in a suitable licensed foster family home or certified family home which has been certified by the agency as meeting licensing standards.

### **Child Identified as Wards (Delinquent)**

Some commercially sexually exploited children may be treated as wards under California law. Cal. Welf. & Inst. Code § 601(a), (b) (Persons subject to jurisdiction of court as ward for refusal to obey orders of parents, violation of curfew, or truancy) states that a child under the age of 18 who “persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian,” violates local or state curfews, or has “four or more truanancies within one school year” may be adjudicated by the juvenile court to be “a ward of the court.” Additionally, Cal. Welf. & Inst. Code § 602(a) (Persons subject to jurisdiction of juvenile court and to adjudication as ward for violation of law or ordinance defining crime; Persons subject to prosecution in criminal court) states that a minor who “violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age” may be adjudicated by the juvenile court to be “a ward of the court.”

## I. Initial Custody

### a. Authority for Initial Custody

Cal. Welf. & Inst. Code § 625(a) (Peace officer’s taking minor into temporary custody without warrant; when permitted) authorizes a law enforcement officer to take a child into temporary custody, without a warrant, where the officer “has reasonable cause for believing” that the child is within the provisions of Cal. Welf. & Inst. Code § 601 or § 602.

### b. Placement

## II. Process following initial custody

Pursuant to Cal. Welf. & Inst. Code § 626 (Alternative procedures as to disposition of minor; governing consideration in selecting alternative),

An officer who takes a minor into temporary custody under the provisions of Section 625 may do any of the following:



- (a) Release the minor.
- (b) Deliver or refer the minor to a public or private agency with which the city or county has an agreement or plan to provide shelter care, counseling, or diversion services to minors so delivered. A placement of a child in a community care facility as specified in Section 1530.8 of the Health and Safety Code shall be made in accordance with Section 319.2<sup>89</sup> or 319.3,<sup>90</sup> as applicable, and with paragraph (8) or (9) of subdivision (e) of Section 361.2,<sup>91</sup> as applicable.
- (c) . . . require the minor or the minor’s parent, guardian, or relative, or both, to sign a written promise to appear [before a probation officer] at the time and place designated in the notice. . . .
- (d) Take the minor without unnecessary delay before [a] probation officer . . . . In no case shall the officer delay the delivery of the minor to the probation officer for more than 24 hours if the minor has been taken into custody without a warrant on the belief that the minor has committed a misdemeanor.

Alternatively, if law enforcement officer “determines that the minor should be brought to the attention of the juvenile court,” the officer can either “require the minor or his or her parent, guardian, or relative, or both, to sign a written promise that either or both will appear [before a probation officer] at the time and place designated in the notice” or immediately take the minor before a probation officer. Cal. Welf. & Inst. Code § 626.5. If the child was “taken into custody without a warrant on the belief that he or she has committed a misdemeanor,” and the officer chooses to take the minor before a probation officer, the officer must do so within 24 hours of taking the child into custody. Cal. Welf. & Inst. Code § 626.5(b).

### III. Placement process pending adjudication/investigation

When a child is delivered to the custody of a probation officer, Cal. Welf. & Inst. Code § 628(a) (Action of probation officer when minor taken into temporary custody; investigation; release or further detention; prerequisites to further detention; compliance with other laws; identification and notification of relatives) states,

[T]he probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his or her being taken into custody and shall immediately release the minor to the custody of his or her parent, legal guardian, or responsible relative unless it can be demonstrated upon the evidence before the court that continuance in the home is contrary to the minor’s welfare and one or more of the following conditions exist:

- (1) The minor is in need of proper and effective parental care or control and has no parent, legal guardian, or responsible relative; or has no parent, legal guardian, or responsible relative willing to exercise or capable of exercising that care or control; or has no parent, legal guardian, or responsible relative actually exercising that care or control.
- (2) The minor is destitute or is not provided with the necessities of life or is not provided with a home or suitable place of abode.
- (3) The minor is provided with a home which is an unfit place for him or her by reason of neglect, cruelty, depravity or physical abuse by either of his or her parents, or by his or her legal guardian or other person in whose custody or care he or she is entrusted.

<sup>89</sup> Cal. Welf. & Inst. Code § 319.2 only applies to a child under the age of 6; the child may only be placed in a temporary shelter or group home for the purpose of evaluation.

<sup>90</sup> Cal. Welf. & Inst. Code § 319.3 applies to children 6 to 12. If a child is deemed dependent, the child may be placed in temporary shelter or group home for the purpose of being evaluated.

<sup>91</sup> Cal. Welf. & Inst. Code § 361.2 deals with placement at community care facilities.

(4) Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the minor or reasonable necessity for the protection of the person or property of another.

(5) The minor is likely to flee the jurisdiction of the court.

....

Even if a probation officer determines that one of the conditions under Cal. Welf. & Inst. Code § 628(a) exists, if the “probation officer believes that 24-hour secure detention is not necessary in order to protect the minor or the person or property of another, or to ensure that the minor does not flee the jurisdiction of the court, the probation officer shall . . . release such minor to his or her parent, guardian, or responsible relative on home supervision.” Cal. Welf. & Inst. Code § 628.1. A minor’s release to home supervision may be subject to a number of conditions such as school attendance, curfew, and mandatory court appearances. Cal. Welf. & Inst. Code § 628.1.

If the probation officer decides to detain the child in custody, the probation officer must, “immediately proceed in accordance with Article 16 (commencing with Section 650) to cause the filing of a petition pursuant to Section 656 with the clerk of the juvenile court who shall set the matter for hearing on the detention calendar,” and a detention hearing must be held to “determine whether the minor shall be further detained.” Cal. Welf. & Inst. Code §§ 630(a), 632(a). If such a petition is not filed within 48 hours of taking the child into custody, or a detention hearing is not held within 48 hours for a child taken into custody “without a warrant on the belief that the minor has committed a misdemeanor that does not involve violence, the threat of violence, or possession or use of a weapon, and if the minor is not currently on probation or parole,” the child must be released. Cal. Welf. & Inst. Code § 631(b).

#### IV. Adjudication or referral to alternate process

If a court determines that the child falls within Cal. Welf. & Inst. Code § 601 or § 602, the court may either, “without adjudging the minor a ward of the court, place the minor on probation” up to 6 months, or adjudge the child a ward of the court. Cal. Welf. & Inst. Code § 725(a).

##### a. Diversion or alternate process

#### V. Outcomes

A ward removed from the custody of a parent or guardian “may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense.” Cal. Welf. & Inst. Code § 726(d)(1)<sup>92</sup>. Under Cal. Welf. & Inst. Code § 731(a) (Treatment, restitution, fine, work program, commitment; recall; maximum period for confinement),

If a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 602, the court may order any of the types of treatment referred to in Sections 727 and 730 and, in addition, may do any of the following:

- (1) Order the ward to make restitution, to pay a fine up to two hundred fifty dollars (\$250) for deposit in the county treasury if the court finds that the minor has the financial ability to pay the fine, or to participate in uncompensated work programs.
- (2) Commit the ward to a sheltered-care facility.

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<sup>92</sup> Here and elsewhere in this report that Cal. Welf. & Inst. Code § 726 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1304, 2014 (effective January 1, 2015).

(3) Order that the ward and his or her family or guardian participate in a program of professional counseling as arranged and directed by the probation officer as a condition of continued custody of the ward.

(4) Commit the ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, if the ward has committed an offense described in subdivision (b) of Section 707 or subdivision (C) of Section 290.008 of the Penal Code and is not otherwise ineligible for commitment to the division under Section 733.

Cal. Welf. & Inst. Code § 207 (Places or facilities for care and detention) specifies the types of facilities where a ward may be detained. Specifically, Cal. Welf. & Inst. Code § 207 states,

(a) No minor shall be detained in any jail, lockup, juvenile hall, or other secure facility who is taken into custody solely upon the ground that he or she is a person described by Section 601 [Persons subject to jurisdiction of court as ward for refusal to obey orders of parents, violation of curfew, or truancy] or adjudged to be such or made a ward of the juvenile court solely upon that ground, except as provided in subdivision (b). If any such minor, other than a minor described in subdivision (b), is detained, he or she shall be detained in a sheltered-care facility or crisis resolution home as provided for in Section 654, or in a nonsecure facility provided for in subdivision (a), (b), (c), or (d) of Section 727.

(b) A minor taken into custody upon the ground that he or she is a person described in Section 601, or adjudged to be a ward of the juvenile court solely upon that ground, may be held in a secure facility, other than a facility in which adults are held in secure custody, in any of the following circumstances:

(1) For up to 12 hours after having been taken into custody for the purpose of determining if there are any outstanding wants, warrants, or holds against the minor in cases where the arresting officer or probation officer has cause to believe that the wants, warrants, or holds exist.

(2) For up to 24 hours after having been taken into custody, in order to locate the minor's parent or guardian as soon as possible and to arrange the return of the minor to his or her parent or guardian, with the exception of an out-of-state runaway who is being held pursuant to the Interstate Compact for Juveniles.

(c) Any minor detained in juvenile hall pursuant to subdivision (b) may not be permitted to come or remain in contact with any person detained on the basis that he or she has been taken into custody upon the ground that he or she is a person described in Section 602 or adjudged to be such or made a ward of the juvenile court upon that ground.

(d) Minors detained in juvenile hall pursuant to Sections 601 and 602 may be held in the same facility provided they are not permitted to come or remain in contact within that facility.

....

To the extent minor victims of commercial sexual exploitation are identified as victims of sexual assault or human trafficking, they may be able to access multidisciplinary services through family justice centers in the City of San Diego, the City of Anaheim, the County of Alameda, and the County of Sonoma, as part of 2-year pilot project<sup>93</sup> establishing centers where “victims of abuse are able to access all needed

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<sup>93</sup> Pursuant to Cal. Penal Code § 13750 (i),

(1) The National Family Justice Center Alliance shall, with private funds, contract with an independent organization to conduct an evaluation and prepare a report on the four pilot centers. The independent organization conducting the evaluation shall submit the report to the Office of Privacy Protection and the National Family Justice Center Alliance for review and comment, and then to the Assembly Committee on

services in one location in order to enhance victim safety, increase offender accountability, and improve access to services for victims of domestic violence, sexual assault, elder or dependent adult abuse, stalking, cyberstalking, cyberbullying, and human trafficking.” Cal. Penal Code § 13750(a), (b).<sup>94</sup> Pursuant to Cal. Penal Code § 13750(d),

[F]amily justice centers shall be defined as multiagency, multidisciplinary service centers where public and private agencies assign staff members on a full-time or part-time basis in order to provide services to victims of crime from one location in order to reduce the number of times victims must tell their story, reduce the number of places victims must go for help, and increase access to services and support for victims and their children. Staff members<sup>95</sup> at a family justice center may be comprised of, but are not limited to, the following:

- (1) Law enforcement personnel.
- (2) Medical personnel.
- (3) District attorneys and city attorneys.
- (4) Victim-witness program personnel.
- (5) Domestic violence shelter service staff.
- (6) Community-based rape crisis, domestic violence, and human trafficking advocates.
- (7) Social service agency staff members.
- (8) Child welfare agency social workers.
- (9) County health department staff.
- (10) City or county welfare and public assistance workers.
- (11) Nonprofit agency counseling professionals.
- (12) Civil legal service providers.
- (13) Supervised volunteers from partner agencies.
- (14) Other professionals providing services.

Additionally, pursuant to Cal. Penal Code § 13750(f), “Victims of crime shall not be denied services on the grounds of criminal history. No criminal history search shall be conducted of a victim at a family justice center without the victim's written consent unless the criminal history search is pursuant to an active criminal investigation.”

Pursuant to Cal. Welf. & Inst. Code § 18259 through 18259.10, the Counties of Alameda and Los Angeles may initiate pilot programs, which would establish a diversion program for sexually exploited children, “to address the needs and effective treatment of commercially sexually exploited minors who have been arrested or detained by local law enforcement.” Cal. Welf. & Inst. Code § 18259.7<sup>96</sup>.

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Judiciary, the Senate Committee on Judiciary, the Assembly Committee on Public Safety, and the Senate Committee on Public Safety, no later than January 1, 2013. . . .

(2) The independent organization conducting the evaluation shall gather the evaluation data from preservices victim information, postservices exit interviews, victim focus groups, partner agency focus group data, and other evaluation criteria necessary to conduct the evaluation under paragraph (1).

(3) The National Family Justice Center Alliance may include any recommendations for statewide legislation, best practices, and model policies and procedures in the comments submitted to the independent evaluation organization and the Legislature under paragraph (1).

<sup>94</sup> Pursuant to Cal. Penal Code § 13752, “This title shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.”

<sup>95</sup> Pursuant to Cal. Penal Code § 13751, “Each family justice center established pursuant to subdivision (a) of Section 13750 shall maintain a formal training program with mandatory training for all staff members, volunteers, and agency professionals of not less than eight hours per year on subjects including, but not limited to, privileges and confidentiality, information sharing, risk assessment, safety planning, victim advocacy, and high-risk case response.”

<sup>96</sup> Here and elsewhere in this report that Cal. Welf. & Inst. Code § 18259.7 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 1304, 2014 (effective January 1, 2015).

Finally, Cal. Penal Code § 236.4 provides that:

(d) Every fine imposed and collected pursuant to Section 236.1 and this section shall be deposited in the Victim-Witness Assistance Fund, to be administered by the California Emergency Management Agency (Cal EMA), to fund grants for services for victims of human trafficking. Seventy percent of the fines collected and deposited shall be granted to public agencies and nonprofit corporations that provide shelter, counseling, or other direct services for trafficked victims. Thirty percent of the fines collected and deposited shall be granted to law enforcement and prosecution agencies in the jurisdiction in which the charges were filed to fund human trafficking prevention, witness protection, and rescue operations.

5.4.1 Recommendation: Establish a statutory protective response framework for victims of domestic minor sex trafficking to ensure victims are identified and directed to specialized services and shelters.

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

Some types of commercial sexual exploitation are expressly identified as a type of abuse and neglect within California’s child protection laws and its laws relating to child abuse and neglect reporting. Cal. Welf. & Inst. Code § 300(d) (Persons subject to jurisdiction of juvenile court) brings “sexually abused” children, “as defined in Section 11165.1 [“Sexual abuse”; “sexual assault”; “sexual exploitation”] of the Penal Code,” within the juvenile court’s jurisdiction as dependent children.

California’s Child Abuse and Neglect Reporting Act<sup>97</sup> expressly states that “child abuse or neglect” includes “sexual abuse as defined in Section 11165.1.” Cal. Penal Code § 11165.6. Cal. Penal Code § 11165.1 states,

“[S]exual abuse” means sexual assault or sexual exploitation as defined by the following:

(a) “Sexual assault” means conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b), or paragraph (1) of subdivision (c) of Section 288 (lewd or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration), or 647.6 (child molestation).

(b) Conduct described as “sexual assault” includes, but is not limited to, all of the following:

(1) Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.

(2) Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

(3) Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose.

(4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

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<sup>97</sup> Cal. Penal Code §§ 11164–11174.31.

- (5) The intentional masturbation of the perpetrator’s genitals in the presence of a child.
- (c) “Sexual exploitation” refers to any of the following:
- (1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (Employment of minor to perform obscene acts).
  - (2) Any person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or any person responsible for a child’s welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct, or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, “person responsible for a child’s welfare” means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home, residential school, or other residential institution.
  - (3) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

5.5.1 Recommendation: Amend Cal. Penal Code § 11165.6 (“Child abuse or neglect”) and § 11165.6 (“Sexual abuse”; “sexual assault”; “sexual exploitation”) to expressly include conduct in violation of Cal. Penal Code § 236.1 (Human trafficking defined; Punishment) and California’s CSEC laws within the definition of “child abuse or neglect” and “sexual exploitation.”

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

The term “caregiver” is used in several provisions under California’s child welfare statutes;<sup>98</sup> however, no definition is provided for that term under Division 2 (Children), Part 1 (Delinquents and wards of the juvenile court) of California’s Welfare and Institutions Code. Although Cal. Welf. & Inst. Code § 727(a)(4)(A) (Order for care and custody of minor adjudged ward of court) refers to the definition of “caregiver” found in “paragraph (1) of subdivision (a) of Section 362.04 [Use of short-term babysitters],”<sup>99</sup> this definition does not appear to be applicable to the term “caregiver” as used in other provisions of California’s Welfare and Institutions Code, Division 2 (Children), Part 1 (Delinquents and wards of the juvenile court). However, Cal Welf. & Inst Code § 362.7 (Evaluation of home for placement with nonrelative extended family member; “nonrelative extended family member”) defines a “nonrelative extended family member” as,

any adult caregiver who has an established familial or mentoring relationship with the child. The county welfare department shall verify the existence of a relationship through interviews with the parent and child or with one or more third parties. The parties may include relatives of the child, teachers, medical professionals, clergy, neighbors, and family friends.

<sup>98</sup> E.g., Cal. Welf. & Inst. Code § 290.1(a)(5) (Duty to file petition and give notice), § 290.2(a)(5) (Issuance and service of notice), § 291(a)(5), (8) (Notice following initial petition hearing; service; waiver), and § 292(a)(5) (Notice of dependency status review hearing when child not removed from parent’s custody).

<sup>99</sup> Cal. Welf. & Inst. Code § 362.04 (Use of short-term babysitters) defines “caregiver” as “any licensed or certified foster parent, approved relative caregiver, or approved nonrelative extended family member.”

5.6.1 Recommendation: Enact a law that defines “caregiver,” as used in Division 2 (Children), Part 1 (Delinquents and wards of the juvenile court) of California’s Welfare and Institutions Code, to include individuals in control of a child, such as a trafficker.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*

To the extent that a commercially sexually exploited child suffers pecuniary loss and physical injury, emotional injury and a threat of physical injury, or only emotional injury from a specified crime, the child may be eligible to receive crime victims’ compensation. Human trafficking victims are expressly exempted from certain, but not all ineligibility factors.

Cal. Gov’t Code § 13953(a) (Time period for filing application) requires an application for victim compensation to be filed with the California Victim Compensation and Government Claims Board (“Board”) within 1 year of the commission of the crime, within 1 year of the victim’s 18th birthday or within 1 year of the time the victim knew or “could have discovered that an injury or death had been sustained as a direct result of crime, whichever is later.” However, “[a]n application based on any crime eligible for prosecution under” Cal. Penal Code § 261, § 286, § 288, § 288.5, § 288a, § 289, or § 289.5 are allowed to be filed any time before the victim’s 28th birthday. Cal. Gov’t Code §§ 13953(a); Cal. Penal Code 801.1(a). If the Board finds good cause, however, it may grant an extension of time. Cal. Gov’t Code § 13953(b) states that, in determining whether there is good cause to grant an extension, the Board will consider, among others, the following factors:

- (1) A recommendation from the prosecuting attorney regarding the victim’s or derivative victim’s cooperation with law enforcement and the prosecuting attorney in the apprehension and prosecution of the person charged with the crime.
- (2) Whether particular events occurring during the prosecution or in the punishment of the person convicted of the crime have resulted in the victim or derivative victim incurring pecuniary loss.
- (3) Whether the nature of the crime is such that a delayed reporting of the crime is reasonably excusable.

Under Cal. Gov’t Code § 13956(a) (Non-eligible persons), a victim who “knowingly and willingly participated in the commission of the crime [other than a crime committed under Cal. Penal Code § 261 (Rape; “duress”; “menace”), § 262, § 273.5, or § 261.5(d) (Unlawful sexual intercourse with a minor; misdemeanor or felony violations; civil penalties)] that resulted in the pecuniary loss for which compensation is being sought” is not eligible to receive a victim compensation award. Cal. Gov’t Code § 13956(b)(1) also requires the Board to deny a victim’s application if it finds that the victim “failed to cooperate reasonably with a law enforcement agency in the apprehension and conviction of a criminal committing the crime;” however, Cal. Gov’t Code § 13956(b)(3) provides,

An application for a claim based on human trafficking as defined in Section 236.1 [Human trafficking defined; punishment] of the Penal Code may not be denied solely because no police report was made by the victim. The board shall adopt guidelines that allow the board to consider and approve applications for assistance based on human trafficking relying upon evidence other than a police report to establish that a human trafficking crime as defined in Section 236.1 has occurred. That evidence may include any reliable corroborating information approved by the board, including, but not limited to, the following:

- (A) A Law Enforcement Agency Endorsement issued pursuant to Section 236.2 [Duty of law enforcement agencies to use due diligence to identify victims of human trafficking; indicators] of the Penal Code.

(B) A human trafficking caseworker as identified in Section 1038.2 [Definitions] of the Evidence Code, has attested by affidavit that the individual was a victim of human trafficking.

For a victim to receive a victim compensation award, Cal. Gov't Code § 13955(g)<sup>100</sup> additionally requires that the "injury or death has resulted or may result in pecuniary loss. . . ."<sup>101</sup> Thus, proving a pecuniary loss may be a barrier to receiving victim compensation.

Under Cal. Gov't Code § 13959(a) (Hearing to contest denial of compensation), if a victim's application for compensation is denied, the victim may request a hearing to contest the denial. Pursuant to Cal. Gov't Code § 13960(a) (Filing petition for judicial review), if the Board again denies the application, the victim may seek judicial review.

5.7.1 Recommendation: Amend Cal. Gov't Code § 13953(a) (Time period for filing application) to eliminate any limitation on when a victim of Cal. Penal Code § 236.1 (Human trafficking defined; punishment) may file an application for compensation, or amend Cal. Gov't Code § 13953(b) to expressly require the Board to consider the special circumstances of a commercially sexually exploited child in determining whether good cause exists for the failure to file within the applicable filing deadlines.

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

Some victim-friendly protections are provided to victims of Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Evid. Code § 1038(a) (Right to prevent disclosure of confidential communication between victim and caseworker; who may claim privilege; notice to victim) provides that "[a] trafficking victim,<sup>102</sup> whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a human trafficking caseworker." Under Cal. Evid. Code § 1038.1(a) (When court may compel disclosure; ruling on claim of privilege), however, the court may compel disclosure of a trafficking victim's confidential communications. Additionally, Cal. Penal Code § 293(a) (Publication of information regarding victim of sex offense or human trafficking) states,

An employee of a law enforcement agency who personally receives a report from a person, alleging that the person making the report . . . was forced to commit an act of prostitution because he or she is the victim of human trafficking, as defined in Section 236.1, shall inform that person that his or her name will become a matter of public record unless he or she requests that it not become a matter of public record . . . .

Cal. Penal Code § 273.7(a) (Disclosure of trafficking or domestic violence shelter) helps ensure that the location of trafficking shelters is not disclosed, by providing that "[a]ny person who maliciously publishes, disseminates, or otherwise discloses the location of any trafficking shelter or domestic violence shelter or any place designated as a trafficking shelter or domestic violence shelter, without the authorization of that trafficking shelter or domestic violence shelter, is guilty of a misdemeanor."

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<sup>100</sup> Here and elsewhere in this report that Cal. Gov't Code § 13955 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 60, 2013 (effective January 1, 2014).

<sup>101</sup> Cal. Gov't Code § 13951(e) (Definitions) defines "pecuniary loss" as "an economic loss or expense resulting from an injury or death to a victim of crime that has not been and will not be reimbursed from any other source."

<sup>102</sup> Cal. Evid. Code § 1038.2(a) (Definitions) states that "[a]s used in this article, "victim" means any person who is a "trafficking victim" as defined in Section 236.1 [Human trafficking defined; Punishment]."



Cal. Evidence Code Section 1161<sup>103</sup> protects victims of human trafficking while testifying and establishes that

- (a) Evidence that a victim of human trafficking, as defined in Section 236.1 of the Penal Code, has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim's criminal liability for the commercial sexual act.
- (b) Evidence of sexual history or history of any commercial sexual act of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, is inadmissible to attack the credibility or impeach the character of the victim in any civil or criminal proceeding.

Additionally, minors under the age of 13 who are victims of sexual offenses, but not those who are victims of Cal. Penal Code § 236.1 (Human trafficking defined; Punishment) or California's CSEC laws, may provide testimony via closed circuit television pursuant to Cal. Penal Code § 1347(b)(1)<sup>104</sup> (Testimony of minor witness by closed circuit television). Where "a prosecuting witness in a case involving a violation or attempted violation of . . . subdivision (b) of Section 209 [Kidnapping for gain or to commit robbery or rape; punishment], Section . . . 236.1 [Human trafficking], 266 [Procurement], 266a [Procurement by force or fraud], . . . 266c [Inducing consent to sexual act by fraud or fear], . . . 266e [Acquiring prostitute], 266f [Selling prostitute], . . . 266h [Pimping], 266i [Pandering], 266j [Procurement of child], . . . 267 [Abduction of minor for prostitution], . . . 288.7 [Sexual acts with child 10 years old or younger; punishment as felony], . . . 311.3 [Sexual exploitation of a child], § 422 [Punishment for threats], § 646.9 [Stalking]" may bring up to two people for support while giving testimony for a preliminary hearing, trial, or juvenile court proceeding. Cal. Penal Code § 868.5(a).

Furthermore, in order to protect minors from "coercion, intimidation, or undue influence as a witness," California allows the court in criminal proceedings to take special precautions to provide for their comfort and support when

the defendant is charged with a violation or attempted violation of subdivision (b) of Section 209 [Kidnapping for gain or to commit robbery or rape; punishment], Section 220 [Assault with intent to commit mayhem or specified sex offenses; assault of person under 18 years of age with intent to commit specified sex offenses; such assault in commission of first degree burglary], 236.1 [Admissibility of evidence relating to victim of human trafficking], 243.4 [Sexual battery; seriously disabled or medically incapacitated victims], 261 [Rape; "duress"; "menace"], 269 [Aggravated sexual assault of child], 273a [Endangering child or causing or permitting child to suffer physical pain, mental suffering, or injury; conditions of probation], 273d [Infliction of corporal punishment or injury on child resulting in traumatic condition; enhancement; conditions of probation], 285 [Incest], 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.5 [Continuous sexual abuse of child], 288.7 [Sexual acts with child 10 years old or younger; punishment as felony], or 289 [Penetration by foreign object], subdivision (1) of Section 314 [Indecent exposure], Section 422 [Punishment for threats], 646.9 [Stalking], 647.6 [Annoying or molesting children; punishment; probation], or former Section 647a [Transportation of person to shelter], or any crime that constitutes domestic violence defined in Section 13700, committed with or upon a person with a disability or a minor under 11 years of age.

Cal. Penal Code § 868.8 (Special precautions to provide for comfort and support of person with disability or minor). The special precautions pursuant to Cal Penal Code § 868.8 are as follows:

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<sup>103</sup> Here and elsewhere in this report that Cal. Evidence Code § 1161 is quoted or cited, it has been updated to reflect the amendments added by the passage of Assembly Bill 694, 2013 (effective January 1, 2014).

<sup>104</sup> Here and elsewhere in this report that Cal. Penal Code § 1347 is quoted or cited, it has been updated to reflect the amendments added by the passage of Assembly Bill 1900, 2013 (effective January 1, 2014).

- (a) In the court's discretion, the witness may be allowed reasonable periods of relief from examination and cross-examination during which he or she may retire from the courtroom. The judge may also allow other witnesses in the proceeding to be examined when the person with a disability or child witness retires from the courtroom.
- (b) Notwithstanding Section 68110 of the Government Code, in his or her discretion, the judge may remove his or her robe if the judge believes that this formal attire intimidates the person with a disability or the minor.
- (c) In the court's discretion the judge, parties, witnesses, support persons, and court personnel may be relocated within the courtroom to facilitate a more comfortable and personal environment for the person with a disability or the child witness.
- (d) In the court's discretion, the taking of the testimony of the person with a disability or the minor may be limited to normal school hours if there is no good cause to take the testimony of the person with a disability or the minor during other hours.

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.*

A child who is adjudged a ward of the court<sup>105</sup> for violating Cal. Penal Code § 647(b)<sup>106</sup> (Disorderly conduct; restrictions on probation) or § 653.22(a) (Loitering with intent to commit prostitution; determination of intent), or for being beyond the control of the child's parents, guardians, or custodians, or for being habitually truant may be able to have records related to their adjudication sealed pursuant to Cal. Welf. & Inst. Code § 781 (Sealing of records; admission of records in defamation actions; exception for DMV records; destruction of records; use of records to prove alleged enhancements).

Cal. Welf. & Inst. Code § 781(a) states,

In any case in which a petition has been filed with a juvenile court to commence proceedings to adjudge a person a ward of the court, in any case in which a person is cited to appear before a probation officer or is taken before a probation officer pursuant to Section 626 [Alternative procedures as to disposition of minor; Governing consideration in selecting alternative], or in any case in which a minor is taken before any officer of a law enforcement agency, the person or the county probation officer may, five years or more after the jurisdiction of the juvenile court has terminated as to the person, or, in a case in which no petition is filed, five years or more after the person was cited to appear before a probation officer or was taken before a probation officer pursuant to Section 626 or was taken before any officer of a law enforcement agency, or, in any case, at any time after the person has reached the age of 18 years, petition the court for sealing of the records, including records of arrest, relating to the person's case, in the custody of the juvenile court and probation officer and any other agencies, including law enforcement agencies, and public officials as the petitioner alleges, in his or her petition,

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<sup>105</sup> Cal. Welf. & Inst. Code § 601(a), (b) (Persons subject to jurisdiction of court as ward for refusal to obey orders of parents, violation of curfew, or truancy) states that a child under the age of 18 who "persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian," violates local or state curfews, or has "four or more truanancies within one school year" may be adjudicated by the juvenile court to be "a ward of the court." Additionally, Cal. Welf. & Inst. Code § 602(a) (Persons subject to jurisdiction of juvenile court and to adjudication as ward for violation of law or ordinance defining crime; persons subject to prosecution in criminal court) states that a child who "violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age" may be adjudicated by the juvenile court to be "a ward of the court."

<sup>106</sup> See *supra* note 20.

to have custody of the records. . . . If, after hearing, the court finds that since the termination of jurisdiction or action pursuant to Section 626, as the case may be, he or she has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, it shall order all records, papers, and exhibits in the person's case in the custody of the juvenile court sealed, including the juvenile court record, minute book entries, and entries on dockets, and any other records relating to the case in the custody of the other agencies and officials as are named in the order. . . . Once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed. . . .

Cal. Welf. & Inst. Code § 781(d) further provides that 5 years after a ward's records are sealed, "[u]nless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person's juvenile court records that are sealed." However, Cal. Welf. & Inst. Code § 781(f) states that "[t]his section shall not permit the sealing of a person's juvenile court records for an offense where the person is convicted of that offense in a criminal court pursuant to the provisions of Section 707.1 [Minor not dealt with under juvenile law; filing of accusatory pleading; detention; right to release on bail]."

Furthermore, Cal. Welf. & Inst. Code § 826(a) (Destruction of records) provides,

After five years from the date on which the jurisdiction of the juvenile court over a minor is terminated, the probation officer may destroy all records and papers in the proceedings concerning the minor.

The juvenile court record, which includes all records and papers, any minute book entries, dockets and judgment dockets, shall be destroyed by order of the court as follows: when the person who is the subject of the record reaches the age of 28 years, if the person was alleged or adjudged to be a person described by Section 300 [Persons subject to jurisdiction of juvenile court], when the person who is the subject of the record reaches the age of 21 years, if the person was alleged or adjudged to be a person described by Section 601 [Persons subject to jurisdiction of court as ward for refusal to obey orders of parents, violation of curfew, or truancy], or when the person reaches the age of 38 years if the person was alleged or adjudged to be a person described by Section 602 [Persons subject to jurisdiction of juvenile court and to adjudication as ward for violation of law or ordinance defining crime; persons subject to prosecution in criminal court], unless for good cause the court determines that the juvenile record shall be retained, or unless the juvenile court record is released to the person who is the subject of the record pursuant to this section. . . .

#### *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.*

Cal. Civ. Code § 52.5(a), (f)<sup>107</sup> (Action by victim of human trafficking) expressly states that victims of Cal. Penal Code § 236.1 (Human trafficking defined; punishment) "may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney's fees and costs," as well as "litigation costs including, but not limited to, expert witness fees and expenses. . . ." Additionally, "the plaintiff may be awarded up to three times his or her actual damages or ten thousand dollars (\$10,000),

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<sup>107</sup> Here and elsewhere in this report that Cal. Civ. Code § 52.5 is quoted or cited, it has been updated to reflect the amendments added by the passage of Assembly Bill 1847, 2014 (effective January 1, 2015).

whichever is greater,” as well as “punitive damages . . . upon proof of the defendant’s malice, oppression, fraud, or duress in committing the act of human trafficking.” Cal. Civ. Code § 52.5(b).

Cal. Penal Code § 1202.4(q) (Restitution; amount; hearing and court order; financial disclosure)<sup>108</sup> expressly mandates payment of restitution directly<sup>109</sup> to a victim of Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 1202.4(q) provides,

(q) Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, order the defendant to pay restitution to the victim in any case in which a victim has suffered economic loss as a result of the defendant's conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services or any other appropriate means to provide reparations to the victim.

Restitution is available directly to domestic minor sex trafficking victims whose offenders are guilty of other crimes under Cal. Penal Code § 1202.4(f).<sup>110</sup> Specifically, Cal. Penal Code § 1202.4(f)(3) provides a non-exhaustive list stating that a victim may receive restitution for any of the following:

- (A) Full or partial payment for the value of stolen or damaged property. . . .
- (B) Medical expenses.
- (C) Mental health counseling expenses.
- (D) Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor’s parent, parents, guardian, or guardians, while caring for the injured minor. Lost wages shall include any commission income as well as any base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.
- (E) Wages or profits lost by the victim, and if the victim is a minor, wages or profits lost by the minor’s parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution. Lost wages shall include any commission income as well as any base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.
- (F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288 [Lewd or lascivious acts involving children].
- (G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court.
- (H) Actual and reasonable attorney’s fees and other costs of collection accrued by a private entity on behalf of the victim.
- (I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items.

<sup>108</sup> See *supra* Section 3.4 for the provisions of Cal. Penal Code § 1202.4(q).

<sup>109</sup> Cal. Penal Code § 1202.4(a)(3)(B) states, “(3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . [r]estitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment.”

<sup>110</sup> See *supra* Section 2.8 for the provisions of Cal. Penal Code § 1202.4(f).

Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.

(J) Expenses to install or increase residential security incurred related to a crime, as defined in subdivision (c) of Section 667.5 [Enhancement of prison terms for new offenses], including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

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

A civil action pursuant to Cal. Civ. Code § 52.5(c)<sup>111</sup> (Action by victim of human trafficking) generally must commence “within five years of the date on which the trafficking victim was freed from the trafficking situation, or if the victim was a minor when the act of human trafficking against the victim occurred, within eight years after the date the plaintiff attains the age of majority.” Pursuant to Cal. Civ. Code § 52.5(d), (e), however,

(d) If a person entitled to sue is under a disability at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the disability is not part of the time limited for the commencement of the action.

Disability will toll the running of the statute of limitation for this action.

(1) Disability includes being a minor, lacking legal capacity to make decisions, imprisonment, or other incapacity or incompetence.

.....

(3) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action, or due to threats made by the defendant causing duress upon the plaintiff.

(4) The suspension of the statute of limitations due to disability, lack of knowledge, or estoppel applies to all other related claims arising out of the trafficking situation.

(5) The running of the statute of limitations is postponed during the pendency of any criminal proceedings against the victim.

(e) The running of the statute of limitations may be suspended where a person entitled to sue could not have reasonably discovered the cause of action due to circumstances resulting from the trafficking situation, such as psychological trauma, cultural and linguistic isolation, and the inability to access services.

Cal. Penal Code § 801 (Offense punishable by imprisonment in state prison) establishes a 3-year statute of limitations “for an offense punishable by imprisonment in the state prison or pursuant to subdivision (h) of Section 1170,” which includes Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 236.1(c). Cal. Penal Code § 800 (Offenses punishable by imprisonment for eight years or more) establishes a 6-year statute of limitations for offenses “punishable by imprisonment in the state prison for eight years or more or by imprisonment pursuant to subdivision (h) of Section 1170 for eight years or more,” while Cal. Penal Code § 799 (Offenses punishable by death or life imprisonment without parole; embezzlement of public money) allows prosecution for an offense punishable by “death or by imprisonment in the state prison for life or for life without the possibility of parole,” to be “commenced at any time.” Additionally, Cal. Penal Code § 801.2 (Time limitation for prosecution of use of minor in production of pornography) establishes a 10-year statute of limitations for a “prosecution for a violation

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<sup>111</sup> See *supra* note 107.

of subdivision (b) of Section 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography].”

However, under Cal. Penal Code § 803(f) (Tolling or extension of time period generally; tolling until discovery of certain offenses; tolling where defendant is out of state; time limits for certain crimes against children and certain other crimes) and § 801.1(a) (Ten-year limitation for specified sex offenses; exception for minor victims), statutes of limitations related to specified sex offenses may be tolled where the victim was a minor at the time of the crime’s commission. Specifically, although a 10-year statute of limitation generally applies to prosecutions for violations of Cal. Penal Code § 261 (Rape; “duress”; “menace”), § 286 (Sodomy), § 288 (Lewd or lascivious acts involving children), § 288a (Oral copulation), § 288.5 (Continuous sexual abuse of child), § 289 (Penetration by foreign object), and § 289.5 (Sex offender fleeing state), Cal. Penal Code § 801.1(b) allows a prosecution to commence “any time prior to the victim’s 28th birthday” in instances where the victim was under 18 at the time of the offense. Cal. Penal Code § 801.1(a). Cal. Penal Code § 803(f)(1), (2) further provides,

(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261 [Rape; “duress”; “menace”], 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.5 [Continuous sexual abuse of child], or 289 [Penetration by foreign object], or Section 289.5 [Sex offender fleeing state], as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object.

(2) This subdivision applies only if all of the following occur:

(A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.

(C) There is independent evidence that corroborate the victim’s allegation. . . .

5.11.1 Recommendation: Eliminate or lengthen the statute of limitation applicable to a civil cause of action provided under Cal. Civ. Code § 52.5(c) (Action by victim of human trafficking).

***Legal Components:***

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
- 6.2 *Single party consent to audio-taping is permitted in law enforcement investigations.*
- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
- 6.4 *Using a law enforcement posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
- 6.5 *Using the Internet to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

***Legal Analysis:***

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

Cal. Penal Code § 13519.14 (Training and guidelines for handling human trafficking complaints) provides,

(a) The [Commission on Peace Officer Standards and Training (“commission”)] shall implement by January 1, 2007, a course or courses of instruction for the training of law enforcement officers in California in the handling of human trafficking complaints and also shall develop guidelines for law enforcement response to human trafficking. The course or courses of instruction and the guidelines shall stress the dynamics and manifestations of human trafficking, identifying and communicating with victims, providing documentation that satisfy the Law Enforcement Agency (LEA) endorsement required by federal law, collaboration with federal law enforcement officials, therapeutically appropriate investigative techniques, the availability of civil and immigration remedies and community resources, and protection of the victim. Where appropriate, the training presenters shall include human trafficking experts with experience in the delivery of direct services to victims of human trafficking. Completion of the course may be satisfied by telecommunication, video training tape, or other instruction.

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(d) The commission, in consultation with these groups and individuals, shall review existing training programs to determine in what ways human trafficking training may be included as a part of ongoing programs.

(e) Every law enforcement officer who is assigned field or investigative duties shall complete a minimum of two hours of training in a course or courses of instruction pertaining to the handling of human trafficking complaints as described in subdivision (a) by July 1, 2014, or within six months of being assigned to that position, whichever is later.

Under Cal. Penal Code § 13516(a) (Procedures to be followed in sexual assault, exploitation, and abuse cases), however, the commission shall provide police agencies “guidelines establishing standard procedures” to be followed in investigating “sexual assault cases, and cases involving the sexual exploitation<sup>112</sup> or sexual abuse<sup>113</sup> of children, including, police response to, and treatment of, victims of

<sup>112</sup> See *supra* Section 5.5 for the definition of “sexual exploitation.”

these crimes.” Cal. Penal Code § 13510.5 (Minimum standards for training) further mandates that the commission establish minimum training standards for law enforcement officers.

Cal. Penal Code § 13516(b) states that “[t]he course of training leading to the basic certificate issued by the commission shall, on and after July 1, 1977, include adequate instruction in the procedures” regarding cases involving the sexual exploitation or sexual abuse of children. Law enforcement officers’ basic training courses<sup>114</sup> must also “include adequate instruction in the handling of missing person and runaway cases.” Cal. Penal Code § 13519.1(b), (c).

In addition, Cal. Penal Code § 236.2 requires a peace officer who comes into contact with a minor who has engaged in a commercial sex act to consider whether the following indicators of human trafficking are present:

- (a) Signs of trauma, fatigue, injury, or other evidence of poor care.
- (b) The person is withdrawn, afraid to talk, or his or her communication is censored by another person.
- (c) The person does not have freedom of movement.
- (d) The person lives and works in one place.
- (e) The person owes a debt to his or her employer.
- (f) Security measures are used to control who has contact with the person.
- (g) The person does not have control over his or her own government-issued identification or over his or her worker immigration documents. Cal. Penal Code § 236.2.

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

California allows single party consent for audiotaping under limited circumstances, none of which apply to the investigations of human trafficking or CSEC laws. Cal. Penal Code § 632(a) (Eavesdropping on confidential communication; punishment) makes it a crime if a person

intentionally and without the consent of all parties to a confidential communication,<sup>115</sup> by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio . . . .

Cal. Penal Code § 632(d) further provides that “[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.”

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<sup>113</sup> See *supra* Section 5.5 for the definition of “sexual abuse.”

<sup>114</sup> Pursuant to Cal. Code Regs. tit. 11, § 9070(f) (Professional certificates—peace officers), to receive the basic certificate award, law enforcement officers must satisfy basic training requirements and complete a probationary period of employment.

<sup>115</sup> As used in Cal. Penal Code § 632(a), Cal. Penal Code § 632(c) defines a “confidential communication” as

any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.



Although Cal. Penal Code § 633.5 (Recording by party to communication) authorizes single-party consent under limited circumstances, none of the situations in which a recording is authorized under Cal. Penal Code § 633.5 are directly related to human trafficking or CSEC offenses. Specifically, Cal. Penal Code § 633.5 states,

Nothing in Section 631 [Unauthorized wiretaps; punishment], 632 [Eavesdropping on confidential communication; punishment], 632.5 [Interception of cellular radio telephone communications; punishment], 632.6 [Eavesdropping on confidential communication transmitted between cordless telephones; punishment], or 632.7 [Eavesdropping on and recording of communications transmitted between cellular or cordless telephones; punishment] prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m. Nothing in Section 631 [Unauthorized wiretaps; Punishment], 632 [Eavesdropping on confidential communication], 632.5 [Interception of cellular radio telephone communications; Punishment], 632.6 [Eavesdropping on confidential communication transmitted between cordless telephones; Punishment], or 632.7 [Eavesdropping on and recording of communications transmitted between cellular or cordless telephones; Punishment] renders any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, a violation of Section 653m, or any crime in connection therewith.

Cal. Penal Code § 632.7 (Eavesdropping on and recording of communications transmitted between cellular or cordless telephones; punishment), § 632.6 (Eavesdropping on confidential communication transmitted between cordless telephones; punishment), and § 632.5 (Interception of cellular radio telephone communications; punishment) apply to specified forms of communication, including communications transmitted via cellular or cordless telephones, but each requires the consent of all parties to the communication.

- 6.2.1 Recommendation: Amend Cal. Penal Code § 633.5 (Recording by party to communication) to expressly enumerate Cal. Penal Code § 236.1 (Human trafficking defined; punishment) and California's CSEC laws as offenses for which an exception exists to the two-party consent requirement for recording communications.

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

Cal. Penal Code § 629.52 (Ex parte order for interception) allows, until January 1, 2015, a judge to enter an ex parte order authorizing the interception of electronic communications in certain situations, none of which include offenses related to CSEC or human trafficking.

- 6.3.1 Recommendation: Amend Cal. Penal Code § 629.52(a) (Ex part order for interception) to include Cal. Penal Code § 236.1 (Human trafficking defined; punishment) and California's CSEC laws.

### 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.*

California’s laws do not expressly authorize the use of a decoy by law enforcement in investigating prostitution, CSEC, or sex trafficking. Case law does indicate, however, that the use of police decoys in the investigation of prostitution is permissible and does not amount to entrapment.<sup>116</sup>

- 6.4.1 Recommendation: Enact a law specifically authorizing the use of a decoy by law enforcement in investigating prostitution-related offenses involving minors under the age of 18, Cal. Penal Code § 236.1 (Human trafficking defined; punishment), and any California CSEC law.

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

California law does not expressly authorize the use of the Internet to investigate buyers and traffickers. Case law does suggest, however, that Cal. Penal Code § 288.2<sup>117</sup> (Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; defenses; exemption of carrier, broadcaster, or transmitter) has been used, along with an attempted violation of Cal. Penal Code § 288 (Lewd or lascivious acts involving children), to prosecute offenders who use the Internet to communicate with people they believed to be minors with the intent to commit a lewd or lascivious act, where the person was actually an adult.<sup>118</sup>

- 6.5.1 Recommendation: Enact a law specifically authorizing the use of the Internet to investigate human trafficking and CSEC offenses.

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

Pursuant to Cal. Penal Code § 14205 (Missing person reports; persons under 21 or persons at risk),

(a) All local police and sheriffs’ departments shall accept any report, including any telephonic report, of a missing person, including runaways, without delay and shall give priority to the handling of these reports over the handling of reports relating to crimes involving property. . . . In cases of reports involving missing persons, including, but not limited to, runaways, the local police or sheriff’s department shall immediately take the report and make an assessment of reasonable steps to be taken to locate the person. If the missing person is under 16 years of age, or there is evidence that the person is at risk, the department shall broadcast a “Be On the Look-Out” bulletin, without delay, within its jurisdiction.

(b) If the person reported missing is under 16 years of age, or if there is evidence that the person is at risk, the local police, sheriff’s department, or the California Highway Patrol shall submit the report to the Attorney General’s office within four hours after accepting

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<sup>116</sup> See *People v. Barraza*, 591 P.2d 947, 955 (Cal. 1979) (“Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.”). See also *Reyes v. Municipal Court*, 173 Cal. Rptr. 48, 51 (Cal. Ct. App. 1981) (holding a defendant’s conviction under Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) when the defendant solicited an undercover police officer).

<sup>117</sup> Here and elsewhere in this report that Cal. Penal Code § 288.2 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 145, 2013 (effective January 1, 2014).

<sup>118</sup> *People v. Hsu*, 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000) (affirming a defendant’s conviction for an attempted violation of Cal. Penal Code § 288.2 where a defendant communicated on the Internet with a law enforcement officer, whom the defendant believed to be a 14 year-old child, and offered to meet to engage in sexual acts); *People v. Federico*, 120 Cal. Rptr. 3d 349 (Cal. Ct. App. 2011) (affirming a defendant’s conviction for attempting to commit a lewd act with a child under the age of 14 and attempting to send harmful matter to a minor with the intent of seducing the minor for the defendant’s Internet interactions with a non-law enforcement individual posing as a 12-year-old girl).

the report. After the California Law Enforcement Telecommunications System online missing person registry becomes operational, the reports shall be submitted, within four hours after accepting the report, to the Attorney General's office through the use of the California Telecommunications System.

(c) In cases where the report is taken by a department, other than that of the city or county of residence of the missing person or runaway, the department, or division of the California Highway Patrol taking the report shall, without delay, and, in the case of children under 16 years of age or where there was evidence that the missing person was at risk, within no more than 24 hours, notify, and forward a copy of the report to the police or sheriff's department or departments having jurisdiction of the residence address of the missing person or runaway and of the place where the person was last seen. The report shall also be submitted by the department or division of the California Highway Patrol which took the report to the center.

Cal. Penal Code § 14201.5(b) (Missing and exploited children's recovery network) provides for the creation of the Missing and Exploited Children's Recovery Network, which consists of

an automated computerized system that shall have the capability to electronically transmit to all state and local law enforcement agencies, and all cooperating news media services, either by facsimile or computer modem, a missing child poster that includes the name, personal description data, and picture of the missing child. The information contained in this poster shall include, but not be limited to, the child's date of birth, color of eyes and hair, sex, height, weight, race, the time and date he or she was reported missing, the reporting agency, including contact person at reporting agency if known, and any other data pertinent to the purpose of locating missing persons.

Additionally, pursuant to Cal. Penal Code § 14201.6(a)(2) (Internet information), the California Department of Justice must "maintain a publicly accessible computer internet directory of information relating to . . . [c]ritical missing children." Cal. Penal Code § 14201.6(d) defines a "critical missing child" to include "any case of a missing child for which there is evidence or indications that the child is at risk, as specified in subdivision (b) of Section 14213 [Definitions]<sup>119</sup>." A director within the Department of Justice will "coordinat[e] California's response to missing persons," to "assist law enforcement agencies, at their request, with the timely search and recovery of at-risk abducted children . . . [and] maintain up-to-date knowledge and expertise of those protocols, best practices, and technologies that are most effective for recovering missing children in a timely manner." Cal. Penal Code § 14201.8(a)(1), (2). Additionally, Cal. Penal Code § 14202(a) (Investigative support unit and automated violent crime method of operation system; files; contents; duties) requires the Attorney General to establish an "investigative support unit and an automated violent crime method of operation system . . . responsible for identifying perpetrators of violent felonies collected from the center and analyzing and comparing data on missing persons in order to determine possible leads which could assist local law enforcement agencies."

Pursuant to Cal. Penal Code § 14201.3 (Accessibility of information regarding missing or unidentified persons),

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<sup>119</sup> Cal. Penal Code § 14213(b) provides,

As used in this title, "evidence that the person is at risk" includes, but is not limited to, evidence or indications of any of the following:

- (1) The person missing is the victim of a crime or foul play.
- (2) The person missing is in need of medical attention.
- (3) The person missing has no pattern of running away or disappearing.
- (4) The person missing may be the victim of parental abduction.
- (5) The person missing is mentally impaired.

The [California Violent Crime Information Center (“center”)] shall make accessible to the National Missing and Unidentified Persons System specific information authorized for dissemination and as determined appropriate by the center that is contained in law enforcement reports regarding missing or unidentified persons. The information shall be accessible in a manner and format approved by the center and shall be used to assist in the search for the missing person or persons. The center shall not permit the transmission or sharing of information, or portions of information, to the National Missing and Unidentified Persons System unless the reporting agency, as specified in Section 14205 , or the reporting party, with respect to the information submitted to the center, submits authorization to the center to transmit or share that information.

Cal. Penal Code § 14207(a) (Report of finding missing person) requires the law enforcement agency that locates the missing person to “immediately report that information to the Attorney General’s office.” Cal. Penal Code § 14207(b), (c) further provides,

(b) When a child under 12 years of age or a missing person where there was evidence that the person was at risk, is found, the report indicating that the person is found shall be made not later than 24 hours after the person is found. A report shall also be made to the law enforcement agency that made the initial missing person report. The Attorney General’s office shall then notify the National Crime Information Center that the missing person has been found.

(c) In the event that a missing person is found alive or dead in less than 24 hours and the local police or sheriff’s department has reason to believe that the person had been abducted, the department shall submit a report to the center in a format established by the Attorney General. In the event that a missing person has been found before he or she has been reported missing to the center, the information related to the incident shall be submitted to the center.

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