

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2014 ANALYSIS AND RECOMMENDATIONS DELAWARE

### 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.*

The Delaware human trafficking law, codified at Del. Code Ann. tit. 11, § 787<sup>2</sup> (Trafficking an individual, forced labor and sexual servitude) makes sex trafficking of a minor a crime. Del. Code Ann. tit. 11, § 787(b)(1) states,

A person is guilty of trafficking an individual if the person knowingly recruits, transports, harbors, receives, provides, obtains, isolates, maintains, or entices an individual in furtherance of

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<sup>1</sup> Unless otherwise specified, all references to Delaware statutes were taken from Delaware Code Annotated (LEXIS through 79 Del. Laws, Ch. 437), 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> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 787 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

forced labor in violation of paragraph (b)(2) of this section or sexual servitude in violation of paragraph (b)(3) of this section.

Del. Code Ann. tit. 11, § 787(b)(3) (Trafficking an individual, forced labor and sexual servitude) specifies that force, fraud or coercion is not required to commit sexual servitude of a child, stating that

- (a) A person commits the offense of sexual servitude if the person knowingly:
  - 1. maintains or makes available a minor for the purpose of engaging in commercial sexual activity<sup>3</sup>; or
  - 2. uses coercion or deception to compel an adult to engage in commercial sexual activity.

Sexual servitude of a minor is a Class B felony and is punishable by imprisonment<sup>4</sup> for 2–25 years<sup>5</sup>. Del. Code Ann. tit. 11, §§ 787(b)(3)(b), 4205(b)(2). If aggravating circumstances were used in the commission

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<sup>3</sup> “Commercial sexual activity” is defined as “any sexual activity for which on account of which anything of value is given, promised to, or received by any person.” Del. Code Ann. tit. 11, § 787(a)(2). *See supra* note 2.

<sup>4</sup> Pursuant to Del. Code Ann. tit. 11, § 4204(c)(1)–(5),

- (c) When a person is convicted of any offense other than a class A felony the court may take the following action:
  - (1) Impose a sentence involving an Accountability Level I sanction.—Such sanctions include imposition of a fine as provided by law for the offense or placement of the offender upon unsupervised probation with or without special conditions, or with or without the imposition of a fine as provided by law for the offense;
  - (2) Impose a sentence involving an Accountability Level II sanction.—Such a sanction includes a placement of the offender upon supervised probation amounting to field supervision rather than intensive supervision, with or without special conditions, or with or without the imposition of a fine as provided by law for the offense;
  - (3) Impose a sentence involving an Accountability Level III sanction.— Such sanctions include placement of the offender upon intensive supervision or placement of the offender upon community service, with or without special conditions, or with or without the imposition of a fine as provided by law for the offense. Such intensive supervision shall entail at least the equivalent of 1 hour of supervision per day and no more than 56 hours of supervision per week;
  - (4) Impose a sentence involving an Accountability Level IV sanction.—Such sanctions include placement of the offender upon partial confinement under house arrest under the supervision of the Department of Correction or commitment of the offender to the Department of Correction under partial confinement to a half-way house or restitution center or placement of the offender in a residential treatment facility, all with or without special conditions, and all with or without the imposition of a fine as provided by law for the offense;
  - (5) Impose a sentence involving an Accountability Level V sanction.—Such a sentence consists of the commitment of the offender to the Department of Correction for a period of incarceration, with or without the imposition of a fine provided by law for the offense.

Most of the felonies reviewed in this document are expressly restricted to a Level V sanction, therefore, all imprisonment penalties should be interpreted to be subject to Level V, unless it is designated a Class A felony or specifically stated otherwise. Additionally, Del. Code Ann. tit. 11, § 787 (Trafficking of an individual, forced labor and sexual servitude) is designated as a violent felony under Del. Code Ann. 11, § 4201(c).

<sup>5</sup> Del. Code Ann. tit. 11, § 4205(k) provides, “In addition to the penalties set forth above, the court may impose such fines and penalties as it deems appropriate.” Therefore, in all instances where penalties for a felony conviction are mentioned throughout this document, it should be inferred that an additional indeterminate fine may be imposed at the judge’s discretion.

of the crime, including force and recruitment of the victim from a shelter, a conviction is punishable as a Class A felony by imprisonment for 15 years to life.<sup>6</sup>

Since the definition of “labor or services” includes “commercial sexual activity,” a sex trafficker could also be convicted under Del. Code Ann. tit. 11, § 787(b)(3) (Trafficking an individual, forced labor and sexual servitude) for forced labor, but the offense must involve coerced commercial sexual activity<sup>7</sup> even when the victim is a minor. Del. Code Ann. tit. 11, § 787(b)(3) (Trafficking an individual, forced labor and sexual servitude) states that

(2) A person is guilty of forced labor if the person knowingly uses coercion<sup>8</sup> to compel an individual to perform labor or services<sup>9</sup>, except where such conduct is permissible under federal law or law of this state other than this act.

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<sup>6</sup> Convictions under Del. Code Ann. tit. 11, § 787(b)(1)-(3) (Trafficking an individual, forced labor and sexual servitude) may result in an enhanced penalty if aggravating circumstances are present. Aggravating circumstances occur when:

- a. The person recruited, enticed, or obtained the victim from a shelter designed to serve victims of human trafficking, victims of domestic violence, victims of sexual assault, runaway youth, foster children, or the homeless; or
- b. The person used or threatened use of force against, abduction of, serious harm to, or physical restraint of the victim.

If aggravated circumstances are found, the offense under Del. Code Ann. tit. 11, § 787(b)(3) (Trafficking an individual, forced labor and sexual servitude) is elevated by one felony grade higher than the underlying offense. *See supra* note 2.

<sup>7</sup> Pursuant to Del. Code Ann. tit. 11, § 787(a)(4) (Trafficking an individual, forced labor and sexual servitude) “[d]ebt bondage” is defined to include “commercial sexual activity in payment toward or satisfaction of a real or purported debt.” *See supra* note 2.

<sup>8</sup> Pursuant to Del. Code Ann. tit. 11, § 787(a)(2) (Trafficking an individual, forced labor and sexual servitude) “[c]oercion” is defined to include

- a. the use or threat of force against abduction of, serious harm to, or physical restraint of an individual;
- b. the use of a plan, pattern, or statement with intent to cause an individual to believe that failure to perform an act will result in the use of force against, abduction of, serious harm to, or physical restraint of an individual;
- c. the abuse or threatened abuse of law or legal process;
- d. controlling or threatening to control an individual’s access to a controlled substance enumerated in Sections 4714, 4716, 4718, 4720, 4722 of Title 16 of the Delaware Code;
- e. the destruction of, taking of, or the threat to destroy or take an individual’s identification document or other property;
- f. use of debt bondage;
- g. the use of an individual’s physical, cognitive disability, or mental impairment, where such impairment has substantial adverse effects on the individual’s cognitive or volitional functions; or
- h. the commission of civil or criminal fraud.

<sup>9</sup> Pursuant to Del. Code Ann. tit. 11, § 787 (a)(3), “forced labor or services” is defined as “labor, as defined in this section, or services, as defined in this section, that are performed or provided by another person and are obtained or maintained through coercion as enumerated in paragraph (b)(1) of this section.” “Labor or services” is defined as “activity having economic or financial value, including commercial sexual activity. Nothing in this definition should be construed to legitimize or legalize prostitution.” “Sexual activity” is defined as “any of the sex-related acts enumerated in Section 761 if this Title, or in Sections 1342, 1351, 1352(1), 1353(1), 1354 or 1355 of this Title or sexually-explicit performances.” Del. Code Ann. tit. 11, § 787(a) (a)(4), (7). *See supra* note **Error! Bookmark not defined.** for the definition of “sexually-explicit performance. *See also supra* note 2.

A conviction for forced labor under Del. Code Ann. tit. 11, § 787(b)(3)(b) is punishable as a Class B felony by imprisonment for 2–25 years when the offense involves a minor. Del. Code Ann. tit. 11, §§ 787(b)(3), 4205(b)(2).

Lastly, organizations that commit a human trafficking offense may be prosecuted under Del. Code Ann. tit. 11, § 787(c)<sup>10</sup> (Organizational liability) states,

- (1) An organization may be prosecuted for an offense under this section pursuant to § 281 of this title (Criminal liability of organizations).
- (2) The court may consider the severity of an organization's offense under this section and order penalties in addition to those otherwise provided for the offense, including:
  - a. A fine of not more than \$ 25,000.00 per offense;
  - b. Disgorgement of profit from illegal activity in violation of this section; and
  - c. Debarment from state and local government contracts.

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.*

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

1. Del. Code Ann. tit. 11, § 1108 (Sexual exploitation of a child) states,

A person is guilty of sexual exploitation of a child when:

- (1) The person knowingly, photographs or films a child engaging in a prohibited sexual act<sup>11</sup> or in the simulation of such an act, or otherwise knowingly creates a visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (2) The person knowingly, finances or produces any motion picture, video or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (3) The person knowingly publishes or makes available for public distribution or sale by any means, including but not limited to computer, any book, magazine, periodical, pamphlet, photograph, Internet site or web page which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly publishes or makes available for public distribution or sale by any means, including computer, any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or

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<sup>10</sup> See *supra* note 2.

<sup>11</sup> Del. Code Ann. tit. 11, § 1103(e) (Definitions relating to children) defines “[p]rohibited sexual act” to include:

- (1) Sexual intercourse;
- (2) Anal intercourse;
- (3) Masturbation;
- (4) Bestiality;
- (5) Sadism;
- (6) Masochism;
- (7) Fellatio;
- (8) Cunnilingus;
- (9) Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction;
- (10) Sexual contact;
- (11) Lascivious exhibition of the genitals or pubic area of any child;
- (12) Any other act which is intended to be a depiction or simulation of any act described in this subsection.

(4) The person permits, causes, promotes, facilitates, finances, produces or otherwise advances an exhibition, display or performances of a child engaging in a prohibited sexual act or the simulation of such an act.

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A first conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years, while a subsequent conviction is punishable by life imprisonment. Del. Code Ann. tit. 11, §§ 1108, 4205(b)(2), 1110. However, if the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14.

2. Del. Code Ann. tit. 11, § 1352 (Promoting prostitution in the second degree) states,

A person is guilty of promoting prostitution<sup>12</sup> in the second degree when the person knowingly:

- (1) Advances or profits from prostitution<sup>13</sup> by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by 2 or more prostitutes; or
- (2) Advances or profits from prostitution of a person less than 18 years old.

Promoting prostitution in the second degree is a class E felony.

A Class E felony is punishable by imprisonment up to 5 years. Del. Code Ann. tit. 11, § 4205(b)(5).

3. Del. Code Ann. tit. 11, § 1353 (Promoting prostitution in the first degree) states,

A person is guilty of promoting prostitution<sup>14</sup> in the first degree when the person knowingly:

- (1) Advances prostitution<sup>15</sup> by compelling a person by force or intimidation to engage in prostitution or profits from such coercive conduct by another; or
- (2) Advances or profits from prostitution of a person less than 16 years old.

Promoting prostitution in the first degree is a class C felony.

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<sup>12</sup> Del. Code. Ann. tit. 11, § 1354 (Promoting prostitution; attempt to promote prostitution; corroboration) provides, “A person shall not be convicted of promoting prostitution or of an attempt to promote prostitution solely on the uncorroborated testimony of a person whose prostitution activity the person is alleged to have advanced or attempted to advance or from whose prostitution activity the person is alleged to have profited or attempted to profit.”

<sup>13</sup> Pursuant to Del. Code Ann. tit. 11, § 1356(1) (Definitions relating to prostitution),

A person advances prostitution when, acting other than as a prostitute or as a patron thereof, the person knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

<sup>14</sup> See *supra* note 12.

<sup>15</sup> See *supra* note 13.

A Class C felony is punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, § 4205(b)(3). Several other Delaware laws, while not expressly commercial in nature, may also be applicable in cases involving the commercial sexual exploitation of a child. Some of those statutes are as follows:

1. Del. Code Ann. tit. 11, § 1112A(a) (Sexual solicitation of a child) states,

(a) A person is guilty of sexual solicitation of a child if the person, being 18 years of age or older, intentionally or knowingly:

(1) Solicits, requests, commands, importunes or otherwise attempts to cause any child who has not yet reached that child's eighteenth birthday to engage in a prohibited sexual act;<sup>16</sup> or

(2) Solicits, requests, commands, importunes or otherwise attempts to cause any child who has not yet reached that child's sixteenth birthday to meet with such person or any other person for the purpose of engaging in a prohibited sexual act; or

(3) Compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses by any means, including by means of computer, any notice, statement, document, advertisement, file or data containing the name, telephone number, address, e-mail address, school address or location, physical characteristics or other descriptive or identifying information pertaining to any child who has not yet reached that child's sixteenth birthday for the purpose of facilitating, encouraging, offering or soliciting a prohibited sexual act involving such child and such person or any other person.

A conviction under this statute is punishable as a Class C felony by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 1112A(c), 4205(b)(3). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a "dangerous crime against a child" under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a "dangerous crime against a child" is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced "pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served." Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14.

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<sup>16</sup> Del. Code Ann. tit. 11, § 1103(e) defines "[p]rohibited sexual act" to include,

- (1) Sexual intercourse;
- (2) Anal intercourse;
- (3) Masturbation;
- (4) Bestiality;
- (5) Sadism;
- (6) Masochism;
- (7) Fellatio;
- (8) Cunnilingus;
- (9) Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction;
- (10) Sexual contact;
- (11) Lascivious exhibition of the genitals or pubic area of any child;
- (12) Any other act which is intended to be a depiction or simulation of any act described in this subsection.

2. Del. Code tit. 11 § 773(a)(5) (Rape in the first degree) provides that “[a] person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and . . . [t]he victim has not yet reached that victim’s twelfth birthday, and the defendant has reached that defendant’s eighteenth birthday.” A conviction under Del. Code tit. 11 § 773(a)(5) is punishable as a Class A felony by imprisonment for 25 years to life. Del. Code Ann. tit. 11, §§ 773, 4205A(a)(2). If, however, among other things, a victim of an offense under Del. Code tit. 11 § 773(a)(5) suffers serious bodily injury or the defendant “has been previously convicted of unlawful sexual intercourse in the first degree, rape in the second degree or rape in the first degree, or any equivalent offense under the laws of this State, any other state or the United States,” a conviction is punishable by imprisonment for life “without benefit of probation, parole or any other reduction.” Del. Code tit. 11, §773(c)(1), (4).
3. Pursuant to Del. Code tit. 11, § 771(a) (Rape in the third degree),
  - (a) A person is guilty of rape in the third degree when the person:
    - (1) Intentionally engages in sexual intercourse with another person, and the victim has not reached that victim’s sixteenth birthday and the person is at least 10 years older than the victim, or the victim has not yet reached that victim’s fourteenth birthday and the person has reached that person’s nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 [Rape in the second degree] or § 773 [Rape in the first degree] of this title; or
    - (2) Intentionally engages in sexual penetration with another person under any of the following circumstances:
      - ...
      - (b) The victim has not reached that victim’s sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury or serious mental or emotional injury to the victim.

A conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 771, 4205(b)(2). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). A defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 771(a)(2) is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14. Convictions under Del. Code Ann. tit. 11, § 771(a)(1) fall under Del. Code Ann. tit. 11, § 4205A(a) through Del. Code Ann. tit. 11, § 777.

4. Del. Code tit. 11 § 770(a) (Rape in the fourth degree) states,
  - (a) A person is guilty of rape in the fourth degree when the person:
    - (1) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim’s sixteenth birthday; or
    - (2) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim’s eighteenth birthday, and the person is 30 years of age or older, except

that such intercourse shall not be unlawful if the victim and person are married at the time of such intercourse; or

(3) Intentionally engages in sexual penetration with another person under any of the following circumstances:

- a. The sexual penetration occurs without the victim's consent; or
- b. The victim has not reached that victim's sixteenth birthday.

5. A conviction under this statute is punishable as a Class C felony by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 770, 4205(b)(3). However, if the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, a conviction is designated a "dangerous crime against a child" under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a "dangerous crime against a child" is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, §§ 777(b), 4205(b)(2). Subsequently, a defendant sentenced "pursuant to [Del. Code Ann. tit. 11, § 777] shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served." Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14. Del. Code tit. 11 § 768 (Unlawful sexual contact in the second degree) makes it a crime "when the person intentionally has sexual contact<sup>17</sup> with another person who is less than 18 years of age or causes the victim to have sexual contact with the person or a third person." A conviction under this statute is punishable as a Class F felony by imprisonment up to 3 years. Del. Code Ann. tit. 11, §§ 768, 4205(b)(6).
6. Del. Code tit. 11 § 769(a)(3) (Unlawful sexual contact in the first degree) makes it a crime when a "person intentionally has sexual contact with another person who is less than 13 years of age or causes the victim to have sexual contact with the person or a third person." A conviction under this statute is punishable as a Class D felony by imprisonment up to 8 years. Del. Code Ann. tit. 11, §§ 769(b), 4205(b)(4).
7. Del. Code Ann. tit. 11, § 1100 (Dealing in children) states in part, "A person is guilty of dealing in a child if the person intentionally or knowingly trades, barter, buys or negotiates to trade, barter, buy or sell a child under the age of 18 . . ." A conviction under this statute is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1100, 4205(b)(5).

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

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<sup>17</sup> Pursuant to Del. Code tit. 11 § 761(f),

(f) "Sexual contact" means:

- (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or
- (2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia; or
- (3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks or genitalia

which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. Sexual contact shall also include touching when covered by clothing.



Delaware's prostitution statutes, Del. Code Ann. tit. 11, § 1342(a)(1) (Prostitution) and § 1343 (Patronizing a prostitute prohibited), do not refer to the human trafficking statute to identify commercially sexually exploited minors as victims of sex trafficking. However, an affirmative defense provided under the human trafficking law clarifies the status of commercially sexually exploited youth as victims of sex trafficking. Del. Code Ann. tit. 11, § 787(h) provides that "An individual charged with prostitution or loitering committed as a direct result of being a victim of human trafficking may assert as an affirmative defense that the individual is a victim of human trafficking."

*1.4 The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

Chapter 15 of the Delaware Criminal Code is entitled "Organized Crime and Racketeering." Del. Code Ann. tit. 11, § 1503 (Violations) states,

- (a) It shall be unlawful for any person employed by, or associated with, any enterprise<sup>18</sup> to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity or collection of an unlawful debt.
- (b) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property or personal property, of any nature, including money.
- (c) It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity in which such person has participated, to use or invest, directly or indirectly, any part of such proceeds or any proceeds derived from the investment or use thereof, in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property.
- (d) It is unlawful for any person to conspire or attempt to violate any of the provisions of subsection (a), (b) or (c) of this section.

Pursuant to Del. Code Ann. tit. 11, § 1502(5)<sup>19</sup>,

- (5) "Pattern of racketeering activity" shall mean 2 or more incidents of conduct:
  - a. That:
    - 1. Constitute racketeering activity;
    - 2. Are related to the affairs of the enterprise;
    - 3. Are not so closely related to each other and connected in point of time and place that they constitute a single event; and
  - b. Where:
    - 1. At least 1 of the incidents of conduct occurred after July 9, 1986;
    - 2. The last incident of conduct occurred within 10 years after a prior occasion of conduct; and
    - 3. As to criminal charges, but not as to civil proceedings, at least 1 of the incidents of conduct constituted a felony under the Delaware Criminal Code, or if committed subject to the jurisdiction of the United States or any state of the United States, would constitute a felony under the Delaware Criminal Code if committed in the State.

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<sup>18</sup> Pursuant to Del. Code Ann. tit. 11, § 1502(3), "'Enterprise' shall include any individual, sole proprietorship, partnership, corporation, trust or other legal entity; and any union, association or group of persons associated in fact, although not a legal entity. The word 'enterprise' shall include illicit as well as licit enterprises, and governmental as well as other entities."

<sup>19</sup> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 1502 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

Pursuant to Del. Code Ann. tit. 11 §1502(9), racketeering means “to engage in, to attempt to engage in, to conspire to engage in or to solicit, coerce or intimidate another person to engage in:

a. Any activity defined as “racketeering activity” under 18 U.S.C. § 1961(1)(A), (1)(B), (1)(C) or (1)(D);<sup>20</sup> or

b. Any activity constituting any felony which is chargeable under the Delaware Code or any activity constituting a misdemeanor under the following provisions of the Delaware Code:

....

3. Chapter 5 of Title 11 relating to prostitution;

....

7. Chapter 5 of Title 11 relating to obscenity;

....

12. Chapter 5 of Title 11 relating to human trafficking.

Consequently, all felony and misdemeanor offenses related to commercial sexual exploitation and sex trafficking of children should constitute predicate offenses under the definition of racketeering.

Defendants convicted under Del. Code Ann. tit. 11, § 1503 are guilty of a Class B felony punishable by imprisonment for 2–25 years and a fine of at least \$25,000. Del. Code Ann. tit. 11, §§ 1504(a), 4205(b)(2). Alternatively, defendants may be subject to a restitutionary fine. Del. Code Ann. tit. 11, § 1504(c) states,

In lieu of any fine otherwise authorized by law, any person convicted of engaging in racketeering, or any other conduct in violation of § 1503 of this title, through which such person derived pecuniary value,<sup>21</sup> or by which the person caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed 3 times the gross value gained, or 3 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

Defendants convicted under Del. Code Ann. tit. 11, § 1503 are also subject to certain forfeiture provisions. Del. Code Ann. tit. 11, § 1504(b) (Criminal penalties) states,

Any person convicted of conduct constituting a violation of any of the provisions of § 1503 of this title shall criminally . . . forfeit, to the State any real or personal property used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of § 1503 of this title including any property constituting an interest in or means of control or influence over the enterprise involved in the conduct in violation of § 1503 of this title or any property constituting proceeds derived from the conduct in violation of § 1503 . . .

....

Civil remedies are also available for victims of racketeering. Pursuant to Del. Code Ann. tit. 11, § 1505(c),

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<sup>20</sup> 18 U.S.C. § 1961(1)(A), (1)(B), (1)(C) or (1)(D) includes “sections 1581–1592 (relating to peonage, slavery, and trafficking in persons) [and] sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children).”

<sup>21</sup> Pursuant to Del. Code Ann. tit. 11, § 1502(6),

“Pecuniary value” shall mean:

a. Anything of value in the form of money, a negotiable instrument, a commercial interest or anything else which constitutes an economic advantage; or

b. Any other property or service that has a value in excess of \$100.

Any person directly or indirectly injured by reason of any conduct constituting a violation of this chapter may sue therefor in any appropriate court, and if successful shall recover 3 times the actual damages sustained and, when appropriate, punitive damages. Damages under this subsection are not limited to competitive or distinct injury. Plaintiffs who substantially prevail shall also recover attorneys' fees in the trial and appellate courts, together with the costs of investigation and litigation, reasonably incurred; provided, however, no action may be had under § 1503 of this title except against a defendant who has been criminally convicted of a racketeering activity which was the source of the injury alleged, and no action may be brought under this provision except within 1 year of such conviction.

Additionally, Del. Code Ann. tit. 11, § 1505(b) authorizes the Attorney General to institute civil proceedings against traffickers who violate Del. Code Ann. tit. 11, § 1503 and impose “a civil penalty of up to \$ 100,000 for each incident of activity constituting a violation of this chapter.”

**Legal Components:**

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

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**Legal Analysis:**

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

Del. Code Ann. tit. 11, § 787(b)(1)<sup>22</sup> (Trafficking an individual, forced labor and sexual servitude) does not apply to buyers. It states,

A person is guilty of trafficking an individual if the person knowingly recruits, transports, harbors, receives, provides, obtains, isolates, maintains, or entices an individual in furtherance of forced labor in violation of paragraph (b)(2) of this section or sexual servitude in violation of paragraph (b)(3) of this section.

While Del. Code Ann. tit. 11, § 787(b)(1) (Trafficking an individual, forced labor and sexual servitude) includes as prohibited conduct the term “obtains,” which could apply to buyers following federal precedent,<sup>23</sup> the conduct proscribed as “[s]exual servitude” under Del. Code Ann. tit. 11, § 787(b)(3) (Sexual servitude) requires ongoing control that makes the statute largely inapplicable to buyers. It states,

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<sup>22</sup> See *supra* note 2.

<sup>23</sup> See *United States v. Jungers*, 702 F.3d 1066 (8<sup>th</sup> Cir. 2013). In this case, the Eighth Circuit specifically addressed whether the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers when it reversed a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers. *United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011). Holding that the conduct of buyers who obtain a child for commercial sex can violate 18 U.S.C. § 1591(a)(1), the Eighth Circuit illustrated through hypothetical buyer scenarios that, under certain circumstances, most of the terms in the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) could apply to buyers. While other terms may apply to buyers’ conduct under state law as well, the analysis here focuses on the term “obtains” which is most likely to apply in the majority of buyer cases. *United States v. Jungers* establishes persuasive authority for state courts interpreting the same language used under state law to the extent such interpretation does not conflict with the state constitution.

- (a) A person commits the offense of sexual servitude if the person knowingly:
  1. maintains<sup>24</sup> or makes available a minor for the purpose of engaging in commercial sexual activity<sup>25</sup>; or
  2. uses coercion or deception to compel an adult to engage in commercial sexual activity.

However, Delaware criminalizes buyers for patronizing a victim of sexual servitude under the human trafficking chapter. Del. Code Ann. tit. 11, § 787(b)(4)<sup>26</sup> (Patronizing a victim of sexual servitude) states,

A person is guilty of patronizing a victim of sexual servitude if the person knowingly gives, agrees to give, or offers to give anything of value so that the person may engage in commercial sexual activity with another person and the person knows that the other person is a victim of sexual servitude. Patronizing a victim of sexual servitude is a Class D felony unless the victim of sexual servitude is a minor, in which case it is a Class C felony.

A Class C felony is punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, § 4205(b)(3).

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

None of Delaware’s CSEC statutes apply to buyers. While Del. Code Ann. tit. 11, § 1112A(a) (Sexual solicitation of a child) may apply to a buyer who “[c]ompiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses by any means, including by means of computer, any notice, statement, document, advertisement, file or data containing the name, telephone number, address, e-mail address, school address or location, physical characteristics or other descriptive or identifying information pertaining to any child who has not yet reached that child’s sixteenth birthday for the purpose of facilitating, encouraging, offering or soliciting a prohibited sexual act<sup>27</sup> involving such child and such person or any other person,” this offense does not refer to commercial conduct or make it a crime to purchase sex acts with a minor.

- 2.2.1 Recommendation: Enact a law that specifically criminalizes the act of buying sex with a minor with penalties as high as Del. Code Ann. tit. 11, § 787(b)(1) (Trafficking an individual, forced labor and sexual servitude).

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

Del. Code Ann. tit. 11, § 1343 (Patronizing a prostitute prohibited) includes the crime of solicitation of prostitution. It does not, however, distinguish between the solicitation of an adult versus a child for prostitution. Pursuant to Del. Code Ann. tit. 11, § 1343(a)(3),

- (a) A person is guilty of patronizing a prostitute when:
  - ...
  - (3) The person solicits or requests another person to engage in sexual conduct with the person in return for a fee.

<sup>24</sup> Pursuant to Del. Code Ann. tit. 11, § 787(a)(9), “‘Maintain’ means in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the victim to perform such type of service.”

<sup>25</sup> “Commercial sexual activity” is defined as “any sexual activity for which on account of which anything of value is given, promised to, or received by any person.” Del. Code Ann. tit. 11, § 787(a)(2). See *supra* note 2.

<sup>26</sup> See *supra* note 2.

A conviction under this statute is punishable as an unclassified misdemeanor by imprisonment up to 30 days and a fine of \$500–\$575. Del. Code Ann. tit. 11, §§ 1343(b), 4206(c). If, however, the crime occurs “on or within 1,000 feet of the property of any school, residence, church, synagogue or other place of worship,” a conviction is punishable as a Class A misdemeanor by imprisonment up to 1 year and a fine of \$1,000–\$2,300. Del. Code Ann. tit. 11, §§ 1343(e)(1), 4206(a).

2.3.1 Recommendation: Amend Del. Code Ann. tit. 11, § 1343(a)(3) (Patronizing a prostitute prohibited) to distinguish between patronizing a minor versus an adult and provide heightened penalties comparable to the penalties provided under Del. Code Ann. tit. 11, § 787(b)(1) (Trafficking an individual, forced labor and sexual servitude) when the person patronized is a minor under 18 .

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

Under Del. Code Ann. tit. 11, § 787(b)(4) (Patronizing a victim of sexual servitude) is a Class C felony punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, § 787(b)(4), 4205(b)(3).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>28</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>29</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>30</sup>

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

No statutes in Delaware specifically criminalize the use of the Internet to lure, entice, recruit or purchase sex acts with a minor or provide penalty enhancements for such use. Del. Code Ann. tit. 11, § 1112A(a)

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<sup>28</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>29</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>30</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).

(Sexual solicitation of a child), however, may reach the conduct of buyers who seek to purchase sex acts with minors through the Internet. Del. Code Ann. tit. 11, § 1112A(a) states,

A person is guilty of sexual solicitation of a child if the person, being 18 years of age or older, intentionally or knowingly:

- (1) Solicits, requests, commands, importunes or otherwise attempts to cause any child who has not yet reached that child's eighteenth birthday to engage in a prohibited sexual act; or
- (2) Solicits, requests, commands, importunes or otherwise attempts to cause any child who has not yet reached that child's sixteenth birthday to meet with such person or any other person for the purpose of engaging in a prohibited sexual act; or
- (3) Compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses by any means, including by means of computer, any notice, statement, document, advertisement, file or data containing the name, telephone number, address, e-mail address, school address or location, physical characteristics or other descriptive or identifying information pertaining to any child who has not yet reached that child's sixteenth birthday for the purpose of facilitating, encouraging, offering or soliciting a prohibited sexual act involving such child and such person or any other person.

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

A mistake of age defense is expressly prohibited for buyers charged under Del. Code Ann. tit. 11, § 787(b)(4) (Patronizing a victim of sexual servitude) which states in part, "It is not a defense in a prosecution when the victim of sexual servitude is a minor that . . . the defendant believed the minor was an adult."<sup>31</sup>

Del. Code Ann. tit. 11, § 454 (Knowledge of victim's age) eliminates a defendant's ability to assert a mistake of age defense in most prosecutions where age is an element of the offense. Specifically, Del. Code Ann. tit. 11, § 454 states,

Notwithstanding any provision of law to the contrary, it is no defense for an offense or sentencing provision defined in [Del. Code Ann. Title 11] . . . which has as an element of such offense . . . the age of the victim that the accused did not know the age of the victim or reasonably believed the person to be of an age which would not meet the element of such offense . . . unless the statute defining such offense . . . or a statute directly related thereto expressly provides that knowledge of the victim's age is an element of the offense or that lack of such knowledge is a defense.

Del. Code Ann. tit. 11, § 762(a) (Provisions generally applicable to sexual offenses) eliminates the mistake of age defense in sexual offense cases. It provides, "Whenever in the definition of a sexual offense,<sup>32</sup> the criminality of conduct or the degree of the offense depends on whether the person has reached that person's sixteenth birthday, it is no defense that the actor did not know the person's age, or

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<sup>31</sup> Notably, the offense of patronizing a victim of sexual servitude under Del. Code Ann. tit. 11, § 787(b)(4) (Patronizing a victim of sexual servitude) requires proof that the buyer had knowledge of third party control over the minor. By expressly requiring proof that a buyer "knows that the other person is a victim of sexual servitude," the patronizing offense requires proof of the buyer's knowledge of the essential elements of the predicate offense of sexual servitude under Del. Code Ann. tit. 11, § 787(b)(3) (Sexual servitude) which requires that the minor victim was under the control of a trafficker who "maintain[ed] or ma[de] available [the] minor for the purpose of engaging in commercial sexual activity."

<sup>32</sup> Del. Code Ann. tit. 11 § 761(h) (Definitions generally applicable to sexual offenses) defines "sexual offense" as "any offense defined by §§ 763[Sexual harassment]–780[Female genital mutilation] and §§ 1108 [Sexual exploitation of a child]–1112A [Sexual solicitation of a child], 1352(2) [Promoting prostitution in the second degree], and 1353(2) [Promoting prostitution in the first degree] of this title."

that the actor reasonably believed that the person had reached that person's sixteenth birthday." Pursuant to Del. Code Ann. tit. 11 § 777(a) (Dangerous crime against a child), however, "For purposes of this section only, and Sec. 762(a) of this title to the contrary notwithstanding, the defendant may use as an affirmative defense that the defendant believed that the victim of the crime was over the age of 16 years of age." Del. Code Ann. tit. 11 § 777(a) defines a "dangerous crime against a child" to include "any criminal sexual conduct against a minor under the age of 14 years as defined in . . . §§ 1108–1112A<sup>33</sup> of this title."

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

A buyer may be prosecuted under Del. Code Ann. tit. 11, § 787(b)(4)<sup>34</sup> (Patronizing a victim of sexual servitude) for any offense involving a minor under 18. The penalty for an offense regardless of the minor's age is a Class C felony punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, § 787(b)(4), 4205(b)(3).

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

Del. Code Ann. tit. 11, § 4205(k) (Sentence for felonies) provides, "In addition to the [felony] penalties set forth above, the court may impose such fines and penalties as it deems appropriate." Therefore, any buyer convicted of a felony trafficking, CSEC or sexual offense is subject to an indeterminate discretionary fine.<sup>35</sup>

Buyers convicted of Del. Code Ann. tit. 11, § 787(b)(4) (Patronizing a victim of sexual servitude) do not face mandatory asset forfeiture under Del. Code Ann. tit. 11, § 787(e) (Trafficking an individual, forced labor and sexual servitude).<sup>36</sup> However, under Del. Code Ann. tit. 11, § 1343 (Patronizing a prostitute prohibited), a convicted buyer is subject to vehicle seizure if the vehicle was used in the commission of patronizing a prostitute or the buyer has a prior conviction under Del. Code Ann. tit. 11, § 1343 within the last 5 years. Del. Code Ann. tit. 11, § 1343(c), (d).

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<sup>33</sup> Offenses contained within Del. Code Ann. tit. 11 §§ 1108–1112A include: sexual exploitation of a child, dealing in child pornography, possession of child pornography and sexual solicitation of a child.

<sup>34</sup> See *supra* note 2.

<sup>35</sup> Additional financial penalties applicable to all crimes are provided under Del. Code tit. 11, § 9016 (Penalty assessment) and § 9018 (Compensating fine). Del. Code tit. 11, § 9016(a) provides, "In addition to, and at the same time as, any fine is assessed to any criminal defendant or any child adjudicated delinquent, there shall be levied an additional penalty of 18 percent of every fine, penalty and forfeiture imposed and collected by the courts for crimes or offenses as defined in Sec. 233 of this title. Where multiple offenses are involved, the penalty assessment shall be based upon the total fine for all offenses." Del. Code tit. 11, § 9018 provides in part, "In any court of the State upon the conviction of any person or the adjudication of delinquency of any child for a crime resulting in the personal injury or death of another person, the court may, in addition to any other penalty, order such person to pay a compensating fine, in lieu of, but greater than, the penalty set forth in Sec. 9016 of this title. The amount of such fine shall be in the discretion of the court and shall be commensurate with the malice shown and the injury done to the victim." Both the penalty under Del. Code tit. 11, § 9016(a) and the compensating fine under Del. Code tit. 11, § 9018 are to be paid into the Crime Victims' Compensation Fund. Del. Code tit. 11, §§ 9016(b), 9018.

<sup>36</sup> Del. Code Ann. tit. 11, § 787(e) provides that "the court shall order a person convicted of an offense under paragraphs (b)(1)-(3) of this section to forfeit any interest in real or personal property that was used or intended to be used to commit or facilitate the commission of the offense," however buyers may only be charged under subsection (b)(4) of § 787.



Buyers convicted of Del. Code Ann. tit. 11, § 787(b)(4) (Patronizing a victim of sexual servitude) face mandatory restitution under Del. Code Ann. tit. 11, § 787(d)<sup>37</sup> (Trafficking an individual, forced labor and sexual servitude) which states,

- (1) In addition to any other amount of loss identified, the court shall order restitution, including the greater of:
  - a. The gross income or value to the defendant of the victim’s labor or services; or
  - b. The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 201 et seq.] or of Title 19, whichever is greater.
- (2) The court shall order restitution under paragraph (d) even if the victim is unavailable to accept payment of restitution.
- (3) If the victim is unavailable for 5 years from the date of the restitution order, the restitution ordered under this paragraph (d) must be paid to the Victim Compensation Fund established under Section 9016 of this Title.

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

Delaware law prohibits both possessing and purchasing of child pornography. Del. Code Ann. tit. 11, § 1111 (Possession of child pornography) states,

A person is guilty of possession of child pornography when:

- (1) the person knowingly possesses any visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (2) the person knowingly possesses any visual depiction which has been created, adapted, modified or edited so as to appear that a child is engaging in a prohibited sexual act or in the simulation of such an act.

....

A conviction under this statute is punishable as a Class F felony by imprisonment up to 3 years. Del. Code Ann. tit. 11, §§ 1111, 4205(b)(6). Del. Code Ann. tit. 11, § 1109(4) (Dealing in child pornography) may also cover possessing and buying child pornography to the extent it prohibits the conduct of a person who “intentionally . . . accesses . . . receives, exchanges . . . stores . . . prints, reproduces or otherwise possesses any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act.” A conviction under Del. Code Ann. tit. 11, § 1109 is punishable as a Class B felony by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 1109, 4205(b)(2). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14.

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<sup>37</sup> See *supra* note 2.

In comparison, a federal conviction for possession of child pornography<sup>38</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>39</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>40</sup>

2.9.1 Recommendation: Amend Del. Code Ann. tit. 11, § 1111 (Possession of child pornography) to make the penalty under this provision comparable to the penalty under Del. Code Ann. tit. 11, § 1109 (Dealing in child pornography) and comparable to federal penalties.

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

Pursuant to Del. Code Ann. tit. 11, § 4120(b)(1) (Registration of sex offenders), “Any sex offender who is released, discharged or paroled from any Level IV or Level V facility or other custodial institution after that sex offender has completed a sentence imposed following a conviction for any offense specified in § 4121(a)(4) of this title shall be required to register as a sex offender.” Del. Code Ann. tit. 11, § 4121(a)(4)(a)<sup>41</sup> (Community notification of sex offenders on probation, parole, conditional release or release from confinement) defines “sex offender” to include any person convicted of “any of the offenses specified in §§ 765 through 780, § 787(b)(3), § 787(b)(4), § 1100, §§ 1108 through 1112A, § 1335(a)(6), § 1335(a)(7), § 1352(2), § 1353(2) or § 1361(b) of this title, or of any attempt or conspiracy to commit any of the aforementioned offenses.” Therefore, a buyer convicted of possession of child pornography under Del. Code Ann. tit. 11, § 1111, dealing in child pornography under Del. Code Ann. tit. 11, § 1109, sexual solicitation of a child under Del. Code Ann. tit. 11, § 1112A, or trafficking of persons under Del. Code Ann. tit. 11, § 787(b)(4) must register as a sex offender. Del. Code Ann. tit. 11, §§ 4120, 4121(a)(4)(a).

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<sup>38</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>39</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>40</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>41</sup> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 4121 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

**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.*

Under Del. Code Ann. tit. 11, § 787(b)<sup>42</sup> (Trafficking an individual, forced labor and sexual servitude),<sup>43</sup> a sexual servitude offense, or forced labor offense involving commercial sexual activity, against a minor is a Class B felony punishable by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 787(b)(3)(b), 4205(b)(2). If aggravating circumstances were involved, including force or recruitment of the victim from a shelter, a conviction under § 787(b) is punishable as a Class A felony by imprisonment for 15 years to life.<sup>44</sup>

A trafficker may also be convicted under Del. Code Ann. tit. 11, § 1108 (Sexual exploitation of a child).<sup>45</sup> A first conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years, while a subsequent conviction is punishable by life imprisonment. Del. Code Ann. tit. 11, §§ 1108, 4205(b)(2), 1110. However, if the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14.

Traffickers may also be convicted under Del. Code Ann. tit. 11, § 1352 (Promoting prostitution in the second degree).<sup>46</sup> A conviction under this statute is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1352, 4205(b)(5). Additionally, a trafficker convicted under Del.

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<sup>42</sup> See *supra* note 2.

<sup>43</sup> See *supra* Section 1.1 for the substantive provisions of Del. Code Ann. tit. 11, § 787(b).

<sup>44</sup> See *supra* note 6.

<sup>45</sup> See *supra* Section 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1108.

<sup>46</sup> See *supra* Section 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1352.

Code Ann. tit. 11, § 1353 (Promoting prostitution in the first degree)<sup>47</sup> is guilty of a Class C felony punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 1353, 4205(b)(3).

Additionally, a trafficker may be convicted under Del. Code Ann. tit. 11, § 1100 (Dealing in children)<sup>48</sup> which states in part, “A person is guilty of dealing in a child if the person intentionally or knowingly trades, barter, buys or negotiates to trade, barter, buy or sell a child under the age of 18 . . . .” A conviction under this statute is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1100, 4205(b)(5).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA) for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>49</sup> against a minor.

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

Delaware penalizes both the creation and distribution of child pornography. Del. Code Ann. tit. 11, § 1108(1)–(4) (Sexual exploitation of a child) states,

A person is guilty of sexual exploitation of a child when:

- (1) The person knowingly, photographs or films a child engaging in a prohibited sexual act or in the simulation of such an act, or otherwise knowingly creates a visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (2) The person knowingly, finances or produces any motion picture, video or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (3) The person knowingly publishes or makes available for public distribution or sale by any means, including but not limited to computer, any book, magazine, periodical, pamphlet, photograph, Internet site or web page which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly publishes or makes available for public distribution or sale by any means, including computer, any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (4) The person permits, causes, promotes, facilitates, finances, produces or otherwise advances an exhibition, display or performances of a child engaging in a prohibited sexual act or the simulation of such an act.

. . . .

A first conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years, while a subsequent conviction is punishable by life imprisonment. Del. Code Ann. tit. 11, §§ 1108, 4205(b)(2), 1110. However, if the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence

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<sup>47</sup> See *supra* Section 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1353.

<sup>48</sup> See *supra* Section 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1100.

<sup>49</sup> See *supra* note 28.

imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14.

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>50</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>51</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>52</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>53</sup>

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

No statutes in Delaware specifically prohibit the use of the Internet to lure, entice, recruit or purchase sex acts with a minor or provide penalty enhancements for such use. Del. Code Ann. tit. 11, § 1112A(a) (Sexual solicitation of a child) may, however, implicate buyers who seek to purchase sex acts with minors through the Internet by providing,

A person is guilty of sexual solicitation of a child if the person, being 18 years of age or older, intentionally or knowingly:

....

(3) Compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses by any means, including by means of computer, any notice, statement, document, advertisement, file or data containing the name, telephone number, address, e-mail address, school address or location, physical characteristics or other descriptive or identifying information pertaining to any child who has not yet reached that child’s sixteenth birthday for the purpose of facilitating, encouraging, offering or soliciting a prohibited sexual act involving such child and such person or any other person.

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<sup>50</sup> See *supra* note 28.

<sup>51</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>52</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>53</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

Del. Code Ann. tit. 11, § 4205(k) (Sentence for felonies) provides, “In addition to the [felony] penalties set forth above, the court may impose such fines and penalties as it deems appropriate.” Therefore, any trafficker convicted under Del. Code Ann. tit. 11, § 787<sup>54</sup> (Trafficking an individual, forced labor and sexual servitude) or any other felony CSEC or sexual offense is subject to an indeterminate discretionary fine.<sup>55</sup>

Additionally, a trafficker convicted under Del. Code Ann. tit. 11, § 787(b)(1) is subject to mandatory restitution. Del. Code Ann. tit. 11, § 787(d) states,

- (1) Restitution is mandatory under this section.—In addition to any other amount of loss identified, the court shall order restitution, including the greater of:
  - a. The gross income or value to the defendant of the victim’s labor or services; or
  - b. The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 201 et seq.] or of Title 19, whichever is greater.
- (2) The Court shall order restitution under paragraph (d) even if the victim is unavailable to accept payment of restitution.

Lastly, traffickers are subject to asset forfeiture if convicted under Del. Code Ann. tit. 11, § 787(b)(1–3). Del. Code Ann. tit. 11, § 787(e)(1) states that

On motion, the court shall order a person convicted of an offense under subsection (b)(1)–(3) [Trafficking of an individual, forced labor and sexual servitude] of this section to forfeit any interest in real or personal property that was used or intended to be used to commit or facilitate the commission of the offense or that constitutes or derives from proceeds that the person obtained, directly or indirectly, as a result of the offense.

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

Pursuant to Del. Code Ann. tit. 11, § 4120(b)(1) (Registration of sex offenders), “Any sex offender who is released, discharged or paroled from any Level IV or Level V facility or other custodial institution after that sex offender has completed a sentence imposed following a conviction for any offense specified in § 4121(a)(4) of this title shall be required to register as a sex offender.” Del. Code Ann. tit. 11, § 4121(a)(4)(a)<sup>56</sup> (Community notification of sex offenders on probation, parole, conditional release or release from confinement) defines “sex offender” to include any person convicted of “any of the offenses specified in §§ 765 through 780, § 787(b)(2), § 1100, §§ 1108 through 1112A, § 1335(a)(6), § 1335(a)(7), § 1352(2), § 1353(2) or § 1361(b) of this title, or of any attempt or conspiracy to commit any of the aforementioned offenses.” Therefore, a trafficker convicted under Del. Code Ann. tit. 11, § 787(b)(1)<sup>57</sup> (Trafficking an individual, forced labor and sexual servitude), § 1352(2) (Promoting prostitution in the second degree), § 1108 (Sexual exploitation of a child), § 1109 (Dealing in child pornography), § 1100 (Dealing in children), or § 1112A (Sexual solicitation of a child) must register as a sex offender.

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<sup>54</sup> See *supra* note 2.

<sup>55</sup> See *supra* note 35 for discussion of additional financial penalties applicable to all crimes provided under Del. Code tit. 11, § 9016 (Penalty assessment) and § 9018 (Compensating fine).

<sup>56</sup> See *supra* note 41.

<sup>57</sup> See *supra* note 2.

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.*

Convicted traffickers are subject to termination of parental rights under Del. Code Ann. tit. 13, § 1103(a) (Grounds for termination of parental rights) which provides,

(a) The procedure for termination of parental rights . . . may be initiated whenever it appears to be in the child’s best interest and that 1 or more of the following grounds exist:

. . . .

- (4) The respondent has been found by a court of competent jurisdiction to have:
- a. Committed a felony level offense against the person, as described within subchapter II of Chapter 5 of Title 11,<sup>58</sup> [which includes Del. Code Ann. tit. 11, § 787(b)(1)<sup>59</sup> (Trafficking an individual, forced labor and sexual servitude),] in which the victim was a child; or
  - b. Aided or abetted, attempted, conspired or solicited to commit an offense set forth in paragraph (a)(4)a. of this section; or
  - c. Committed or attempted to commit the offense of Dealing in Children, as set forth in § 1100 of Title 11; or d. Committed the felony level offense of endangering the welfare of a child as set forth in § 1102 of Title 11.

. . . .

(7) The parent has subjected a child to torture, chronic abuse, sexual abuse, and/or life-threatening abuse.

(8) A child has suffered unexplained serious physical injury, near death or death under such circumstances as would indicate that such injuries, near death or death resulted from the intentional or reckless conduct or willful neglect of the parent.

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<sup>58</sup> Subchapter II of Chapter 5 of Title 11 (Offenses against the person) includes all offenses contained in §§ 601[Offensive touching]–792 [Coercion; truth and proper motive as a defense].

<sup>59</sup> See *supra* note 2.

**Legal Components:**

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

**Legal Analysis:**

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

Del. Code Ann. tit. 11, § 787(b)(1)<sup>60</sup> (Trafficking an individual, forced labor and sexual servitude) does not apply to a facilitator who assists, enables, or benefits from the commission of a crime under Del. Code Ann. tit. 11, § 787(b)(1) or (3), however a facilitator who “knowingly . . . transports, [or] harbors” a minor “in furtherance of forced labor . . . or sexual servitude” faces a Class B felony under Del. Code Ann. tit. 11, § 787(b)(1), punishable by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 787(b)(1)(b), 4205(b)(2).

A facilitator may also face penalties under Del. Code Ann. tit. 11, § 1353(2) (Promoting prostitution in the first degree).<sup>61</sup> A facilitator convicted under Del. Code Ann. tit. 11, § 1353(2) is guilty of a Class C felony punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 1353, 4205(b)(3). Similarly, a facilitator may face penalties under Del. Code Ann. tit. 11, § 1352 (Promoting prostitution in the second degree),<sup>62</sup> which is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1352, 4201(b)(5)<sup>63</sup>.

- 4.1.1 Recommendation: Amend Del. Code Ann. tit. 11, § 787(b)(1) (Trafficking an individual, forced labor and sexual servitude) and Del. Code Ann. tit. 11, § 787(c) (Organizational liability) to expressly apply to facilitators who assist, enable, or financially benefit from a human trafficking offense.

- 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.*

Del. Code Ann. tit. 11, § 4205(k) (Sentence for felonies) provides, “In addition to the [felony] penalties set forth above, the court may impose such fines and penalties as it deems appropriate.” Therefore, any facilitator convicted of a felony CSEC or sexual offense is subject to an indeterminate discretionary fine.<sup>64</sup>

<sup>60</sup> See *supra* note 2.

<sup>61</sup> See *supra* Section 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1352.

<sup>62</sup> See *supra* Section 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1353.

<sup>63</sup> See *supra* note 6.

<sup>64</sup> See *supra* note 35 for discussion of additional financial penalties applicable to all crimes provided under Del. Code tit. 11, § 9016 (Penalty assessment) and § 9018 (Compensating fine).



Additionally, a facilitator convicted under Del. Code Ann. tit. 11, § 787(b)(2)(a), (b)(3)(b) is subject to mandatory restitution. Del. Code Ann. tit. 11, § 787(cd) states,

- (1c) Restitution is mandatory under this section.—In addition to any other amount of loss identified, the court shall order restitution, including the greater of:
- (1a.) The gross income or value to the defendant of the victim’s labor or services; or
  - (2b.) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 201 et seq.] or of Title 19, whichever is greater.

Facilitators are also subject to asset forfeiture following conviction for a trafficking offense. Del. Code Ann. tit. 11, § 787(e)(1) states that

On motion, the court shall order a person convicted of an offense under subsection (b)(1)-(3) [Trafficking of an individual, forced labor and sexual servitude] of this section to forfeit any interest in real or personal property that was used or intended to be used to commit or facilitate the commission of the offense or that constitutes or derives from proceeds that the person obtained, directly or indirectly, as a result of the offense.

An organization involved in the commission of a human trafficking offense is subject to criminal liability and a range of financial penalties. Del. Code Ann. tit. 11, § 787(c) (Organizational liability) states that

- ...
- (2) The court may consider the severity of an organization’s offense under this section and order penalties in addition to those otherwise provided for the offense, including:
- a. a fine of not more than \$25,000 per offense;
  - b. disgorgement of profit from illegal activity in violation of this section; and
  - c. debarment from state and local government contracts.

Lastly, Del. Code Ann. tit. 11, § 787(l) (Display of public awareness sign) employers in Delaware who fail to post a public awareness sign clearly conspicuous and visible to employees at the following locations is subject to a \$300 penalty for each violation:

- a. an adult entertainment facility;
- b. an entity found to be maintaining a criminal nuisance involving prostitution under Section 7104 of Title 10 of the Delaware Code;
- c. a job recruitment center;
- d. a hospital; and
- e. an emergency care provider.

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

Delaware has no specific provision prohibiting the promoting or selling of child sex tourism in Delaware.

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

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

Delaware specifically penalizes promoting and selling child pornography. Del. Code Ann. tit. 11, § 1108(2)–(4) (Sexual exploitation of a child) states,

A person is guilty of sexual exploitation of a child when:

...

- (2) The person knowingly, finances or produces any motion picture, video or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (3) The person knowingly publishes or makes available for public distribution or sale by any means, including but not limited to computer, any book, magazine, periodical, pamphlet, photograph, Internet site or web page which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly publishes or makes available for public distribution or sale by any means, including computer, any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (4) The person permits, causes, promotes, facilitates, finances, produces or otherwise advances an exhibition, display or performances of a child engaging in a prohibited sexual act or the simulation of such an act.

A first conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years, while a subsequent conviction is punishable by life imprisonment. Del. Code Ann. tit. 11, §§ 1108, 4205(b)(2), 1110. If the victim is under the age of 14, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences), which is punishable under Del. Code Ann. tit. 11, § 4205A(a)(2) (Additional penalty for serious sex offenders or pedophile offenders) by imprisonment for 25 years to life. In addition, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c).

Additionally, Delaware specifically penalizes the distribution of child pornography. Del. Code Ann. tit. 11, § 1109 (Dealing in child pornography) makes it a crime when,

- (1) The person knowingly ships, transmits, mails or transports by any means, including by computer or any other electronic or digital method, any book, magazine, periodical, pamphlet, video or film depicting a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly ships, transmits, mails or transports by any means, including by computer or any other electronic or digital method, any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act;
- (2) The person knowingly receives for the purpose of selling or sells any magazine, photograph or film which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly receives for the purpose of selling or sells any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act;
- (3) The person knowingly distributes or disseminates, by means of computer or any other electronic or digital method, or by shows or viewings, any motion picture, video or other visual depiction of a child engaging in a prohibited sexual act or the simulation of such an act. The possession or showing of such motion pictures shall create a rebuttable presumption of ownership thereof for the purposes of distribution or dissemination;
- (4) The person, intentionally compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act. For the purposes of this subsection, conduct occurring outside the State shall be sufficient to constitute this offense if such conduct is within the terms of § 204 of this title, or if such photograph, image, file or data was compiled, entered, accessed, transmitted,

received, exchanged, disseminated, stored, made, printed, reproduced or otherwise possessed by, through or with any computer located within Delaware and the person was aware of circumstances which rendered the presence of such computer within Delaware a reasonable possibility; or

(5) The person knowingly advertises, promotes, presents, describes, transmits or distributes any visual depiction, exhibition, display or performance with intent to create or convey the impression that such visual depiction, exhibition, display or performance is or contains a depiction of a child engaging in a prohibited sexual act or in the simulation of such an act.

....

A conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 1109, 4205(b)(3). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Additionally, under Del. Code Ann. tit. 11, § 4205A(a) (Additional penalty for serious sex offenders or pedophile offenders), a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life, if, among other things, the victim is under the age of 14.

**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.*

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**Legal Analysis:**

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

“Victim” is defined under De. Code tit. 11, § 787(a) (Definitions), the section criminalizing human trafficking, and

means a person who is subjected to the practices set forth in subsection(b) of this section or to conduct that would have constituted a violation of subsection (b) of this section had this act been in effect when the conduct occurred, regardless of whether a perpetrator is identified, apprehended, prosecuted, or convicted.

Under Delaware’s Victims’ Bill of Rights,<sup>65</sup> Del. Code Ann. tit. 11, § 9401(7)<sup>66</sup> (Definitions) defines “victim” in part as

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<sup>65</sup> Del. Code Ann. tit. 11, §§ 9401–9424.

<sup>66</sup> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 9401 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

the person, organization, partnership, business, corporation, agency or governmental entity identified as the victim of a crime in a police report, a criminal complaint or warrant, an indictment or information or other charging instrument. “Victim” includes a parent, guardian or custodian of a victim who is unable to meaningfully understand or participate in the legal process due to physical, psychological or mental impairment. . . .

. . . .

Del. Code Ann. tit. 11, § 9401(2) includes the following violations in its definition of “crime”: Del. Code Ann. tit. 11, § 768 (Unlawful sexual contact in the second degree), § 769 (Unlawful sexual contact in the first degree), § 770 (Rape in the fourth degree), § 771 (Rape in the third degree), § 773 (Rape in the first degree), § 1108 (Sexual exploitation of a child), § 1112A (Sexual solicitation of a child), and § 787<sup>67</sup> (Trafficking of an individual, forced labor and sexual servitude). It does not include, however, violations of (Trafficking an individual, forced labor and sexual servitude) Del. Code Ann. tit. 11, §§ 1352, 1353 (Promoting prostitution) or Del. Code Ann. tit. 11, §§ 1109, 1111 (Child pornography).

Under Chapter 90 of the Delaware Code (Compensation for innocent victims of crime), Del. Code Ann. tit. 11, § 9002(12) (Definitions) defines “victim” as “a person who is injured<sup>68</sup> or killed by the act of any other person during the commission of a crime as defined in this chapter.” Pursuant Del. Code Ann. tit. 11, § 9002(5)<sup>69</sup>,

- (5) “Crime” for purposes of this chapter shall mean:
- a. Any specific offense set forth in Chapter 5 of this title, if the offense was committed after July 1, 1973, and contains the characteristics of . . . unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact . . . or endangering the welfare of a child;  
. . . .
  - c. Any specific offense occurring in another state, possession or territory of the United States in which a person whose domicile is in Delaware is a victim, if the offense contains the characteristics of . . . rape or any sexual assault or sexual abuse . . . as set forth in Chapter 5 of this title;
  - d. Any specific act of delinquency by a child, which if committed by an adult would constitute a specific offense set forth in Chapter 5 of this title, and contains the characteristics of . . . unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact . . .  
. . . .
  - g. Any act of domestic violence or abuse;
  - h. Any act of human trafficking as defined in § 787 of this title.,

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.*

Two statutes expressly prohibit a defendant from raising consent of the minor to commercial sexual activity as a defense. Del. Code Ann. tit. 11, § 787(b)(3)(c) (Trafficking an individual, forced labor and sexual servitude) and Del. Code Ann. tit. 11, § 787(b)(4) (Patronizing a victim of sexual servitude) state that “it is not a defense in a prosecution [for human trafficking] that the minor consented to engage in commercial sexual activity . . . .”

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<sup>67</sup> See *supra* note 2.

<sup>68</sup> While the Delaware Code does not define “a person who is injured,” Del. Code Ann. tit. 11, § 9002(10) (Definitions) states, “‘Personal injury’ shall mean bodily harm; or mental, emotional or psychological harm, or shall include pregnancy resulting from the crime.”

<sup>69</sup> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 9002 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

Pursuant to Del. Code tit. 11, § 761(k) (Definitions generally applicable to sexual offenses), “A child who has not yet reached that child’s sixteenth birthday is deemed unable to consent to a sexual act with a person more than 4 years older than said child. Children who have not yet reached their twelfth birthday are deemed unable to consent to a sexual act under any circumstances.” This definition does not protect minors between the ages of 16 and 18, even though Del. Code Ann. tit. 11, § 787(b)(2)<sup>70</sup> (Trafficking an individual, forced labor and sexual servitude) covers offenses against minors under the age of 18.

In addition, Del. Code Ann. tit. 11, § 451 (Consent of victim to acts not involving physical injury as defense) and § 452 (Consent of victim to inflictions of physical injury as defense) allow consent as a defense to crimes without regard to the age of victim. Del. Code Ann. tit. 11, § 451 provides,

In any prosecution for an offense, it is a defense that the victim consented to the act done, provided that:

- (1) The act did not involve or threaten physical injury; and
- (2) Such consent negatives an element of the offense.

Any person who enters the presence of other people consents to the normal physical contacts incident to such presence.

Regarding offenses involving physical injury, Del. Code Ann. tit. 11, § 452 (Consent of victim to inflictions of physical injury as a defense) provides,

In any prosecution for an offense involving or threatening physical injury, it is a defense that the victim consented to the infliction of physical injury of the kind done or threatened, provided that:

- (1) The physical injury done or threatened by the conduct consented to is not serious physical injury; or
- (2) The physical injury done or threatened is a reasonably foreseeable hazard of joint participation in any concerted activity, athletic contest or sport not prohibited by law.

However, Del. Code Ann. tit. 11, § 453 (Circumstances negating consent as a defense) states,

Unless otherwise provided by this Criminal Code or by the law defining the offense, consent of the victim does not constitute a defense if:

- (1) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense unless the defendant believes the victim is legally competent; or
- (2) It is given by a person who, because of youth . . . is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or
- . . .
- (4) It is induced by force, duress or deception.

Although it is arguable that the above laws may prevent a consent defense to child prostitution, they do not unambiguously do so. Moreover, Del. Code Ann. tit. 11, § 787 does not specifically preclude consent as a defense to child sex trafficking.

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

Del. Code Ann. tit. 11, § 1342(a)(1) (Prostitution) does not make minors immune from the offense of prostitution. It states, “A person is guilty of prostitution when the person engages or agrees or offers to

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<sup>70</sup> See *supra* note 2.

engage in sexual conduct with another person in return for a fee.”

5.3.1 Recommendation: Amend Del. Code Ann. tit. 11, § 1342(a)(1) (Prostitution) to make minors under the age of 18 specifically immune from prosecution for prostitution.

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

### **Child Identified as Abused/Neglected**

Pursuant to Del. Code Ann. tit. 10, § 901(11), a sexually exploited child is likely to be identified as abused or neglected. If a child is identified as abused or neglected under Del. Code Ann. tit. 10, § 901(1), the definition of “custodian” is broad enough to involve Child Protective Services in investigations where the child is in the custody or control of a non-family member. Furthermore, pursuant to Del. Code Ann. tit. 787(g)(1) (Special provisions regarding a minor), “[a] minor who has engaged in commercial sexual activity is presumed to be a neglected or abused child under § 901 et seq. of Title 10.”

#### *I. Initial Custody*

##### a. Authority for Initial Custody

A child may be identified as abused and receive protective services following a mandatory report of abuse made pursuant to Del. Code Ann. tit. 16, § 903 (Reports required), which states,

Any person,<sup>71</sup> agency, organization or entity who knows or in good faith suspects child abuse or neglect shall make a report in accordance with § 904 of this title. . . . In addition to and not in lieu of reporting to the Division of Family Services, any such person may also give oral or written notification of said knowledge or suspicion to any police officer who is in the presence of such person for the purpose of rendering assistance to the child in question or investigating the cause of the child’s injuries or condition.

A child may also be reported as abused by law enforcement who must file a report to the Department when there is probable cause to believe a minor has engaged in commercial sexual activity. Pursuant to Del. Code Ann. tit. 787(g)(1) (Special provisions regarding a minor), “Whenever a police officer has probable cause to believe that a minor has engaged in commercial sexual activity, the police officer shall make an immediate report to the Department of Services for Children, Youth and Their Families pursuant to § 901 et seq. of Title 16.”

Pursuant to Del. Code Ann. tit. 16, § 906(b)(3) (State response to reports of abuse or neglect),

The Division may investigate any report, but shall conduct an investigation involving all reports, which if true, would constitute violations against a child by a person responsible for the care, custody and control of the child of any of the following provisions of . . . § 777 [Dangerous crime against a child], § 1100 [Dealing in children], § 1102 [Endangering the welfare of a child], § 1108 [Sexual exploitation of a child], § 1109 [Dealing in child pornography], § 1110 [Subsequent convictions of § 1108 or § 1109 of this title] . . . of Title 11, or an attempt to commit any such

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<sup>71</sup> Del. Code Ann. tit. 16, § 903 (Reports required) provides in part, “For purposes of this section, ‘person’ shall include, but shall not be limited to, any physician, any other person in the healing arts including any person licensed to render services in medicine, osteopathy or dentistry, any intern, resident, nurse, school employee, social worker, psychologist, medical examiner, hospital, health care institution, the Medical Society of Delaware or law-enforcement agency.”

crimes. The Division staff shall also contact the Delaware Department of Justice and the appropriate law-enforcement agency upon receipt of any report under this section and shall provide such agency with a detailed description of the report received.

Under Del. Code Ann. tit. 16, § 906(b)(4), “The assisting law-enforcement agency shall promptly conduct its own criminal investigation, and keep the Division regularly apprised of the status and findings of its investigation. Law-enforcement agencies and the Division shall develop protocols to ensure compliance with this subsection.”

In exigent circumstances, Del. Code Ann. tit. 16, § 907(a) (Temporary emergency protective custody) provides, “A police officer or a physician who reasonably suspects that a child is in imminent danger of suffering serious physical harm or a threat to life as a result of abuse or neglect and who reasonably suspects the harm or threat to life may occur before the Family Court can issue a temporary protective custody order may take or retain temporary emergency protective custody of the child without the consent of the child’s parents, guardian or others legally responsible for the child’s care.”

A child protection response may also be available to trafficking victims under the age of 18 who are taken into custody pursuant to Del. Code Ann. tit. 10, § 1004 (Duties of officer having child in custody), which allows “[a] peace officer . . . [to] take into custody a child<sup>72</sup> the officer believes to be dependent,<sup>73</sup> neglected<sup>74</sup> or delinquent.<sup>75</sup>

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<sup>72</sup> Pursuant to Del. Code Ann. tit. 10, § 901(4), “child” is defined as “a person who has not reached his or her 18th birthday.”

<sup>73</sup> Pursuant to Del. Code Ann. tit. 10, § 901(8) (Definitions),

- (8) “Dependency” or “dependent child” means that a person:
- a. Is responsible for the care, custody, and/or control of the child; and
  - b. Does not have the ability and/or financial means to provide for the care of the child; and
    1. Fails to provide necessary care with regard to: food, clothing, shelter, education, health care, medical care or other care necessary for the child’s emotional, physical or mental health, or safety and general well-being; or
    2. The child is living in a nonrelated home on an extended basis without the consent and approval of the DSCYF or any agency or court licensed or authorized to place children in a nonrelated home; or
    3. The child has been placed with a licensed agency which certifies it cannot complete a suitable adoption plan.

In making a finding of dependency under this section, consideration may be given to dependency, neglect, or abuse history of any party.

<sup>74</sup> Pursuant to Del. Code Ann. tit. 10, § 901(18)

- “Neglect” or “neglected child” means that a person:
- a. Is responsible for the care, custody, and/or control of the child; and
  - b. Has the ability and financial means to provide for the care of the child; and
    1. Fails to provide necessary care with regard to: food, clothing, shelter, education, health, medical or other care necessary for the child’s emotional, physical, or mental health, or safety and general well-being; or
    2. Chronically and severely abuses alcohol or a controlled substance, is not active in treatment for such abuse, and the abuse threatens the child’s ability to receive care necessary for that child’s safety and general well-being, or
    3. Fails to provide necessary supervision appropriate for a child when the child is unable to care for that child’s own basic needs or safety, after considering such factors as the child’s age, mental ability, physical condition, the length of the caretaker’s absence, and the context of the child’s environment.



b. Placement

“[T]emporary emergency protective custody shall mean temporary placement within a hospital, medical facility or such other suitable placement; provided, however, that an abused or neglected child may not be detained in temporary custody in a secure detention facility,” and “shall not exceed 4 hours and shall cease upon the Division’s response pursuant to subsection (b).” Del. Code Ann. tit. 16, § 907(d), (c).

Del. Code Ann. tit. 16, § 907(b) provides in part, “Any person taking a child into temporary emergency protective custody under this section shall immediately notify the Division, in the county in which the child is located, of the person’s actions and make a reasonable attempt to advise the parents, guardians, or others legally responsible for the child’s care . . . . Upon notification that a child has been taken into temporary emergency protective custody, the Division shall immediately respond in accordance with § 906 of this title to secure the safety of the child which may include ex parte custody relief from the Family Court if appropriate.”

After taking the child into custody, the peace officer must notify the child’s custodian. Del. Code Ann. tit. 10, § 1004. If the custodian is not able or available to take the child, the “Division of Child Protective Services of the Department of Services for Children, Youth and Their Families” will take responsibility for the child if the child is not charged with a “delinquent act,” and “[a]fter making every reasonable effort to locate the custodian . . . may release the child to the child’s custodian or forthwith file with the Court a petition for custody alleging dependency or neglect.” Del. Code Ann. tit. 10, § 1004(1). If not released to the custodian, the Department will also be responsible for “providing shelter and care for the child in a shelter home, foster home, group home, private agency home or other appropriate facility for children.” Del. Code Ann. tit. 10, § 1004(1).

*II. Process Following Initial Custody*

Under Del. Code Ann. tit. 10, § 1003, any person having knowledge of a child who appears to be neglected, dependent or delinquent may file a petition with the Clerk of the Court

*III. Adjudication or Referral to Alternative Process*

After a petition for adjudication of delinquency of a child in custody is filed, Del. Code Ann. tit. 10, § 1009(a) (Adjudication; disposition following adjudication; commitment to custody of Department of Services for Children, Youth and Their Families; effect) provides, “Where the evidence supports such holding, the Court may declare a child to be dependent, neglected, abused,<sup>76</sup> as those terms are defined by

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In making a finding of neglect under this section, consideration may be given to dependency, neglect, or abuse history of any party.

<sup>75</sup> Pursuant to Del. Code Ann. tit. 10, § 901(7) “‘Delinquent child’ means a child who commits an act which if committed by an adult would constitute a crime.”

<sup>76</sup> Pursuant to Del. Code Ann. tit. 10, § 901(1),

- (1) “Abuse” or “abused child” means that a person:
  - a. Causes or inflicts sexual abuse on a child; or
  - b. Has care, custody or control of a child, and causes or inflicts:
    1. Physical injury through unjustified force as defined in § 468 of Title 11;
    2. Emotional abuse;
    3. Torture;

§ 902(1) of Title 16, or delinquent. In declaring a child to be dependent, neglected or abused pursuant to this section, the Court shall give priority to ensuring the well-being and safety of the child.”

## **Child Identified as Delinquent**

### *I. Initial Custody*

#### a. Authority for Initial Custody

A child protection response may be available to trafficking victims under the age of 18 who are taken into custody pursuant to Del. Code Ann. tit. 10, § 1004 (Duties of officer having child in custody), which allows “[a] peace officer . . . [to] take into custody a child<sup>77</sup> the officer believes to be . . . delinquent.”<sup>78</sup>

#### b. Placement

After taking the child into custody, the peace officer must notify the child’s custodian. Del. Code Ann. tit. 10, § 1004. If the custodian is not able or available to take the child, the “Division of Child Protective Services of the Department of Services for Children, Youth and Their Families” will take responsibility for the child if the child is not charged with a “delinquent act,” and “[a]fter making every reasonable effort to locate the custodian . . . may release the child to the child’s custodian or forthwith file with the Court a petition for custody alleging dependency or neglect.” Del. Code Ann. tit. 10, § 1004(1). If not released to the custodian, the Department will also be responsible for “providing shelter and care for the child in a shelter home, foster home, group home, private agency home or other appropriate facility for children.” Del. Code Ann. tit. 10, § 1004(1).

### *II. Process Following Initial Custody*

If a child is taken into custody for committing a delinquent act, the peace officer shall “take the child directly before the Court if the Court is in session or take the child before a court or commissioner for disposition in accordance with § 1005 of this title. After taking the child into custody, the peace officer shall forthwith file with the Court a sworn complaint alleging delinquency with a report for the reason of the child’s apprehension.” Del. Code Ann. tit. 10, § 1004(2). Under Del. Code Ann. tit. 10, § 1005(b), “Any judge of any court of this State, including justices of the peace and local aldermen, before whom a child is brought by a peace officer” may release the child with or without bail or detain the child. Additionally, the judge is directed to notify the child’s caregiver that the child has been taken into custody and file a petition with the court. Del. Code Ann. tit. 10, § 1005(b).

### *III. Placement process pending adjudication/investigation*

However, a child taken into custody on charges of delinquency may face secure detention pending adjudication if a less restrictive placement is not appropriate. Del. Code Ann. tit. 10, § 1007(a) states that no allegedly delinquent child may be placed in a secure detention facility “unless the Court determines that no means less restrictive of the child’s liberty gives reasonable assurance that the child will attend the

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4. Exploitation; or
  5. Maltreatment or mistreatment.

<sup>77</sup> Pursuant to Del. Code Ann. tit. 10, § 901(4), “child” is defined as “a person who has not reached his or her 18th birthday.”

<sup>78</sup> Pursuant to Del. Code Ann. tit. 10, § 901(7) “‘Delinquent child’ means a child who commits an act which if committed by an adult would constitute a crime.”

adjudicatory hearing” and the child is either a fugitive, charged with a felony or certain misdemeanor offenses, likely to fail to appear at the adjudicatory hearing, the child has committed an offense while in placement or while released if those charges by themselves do not normally warrant detention or if, “the child has breached a condition of release.” If a child alleged to be delinquent is held in custody pending adjudication, alternatives to secure custody are available and must be considered pursuant to Del. Code Ann. tit. 10, § 1007(b) (Disposition of child pending adjudication; payment for care) which states,

Prior to making a decision of secure detention pending adjudication the Court shall consider and, where appropriate, employ any of the following alternatives:

- (1) Release on the child’s own recognizance;
- (2) Release to parents, guardian, custodian or other willing member of the child’s family acceptable to the Court;
- (3) Release on bail with or without conditions;
- (4) Release with imposition of restrictions on activities, associations, movements and residence reasonably related to securing the appearance of the child at the next hearing;
- (5) Release to a non-secure detention alternative developed by the Department of Services for Children, Youth and Their Families such as home detention, daily monitoring, intensive home base services with supervision, foster placement, or a non-secure residential setting.

#### *IV. Adjudication or Referral to Alternative Process*

##### *a. Diversion for Commercially Sexually Exploited Minors*

Pursuant to Del. Code Ann. tit. 11, 787 (g)(2) (Special provisions regarding a minor),

A party to a juvenile delinquency proceeding in which a minor is charged with prostitution or loitering, or an attorney guardian ad litem or court-appointed special advocate appointed in a proceeding under § 901 et seq. of Title 10, may file a motion on behalf of a minor in a juvenile delinquency proceeding seeking to stay the juvenile delinquency proceedings. Such motion may be opposed by the Attorney General. The Family Court may consider such a motion and, in its discretion, may stay the juvenile delinquency proceeding indefinitely. Upon such motion, the Department of Services for Children, Youth and Their Families and/or the Family Court may identify and order available specialized services for the minor that, in the opinion of the Department of Services for Children, Youth and Their Families or Family Court, are best suited to the needs of the juvenile. So long as the minor substantially complies with the requirement of services identified by the Department of Services for Children, Youth and Their Families and/or ordered by the Family Court, the Attorney General shall, upon motion, nolle prosequi the stayed charges no earlier than 1 year after the stay was imposed. Upon motion of the Attorney General that the minor has not substantially complied with the requirement of services identified by the Department of Services for Children, Youth and Their Families and/or ordered by the Family Court, the Family Court shall lift the stay for further proceedings in accordance with the regular course of such proceedings.

##### *b. Delinquency adjudication:*

A minor victim who is not diverted may proceed to delinquency adjudication. Pursuant to Del. Code Ann. tit. 10, § 1007(f), an adjudication hearing must be held within 30 days of the child’s detention.

After a petition for adjudication of delinquency of a child in custody is filed, Del. Code Ann. tit. 10, § 1009(a) (Adjudication; disposition following adjudication; commitment to custody of Department of Services for Children, Youth and Their Families; effect) provides, “Where the evidence supports such

holding, the Court may declare a child to be dependent, neglected, abused,<sup>79</sup> as those terms are defined by § 902(1) of Title 16, or delinquent..”

#### V. Outcomes

If the minor enters a plea, the court may suspend adjudication and impose a term of probation pursuant to Del. Code Ann. tit. 10, § 1009A (Probation before adjudication of delinquency) which states,

After accepting an admission or a plea of nolo contendere to an act of delinquency, the court may, prior to entering an adjudication of delinquency, under § 1009 of this title and with the consent of the child and the State, stay the declaration of delinquency, defer further proceedings, and place the child on probation before adjudication subject to the same limitations and upon the same terms and conditions as are applied to adult criminal offenders in § 4218 of Title 11.

Del. Code Ann. tit. 10, § 1009(c) states that if the child is declared delinquent the court can, among other things, “release the child upon the child’s own recognizance” or in the custody of a relative, place the child on probation, grant custody to the Department of Services for Children, Youth and Their Families, “grant the care or custody of a child to any private institution within or without the State that cares for children,” order the child be placed under house arrest, or order any treatment or care that may be in the best interests of the child. Del. Code Ann. tit. 10, § 1009(c)(1), (3), (9), (11), (14), (15).

- 5.4.1 Recommendation: Amend Del. Code Ann. tit. 11, § 787 by enacting a provision that requires any minor under the age of 18 who is involved in prostitution or is a victim of sex trafficking be diverted away from the criminal justice system and into the child protection system and to further require the implementation of a child protection response specifically tailored to the needs of domestic minor sex trafficking victims.

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

A minor trafficking victim should be identified as neglected or abused under Delaware law for purposes of intervention by the Department of Services for Children. Del. Code Ann. tit. 11, § 787(g)(1)<sup>80</sup> (Special provisions regarding a minor) states that

A minor who has engaged in commercial sexual activity is presumed to be a neglected or abused child under 10 Del. C. §§ 901 et seq. Whenever a police officer has probable cause to believe that a minor has engaged in commercial sexual activity, the police officer shall make an immediate report to the Department of Services for Children, Youth, and Their Families pursuant to 16 Del. C. §§ 901 et seq.

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<sup>79</sup> Pursuant to Del. Code Ann. tit. 10, § 901(1),

- (1) “Abuse” or “abused child” means that a person:
- a. Causes or inflicts sexual abuse on a child; or
  - b. Has care, custody or control of a child, and causes or inflicts:
    1. Physical injury through unjustified force as defined in § 468 of Title 11;
    2. Emotional abuse;
    3. Torture;
    4. Exploitation; or
    5. Maltreatment or mistreatment.

<sup>80</sup> See *supra* note 2.

Additionally, although commercial motives are not specifically identified, the definition of abuse in the Family Court chapter is broad enough to include commercial sexual exploitation. “Abuse” or “abused child” is defined in Del. Code Ann. tit. 10, § 901(1) (Definitions) as occurring when a person “[c]auses or inflicts sexual abuse on a child,” or “[h]as care, custody or control of a child, and causes or inflicts . . . [e]xploitation . . . .” Del. Code Ann. tit. 10, § 901(11) defines “exploitation” as “taking advantage of a child for unlawful or unjustifiable personal or sexual gain.”

- 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.*

Although the term “caregiver” is not defined in Delaware’s child welfare statutes, the definition of “custodian” under Del. Code tit. 10, § 901 (Definitions) in the Family Court chapter appears to include a trafficker who has custody or control of a trafficked child. Pursuant to Del. Code tit. 10, § 901(6) (Definitions), “custodian” is defined as “any person who is charged by law with or who has assumed responsibility for a child’s care.” Additionally, “‘Care, custody and control’ or ‘those responsible for care custody and control’ shall mean a person or persons in a position of trust, authority, supervision or control over a child.” Del. Code tit. 10, § 901(3). This includes “[a]ny person who has assumed control of or responsibility for the child.” Del. Code tit. 10, § 901(3)(e).

However, Del. Code tit. 10, § 901(3) clarifies the investigative role of the Department of Services for Children and Their Families in cases involving non-family members who have care, custody or control as follows:

For the purpose of investigation of child abuse, dependency or neglect, the Department of Services for Children and Their Families (DSCYF) may investigate any allegation of child abuse, dependency or neglect committed by persons identified herein, but shall only be responsible for the investigation of intrafamilial and institutional child abuse, dependency or neglect. Where the DSCYF is not responsible for the investigation of such child abuse or neglect, it shall immediately refer such report to the appropriate police authorities or child protective services agencies within or without the State.

- 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.*

Pursuant to Del. Code Ann. tit. 11, § 9009 (Administrative provisions; compensation), Delaware law provides crime victims’ compensation “[i]n any instance in which a person sustains personal injury or is killed by any crime . . . .” Additionally, Del. Code Ann. tit. 11, § 787(m) (Eligibility for services) provides,

- (1) A victim of human trafficking is eligible for a benefit or service, which is available through the State and identified in the plan developed under paragraph (k)(2)a.<sup>81</sup> of this section, including compensation under § 9009 of this title, regardless of immigration status.
- (2) A minor engaged in commercial sexual activity is eligible for a benefit or service, which is available through the State and identified in the plan developed under paragraph (k)(2)a. of this section, regardless of immigration status.
- (3) As soon as practicable after a first encounter with an individual who reasonably appears to a police officer to be a victim or a minor engaged in commercial sexual activity, the police officer

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<sup>81</sup> Del. Code Ann. tit. 11, § 787(k)(2)(a) (Human trafficking coordinating council) states, “The Council shall . . . [d]evelop a comprehensive plan to provide victims of human trafficking with services. . . .”

shall notify the appropriate state or local agency, as identified in the plan developed under paragraph (k)(2)a. of this section, that the individual may be eligible for a benefit or service under this section.

However, certain ineligibility factors that could apply to domestic minor sex trafficking victims threaten access to this compensation, while other ineligibility factors are mitigated by special exceptions for minor victims of sexual abuse. Specifically, Del. Code Ann. tit. 11, § 9010(a) (Denial of claim; reduction) provides in part,

(a) The Agency<sup>82</sup> shall deny payment of a claim for the following reasons:

...

(2) Where the claimant incurred the personal injury on which the claim is based through collusion with the perpetrator of the crime;

(3) Where the claimant refused to give reasonable cooperation to state or local law-enforcement agencies in their efforts to apprehend or convict the perpetrator of the crime in question;

(4) Where the claim has not been filed within 1 year after the personal injury on which the claim is based, unless an extension is granted by the Agency;

(5) Where the claimant has failed to report the crime to a law-enforcement agency within 72 hours of its occurrence. This requirement shall be waived where:

a. The crime has been reported to an appropriate governmental agency, such as child and/or adult protective services or the Family Court;

b. The claimant can provide a protection from abuse order;

c. The claimant has cooperated with law enforcement or an appropriate government agency in cases of crimes involving sexual assault or abuse; or

d. Where the Agency in its discretion determines that the circumstances of the crime render this requirement unreasonable.

....

In addition to the 72 hour reporting exceptions listed in subsection (a)(5), Del. Code Ann. tit. 11, § 9010(d) states, “In no event shall the Agency deny any claim solely because the applicant was a child victim of sexual assault or abuse by an adult, and said applicant either delayed reporting the abuse or assault to authorities or said applicant delayed an application for services to mitigate the effects of the impact of sexual assault or abuse by an adult.” However, this exception fails to exempt trafficking victims from the ineligibility factors set out in Del. Code Ann. tit. 11, § 9010(b), (c), which states,

(b) In determining whether or not to make an award under this chapter, or in determining the amount of any award, the Agency may consider any circumstances it deems to be relevant, including the behavior of the victim which directly or indirectly contributed to injury or death, unless such injury or death resulted from the victim’s lawful attempt to prevent the commission of a crime or to apprehend an offender.

(c) If the victim bears any share of responsibility that caused injury or death, the Agency shall reduce the amount of compensation in accordance with its assessment of the degree of such responsibility attributable to the victim. A claim may be denied or reduced if the victim of the personal injury in question, either through negligence or through wilful and unlawful conduct, substantially provoked or aggravated the incident giving rise to the injury.

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<sup>82</sup> “Agency” refers to the “Victims’ Compensation Assistance Program.” Del. Code Ann. tit. 11, § 9009.

Therefore, while the sexual abuse exceptions could benefit certain minor trafficking victims, not all victims are protected since no exceptions are provided for ineligibility due to non-cooperation with law enforcement or injury arising from collusion with the perpetrator.

5.7.1 Recommendation: Amend Del. Code Ann. tit. 11, § 9010(d) (Denial of claim; reduction) to incorporate an exception that exempts all minor trafficking victims under the age of 18 from the ineligibility factors provided in Del. Code Ann. tit. 11, § 9010(a)–(c) that restrict eligibility based on cooperation with law enforcement, criminal culpability arising from the child’s trafficked condition, and time restrictions on reporting and filing claims.

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

Delaware law provides for the following victim-friendly court procedures:

Pursuant to Del. Code Ann. tit. 11, § 9403(a) (Nondisclosure of information about victim), certain identifying information about a victim must be kept confidential unless the victim waives confidentiality. That information includes, among other things, the victim’s address, telephone number, and place of employment.

Del. Code Ann. tit. 11, § 9404(b) (Victim’s interest in speedy prosecution; child victim or witness) states, “Proceedings shall be expedited in cases involving a child victim or witness particularly in child abuse and sexual abuse cases.” Additionally, Del. Code Ann. tit. 11, § 9406(a) (Safety of victim) provides, “The court shall provide a waiting area for victims separate from the defendant, defendant’s relatives and defense witnesses if such an area is available and the use of the area is practicable. If a separate waiting area is not available or practical, the court shall provide other available safeguards to minimize the victim’s contact with the defendant, defendant’s relatives and defense witnesses during court proceedings.”

Pursuant to Del. Code Ann. tit. 11, § 9407(a) (Presence at court proceedings; notice), the victim has a right to be present at all proceedings other than the grand jury proceeding unless “good cause can be shown by the defendant to exclude the victim. If the victim is present, the court, at the victim’s request, shall permit the presence of an individual to provide support to the victim, unless the court determines that exclusion of the individual is necessary to protect the defendant’s right to a fair trial.” The victim has the right to notice regarding the court proceedings “relative to the disposition of the case at which the victim has a right to be present, unless a victim requests that notice of proceedings not be provided under this chapter.” Del. Code Ann. tit. 11, § 9407(b).

Delaware’s “rape shield” law requires an in camera hearing, on motion of the defendant, to determine the admissibility of evidence of the complaining witness’s sexual conduct offered to attack the credibility of the victim-witness “[i]n any prosecution for the crime of any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact,” or an attempt, solicitation, or conspiracy to commit the same. Del. Code Ann. tit. 11, § 3508(a) (Rape—sufficiency of evidence; proceedings in camera). Del. Code Ann. tit. 11, § 3508(a)(4) further provides,

At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and is not inadmissible, the court may issue an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

Additionally, minor victims testifying in a sex trafficking prosecution are afforded certain rape shield protections. Del. Code Ann. tit. 11, § 787(f)(1)<sup>83</sup> (Admissibility of certain evidence) states that

In a prosecution or civil action for damages under this section, evidence of a specific instance of the alleged victim’s past sexual behavior or reputation or opinion evidence of past sexual behavior of the alleged victim, is not admissible unless the evidence is:

- f. Admitted in accordance with Sections 3508 and 3509 of this Title; or
- g. offered by the prosecution in a criminal case to prove a pattern of trafficking by the defendant.

Similarly, Del. Code Ann. tit. 11, § 3509(a) (Rape—admissibility of certain evidence) states, “Notwithstanding any other provision of this Code to the contrary, and except as provided in this section, in any prosecution for any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact, any opinion evidence, reputation evidence and evidence of specific instances of the complaining witness’ sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the complaining witness.” However, under Del. Code Ann. tit. 11, § 3509(b), “This section . . . shall not be applicable to evidence of the complaining witness’ sexual conduct with the defendant.”

Pursuant to Del. Code Ann. tit. 11, § 3511(a) (Videotaped deposition and procedures for child witnesses),

In any criminal case or hearing on delinquency, upon motion of the Deputy Attorney General prior to trial and with notice to the defense, the court may order all questioning of any witnesses under the age of 12 years to be videotaped in a location designated by the court. Persons present during the videotaping shall include the witness, the Deputy Attorney General, the defendant’s attorney and any person whose presence would contribute to the welfare and well-being of the witness, and if the court permits, the person necessary for operating the equipment. Only the attorneys or a defendant acting pro se may question the child. The court shall permit the defendant to observe and hear the videotaping of the witness in person or, upon motion by the State, the court may exclude the defendant providing the defendant is able to observe and hear the witness and communicate with the defense attorney. . . .

. . . .

Pursuant to Del. Code Ann. tit. 11, § 3513(a) (Hearsay exception for child victim’s or witness’s out-of-court statement of abuse),

(a) An out-of-court statement made by a child victim or witness who is under 11 years of age at the time of the proceeding concerning an act that is a material element of the offense relating to sexual abuse, physical injury, serious physical injury, death, abuse or neglect as described in any felony delineated in subpart A, B or D of subchapter II of Chapter 5 of this title, or in any of the felonies delineated in § 782, § 783, § 783A, § 1102, § 1108, § 1109, § 1111 or § 1112A of this title or in any attempt to commit any felony delineated in this paragraph that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of subsections (b)–(f)<sup>84</sup> of this section are met.

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<sup>83</sup> See *supra* note 2.

<sup>84</sup> Under subsection (b), an out-of-court statement is admissible under subsection (a) if the child “found by the court to be unavailable to testify” due to the child’s “persistent refusal to testify,” “the child’s inability to communicate about the offense because of fear or a similar reason,” or, among others, there is a “substantial likelihood that the child would suffer severe emotional trauma from testifying.” In order for a child to be deemed “unavailable,” it must be supported by expert testimony. Del. Code Ann. tit. 11, § 3513(c). Additionally, the child must give notice to the adverse party that the out-of-court statement will be used. Del. Code Ann. tit. 11, § 3513(d). Lastly, the



Lastly, Del. Code Ann. tit. 11, § 3514(a)(1) (Testimony of victim or witness in child abuse case by means of closed circuit television) provides,

- (a) (1) In any prosecution involving any offense set forth in § 3513(a) of this title, a court may order that the testimony of a child victim or witness less than 11 years of age be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
  - a. The testimony is taken during the proceeding; and
  - b. The judge determines that testimony by the child victim or witness in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

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.*

(Application for pardon and petition to expunge; motion to vacate conviction and expunge record) states that

Del. Code Ann. tit. 10, § 1017(a) (Mandatory expungement ) provides,<sup>85</sup>

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child's statement must be trustworthy. Del. Code Ann. tit. 11, § 3513(b)(2)(b). Pursuant to Del. Code Ann. tit. 11, § 3513(e), (f),

- (e) In determining whether a statement possesses particularized guarantees of trustworthiness under paragraph (b)(2) of this section, the court may consider, but is not limited to, the following factors:
  - (1) The child's personal knowledge of the event;
  - (2) The age and maturity of the child;
  - (3) Certainty that the statement was made, including the credibility of the person testifying about the statement;
  - (4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion;
  - (5) The timing of the child's statement;
  - (6) Whether more than 1 person heard the statement;
  - (7) Whether the child was suffering pain or distress when making the statement;
  - (8) The nature and duration of any alleged abuse;
  - (9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
  - (10) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the child's age;
  - (11) Whether the statement is spontaneous or directly responsive to questions;
  - (12) Whether the statement is suggestive due to improperly leading questions;
  - (13) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.
- (f) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

<sup>85</sup> If a minor victim is charged criminally for offenses committed as a result of his or her victimization, human trafficking victims may expunge criminal prostitution convictions pursuant to Del. Code Ann. tit. 11, § 787(j) (Application for pardon and petition to expunge; motion to vacate conviction and expunge record) which states,

- (1) Notwithstanding any provision of Title 11, Chapter 43 or any other law to the contrary, a person convicted of prostitution, loitering, or obscenity committed as a direct result of being a

- (a) The Family Court shall grant a petition for expungement if:
- (1) A child is charged with the commission of one or more crimes designated as a misdemeanor or violation in Title . . . 11 [Crimes and Criminal Procedure], . . . of this Code, or a county or municipal code, ordinance, or regulation which is the same as, or equivalent to, any offense defined in Title 4,7, 11, 16 or 23 of this Code, and the case is terminated in favor of the child,<sup>86</sup> provided the petitioner has no prior adjudication of delinquency, and provided that the petitioner has no subsequent adjudication of delinquency or adult conviction, and provided that the petitioner has no pending criminal charges.
  - . . . .
  - (3) A child has no more than one adjudication of delinquency in a case where the crime or crimes for which the child was adjudicated delinquent are designated as felonies or misdemeanors or violations in Title 4,7, 11,16 or 23 of this Code, or a county or municipal code, ordinance, or regulation which is the same as, or equivalent to, any offenses enumerated in Title 4,7, 11, 16 or 23 of this code excepting violent felonies and sex offenses, and provided the petitioner has no prior adjudication of delinquency, and provided that the petitioner has no subsequent adjudication of delinquency or adult conviction, and provided that the petitioner has no pending criminal charges, and provided that at least three years have passed following the date the adjudication of delinquency was entered in Family Court.

Del. Code Ann. tit. 10, § 1018(a)(3) (Discretionary expungement) also gives the court discretion to grant an expungement to a minor CSEC victim provided that, among others, the child has no more than 2 adjudications for misdemeanor or violation offenses under 4, 7, 11, 16 or 23 and at least five years have elapsed from the second adjudication of delinquency.

Lastly, a minor CSEC victim may have a juvenile record expunged pursuant to Del. Code Ann. tit. 10, § 1018(e), which states,

Notwithstanding any provision of this subchapter or any other statute or rule to the contrary, the Attorney General or the Attorney General’s designee responsible for prosecuting a delinquency

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victim of human trafficking may file an application for a pardon pursuant to Article VII of the Delaware Constitution and 11 Del. C. §§ 4361, et seq. and may file a petition requesting expungement of such criminal record pursuant to 11 Del. C. §§ 4371, et seq.

(2) A person convicted of prostitution, loitering, or obscenity as a direct result of being a victim of human trafficking may file a motion in the court in which the conviction was obtained to vacate the judgment of conviction . . .

(3) Notwithstanding any provision of Title 11, Chapter 43 or any other law to the contrary, any person filing a motion under paragraph (j)(2) in Superior Court or Family Court may also seek in that motion expungement of the criminal record related to such conviction. If the court grants the motion to vacate the conviction under paragraph (j)(2) and the movant also requested expungement, the court’s order shall require expungement of the police and court records relating to the charge and conviction.

*See supra* note 2.

<sup>86</sup> Pursuant to Del. Code Ann. tit. 10, § 1016(7) (Definitions applicable to juvenile expungements), “terminated in favor of the child” is defined as,

- a. The child is acquitted of all charges related to the case; or
- b. A nolle prosequi is entered on all charges related to the case; or
- c. The charges have been otherwise dismissed for any reason, including, but not limited to dismissals following successful completion of arbitration, probation before adjudication of delinquency, or any court-approved diversion program.

action may petition the Court to expunge the instant arrest record of a child if at the time of a state motion to dismiss or entry of a nolle prosequi in the case, the State has determined that the continued existence and possible dissemination of information relating to the arrest of the child for the matter dismissed or for which a nolle prosequi was entered may cause circumstances which constitute a manifest injustice to the juvenile.

*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.*

Under Del. Code Ann. tit. 11, § 787(d)<sup>87</sup>, restitution is mandatory for those convicted of violations of human trafficking:

- (1) In addition to any other amount of loss identified, the court shall order restitution, including the greater of:
  - a. The gross income or value to the defendant of the victim’s labor or services; or
  - b. The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 201 et seq.] or of Title 19, whichever is greater.
- (2) The Court shall order restitution under this paragraph (d) even if the victim is unavailable to accept payment of restitution.

Civil actions are expressly available for victims of human trafficking. Del. Code Ann. tit. 11, § 787(j)<sup>88</sup> (Civil action) provides that

- (1) A victim may bring a civil action against a person that commits an offense under subsection (b) [Trafficking an individual] of this section for compensatory damages, punitive damages, injunctive relief, and any other appropriate relief.
- (2) In an action under this subsection, the court shall award a prevailing victim reasonable attorney’s fees and costs, including reasonable fees for expert witnesses.
- (3) An action under this subsection must be commenced not later than 5 years after the later of the date on which the victim
  - a. was freed from the human trafficking situation; or
  - b. attained 18 years of age.

*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.*

Under Del. Code Ann. tit. 11, § 205(b)<sup>89</sup> (Time limitations), the general criminal statute of limitations is 5 years, but under subsection (a), prosecutions for Class A felonies “may be commenced at any time.” However, “a prosecution for any crime that is delineated in § 787 of this title and which the victim is a minor, Subpart D of Subchapter II of Chapter 5 of this title, or is otherwise defined as a ‘sexual offense’ by Sec. 761 of this title except Sec. 763, 764 or 765 of this title, or any attempt to commit said crimes, may be commenced at any time.” Del. Code Ann. tit. 11, § 205(e). Since “[s]exual offense” as defined by Del. Code Ann. tit. 11, § 761(h) does not include violations of Del. Code Ann. tit. 11, § 787<sup>90</sup> (Trafficking an individual, forced labor and sexual servitude), the general 5 year statute of limitations

<sup>87</sup> See *supra* note 2.

<sup>88</sup> See *supra* note 2.

<sup>89</sup> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 205 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

<sup>90</sup> See *supra* note 2.

would be applicable in prosecutions under the trafficking law. Violations of Del. Code Ann. tit. 11, § 1108 (Sexual exploitation of a child), § 1352 (Promoting prostitution in the second degree), and § 1353 (Promoting prostitution in the first degree), however, are included in the definition of “sex offense” and, therefore, can be prosecuted at any time.

Regarding civil suits, Del. Code Ann. tit. 11, § 787(j) (Civil action) establishes the statute of limitations for civil actions based on human trafficking offenses and provides that

- (3) An action under this subsection must be commenced not later than 5 years after the later of the date on which the victim:
  - a. was freed from the human trafficking situation; or
  - b. attained 18 years of age.

Further, Del. Code Ann. tit. 10, § 8145(a) (Civil suits for damages based upon sexual abuse of a minor by an adult) eliminates the statute of limitations on any claims arising from criminal sexual abuse. Del. Code Ann. tit. 10, § 8145(a) specifically provides,

A cause of action based upon the sexual abuse of a minor by an adult may be filed in the Superior Court of this State at any time following the commission of the act or acts that constituted the sexual abuse. A civil cause of action for sexual abuse of a minor shall be based upon sexual acts that would constitute a criminal offense under the Delaware Code.

**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.*

Del. Code Ann. tit. 11, § 787(k)<sup>91</sup> (Human trafficking coordinating council) establishes a human trafficking coordinating council and tasks the council with coordinating training that would include training for law enforcement as state and local employees. Del. Code Ann. tit. 11, § 787(k)(2)(f) states that “[t]he Council shall . . . [c]oordinate training on human trafficking prevention and victim services for state and local employees who may have recurring contact with victims or perpetrators.”

Additionally, while Del. Code Ann. tit. 11, § 8405 (Mandatory training; exceptions) does not specifically mandate that law enforcement must be trained on human trafficking and domestic minor sex trafficking, Del. Code Ann. tit. 11, § 8404(a)(19) (Powers and Duties) provides that the Council on Police Training may “[m]andate training for all persons seeking permanent or seasonal appointment as a police officer in the detection, prosecution and prevention of child sexual and physical abuse, exploitation and domestic violence . . . .”

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

Pursuant to Del. Code Ann. tit. 11, § 2402<sup>92</sup> (Interception of communications generally; divulging contents of communications, violations of chapter), single party consent to interception of a communication is permitted in law enforcement investigations. Specifically, Del. Code Ann. tit. 11, § 2402(c)(4) states,

(c) Lawful acts.—It is lawful:

....

(4) For a person to intercept<sup>93</sup> a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitutions or laws of the United

<sup>91</sup> See *supra* note 2.

<sup>92</sup> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 2402 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

<sup>93</sup> Del. Code Ann. tit. 11, § 2401(10) (Definitions) defines “intercept” as “the aural or other acquisition of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.”

States, this State or any other state or any political subdivision of the United States or this or any other state.

Additionally, single party consent to the use of body wires by law enforcement officers and their agents is permitted pursuant to Del. Code Ann. tit. 11, § 2402 (c)(7), which states,

It is lawful . . . [f]or law-enforcement personnel or those acting under their direction to utilize body wires to intercept oral communications in the course of a criminal investigation when the law-enforcement personnel or a person acting under their direction is a party to the communication. Communications intercepted by such means may be recorded and may be used against the defendant in a criminal proceeding.

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

Pursuant to Del. Code Ann. tit. 11, § 2402(c)(3) (Interception of communications generally; divulging contents of communications, violations of chapter), “It is lawful . . . [f]or an investigative or law-enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law-enforcement officer in such investigation pursuant to a court order . . . to intercept a wire, oral or electronic communication in order to provide evidence of the commission of . . . human trafficking . . .”

Additionally, pursuant to Del. Code Ann. tit. 11, § 2405<sup>94</sup> (Authorities permitted to apply for order authorizing interception), wiretapping by law enforcement is permitted with a court order, depending on the nature of the offense being investigated. Specifically, Del. Code Ann. tit. 11, § 2405 states,

The Attorney General, Chief Deputy Attorney General, State Prosecutor or Chief Prosecutor of any county may apply to a judge authorized to receive intercept applications and the judge, in accordance with § 2407 of this title, may grant an order authorizing the interception by investigative or law-enforcement officers of wire, oral or electronic communications when the interception may provide evidence:

- (1) Of the commission of the offense of racketeering . . . human trafficking . . .
- (2) Of the commission of any felony creating a risk of physical injury to a person;
- (3) Of any conspiracy or solicitation to commit any of the offenses set forth in paragraph (1) or (2) of this section; or
- (4) Aiding in the apprehension of the perpetrator of any of the offenses set forth in this section.

No application or order shall be required if the interception is lawful under the provisions of § 2406(c) of this title.

Therefore, while human trafficking is expressly permitted for wiretapping by law enforcement during investigations, wiretapping for investigation of CSEC offenses would only be permitted to the extent that the suspected trafficking constituted racketeering violations, or if the court determined that the trafficking was likely to result in personal injury.

Once a communication is lawfully intercepted, Del. Code Ann. tit. 11, § 2406(e) (Lawful disclosure or use of contents of communication) permits evidence of other offenses to be used by law enforcement for

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<sup>94</sup> Here and elsewhere in this report that Del. Code Ann. tit. 11, § 2405 is quoted or cited, it has been updated to reflect the amendments added by the enactment of House Bill 197. Del. Laws. (2014) (effective June 30, 2014).

purposes of investigation pursuant to Del. Code Ann. tit. 11, § 2406(a) and (b), however, such evidence may only be introduced through testimony “when authorized or approved by a judge authorized to receive intercept applications where the judge finds on subsequent application that the contents were otherwise intercepted in accordance with this chapter. Such application should be made forthwith.” Del. Code Ann. tit. 11, § 2406(e). Therefore, even if evidence of trafficking was obtained through a wiretap authorized for another offense, that evidence could not be introduced through testimony if the suspected trafficking constituted racketeering violations, or if the court determined that the trafficking was likely to result in personal injury.

The “contents of any intercepted wire, oral or electronic communication or evidence derived therefrom” are inadmissible at trial and other court proceedings “unless each party, not less than 10 days before the trial, hearing or proceeding,” receives a copy of the court order and application authorizing the interception, although the time deadline may be judicially waived. Del. Code Ann. tit. 11, § 2407(h).

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.*

Delaware does not have a law specifically authorizing use of a law enforcement decoy in investigation of trafficking or CSEC offenses.

6.4.1 Recommendation: Enact a law specifically authorizing use of use of a law enforcement decoy in investigation of domestic minor sex trafficking or CSEC offenses.

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

Delaware does not have a law specifically authorizing or otherwise addressing use of the Internet in human trafficking investigations.

6.5.1 Recommendation: Enact a law specifically authorizing use of the Internet in investigations of sex trafficking and other CSEC offenses.

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

Del. Code Ann. tit. 11, § 8542 (Definitions) defines “missing child” for the purposes of missing child reporting requirements. It states,

(1) “Missing child” means any person who is under the age of 18 years, whose temporary or permanent residence is in Delaware, or is believed to be in Delaware, whose location has not been determined, and who has been reported as missing to a law-enforcement agency.

Pursuant to Del. Code Ann. tit. 11, § 8543 (Duties), the [Missing Children Information] Clearinghouse<sup>95</sup> is required to,

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<sup>95</sup> Del. Code tit. 11, § 8541 (Established) states, “The Missing Children Information Clearinghouse, hereinafter referred to as ‘Clearinghouse,’ is created within the State Bureau of Identification. The Clearinghouse is established as a central repository of information regarding missing children. Such information shall be collected and disseminated to assist in the location of missing children. The Director of the State Bureau of Identification shall establish services deemed appropriate by the Superintendent of State Police to aid in the location of missing children.”

- (1) Provide a form of missing child report for use by private citizens and law-enforcement agencies;
- (2) Establish a system of interstate communication of information relating to children determined to be missing by the parent, guardian or legal custodian of the child, or by a law-enforcement agency;
- (3) Provide a centralized file for the exchange of information of missing children within the State;
- (4) Interface with the National Crime Information Center for the exchange of information on a missing child suspected of interstate travel;
- (5) Collect, process, maintain and disseminate information on missing children and strive to maintain or disseminate only accurate and complete information.

Pursuant to Del. Code Ann. tit. 11, § 8544(b) (Filing missing child reports; notification upon location; purging information; return of fingerprints), “Any parent, guardian or legal custodian may submit a missing child report to a local law-enforcement agency having jurisdiction for investigation and referral of the missing child report to the Clearinghouse on any child whose whereabouts is unknown, regardless of the circumstances, which shall be included in the Clearinghouse data base.”

Upon receiving a missing child report, Del. Code Ann. tit. 11, § 8544(a) provides,

Every sheriff, constable, chief police officer, officer in charge, member of the State Police and other law-enforcement agency and officer of the State and of any local governmental unit shall immediately accept and act upon information on any missing child by police radio broadcasts and by causing missing child entries into DELJIS and NCIC and shall transmit information to the Clearinghouse, so far as available, on a missing child report concerning a missing child within 24 hours after receipt thereof. The investigating law-enforcement agency shall also notify the Delaware Information Analysis Center (DIAC) who shall assist the investigating law-enforcement agency in regard to the search and location of the missing child.

After a parent, guardian or custodian has reported a child as missing they are obligated to notify the Clearinghouse once the child is located pursuant to Del. Code Ann. tit. 11, § 8544(c).

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