

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

2015 ANALYSIS AND RECOMMENDATIONS VIRGINIA

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

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

Legal Analysis¹:

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

Va. Code Ann. § 18.2-357.1² (Commercial sex trafficking; penalties) specifically criminalizes domestic minor sex trafficking without requiring proof of force, fraud or coercion when the victim is a minor. Pursuant to Va. Code Ann. § 18.2-357.1,

A. Any person who, with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse in violation of subsection A of §18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], solicits, invites, recruits, encourages, or otherwise causes or attempts to cause a person to violate subsection A of § 18.2-346 is guilty of a class 5 felony.

¹ This report includes legislation enacted as of August 1, 2015.

² The text of Va. Code Ann. § 18.2-357.1 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964 and Senate Bill 1188, 2015 Leg. Sess. (Va. 2015) (effective July 1, 2015).

B. Any person who violates subsection A through the use of force, intimidation, or deception is guilty of a Class 4 felony.

C. Any adult who violates subsection A with a person under the age of 18 is guilty of a Class 3 felony.

A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).³ A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(d). A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e).

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. Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) criminalizes the “[a]bduction (i) of any person with the intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, (iii) of any child under sixteen years of age for the purpose of concubinage or prostitution, (iv) of any person for the purpose of prostitution, or (v) of any minor for the purpose of manufacturing child pornography.” Va. Code Ann. § 18.2-48. Under Va. Code Ann. § 18.2-47 (Abduction and kidnapping defined; punishment),

A. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of “abduction.”

B. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to subject him to forced labor or services shall be deemed guilty of “abduction.” For purposes of this subsection, the term “intimidation” shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.

Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) is punishable as a Class 2 felony, which carries a minimum sentence of 20 years to life and a possible fine of up to \$100,000. Va. Code Ann. §§ 18.2-10 (b), (g). Va. Code Ann. § 18.2-48 also specially directs that “[i]f the sentence imposed for a violation of (ii), (iii), (iv), or (v) includes a term of confinement less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life subject to revocation by the court.”

2. Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) criminalizes soliciting sex with minors, stating that “any person who solicits

³ Va. Code Ann. § 18.2-10(g) provides that “[e]xcept as specifically authorized in subdivision (e) [Class 5 felonies] or (f) [Class 6 felonies], or in Class 1 felonies for which a sentence of death is imposed, the court shall impose either a sentence of imprisonment together with a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine.”

prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.” Va. Code Ann. § 18.2-346(B). A Class 6 felony is punishable by “a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(f). A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e).

3. Va. Code Ann. § 18.2-355(4)⁴ (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking) provides that any person who “for purposes of prostitution, takes any minor into, or persuades, encourages, or causes any minor to enter, a bawdy place, or takes or causes such person to be taken to any place for such purposes; is guilty of pandering. . . A violation of subdivision (4) is punishable as a Class 3 felony.” A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).
4. Va. Code Ann. § 18.2-370(B) (Taking indecent liberties with children) states, “Any person 18 years of age or over who, with lascivious intent, knowingly and intentionally receives money, property, or any other remuneration for allowing, encouraging, or enticing any person under the age of 18 years to perform in or be a subject of sexually explicit visual material as defined in § 18.2-374.1⁵ or who knowingly encourages such person to perform in or be a subject of sexually explicit material; is guilty of a Class 5 felony.” A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e). This penalty is enhanced to a Class 4 felony for second or subsequent convictions, “provided that (i) the offenses were not part of a common act, transaction or scheme; (ii) the accused was at liberty as defined in § 53.1-151 between each conviction; and (iii) it is admitted, or found by the jury or judge before whom the person is tried, that the accused was previously convicted of a violation of this section.” Va. Code Ann. § 18.2-370(C). A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed.⁶ Va. Code Ann. § 18.2-10(d).
5. Va. Code Ann. § 18.2-356⁷ (Receiving money for procuring person) states,

Any person who receives any money or other valuable thing for or on account of (i) procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act in violation of § 18.2-361 or (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child

⁴ The text of Va. Code Ann. § 18.2-355 included here and elsewhere in this report includes amendments made by the passage of House Bill 2040, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

⁵ Va. Code Ann. § 18.2-374.1(A) defines “sexually explicit visual material” as “a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer’s temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.”

⁶ See *supra* note 3.

⁷ The text of Va. Code Ann. § 18.2-356 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964 and Senate Bill 1188, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

pornography is guilty of a Class 4 felony. Any person who violates clause (i) or (ii) with a person under the age of 18 is guilty of a Class 3 felony.

A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(d). A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

6. Va Code Ann. § 18.2-357⁸ (Receiving money from earnings of male or female prostitute; penalties) states,

Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, punishable as a Class 4 felony. Any person who violates this section by receiving money or other valuable thing from a person under the age of 18 is guilty of a Class 3 felony. A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

Also, though not specific to commercial sex offenses, the following offenses may also apply to commercial sexual exploitation of children cases:

1. Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties) makes the following a Class 5 felony:

Any person 18 years of age or over, who, with lascivious intent, knowingly and intentionally commits any of the following acts with any child under the age of 15 years . . . :

- (1) Expose his or her sexual or genital parts to any child to whom such person is not legally married or propose that any such child expose his or her sexual or genital parts to such person; or
- (2) [Repealed.]
- (3) Propose that any such child feel or fondle his own sexual or genital parts or the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child; or
- (4) Propose to such child the performance of an act of sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
- (5) Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth in the preceding subdivisions of this section.

A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(e).

2. Va. Code Ann. § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.) makes it a Class 1 misdemeanor for “[a]ny person 18 years of age or older, including the parent of any child” to “willfully contribute[] to, encourage[], or cause[] any act, omission, or condition that renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228” or to “engage[] in consensual sexual intercourse or anal intercourse with or performs cunnilingus, fellatio, or anilingus upon or by a child 15 or older not his spouse, child, or grandchild.” Va. Code Ann. § 18.2-371. A

⁸ The text of Va. Code Ann. § 18.2-357 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964 and Senate Bill 1188, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

Class 1 misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a).

3. Va. Code Ann. § 18.2-61 (Rape), among other things, classifies sex with a child under 13 as rape. Va. Code Ann. § 18.2-61(A)(iii). A mandatory minimum sentence of 25 years is required for rape of a child under 13 where the offender is “more than three years older than the victim” and “if done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment] or § 18.2-48 [Abduction with intent to extort money or for immoral purpose], (ii) § 18.2-89 [Burglary; how punished], 18.2-90 [Entering dwelling house, etc., with intent to commit murder, rape, robbery or arson; penalty], or 18.2-91 [Entering dwelling house, etc., with intent to commit larceny, assault and battery or other felony], or (iii) § 18.2-51.2 [Aggravated malicious wounding; penalty].” Where it is alleged that the offender was 18 or older at the time of the offense, “the punishment shall include a mandatory minimum term of confinement for life.” Va. Code Ann. § 18.2-61(B). “If the term of confinement imposed for any violation of clause (iii) of subsection A, where the offender is more than three years older than the victim, is for a term less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life, subject to revocation by the court.” Va. Code Ann. § 18.2-61(B).
4. Va. Code Ann. § 18.2-63(A) (Carnal knowledge of child between thirteen and fifteen years of age) makes it a Class 4 felony punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 for a person to “carnally know[], without the use of force, a child thirteen years of age or older but under fifteen years of age.”⁹ Va. Code Ann. § 18.2-10(d), (g).¹⁰ Va. Code Ann. § 18.2-63(B) also makes it a Class 6 felony for a person to “carnally know[], without the use of force, a child thirteen years of age or older but under fifteen years of age who consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused’s junior.” A Class 6 felony is punishable by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(f). This crime is reduced to a Class 4 misdemeanor when the “consenting child is less than three years the accused’s junior” punishable by a fine up to \$250. Va. Code Ann. §§ 18.2-63(B), 18.2-11(d). The provision notes that “a child under the age of thirteen years shall not be considered a consenting child.” Va. Code Ann. § 18.2-63(C).
5. Va. Code Ann. § 18.2-67.4:2 (Sexual abuse of a child under 15 years of age; penalty) states, “Any adult who, with lascivious intent, commits an act of sexual abuse, as defined in § 18.2-67.10, with any child 13 years of age or older but under 15 years of age is guilty of a Class 1 misdemeanor.”¹¹ A Class 1

⁹ Va. Code Ann. § 18.2-63(C)(ii) defines “carnal knowledge” as including “acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration.”

¹⁰ See *supra* note 3.

¹¹ Va. Code Ann. § 18.2-67.10(6) states,

- “Sexual abuse” means an act committed with the intent to sexually molest, arouse, or gratify any person, where:
- a. The accused intentionally touches the complaining witness’s intimate parts or material directly covering such intimate parts;
 - b. The accused forces the complaining witness to touch the accused’s, the witness’s own, or another person’s intimate parts or material directly covering such intimate parts;
 - c. If the complaining witness is under the age of 13, the accused causes or assists the complaining witness to touch the accused’s, the witness’s own, or another person’s intimate parts or material directly covering such intimate parts; or

misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a).

6. Va. Code Ann. § 18.2-379 (Employing or permitting minor to assist in offense under article) states, “It shall be unlawful for any person knowingly to hire, employ, use or permit any minor to do or assist in doing any act or thing constituting an offense under this article [Article 5—Obscenity and related offenses].” A first time offense is a Class 1 misdemeanor punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-380, 18.2-11(a). Subsequent offenses are punishable as Class 6 felonies by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(f). “However, if the person, firm, association or corporation convicted of such subsequent offense is the owner of the business establishment where each of the offenses occurred, a fine of not more than \$10,000 shall be imposed in addition to the penalties otherwise prescribed by this section.” Va. Code Ann. § 18.2-381.
7. Va. Code Ann. § 18.2-374.4 (Display of child pornography or grooming video or materials to a child unlawful) states,

Any person 18 years of age or older who displays child pornography or a grooming video or materials to a child under 13 years of age with the intent to entice, solicit, or encourage the child to engage in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration is guilty of a Class 6 felony.

A Class 6 felony is punishable by “a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(f). Va. Code Ann. § 18.2-374.4(B) defines “Grooming video or materials” as “a cartoon, animation, image, or series of images depicting a child engaged in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, masturbation, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration.”

- 1.2.1 Recommendation: Amend Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) to raise the base penalty to comparable federal levels.

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

Virginia’s prostitution statute, Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties), does not refer to the sex trafficking statute, Va. Code Ann. § 18.2-357.1¹² (Commercial sex trafficking; penalties) to identify a commercially sexually exploited minor as a victim of trafficking.

- 1.3.1 Recommendation: Amend Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) to refer to Va. Code Ann. § 18.2-357.1 (Commercial

d. The accused forces another person to touch the complaining witness’s intimate parts or material directly covering such intimate parts.

¹² See *supra* note 2.

sex trafficking; penalties) to clarify that prostituted/trafficked minors should be identified as victims of sex trafficking.

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

Va. Code Ann. § 18.2-514 (Racketeering offenses) states,

A. It shall be unlawful for an enterprise,¹³ or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to receive any proceeds known to have been derived directly from racketeering activity and to use or invest an aggregate of \$10,000 or more of such proceeds in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise.

B. It shall be unlawful for any enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to directly acquire or maintain any interest in or control of any enterprise or real property through racketeering activity.

C. It shall be unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through racketeering activity.

D. It shall be unlawful for any person to conspire to violate any of the provisions of subsection A, B, or C.

Va. Code Ann. § 18.2-513¹⁴ (Definitions) defines “racketeering activity” to mean:

[to] commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit two or more of the following offenses: 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute; penalties], 18.2-357.1 [Commercial sex trafficking; penalties] . . . § 18.2-48 [Abduction with intent to extort money or for immoral purpose] . . . § 18.2-49 [Threatening, attempting or assisting in such abduction] . . . 18.2-374.1 [Possession, reproduction, distribution, solicitation, and facilitation of child pornography; penalty] . . . ; or any substantially similar offenses under the laws of any other state, the District of Columbia, the United States or its territories.

Based on this definition of racketeering, certain acts of commercial sexual exploitation of children constitute predicate crimes to the racketeering law, making it available for combatting criminal enterprises that engage in domestic minor sex trafficking.

Penalties for violation of Va. Code Ann. § 18.2-514 (Racketeering offenses) are described in Va. Code Ann. § 18.2-515 (Criminal penalties; forfeiture)

A. Any person or enterprise convicted of engaging in activity in violation of the provisions of § 18.2-514 is guilty of a felony punishable by imprisonment for not less than five years nor more than 40 years and a fine of not more than \$1 million. A second or subsequent offense shall be punishable as a Class 2 felony and a fine of not more than \$2 million.

¹³ VA Code Ann. § 18.2-513 (Definitions) defines “enterprise” to mean “any of the following: sole proprietorship, partnership, corporation, business trust, criminal street gang; or other group of three or more individuals associated for the purpose of criminal activity.”

¹⁴ The text of Va. Code Ann. § 18.2-513 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964 and Senate Bill 1188, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

The court may order any such person or enterprise to be divested of any interest in any enterprise or real property identified in § 18.2-514; order the dissolution or reorganization of such enterprise; and order the suspension or revocation of any license, permit, or prior approval granted to such enterprise or person by any agency of the Commonwealth or political subdivision thereof.

B. All property, real or personal, including money, together with any interest or profits derived from the investment of such money, used in substantial connection with, intended for use in the course of, or traceable to, conduct in violation of any provision of § 18.2-514 is subject to civil forfeiture to the Commonwealth.

Finally, where the alleged enterprise is a criminal street gang, additional charges may apply. Under Va. Code Ann. § 18.2-46.2(A),

Any person who actively participates in or is a member of a criminal street gang and who knowingly and willfully participates in any predicate criminal act¹⁵ committed for the benefit of, at the direction of, or in association with any criminal street gang shall be guilty of a Class 5 felony. However, if such participant in or member of a criminal street gang is age eighteen years or older and knows or has reason to know that such criminal street gang also includes a juvenile member or participant, he shall be guilty of a Class 4 felony.

Va. Code Ann. § 18.2-46.1 defines “criminal street gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, (i) which has as one of its primary objectives or activities the commission of one or more criminal activities; (ii) which has an identifiable name or identifying sign or symbol; and (iii) whose members individually or collectively have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more predicate criminal acts, at least one of which is an act of violence, provided such acts were not part of a common act or transaction.”

Where CSEC and sex trafficking offenses involve gang recruitment or intimidation, gang members may face prosecution under Va. Code Ann. § 18.2-46.3 (Recruitment of persons for criminal street gang; penalty), which states,

A. Any person who solicits, invites, recruits, encourages or otherwise causes or attempts to cause another to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 1 misdemeanor. Any person age 18 years or older who solicits, invites, recruits, encourages or otherwise causes or attempts to cause a juvenile to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 6 felony.

¹⁵ Va. Code Ann. § 18.2-46.1 defines “predicate criminal act” as including “(i) an act of violence; (ii) any violation of § 18.2-42, 18.2-46.3 [Recruitment of persons for criminal street gang; penalty], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute], or 18.2-357.1 [Commercial sex trafficking; penalties]; . . . or (v) any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.” “Act of violence” is defined as “those felony offenses described in subsection A of § 19.2-297.1.” Va. Code Ann. § 18.2-46.1. Pursuant to Va. Code Ann. § 19.2-297.1(A)(i), the term includes “c. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.)” and “f. Except as otherwise provided in § 18.2-67.5:2 or § 18.2-67.5:3, criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.)” It also includes “(ii) conspiracy to commit any of the violations enumerated in clause (i) of this section; and (iii) violations as a principal in the second degree or accessory before the fact of the provisions enumerated in clause (i) of this section.” The text of Va. Code Ann. § 18.2-46.1 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964 and Senate Bill 1188, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

B. Any person who, in order to encourage an individual (a) to join a criminal street gang, (b) to remain as a participant in or a member of a criminal street gang, or (c) to submit to a demand made by a criminal street gang to commit a felony violation of this title, (i) uses force against the individual or a member of his family or household or (ii) threatens force against the individual or a member of his family or household, which threat would place any person in reasonable apprehension of death or bodily injury, is guilty of a Class 6 felony. The definition of “family or household member” “set forth in § 16.1-228 applies to this section.

Va. Code Ann. § 18.2-46.3:2 provides for civil forfeiture in the case of criminal street gang activities, stating in part,

All property, both personal and real, of any kind or character used in substantial connection with, intended for use in the course of, derived from, traceable to, or realized through, including any profit or interest derived from, any conduct in violation of any provision of this article¹⁶ is subject to civil forfeiture to the Commonwealth. Further, all property, both personal and real, of any kind or character used or intended to be used in substantial connection with, during the course of, derived from, traceable to, or realized through, including any profit or interest derived from, criminal street gang member recruitment as prohibited under Va. Code § 18.2-46.3 is subject to civil forfeiture to the Commonwealth.

¹⁶ Title 18.2, Chapter 4, Article 2.1 (Crimes by gangs), Va. Code Ann. § 18.2-46.1 *et seq.*, includes offenses under § 18.2-46.2 (Prohibited criminal street gang participation; penalty) and § 18.2-46.3 (Recruitment of persons for criminal street gang; penalty).

Legal Components:

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

Legal Analysis:

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

Since Va. Code Ann. § 18.2-357.1¹⁷ (Commercial sex trafficking, penalties) is limited in application to offenders who act “with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse in violation of subsection A of §18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties],” the sex trafficking law does not apply to the conduct of buyers of sex acts with a minor.

- 2.1.1 Recommendation: Amend Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking, penalties) to make the statute applicable to the actions of buyers of sex with minors.

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

Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) criminalizes soliciting sex from minors, stating that “any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.” Va. Code Ann. § 18.2-346(B).

In addition, Va. Code Ann. § 18.2-355(4)¹⁸ (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking) may apply to buyers through the term “causes.” Pursuant to Va. Code Ann. § 18.2-355(4), any person who “for purposes of prostitution, takes any minor into, or persuades, encourages, or causes

¹⁷ See *supra* note 2.

¹⁸ See *supra* note 4.

any minor to enter, a bawdy place, or takes or causes such person to be taken to any place for such purposes; is guilty of pandering. . . A violation of subdivision (4) is punishable as a Class 3 felony.”

While Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties) does not criminalize buying sex with a minor, it may have limited application to buyers who “[p]ropose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 [Crimes against nature; penalties]; or . . . [e]ntice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth” in the subsection. Va. Code Ann. § 18.2-370(A)(4), (5).

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

The offense of solicitation of prostitution differentiates between buying sex with an adult and buying sex with a minor. Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) states, “Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts . . . is guilty of solicitation of prostitution and which is punishable as a Class 1 misdemeanor. However, any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.” Va. Code Ann. § 18.2-346(A-B).

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

Soliciting sex with a minor of 16 years of age or older is a Class 6 felony. Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor). Soliciting sex with a minor younger than 16 years of age is a Class 5 felony. A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both imprisonment and a fine.¹⁹ A Class 6 felony is punishable by a term of imprisonment of 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both imprisonment and a fine.²⁰

Pandering involving a minor is a Class 3 felony. Va. Code Ann. § 18.2-355(4)²¹ (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking). A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)²² 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 offense²³ against a minor. 18 U.S.C. § 3559(e)(1). To the

¹⁹ Va. Code Ann § 18.2-10(e) (General punishment for conviction of felony; penalty).

²⁰ *Id.* § 18.2-10(f).

²¹ *See supra* note 4.

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

²³ 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 §

extent buyers can be prosecuted under other federal CSEC laws,²⁴ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²⁵

2.5 *Using the Internet or electronic communications 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.*

Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) makes it a crime to use the Internet, or other communication systems, to engage in certain types of sexual interactions with a minor. It states in part,

B. It is unlawful for any person to use a communications system,²⁶ including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 [Taking indecent liberties with children; penalties] or 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]. A violation of this subsection is a Class 6 felony.

C. It is unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child younger than 15 years of age to knowingly and intentionally:

1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;
2. Propose that any such child feel or fondle his own sexual or genital parts or the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;
3. Propose to such child the performance of an act of sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus, or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.

Any person who violates this subsection is guilty of a Class 5 felony. However, if the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age, the person shall be punished by a term of imprisonment of not less than five years nor more than 30 years

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).

²⁴ 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).

²⁵ 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).

²⁶ Va. Code Ann. § 18.2-374.3(A) defines “use a communications system” as “making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, the Internet, or any telecommunications, wire, computer network, or radio communications system.”

in a state correctional facility, five years of which shall be mandatory minimum term of imprisonment. Any person who commits a second or subsequent violation of this subsection when the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age shall be punished by a term of imprisonment of not less than 10 years nor more than 40 years, 10 years of which shall be a mandatory minimum term of imprisonment.

D. Any person who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any child he knows or has reason to believe is at least 15 years of age but younger than 18 years of age to knowingly and intentionally commit any of the activities listed in subsection C if the person is at least seven years older than the child is guilty of a Class 5 felony. Any person who commits a second or subsequent violation of this subsection shall be punished by a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

E. Any person 18 years of age or older who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child younger than 18 years of age for (i) any activity in violation of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking] or 18.2-361 [Crimes against nature; penalty], (ii) any activity in violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], or (iii) a violation of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty] is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-376.1 (Enhanced penalties for using a computer in certain violations) states, “Any person who uses a computer in connection with a violation of §§ 18.2-374 [Production, publication, sale, possession, etc., of obscene items], 18.2-375 [Obscene exhibitions and performances], or § 18.2-376 [Advertising, etc., obscene items, exhibitions or performances] is guilty of a separate and distinct Class 1 misdemeanor, and for a second or subsequent such offense within 10 years of a prior such offense is guilty of a Class 6 felony, the penalties to be imposed in addition to any other punishment otherwise prescribed for a violation of any of those sections.”

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

No specific mistake of age defense is contained in the Virginia Code; however, there is no prohibition on the same.

2.6.1 Recommendation: Amend Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking) and Virginia’s CSEC laws to prohibit a mistake of age defense.

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

Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) is a Class 5 felony when the victim is a minor under 16 years of age, and reduces that to a Class 6 felony when the victim is 16 years of age or older. Va. Code Ann. § 18.2-346(B). A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e). A Class 6 felony is punishable by a term of imprisonment 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(f).

2.7.1 Recommendation: Amend Va. Code Ann. § Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) to provide a sufficiently high base penalty for commercial sexual exploitation offenses against any minor under 18.

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

Penalties under Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) may include a fine not to exceed \$2,500. Also, sexual offenses that may be used to prosecute a buyer of sex with a minor, most imposing fines of not more than \$2,500.²⁷

A buyer convicted for possession of child pornography may be subject to a fine of not more than \$2,500. Va. Code Ann. §§ 18.2-10(f), 18.2-374.1:1.²⁸ A person possessing child pornography may also face asset forfeiture pursuant to Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children), which states in part,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (Section 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (Section 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

Should a buyer be convicted under 18.2-374.1:1 (Possession, reproduction, distribution, and facilitation of child pornography; penalty) or 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) will also be required to pay mandatory restitution to the victim. Under Va. Code Ann. § 19.2-305.1(E1)

²⁷ These may include Va. Code Ann. § 18.2-63(A) (Carnal knowledge of child between thirteen and fifteen years of age) carrying a fine of not more than \$100,000 (Va. Code Ann. §§ 18.2-63(A), 18.2-10(d)), and Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties), § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.; penalty; abandoned infant), and § 18.2-67.4:2 (Sexual abuse of a child under 15 years of age; penalty) carrying fines of not more than \$2,500 (Va. Code Ann. §§ 18.2-10(e), 18.2-11(a), 18.2-370(A), 18.2-371, 18.2-67.4:2).

²⁸ Enacted House Bill 504 and Enacted Senate Bill 433 delay the effective date for proposed modifications to the discretionary sentencing guidelines for possession of child pornography in violation of Va. Code Ann. § 18.2-374.1:1 (Possession, reproduction, distribution, and facilitation of child pornography; penalty) until July 1, 2016. The Virginia Criminal Sentencing Commission must complete its review of the discretionary sentencing guidelines recommendations by December 1, 2015, and any proposed modifications in the Commission's 2015 Annual Report will supersede those contained in the Commission's 2013 Annual Report. The text of Va. Code Ann. § 18.2-374.1:1 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 1056, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

A defendant convicted of an offense under . . . 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, ‘victim’ means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children]. The Commonwealth shall make reasonable efforts to notify victims of offenses under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

Also, under Va. Code Ann. § 19.2-386.35²⁹ (Seizure of property used in connection with certain offenses), property used in connection with certain offenses is subject to forfeiture. Va. Code Ann. § 19.2-386.35 provides,

All money, equipment, motor vehicles, and other personal and real property of any kind or character together with any interest or profits derived from the investment of such proceeds or other property that (i) was used in connection with the commission of, or in an attempt to commit, a violation of . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto] . . . ; (ii) is traceable to the proceeds of some form of activity that violates . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-357 [Receiving money from earnings of male or female prostitute; penalties], 18.2-357.1 [Commercial sex trafficking, penalties] . . . ; or (iii) was used to or intended to be used to promote some form of activity that violates . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto] . . . is subject to lawful seizure by a law-enforcement officer and subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). Any forfeiture action under this section shall be stayed until conviction, and property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in this section; if no such judgment is entered, all property seized pursuant to this section shall be released from seizure.

Finally, buyers convicted under Va. Code Ann. § 18.2-374.1:1 (Possession, reproduction, distribution, and facilitation of child pornography; penalty) or Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) are subject to mandatory asset forfeiture. Under Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children),

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, solicitation, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a

²⁹ The text of Va. Code Ann. § 19.2-386.35 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964 and Senate Bill 1188, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (§ 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture.

Asset forfeiture under Va. Code Ann. § 19.2-386.31 may be pursued through criminal or civil procedures. “Upon [the defendant’s] conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court’s discretion.” Va. Code Ann. § 19.2-386.31.

Under Va. Code Ann. § 19.2-386.12 (Sale of forfeited property), forfeited property is sold and the money obtained from the sale is “paid over to the state treasury into a special fund of the Department of Criminal Justice Services . . . ” The Department of Criminal Justice Services then distributes the money to “federal, state and local agencies to promote law enforcement . . . ” Va. Code Ann. § 19.2-386.14(A1) (Sharing of forfeited assets).

A buyer arrested for a second or subsequent offense of Va. Code Ann. 18.2-346 (Prostitution; commercial exploitation of a minor) may be subject to vehicle seizure and forfeiture. Va. Code Ann. § 19.2-386.16(A) (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of Section 18.2-346 [Prostitution; commercial exploitation of a minor], 18.2-347 [Keeping, residing in or frequenting a bawdy place; “bawdy place” defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$ 200 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred. . . .

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

Va. Code Ann. § 18.2-374.1:1(A)³⁰ (Possession, reproduction, distribution, and facilitation of child pornography; penalty) makes it a Class 6 felony to “knowingly possess[] child pornography,”³¹ which is punishable by a possible term of imprisonment of 1–5 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. § 18.2-10(f). Subsequent offenses are Class 5 felonies, punishable by a possible imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury,

³⁰ See *supra* note 28.

³¹ Va. Code Ann. § 18.2-374.1:1(F) states, “For purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.”

confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-10(e), 18.2-374.1:1(B). In addition, Va. Code Ann. § 18.2-374.1:1(C)³² provides,

Any person who knowingly (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography or (ii) commands, entreats, or otherwise attempts to persuade another person to send, submit, transfer or provide to him any child pornography in order to gain entry into a group, association, or assembly of persons engaged in trading or sharing child pornography shall be punished by not less than five years nor more than 20 years in a state correctional facility.

A subsequent violation of subsection C is punishable by imprisonment for 5–20 years with a mandatory minimum of 5 years. Va. Code Ann. § 18.2-374.1:1(C).

In comparison, a federal conviction for possession of child pornography³³ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³⁴ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³⁵

2.9.1 Recommendation: Amend Va. Code Ann. § 18.2-374.1:1(A) (Possession, reproduction, distribution, and facilitation of child pornography; penalty) to impose more substantial penalties to reflect the seriousness of the offense.

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

Under Va. Code Ann. § 9.1-902(A)³⁶ (Offenses requiring registration), “offense for which registration is required” is defined to include, “1. Any offense listed in subsection B; . . . ; 4. A sexually violent offense; 5. Any offense similar to those listed in subdivisions 1 through 4 under the laws of any foreign country or any political subdivision thereof, the United States or any political subdivision thereof; and 6. Any offense for

³² The text of Va. Code Ann. § 18.2-374.1:1 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 1056, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

³³ 18 U.S.C. §§ 2252(a)(2), (a)(4)(A) (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).

³⁴ 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).

³⁵ 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (b)(1), 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 (b)(1), 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).

³⁶ The text of Va. Code Ann. § 9.1-902 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964, Senate Bill 1188, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.”

Under subsection (B),

The offenses included under this subsection include any violation of, attempted violation of, or conspiracy to violate:

1. § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age] unless registration is required pursuant to subdivision E 1; § 18.2-64.1 [Carnal knowledge of certain minors]; . . . any felony violation of §18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties]; any violation of subdivision (4) of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking]; any violation of subsection C of § 18.2-357.1 [Commercial sex trafficking; penalties]; subsection B or C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]; . . . subsection B, C, or D of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children]; or a third or subsequent conviction of (i) § 18.2-67.4 [Sexual battery], (ii) § 18.2-67.4:2 [Sexual abuse of a child under 15 years of age; penalty], (iii) subsection C of § 18.2-67.5 [Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery], or (iv) § 18.2-386.1 [Unlawful filming, videotaping or photographing of another; penalty].

If the offense was committed on or after July 1, 2006, § 18.2-91 [Entering a dwelling, etc.] with the intent to commit any felony offense listed in this section; subsection A of § 18.2-374.1:1 [Possession, reproduction, distribution, solicitation, and facilitation of child pornography; penalty]; or a felony under § 18.2-67.5:1.

2. Where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], clause (i) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-67.4, subsection C of § 18.2-67.5, § 18.2-361 [Crimes against nature; penalty], §18.2-366 [Incest], or a felony violation of former § 18.1-191 or a felony violation of former §18.1-191.

3. § 18.2-370.6 [Penetration of mouth of child with lascivious intent; penalty].

A “sexually violent offense” is defined in subsection (E) as the following:

[A] violation of, attempted violation of, or conspiracy to violate:

1. Clause (ii) and (iii) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], former § 18.1-38 with the intent to defile or, for the purpose of concubinage or prostitution, a felony violation of subdivision (2) or (3) of former § 18.1-39 that involves assisting or aiding in such an abduction, § 18.2-61 [Rape], former § 18.1-44 when such act is accomplished against the complaining witness's will, by force, or through the use of the complaining witness's mental incapacity or physical helplessness, or if the victim is under 13 years of age, subsection A of § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age] where the perpetrator is more than five years older than the victim, § 18.2-67.1 [Forcible Sodomy], § 18.2-67.2 [Aggravated sexual battery; penalty], § 18.2-67.3 [Aggravated sexual battery], former § 18.1-215 when the complaining witness is under 13 years of age, § 18.2-67.4 [Sexual battery] where the perpetrator is 18 years of age or older and the victim is under the age of six, subsections A and B of § 18.2-67.5, § 18.2-370 [Taking indecent liberties with children; penalties], subdivisions (1), (2), or (4) of former §18.1-213, former §18.1-214, §18.2-370.1, or §18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]; or

2. § 18.2-63, § 18.2-64.1 [Carnal knowledge of certain minors], former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape or, where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-67.4, subsection C of § 18.2-67.5, clause (i) of § 18.2-48, § 18.2-361 [Crimes against nature; penalty], § 18.2-366 [Incest], or subsection C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications; . . .

. . . .

4. Chapter 117 (18 U.S.C. § 2421 et seq.) of Title 18 of the United States Code or sex trafficking (as described in § 1591 of Title 18, U.S.C.).

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 or electronic communications to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
- 3.5 *Convicted traffickers are required to register as sex offenders.*
- 3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or commercial sexual exploitation of children (CSEC) offenses in order to remove the children of traffickers from their control and potential exploitation.*

Legal Analysis:

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

A violation of Va. Code Ann. § 18.2-357.1³⁷ (Commercial sex trafficking; penalties) with a person under the age of 18 is punishable as a Class 3 felony by 5–20 years imprisonment. Va. Code Ann. § 18.2-10(c).

A violation of Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) is punishable as a Class 2 felony, which carries a minimum sentence of 20 years and a maximum sentence of life imprisonment. Va. Code Ann. § 18.2-10(b). Va. Code Ann. § 18.2-48 also specially directs that “[i]f the sentence imposed for a violation of (ii), (iii), (iv), or (v) includes a term of confinement less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life subject to revocation by the court.” Va. Code Ann. § 18.2-48.

Traffickers also face Class 3 felonies for violating Va. Code Ann. § 18.2-355³⁸ (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), Va. Code § 18.2-356³⁹ (Receiving money for procuring person) and Va. Code Ann. § 18.2-357⁴⁰ (Receiving money from earnings of male or female prostitute) when these offenses involve a minor victim and a Class 4 felony for violating Va. Code Ann. § 18.2-370(B) (Taking indecent liberties with children). A Class 3 felony is punishable by 5–20 years imprisonment. Va. Code Ann. §18.2-10(c). A Class 4 felony is punishable by 2–10 years imprisonment and a possible fine up to \$100,000.

Other crimes which might apply to the act of trafficking a minor for sexual exploitation do not carry as severe penalties. Va. Code Ann. § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.) is a Class 1 misdemeanor punished by “confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-11(a), 18.2-371. Also, Va. Code Ann. § 18.2-375

³⁷ See *supra* note 2.

³⁸ See *supra* note 4.

³⁹ See *supra* note 10.

⁴⁰ See *supra* note 8.

(Obscene⁴¹ exhibitions and performances) is a Class 1 misdemeanor, stating in part, “It shall be unlawful for any person knowingly to: (1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; . . .” Va. Code Ann. §§ 18.2-375, 18.2-380. An offender is subject to a sentence of up to 12 months in jail, a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-11(a). A second or subsequent violation is punishable as a Class 6 felony by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine not to exceed \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-10(f), 18.2-381.⁴²

Va. Code Ann. § 18.2-374.4 (Display of child pornography or grooming video or materials to a child unlawful) states,

Any person 18 years of age or older who displays child pornography or a grooming video or materials⁴³ to a child under 13 years of age with the intent to entice, solicit, or encourage the child to engage in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration is guilty of a Class 6 felony.

A Class 6 felony is punishable by “a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(f).

The age-neutral prostitution offense under Va. Code Ann. § 18.2-347 (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) may also be used to prosecute a trafficker. Va. Code Ann. § 18.2-347 provides, “It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place. . . . As used in this Code, ‘bawdy place’ shall mean any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution.” Violations of this statute are classified as Class 4 felonies, which carry a sentence of imprisonment for 2–10 years and a possible fine up to \$100,000. Va. Code Ann. § 18.2-10(d), (g).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act⁴⁴ for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18

⁴¹ Va. Code Ann. § 18.2-372 defines “obscene” as “that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.”

⁴² Va. Code Ann. § 18.2-381 states in full, “Any person, firm, association or corporation convicted of a second or other subsequent offense under § 18.2-374, 18.2-375, 18.2-376, 18.2-377, 18.2-378, or 18.2-379 is guilty of a Class 6 felony. However, if the person, firm, association or corporation convicted of such subsequent offense is the owner of the business establishment where each of the offenses occurred, a fine of not more than \$10,000 shall be imposed in addition to the penalties otherwise prescribed by this section.” The text of Va. Code Ann. § 18.2-381 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 1056, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

⁴³ Va. Code Ann. § 18.2-374.4(B) defines “Grooming video or materials” as “a cartoon, animation, image, or series of images depicting a child engaged in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, masturbation, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration.”

⁴⁴ See *supra* note 22.

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 offense⁴⁵ against a minor.

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

Va. Code Ann. § 18.2-374.1(B) (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability)⁴⁶ states,

A person shall be guilty of production of child pornography who:

1. Accosts, entices or solicits a person less than 18 years of age with intent to induce or force such person to perform in or be a subject of child pornography; or
2. Produces or makes or attempts or prepares to produce or make child pornography; or
3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or
4. Knowingly finances or attempts or prepares to finance child pornography.

Va. Code Ann. § 18.2-374.1(D) makes clear that “[f]or the purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.

A violation of Va. Code Ann. § 18.2-374.1(B) is punishable by imprisonment for 5–30 years when the subject of the child pornography is a child under 15, with a mandatory minimum of 5 years if the offender is at least 7 years older than the subject of the child pornography. A subsequent violation, where the offender is at least 7 years older than the child, is punishable by imprisonment for 15–40 years, “15 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C1). When the subject of the child pornography is at least 15 but less than 18, the sentence is 1–20 years, except if the offender is at least 7 years older than the child then the sentence is 3–30 years, with a 3-year “mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2). A subsequent violation by an offender at least 7 years older than the subject is punishable by imprisonment for 10–30 years, “10 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2).

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

⁴⁵ See *supra* note 23 for the definition of “federal sex offense.”

⁴⁶ Va. Code Ann. § 18.2-374.1(A) defines “child pornography” for “this article and Article 4 (§ 18.2-362 et seq.) . . . [as] sexually explicit visual material which utilizes or has as a subject an identifiable minor. An identifiable minor is a person who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting or modifying the visual depiction; and who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and shall not be construed to require proof of the actual identity of the identifiable minor.” Also, the term “sexually explicit visual material” is defined in the same provision as “a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer’s temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.”

imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense⁴⁷ against a minor. Additionally, a federal conviction for distribution of child pornography⁴⁸ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁴⁹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁵⁰

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

Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) makes it a crime to use the Internet, or other communication systems, to engage in certain types of sexual interactions with a minor.⁵¹ It states in part,

B. It shall be unlawful for any person to use a communications system,⁵² including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 [Taking indecent liberties with children; penalties] or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]. A violation of this subsection is a Class 6 felony.

C. It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child younger than 15 years of age to knowingly and intentionally:

1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;
2. Propose that any such child feel or fondle his own sexual or genital parts or the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;

⁴⁷ See *supra* note 23 for the definition of “federal sex offense.”

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

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

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

⁵¹ *Podracky v. Commonwealth*, 662 S.E.2d 81, 87 (Va. Ct. App. 2008) (stating that language of § 18.2-374.3(B) “does not require the solicitation of an actual minor, only the use of a communications system ‘for the purposes of soliciting any person he knows or has reason to believe is a minor’ for specified criminal offenses.”); see also *Grafmuller v. Commonwealth*, 698 S.E.2d 276, 279 (Va. Ct. App. 2010) (citing *Podracky*, explaining “the defendant’s solicitation of sexual behavior from a person that he believes is a child constitutes the behavior that the legislature intended to prohibit.”)

⁵² See *supra* note 26 for the definition of “use a communications system.”

3. Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.

Any person who violates this subsection is guilty of a Class 5 felony. However, if the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age, the person shall be punished by a term of imprisonment of not less than five years nor more than 30 years in a state correctional facility, five years of which shall be mandatory minimum term of imprisonment. Any person who commits a second or subsequent violation of this subsection when the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age shall be punished by a term of imprisonment of not less than 10 years nor more than 40 years, 10 years of which shall be a mandatory minimum term of imprisonment.

D. Any person who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any child he knows or has reason to believe is at least 15 years of age but younger than 18 years of age to knowingly and intentionally commit any of the activities listed in subsection C if the person is at least seven years older than the child is guilty of a Class 5 felony. Any person who commits a second or subsequent violation of this subsection shall be punished by a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

E. Any person 18 years of age or older who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child younger than 18 years of age for (i) any activity in violation of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking] or 18.2-361 [Crimes against nature; penalty], (ii) any activity in violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], or (iii) a violation of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty] is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-376.1 (Enhanced penalties for using a computer in certain violations) states, “Any person who uses a computer in connection with a violation of §§ 18.2-374 [Production, publication, sale, possession, etc., of obscene items], 18.2-375 [Obscene exhibitions and performances], or § 18.2-376 [Advertising, etc., obscene items, exhibitions or performances] is guilty of a separate and distinct Class 1 misdemeanor, and for a second or subsequent such offense within 10 years of a prior such offense is guilty of a Class 6 felony, the penalties to be imposed in addition to any other punishment otherwise prescribed for a violation of any of those sections.”

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

A trafficker convicted under Va. Code Ann. § 18.2-357.1⁵³ (Commercial sex trafficking; penalties), § 18.2-48 (Abduction with intent to extort money or for immoral purpose), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring person; penalties), or § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) could be fined of up to \$100,000. Va. Code Ann. § 18.2-10(b), (c).

Pursuant to Va. Code Ann. § 19.2-386.32 (Seizure and forfeiture of property used in connection with the abduction of children), a trafficker could be subject to non-mandatory asset forfeiture in the course of their criminal proceedings. Va. Code Ann. § 19.2-386.32 states,

⁵³ See *supra* note 2.

All moneys and other property, real and personal, owned by a person and used to further the abduction of a child in violation of § 18.2-47, 18.2-48, or 18.2-48.1 are subject to lawful seizure by a law-enforcement officer and are subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) by order of the court in which a conviction under § 18.2-47, 18.2-48, or 18.2-48.1 is obtained.

Also, under Va. Code Ann. § 19.2-386.35⁵⁴ (Seizure of property used in connection with certain offenses), property used in connection with certain offenses is subject to forfeiture. Va. Code Ann. § 19.2-386.35 provides,

All money, equipment, motor vehicles, and other personal and real property of any kind or character together with any interest or profits derived from the investment of such proceeds or other property that (i) was used in connection with the commission of, or in an attempt to commit, a violation of subsection B of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-48 [Abduction with intent to extort money or for immoral purpose] or . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], or § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute], 18.2-357.1 [Commercial sex trafficking; penalties] . . . ; (ii) is traceable to the proceeds of some form of activity that violates subsection B of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-48 [Abduction with intent to extort money or for immoral purpose] . . . , subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], or § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute] . . . ; or (iii) was used to or intended to be used to promote some form of activity that violates subsection B of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-48 [Abduction with intent to extort money or for immoral purpose] or . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], or § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute] . . . is subject to lawful seizure by a law-enforcement officer and subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). Any forfeiture action under this section shall be stayed until conviction, and property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in this section; if no such judgment is entered, all property seized pursuant to this section shall be released from seizure.

A trafficker arrested under Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) or § 18.2-357 (Receiving money from earnings of male or female prostitute) may be subject to vehicle

⁵⁴ See *supra* note 29.

seizure and forfeiture. Va. Code Ann. § 19.2-386.16(A), (B) (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

A. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of Section 18.2-346 [Prostitution; commercial exploitation of a minor], 18.2-347 [Keeping, residing in or frequenting a bawdy place; “bawdy place” defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$ 200 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred. . . .

B. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a misdemeanor violation of subsection D of Section 18.2-47 [Abduction and kidnapping defined; punishment] or a felony violation of (i) Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2 or (ii) § 18.2-357 [Receiving money from earnings of male or female prostitute] where the prostitute is a minor, shall be forfeited to the Commonwealth.

A trafficker convicted for child pornography is subject to mandatory asset forfeiture. Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children) states,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (Section 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (Section 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

Under Va. Code Ann. § 19.2-386.12 (Sale of forfeited property), forfeited property is sold and the money obtained from the sale is “paid over to the state treasury into a special fund of the Department of Criminal Justice Services . . .” The Department of Criminal Justice Services then distributes the money to “federal, state and local agencies to promote law enforcement . . .” Va. Code Ann. § 19.2-386.14(A1) (Sharing of forfeited assets).

Traffickers convicted of certain offenses also have to pay mandatory restitution under Va. Code Ann. § 19.2-305.1(E1) (Restitution for property damage or loss; community service), which states,

A defendant convicted of an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, ‘victim’ means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children].

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

Under Va. Code Ann. § 9.1-902(A)⁵⁵ (Offenses requiring registration), “offense for which registration is required” is defined to include, “1. Any offense listed in subsection B; . . . ; 4. A sexually violent offense; 5. Any offense similar to those listed in subdivisions 1 through 4 under the laws of any foreign country or any political subdivision thereof, the United States or any political subdivision thereof; and 6. Any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.”

Under subsection (B),

The offenses included under this subsection include any violation of, attempted violation of, or conspiracy to violate:

1. § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age]; unless registration is required pursuant to subdivision E 1; § 18.2-64.1 [Carnal knowledge of certain minors]; . . . any felony violation of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties]; any violation of subdivision (4) of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking]; any violation of subsection C of § 18.2-357.1 [Commercial sex trafficking; penalties]; subsection B or C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]; . . . subsection B, C, or D of § 18.2-374.3; or a third or subsequent conviction of (i) § 18.2-67.4 [Sexual battery], (ii) § 18.2-67.4:2 [Sexual abuse of a child under 15 years of age; penalty], (iii) subsection C of § 18.2-67.5 [Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery] or (iv) § 18.2-386.1 [Unlawful filming, videotaping or photographing of another; penalty]. If the offense was committed on or after July 1, 2006, § 18.2-91 with the intent to commit any felony offense listed in this section; subsection A of § 18.2-374.1:1; or a felony under § 18.2-67.5:1.
2. Where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], clause (i) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-67.4, subsection C of § 18.2-67.5, § 18.2-361 [Crimes against nature; penalty], § 18.2-366, or a felony violation of former § 18.1-191.

A “sexually violent offense” is defined in subsection (E) as the following:

[A] violation of, attempted violation of, or conspiracy to violate:

⁵⁵ See *supra* note 36.

1. Clause (ii) and (iii) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], former § 18.1-38 with the intent to defile or, for the purpose of concubinage or prostitution, a felony violation of subdivision (2) or (3) of former § 18.1-39 that involves assisting or aiding in such an abduction, § 18.2-61, former § 18.1-44 when such act is accomplished against the complaining witness's will, by force, or through the use of the complaining witness's mental incapacity or physical helplessness, or if the victim is under 13 years of age, subsection A of § 18.2-63 where the perpetrator is more than five years older than the victim, § 18.2-67.1, § 18.2-67.2, § 18.2-67.3, former § 18.1-215 when the complaining witness is under 13 years of age, § 18.2-67.4 where the perpetrator is 18 years of age or older and the victim is under the age of six, subsections A and B of § 18.2-67.5, § 18.2-370 [Taking indecent liberties with children; penalties], subdivisions (1), (2), or (4) of former §18.1-213, former §18.1-214, §18.2-370.1, or §18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]; or
2. § 18.2-63, § 18.2-64.1 [Carnal knowledge of certain minors], former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape or, where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10, subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-67.4, subsection C of § 18.2-67.5, clause (i) of § 18.2-48, § 18.2-361 [Crimes against nature; penalty], § 18.2-366 or subsection C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications; . . .
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4. Chapter 117 (18 U.S.C. § 2421 et seq.) of Title 18 of the United States Code or sex trafficking (as described in § 1591 of Title 18, U.S.C.).

Recommendation: Amend Va. Code Ann. § 9.1-902(B) to include the CSEC offenses under § 18.2-356 (Receiving money for procuring persons; penalties) and 18.2-357 (Receiving money from earnings of male or female prostitutes; penalties) as offenses requiring registration.

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

Va. Code Ann. § 16.1-283 (Termination of residual parental rights) does not specifically include violations of § 18.2-357.1 [Commercial sex trafficking; penalties] or Virginia’s CSEC laws as grounds for termination of parental rights.

Under Va. Code Ann. § 16.1-283, “residual parental rights” can be terminated for a number of reasons. Under subsection (B), residual parental rights of a parent of a neglected or abused child placed in foster care “as a result of (i) court commitment; (ii) an entrustment agreement entered into by the parent or parents; or (iii) other voluntary relinquishment by the parent or parents may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child” and the court also finds that

1. The neglect or abuse⁵⁶ suffered by such child presented a serious and substantial threat to his life, health or development; and
2. It is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child’s safe return to his parent or parents within a reasonable period of time. . . .

⁵⁶ See *infra* section 5.5 for a full discussion of the definition of “abuse.”

Proof of severe mental or emotional illness or intellectual disability, debilitating habitual abuse or addiction to drugs or alcohol without attempts to complete treatment to improve parenting ability, or failure “without good cause, [to] respond[] to or follow[] through with appropriate, available and reasonable rehabilitative efforts on the part of social, medical, mental health or other rehabilitative agencies designed to reduce, eliminate or prevent the neglect or abuse of the child” is prima facie evidence of the conditions in Va. Code Ann. § 16.1-283(B)(2).

Under subsection (E), the residual parental rights of a parent whose child “is in the custody of a local board or licensed child-placing agency” may be terminated if, by clear and convincing evidence, the court finds it is in the best interests of the child and that, among other things, “(iii) the parent has been convicted of an offense under the laws of the Commonwealth or a substantially similar law of any other state, the United States or any foreign jurisdiction that constitutes . . . felony sexual assault, if the victim of the offense was a child of the parent or a child with whom the parent resided at the time of such offense; or (iv) the parent has subjected any child to aggravated circumstances.” Va. Code Ann. § 16.1-283(E) defines “aggravated circumstances” for this section as “torture, chronic or severe abuse, or chronic or severe sexual abuse, if the victim of such conduct was a child of the parent or a child with whom the parent resided at the time such conduct occurred, including the failure to protect such a child from such conduct, which conduct or failure to protect: (i) evinces a wanton or depraved indifference to human life, or (ii) has resulted in the death of such a child or in serious bodily injury to such a child.” Furthermore, “chronic sexual abuse” is defined as “recurring acts of physical abuse which place the child’s health, safety and well-being at risk” whereas “severe sexual abuse” may include an act or omission that occurred only once, but otherwise meets the definition of ‘aggravated circumstances.’”

- 3.6.1 Recommendation: Amend Va. Code Ann. § 16.1-283 (Termination of residual parental rights) to include violations of Va. Code Ann. § 18.2-357.1 [Commercial sex trafficking; penalties] and Virginia’s CSEC laws as grounds for termination of parental rights.

Legal Components:

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

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

Va. Code Ann. § 18.2-357.1(A)⁵⁷ (Commercial sex trafficking; penalties) does not specifically criminalize assisting, enabling, or financially benefitting from child sex trafficking unless the facilitator engages in the primary conduct prohibited under the trafficking law. In order to be held liable for sex trafficking, a facilitator must “solicit[], invite[], recruit[], encourage[], or otherwise cause[] or attempt[] to cause a person to violate subsection A of § 18.2-346 [Prostitution]” while acting “with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse.” Therefore, the conduct of assisting, enabling or financially benefitting from child sex trafficking is not specifically criminalized under this offense.

Facilitators may also face prosecution under Virginia’s CSEC laws. Va. Code Ann. § 18.2-355(4) (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking) provides that any person who “for purposes of prostitution, takes any minor into, or persuades, encourages, or causes any minor to enter, a bawdy place, or takes or causes such person to be taken to any place for such purposes; is guilty of pandering. . . . A violation of subdivision (4) is punishable as a Class 3 felony.” Va. Code Ann. § 18.2-356 (Receiving money for procuring person) criminalizes the conduct of, “[a]ny person who receives any money or other valuable thing for or on account of (i) procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act in violation of § 18.2-361 or (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography . . . Any person who violates clause (i) or (ii) with a person under the age of 18 is guilty of a Class 3 felony.” Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) states, “Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering . . . [and] who violates this section by receiving money or other valuable thing from a person under the age of 18 is guilty of a Class 3 felony.” A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction) states, “Any person who (1) threatens, or attempts, to abduct any other person with intent to extort money, or pecuniary benefit, or (2) assists or aids in the abduction of, or threatens to abduct, any person with the intent to defile such person, or (3) assists

⁵⁷ See supra note 2.

or aids in the abduction of, or threatens to abduct, any female under sixteen years of age for the purpose of concubinage or prostitution, shall be guilty of a Class 5 felony.” This crime is punishable by imprisonment for 1–10 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(e).

Facilitators of prostitution with minors or adults may also be found guilty of Va. Code Ann. § 18.2-348 (Aiding prostitution or illicit sexual intercourse), which states, “It is unlawful for any person or any officer, employee or agent of any firm, association or corporation, with knowledge of, or good reason to believe, the immoral purpose of such visit, to take or transport or assist in taking or transporting, or offer to take or transport on foot or in any way, any person to a place, whether within or without any building or structure, used or to be used for the purpose of lewdness, assignation or prostitution within the Commonwealth; or to procure or assist in procuring for the purpose of illicit sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act violative of § 18.2-361 [Crimes against nature; penalty], or to give any information or direction to any person with intent to enable such person to commit an act of prostitution.” Any person convicted under Va. Code Ann. 18.2-348 is guilty of a Class 1 misdemeanor, punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-350.

Also, Va. Code Ann. § 18.2-347 (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) prohibits the maintenance of a place, indoors or outdoors, in which prostitution occurs and states, “It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place. Each and every day such bawdy place shall be kept, resided in or visited, shall constitute a separate offense. In a prosecution under this section the general reputation of the place may be proved. As used in this Code, ‘*bawdy place*’ shall mean any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution.” A conviction under Va. Code Ann. § 18.2-347 is punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-350.

Va. Code Ann. § 18.2-349 (Using vehicles to promote prostitution or unlawful sexual intercourse) states, “It shall be unlawful for any owner or chauffeur of any vehicle, with knowledge or reason to believe the same is to be used for such purpose, to use the same or to allow the same to be used for the purpose of prostitution or unlawful sexual intercourse, or to aid or promote such prostitution or unlawful sexual intercourse by the use of any such vehicle.” Va. Code Ann. § 18.2-349 is a Class 1 misdemeanor punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-350. Facilitators are prosecuted for transporting minors for the purpose of sex trafficking according to the procedures in Va. Code Ann. § 18.2-359 (Venue for criminal sexual assault or where any person transported for criminal sexual assault, attempted criminal sexual assault, or purposes of unlawful sexual intercourse, crimes against nature, and indecent liberties with children; venue for such crimes when coupled with a violent felony). Va. Code Ann. § 18.2-359(A) states, “Any person transporting or attempting to transport through or across the Commonwealth, any person for the purposes of unlawful sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or prostitution, or for the purpose of committing any crime specified in § 18.2-361 [Crimes against nature; penalty] or 18.2-370 [Taking indecent liberties with children; penalties], or for the purposes of committing or attempting to commit criminal sexual assault under Article 7 (§ 18.2-61 et seq.) of Chapter 4, may be presented, indicted, tried, and convicted in any county or city in which any part of such transportation occurred.”

Va. Code Ann. § 18.2-374.1 (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability) could apply to facilitators since it makes a person guilty of production of child pornography who, among other things, “knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means” or “[k]nowingly finances or attempts or prepares to finance child pornography.” Va. Code Ann. § 18.2-374.1(B)(3), (4). A violation of this statute, when the child

is under 15, is punishable by imprisonment for 5–30 years with a 5-year mandatory sentence if the offender is 7 years older than the child victim. Va. Code Ann. § 18.2-374.1(C1). A second or subsequent violation by a person seven years older than the child and involving a child under 15 is punishable by imprisonment for 15–40 years with a 15-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C1). The punishment is reduced to 1–20 years, however, if the child is between 15 and less than 18. Va. Code Ann. § 18.2-374.1(C2). However, if the offender is seven years older than the child, a violation is punishable by imprisonment for 3–30 years with a 3-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C2). A second or subsequent violation from a person at least seven years older than the child and involving a child between 15 and less than 18 is punishable by imprisonment for 10–30 years with a 10-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C2).

Facilitators of sexual performance or pornography involving a minor may be found guilty under Va. Code Ann. § 18.2-375 (Obscene exhibitions and performances). The first conviction under Va. Code Ann. § 18.2-375 is punishable as a Class 1 misdemeanor by imprisonment in jail up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-380. A second or subsequent conviction under Va. Code Ann. § 18.2-375 is punishable as a Class 6 felony by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. §§ 18.2-10(f), 18.2-381. Va. Code Ann. § 18.2-375 states,

It shall be unlawful for any person knowingly to:

- (1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre other than receiving salary and wages; or
- (2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place.

- 4.1.1 Recommendation: Amend Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) to include the crime of assisting, enabling or financially benefitting from child sex trafficking.

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.*

Convicted facilitators face a fine of up to \$100,000 under Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring persons; penalties), and § 18.2-357 (Receiving money from earnings of male or female prostitutes; penalties). Va. Code Ann. §§ 18.2-10(e), 18.2-11(a), 18.2-350, 18.2-11(a), 18.2-11(a), 18.2-380, 18.2-10(f), 18.2-381. Facilitators also face a fine of up to \$2500 under Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction). Va. Code Ann. § 18.2-10(e).

A facilitator convicted of Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring persons; penalties), or § 18.2-357 (Receiving money from earnings of male or female prostitutes; penalties) faces mandatory criminal asset forfeiture pursuant to Va Code Ann.

§ § 19.2-386.35 (Seizure of property used in connection with certain offenses).⁵⁸ Va. Code Ann. § 19.2-386.35 provides,

All money, equipment, motor vehicles, and other personal and real property of any kind or character together with any interest or profits derived from the investment of such proceeds or other property that (i) was used in connection with the commission of, or in an attempt to commit, a violation of . . . § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse] . . . 18.2-357.1 [Commercial sex trafficking; penalties]. . . ; (ii) is traceable to the proceeds of some form of activity that violates § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse] . . . ; or (iii) was used to or intended to be used to promote some form of activity that violates § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse] . . . is subject to lawful seizure by a law-enforcement officer and subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). Any forfeiture action under this section shall be stayed until conviction, and property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in this section; if no such judgment is entered, all property seized pursuant to this section shall be released from seizure.

Additionally, a facilitator of domestic minor sex trafficking arrested under Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction) may be subject to vehicle seizure and, upon conviction, forfeiture and mandatory restitution. Va. Code Ann. § 19.2-386.16(A), (B) (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

A. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of Section 18.2-346 [Prostitution; commercially exploited children], 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$ 200 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred. The officer shall take a receipt therefor.

B. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a misdemeanor violation of subsection D of 18.2-47 [Abduction and kidnapping defined; punishment] or a felony violation of (i) Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2 or (ii) § 18.2-357 [Receiving money from earnings of male or female prostitute] where the prostitute is a minor, shall be forfeited to the Commonwealth.

⁵⁸ See *supra* note 29.

A facilitator convicted for publicizing or selling child pornography is also subject to mandatory asset forfeiture. Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children) states,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (Section 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (Section 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

Asset forfeiture under Va. Code Ann. § 19.2-386.31 may be pursued through criminal or civil procedures. “Upon [the defendant’s] conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court’s discretion.” Va. Code Ann. § 19.2-386.31.

Under Va. Code Ann. § 19.2-386.12 (Sale of forfeited property), forfeited property is sold and the money obtained from the sale is “paid over to the state treasury into a special fund of the Department of Criminal Justice Services. . . .” The Department of Criminal Justice Services then distributes the money to “federal, state and local agencies to promote law enforcement” Va. Code Ann. § 19.2-386.14(A1) (Sharing of forfeited assets).

Facilitators convicted of certain offenses also have to pay mandatory restitution under Va. Code Ann. § 19.2-305.1(E1) (Restitution for property damage or loss; community service), which states,

A defendant convicted of an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, ‘victim’ means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children].

Under Va. Code Ann. § 40.1-11.3, facilitators may also be subject to financial penalties for failure to post notice of the Human Trafficking Hotline number. This provision applies to topless entertainment businesses as well as truck stops.

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

There is no law in Virginia making child sex tourism a crime.

- 4.3.1 Recommendation: Enact a law prohibiting selling or offering to sell travel services that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor or prostitution of a minor, if occurring in Virginia.

4.4 *Promoting and selling child pornography is illegal.*

Va. Code Ann. § 18.2-374.1 (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability)⁵⁹ states in subsection B,

A person shall be guilty of production of child pornography who: . . . ; or 2. Produces or makes or attempts or prepares to produce or make child pornography; or 3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or 4. Knowingly finances or attempts or prepares to finance child pornography.” Va. Code Ann. § 18.2-374.1(D) makes clear that “[f]or the purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.

A violation of Va. Code Ann. § 18.2-374.1(B) is punishable by imprisonment for 5–30 years when the subject of the child pornography is a child under 15, with a mandatory minimum of 5 years if the person is at least seven years older than the subject of the child pornography. Va. Code Ann. § 18.2-374.1(C1). A subsequent violation where the offender is at least 7 years older than the child is punishable by imprisonment for 15–40 years, “15 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C1). When the subject of the child pornography is at least 15 but less than 18, the sentence is 1–20 years, except if the offender is at least 7 years older than the child then the sentence is 3–30 years, with a 3 year mandatory minimum term of imprisonment. Va. Code Ann. § 18.2-374.1(C2). Subsequent violations by an offender at least 7 years older than the subject carry a sentence of 10-30 years, “10 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2).

Also, importantly for facilitator liability, Va. Code Ann. § 18.2-374.1:1(D)⁶⁰ (Possession, reproduction, distribution, and facilitation of child pornography; penalty) states, “Any person who intentionally operates an Internet website for the purpose of facilitating the payment for access to child pornography is guilty of a Class 4 felony.” This offense is punishable by imprisonment for 2–10 years and a potential fine of up to \$100,000. Va. Code Ann. § 18.2-10(d), (g). If the offender is a not a natural person, only a fine will be assessed for this felony. Va. Code Ann. § 18.2-10(g). Under Va. Code Ann. § 18.2-374.1:1(C), “Any person who knowingly (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography or (ii) commands, entreats, or otherwise attempts to persuade another person to send, submit, transfer or provide to him any child pornography in order to gain entry into a group, association, or assembly of persons engaged in trading or sharing child pornography shall be punished by not less than five years nor more than 20 years in a state correctional facility.” Subsequent violations are punishable by imprisonment for 5–20 years with a mandatory 5 year minimum.

⁵⁹ See *supra* note 46 for definition of “child pornography.”

⁶⁰ See *supra* note 28.

Legal Components:

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*
- 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, preventing criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of "caregiver" or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Legal Analysis:

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*

The Virginia Victims' Compensation provisions define a "victim" in Va. Code Ann. § 19.2-368.2 as "a person who suffers personal physical injury or death as a direct result of a crime including a person who is injured or killed as a result of foreign terrorism or who suffers personal emotional injury as a direct result of being the subject of a violent felony offense as defined in subsection C of § 17.1-805, or stalking as described in § 18.2-60.3, or attempted robbery or abduction." Under Va. Code Ann. § 17.1-805(C)⁶¹ (Adoption of initial discretionary sentencing guideline midpoints), the list of "violent felony offenses" includes the following sex trafficking and CSEC offenses: "any felony violation of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], . . . 18.2-49 [Threatening, attempting or assisting in such abduction]; . . . any violation of subdivision (2) or (3) of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking]; any violation of § 18.2-357.1 [Commercial sex trafficking; penalties] . . . 18.2-370 [Taking indecent liberties with children; penalties]."

⁶¹ The text of Va. Code Ann. § 17.1-805 included here and elsewhere in this report includes amendments made by the passage of House Bill 1964 and Senate Bill 1188, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).

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

The Virginia Code does not specifically prohibit a defendant from raising a defense that the subject minor consented to the commercial sex act. However, in the case of a minor accused of committing the sexual offense of carnal knowledge of a child 13–15 years of age pursuant to Va. Code Ann. § 18.2-63(B) proof of victim’s consent in a case where the victim is 3 or more years younger than the accused offender reduces the crime classification to a Class 6 felony. If the consenting victim is less than 3 years younger than the accused offender the crime is classified as a Class 4 misdemeanor. Va. Code Ann. § 18.2-63(B).

5.2.1 Recommendation: Amend Va Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) and Virginia’s CSEC laws to specifically prohibit a defense based on consent of the child to the sex act.

5.3 *Prostitution laws apply only to adults, preventing criminalization of minors under 18 for prostitution offenses.*

Va. Code Ann. § 18.2-346(A) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) is not limited in application to adults. It states in subsection (A), “Any person who, for money or its equivalent, (i) commits adultery, fornication, or any act in violation of § 18.2-361, performs cunnilingus, fellatio, or anilingus upon or by another person, or engages in anal intercourse or (ii) offers to commit adultery, fornication, or any act in violation of § 18.2-361, perform cunnilingus, fellatio, or anilingus upon or by another person, or engage in anal intercourse and thereafter does any substantial act in furtherance thereof is guilty of prostitution, which is punishable as a Class 1 misdemeanor.”

5.3.1 Recommendation: Amend Va. Code Ann. § 18.2-346(A) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) to eliminate liability for prostitution offenses for all minors under 18.

5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*

Child Initially Identified as Abused/Neglected

Pursuant to Va. Code Ann. § 63.2-100 (Definitions),⁶² a sexually exploited child is likely to be identified as abused or neglected. If a child is identified as abused or neglected under Va. Code Ann. § 63.2-100, the definition of “parent” under Va. Code Ann. § 16.1-278.1 § 5.6] is not sufficiently broad to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker.

I. Initial Custody

There is no complete or specific mechanism for directing a commercially sexually exploited child to a child protection response process. Certain procedures permit immediate intervention through either child protective services (CPS) or the juvenile courts.

a. Authority for Initial Custody

⁶² See *infra* section 5.5 for a full analysis of the definition of “abuse” as it related to identification of sexually exploited children.

A child may be taken into custody by law enforcement or medical personnel. Pursuant to Va. Code Ann. § 63.2-1517(A) (Authority to take child into custody), in Chapter 15 (Child abuse and neglect) of Title 63.2:

A. A physician or child-protective services worker of a local department or law-enforcement official investigating a report or complaint of abuse and neglect may take a child into custody for up to 72 hours without prior approval of parents or guardians provided:

1. The circumstances of the child are such that continuing in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the child's care, presents an imminent danger to the child's life or health to the extent that severe or irreparable injury would be likely to result or if evidence of abuse is perishable or subject to deterioration before a hearing can be held;
2. A court order is not immediately obtainable;
3. The court has set up procedures for placing such children;
4. Following taking the child into custody, the parents or guardians are notified as soon as practicable. Every effort shall be made to provide such notice in person;
5. A report is made to the local department; and
6. The court is notified and the person or agency taking custody of such child obtains, as soon as possible, but in no event later than 72 hours, an emergency removal order pursuant to § 16.1-251; however, if a preliminary removal order is issued after a hearing held in accordance with § 16.1-252 within 72 hours of the removal of the child, an emergency removal order shall not be necessary. Any person or agency petitioning for an emergency removal order after four hours have elapsed following taking custody of the child shall state the reasons therefor pursuant to § 16.1-251.

Va. Code Ann. § 16.1-251 (Emergency removal order) permits a child to be brought into "immediate custody and placed in shelter care pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected." The evidence required to support such an order must establish that "an imminent threat to life or health to the extent that severe or irreparable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition." Va. Code Ann. § 16.1-251(A)(1). Also, evidence that "[r]easonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health pending a final hearing on the petition" is required to support an order.⁶³ Va. Code Ann. § 16.1-251(A)(2).

⁶³ "The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to § 16.1-253." Va. Code Ann. § 16.1-251(A)(2).

b. Placement: Where are the victims placed upon initial custody (immediate placement)?

Pursuant to Va. Code Ann. § 16.1-251(A) (Emergency removal order) a child may be taken into immediate custody and placed in shelter care pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected.

A court may place a child in the care and custody of (i) a public agency in accordance with § 16.1-251 or 16.1-252, and (ii) a public or licensed private child-placing agency in accordance with § 16.1-278.2, 16.1-278.4, 16.1-278.5, 16.1-278.6, or 16.1-278.8. Va. Code Ann. § 63.2-906 (Foster care plans; permissible plan goals; court review of foster children).

II. Process following initial custody:

a. Where is the child referred after initial custody?

Pursuant to Va. Code Ann. § 16.1-277.02 (Petition for relief of care and custody),

Requests for petitions for relief of the care and custody of a child shall be referred initially to the local department of social services for investigation and the provision of services, if appropriate, in accordance with the provisions of § 63.2-319 or Chapter 15 (§ 63.2-1500 et seq.) of Title 63.2. Upon the filing of a petition for relief of a child's care and custody pursuant to subdivision A 4 of § 16.1-241, the court shall appoint a guardian ad litem to represent the child in accordance with the provisions of § 16.1-266, and shall schedule the matter for a hearing on the petition.

b. When/how does the court assume jurisdiction?

Pursuant to Va. Code Ann. § 16.1-277.02(C) (Petition for relief of care and custody),

At the conclusion of the hearing on the petition, the court shall make a finding, based upon a preponderance of the evidence, whether there is good cause shown for the petitioner's desire to be relieved of the child's care and custody, unless the petition seeks permanent relief of custody and termination of parental rights. If the petition seeks permanent relief of custody and termination of parental rights, the court shall make a finding, based upon clear and convincing evidence, whether termination of parental rights is in the best interest of the child. If the court makes either of these findings, the court may enter:

1. A preliminary protective order pursuant to § 16.1-253;
2. An order that requires the local board of social services to provide services to the family as required by law;
3. An order that is consistent with any of the dispositional alternatives pursuant to § 16.1-278.3; or
4. Any combination of these orders.

III. Placement process pending adjudication/investigation:

a. Placement hearing, i.e., shelter or detention hearing

Once an order is granted for emergency removal and a child is taken into custody, “a hearing shall be held in accordance with § 16.1-252 as soon as practicable, but in no event later than five business days after the removal of the child.” Va. Code Ann. § 16.1-251(B).

b. Placement Options

“Placement” means any temporary or permanent placement of a child who is in the custody of the state in any foster home, group home or other facility or residence. Va. Code Ann. § 49-1-3 (Definitions relating to abuse and neglect).

A child who does not meet the conditions outlined in Va. Code Ann. § 16.1-248.1(A) for placement in a secure facility, must be released to “a parent, guardian or other person willing and able to provide supervision and care under such conditions as the judge, intake officer or magistrate may impose.” Va. Code Ann. § 16.1-248.1(B).

IV. Adjudication or referral to alternate process:

a. Adjudicatory/dispositional hearing.

The evidence required for a “preliminary order to issue or for an existing order to be continued” is nearly identical to the requirements for an emergency removal order. Va. Code Ann. §§ 16.1-252(E), 16.1-251(A). “If the preliminary removal order includes a finding of abuse or neglect and the child is removed from his home or a preliminary protective order is issued,” a dispositional hearing is to be held within 75 days. Va. Code Ann. § 16.1-252(H).

V. Outcomes (Final permanent placement)

At the dispositional hearing, “[i]f a child is found to be (a) abused or neglected; (b) at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in his care; or (c) abandoned by his parent or other custodian, or without parental care and guardianship because of his parent’s absence or physical or mental incapacity,” the court may order, among other things, that the child “remain with his parent, subject to such conditions and limitations as the court may order with respect to such child and his parent or other adult occupant of the same dwelling,” or, if there is “no less drastic alternative,” that legal custody be transferred to, among others, a relative or a child welfare agency. Va. Code Ann. § 16.1-278.2(A)(2), (5).

Child in need of protection and services, and or in need of supervision

Neither the definition of “Child In Need of Services” nor “Child In Need of Supervision” in Va. Code Ann. § 16.1-228 specifically includes a commercially sexually exploited child. However, under the definition of “Child in Need of Supervision,” a victim of sex trafficking of a minor could be found to be “[a] child who, without reasonable cause and without the consent of his parent, lawful custodian or placement authority, remains away from or deserts or abandons his family or lawful custodian on more than one occasion or escapes or remains away without proper authority from a residential care facility in which he has been placed by the court, and (i) such conduct presents a clear and substantial danger to the child’s life or health, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the

intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family.” Va. Code Ann. § 16.1-228.

I. Initial Custody:

a. Authority for initial custody

Under the juvenile justice procedures, Va. Code Ann. § 16.1-246 (When and how child may be taken into immediate custody) outlines the conditions for taking a child into immediate custody. Subsection (B) permits a child to be taken into immediate custody “[w]hen a child is alleged to be in need of services or supervision and (i) there is a clear and substantial danger to the child’s life or health or (ii) the assumption of custody is necessary to ensure the child’s appearance before the court.” Subsection (C) allows a child to be taken into immediate custody “[w]hen, in the presence of the officer who makes the arrest, a child has committed an act designated a crime under the law of this Commonwealth, or an ordinance of any city, county, town or service district, or under federal law and the officer believes that such is necessary for the protection of the public interest.”

Under Va. Code Ann. § 16.1-246(G), a child can be taken into immediate custody “[w]hen a law-enforcement officer has probable cause to believe that a child (i) has run away from home or (ii) is without adult supervision at such hours of the night and under such circumstances that the law-enforcement officer reasonably concludes that there is a clear and substantial danger to the child’s welfare.”

b. Placement: Where are the victims placed upon initial custody (immediate placement)?

Pursuant to Va. Code Ann. § 16.1-246 subsections (B) and (C), after a child is taken into custody, then Va. Code Ann. § 16.1-247 provides:

B. A person taking a child into custody pursuant to the provisions of subsection B, C, or D of § 16.1-246, during such hours as the court is open, shall, with all practicable speed, and in accordance with the provisions of this law and the orders of court pursuant thereto:

1. Release the child to such child's parents, guardian, custodian or other suitable person able and willing to provide supervision and care for such child and issue oral counsel and warning as may be appropriate; or
2. Release the child to such child's parents, guardian, legal custodian or other person standing in loco parentis upon their promise to bring the child before the court when requested; or
3. If not released, bring the child to the judge or intake officer of the court and, in the most expeditious manner practicable, give notice of the action taken, together with a statement of the reasons for taking the child into custody, in writing to the judge or intake officer, and the judge, intake officer or arresting officer shall give notice of the action taken orally or in writing to the child's parent, guardian, legal custodian or other person standing in loco parentis.

....

E. A person taking a child into custody pursuant to the provisions of subsection B, C, or D of § 16.1-246 during such hours as the court is not open, shall:

1. Release the child pursuant to the provisions of subdivision B 1 or B 2 of this section; or
2. Release the child on bail or recognizance pursuant to Chapter 9 (§ 19.2-119 et seq.) of Title 19.2; or
3. Place the child taken into custody pursuant to subsection B of § 16.1-246 in shelter care after the issuance of a detention order pursuant to § 16.1-255; or
4. Place the child taken into custody pursuant to subsection C or D of § 16.1-246 in shelter care or in a detention home after the issuance of a warrant by a magistrate; or

5. Place the child in a jail subject to the provisions of § 16.1-249 after the issuance of a warrant by a magistrate or after the issuance of a detention order pursuant to § 16.1-255; or
6. In addition to any other provisions of this subsection, detain the child for a reasonably necessary period of time in order to administer a breath or blood test to determine the alcohol content of his blood, if such child was taken into custody pursuant to § 18.2-266.

II. Process following initial custody

a. Where is a child referred after initial custody?

Once a child is taken into custody under Va. Code Ann. § 16.1-246(G), Va. Code Ann. § 16.1-247 provides,

I. A law-enforcement officer taking a child into custody pursuant to the provisions of subsection G of § 16.1-246 shall notify the intake officer of the juvenile court of the action taken. The intake officer shall determine if the child's conduct or situation is within the jurisdiction of the court and if a petition should be filed on behalf of the child. If the intake officer determines that a petition should not be filed, the law-enforcement officer shall as soon as practicable:

1. Return the child to his home;
2. Release the child to such child's parents, guardian, legal custodian or other person standing in loco parentis;
3. Place the child in shelter care for a period not longer than 24 hours after the issuance of a detention order pursuant to § 16.1-255; or
4. Release the child.

During the period of detention authorized by this subsection no child shall be confined in any detention home, jail or other facility for the detention of adults.

J. If a child is taken into custody pursuant to the provisions of subsection . . . G of § 16.1-246 by a law-enforcement officer during such hours as the court is not in session and the child is not released or transferred to a facility or institution in accordance with subsection . . . I of this section, the child shall be held in custody only so long as is reasonably necessary to complete identification, investigation and processing. The child shall be held under visual supervision in a nonlocked, multipurpose area which is not designated for residential use. The child shall not be handcuffed or otherwise secured to a stationary object.

III. Placement process pending adjudication/investigation:

a. Placement hearing i.e., shelter or detention hearing

A juvenile can be detained before adjudication in secure or shelter facilities upon court order under certain conditions. The detention hearing must be held “on the next day on which the court sits within the county or city wherein the charge against the child is pending.” Va. Code Ann. § 16.1-250(A). However, “In the event the court does not sit within the county or city on the following day, such child shall appear before a judge within a reasonable time, not to exceed 72 hours, after he has been taken into custody.” Va. Code Ann. § 16.1-250(A). Va. Code Ann. § 16.1-248.1(A) (Criteria for detention or shelter care) provides the criteria for issuing a detention order.

A. A juvenile taken into custody whose case is considered by a judge, intake officer or magistrate pursuant to § 16.1-247 shall immediately be released, upon the ascertainment of the necessary facts, to the care, custody and control of such juvenile’s parent, guardian, custodian or other suitable person able and willing to provide supervision and care for such juvenile, either on bail or recognizance pursuant to Chapter 9 (§ 19.2-119 et seq.) of Title 19.2 or under such conditions as may be imposed or otherwise.

However, at any time prior to an order of final disposition, a juvenile may be detained in a secure facility, pursuant to a detention order or warrant, only upon a finding by the judge, intake officer, or magistrate, that there is probable cause to believe that the juvenile committed the act alleged, and that at least one of the following conditions is met:

1. The juvenile is alleged to have (a) violated the terms of his probation or parole when the charge for which he was placed on probation or parole would have been a felony or Class 1 misdemeanor if committed by an adult; (b) committed an act that would be a felony or Class 1 misdemeanor if committed by an adult; . . . and there is clear and convincing evidence that:
 - a. Considering the seriousness of the current offense or offenses and other pending charges, the seriousness of prior adjudicated offenses, the legal status of the juvenile and any aggravating and mitigating circumstances, the liberty of the juvenile, constitutes a clear and substantial threat to the person or property of others;
 - b. The liberty of the juvenile would present a clear and substantial threat of serious harm to such juvenile's life or health; or
 - c. The juvenile has threatened to abscond from the court's jurisdiction during the pendency of the instant proceedings or has a record of willful failure to appear at a court hearing within the immediately preceding 12 months.
2. The juvenile has absconded from a detention home or facility where he has been directed to remain by the lawful order of a judge or intake officer.
3. The juvenile is a fugitive from a jurisdiction outside the Commonwealth and subject to a verified petition or warrant, in which case such juvenile may be detained for a period not to exceed that provided for in § 16.1-323 while arrangements are made to return the juvenile to the lawful custody of a parent, guardian or other authority in another state.
4. The juvenile has failed to appear in court after having been duly served with a summons in any case in which it is alleged that the juvenile has committed a delinquent act or that the child is in need of services or is in need of supervision; however, a child alleged to be in need of services or in need of supervision may be detained for good cause pursuant to this subsection only until the next day upon which the court sits within the county or city in which the charge against the child is pending, and under no circumstances longer than 72 hours from the time he was taken into custody.
. . .
5. The juvenile failed to adhere to the conditions imposed upon him by the court, intake officer or magistrate following his release upon a Class 1 misdemeanor charge or a felony charge.
. . . .

b. Placement options

A child who does not meet the conditions outlined in Va. Code Ann. § 16.1-248.1(A) for placement in a secure facility, must be released to “a parent, guardian or other person willing and able to provide supervision and care under such conditions as the judge, intake officer or magistrate may impose.” Va. Code Ann. § 16.1-248.1(B). Except, Va. Code Ann. § 16.1-248.1(B) allows a child to be placed in shelter care if

1. The juvenile is eligible for placement in a secure facility;
2. The juvenile has failed to adhere to the directions of the court, intake officer or magistrate while on conditional release;
3. The juvenile's parent, guardian or other person able to provide supervision cannot be reached within a reasonable time;
4. The juvenile does not consent to return home;
5. Neither the juvenile's parent or guardian nor any other person able to provide proper supervision can arrive to assume custody within a reasonable time; or

6. The juvenile's parent or guardian refuses to permit the juvenile to return home and no relative or other person willing and able to provide proper supervision and care can be located within a reasonable time.

If it is determined that a child should remain in detention or shelter care under Va. Code Ann. § 16.1-248.1, then Va. Code Ann. § 16.1-249(A) (Places of confinement for juveniles) provides the permissible placements as follows,

1. An approved foster home or a home otherwise authorized by law to provide such care;
2. A facility operated by a licensed child welfare agency;
3. If a juvenile is alleged to be delinquent, in a detention home or group home approved by the Department;
4. Any other suitable place designated by the court and approved by the Department;
5. To the extent permitted by federal law, a separate juvenile detention facility located upon the site of an adult regional jail facility established by any county, city or any combination thereof constructed after 1994, approved by the Department of Juvenile Justice and certified by the Board of Juvenile Justice for the holding and detention of juveniles.

IV. Adjudication or referral to alternate process:

a. Adjudicatory/dispositional hearing

Va. Code Ann. § 16.1-277.1 (Time limitation) outlines how long children can remain in detention prior to adjudication and disposition.

- A. When a child is held continuously in secure detention, he shall be released from confinement if there is no adjudicatory or transfer hearing conducted by the court for the matters upon which he was detained within twenty-one days from the date he was first detained.
- B. If a child is not held in secure detention or is released from same after having been confined, an adjudicatory or transfer hearing on the matters charged in the petition or petitions issued against him shall be conducted within 120 days from the date the petition or petitions are filed.
- C. When a child is held in secure detention after the completion of his adjudicatory hearing or is detained when the juvenile court has retained jurisdiction as a result of a transfer hearing, he shall be released from such detention if the disposition hearing is not completed within thirty days from the date of the adjudicatory or transfer hearing.

The Department of Social Services (DSS) has been directed to develop a plan to provide services to human trafficking victims through House Bill 2190,⁶⁴ which Governor McDonnell approved on March 18, 2011. 2011 Va. Acts 258. The law states,

Such plan shall include provisions for (i) identifying victims of human trafficking in the Commonwealth; (ii) assisting victims of human trafficking with applying for federal and state benefits and services to which they may be entitled; (iii) coordinating the delivery of health, mental health, housing, education, job training, victims' compensation, legal, and other services for victims of human trafficking; (iv) preparing and disseminating educational and training programs and materials to increase awareness of human trafficking and services available to victims of human trafficking among local departments of social services, public and private agencies and service providers, and the public;

⁶⁴ House Bill 2190 is appended to Va Code Ann. § 63.2-200 (Department of Social Services created), as published by Lexis.

(v) developing and maintaining community-based services for victims of human trafficking; and (vi) assisting victims of human trafficking with family reunification or return to their place of origin if the person so desires. In developing its plan, the Department shall work together with such other state and federal agencies, public and private entities, and other stakeholders as the Department shall deem appropriate.

V. Outcomes (Final permanent placement)

a. Disposition

i. Children in need of services or status offenders

Pursuant to Va. Code Ann. § 16.1-278.4 the possible dispositions for children in need of services or status offenders:

If a child is found to be in need of services or a status offender, the juvenile court or the circuit court may make any of the following orders of disposition for the supervision, care and rehabilitation of the child:

1. Enter an order pursuant to the provisions of § 16.1-278 (ordering government agencies to provide services provided by law).
2. Permit the child to remain with his parent subject to such conditions and limitations as the court may order with respect to such child and his parent.
3. Order the parent with whom the child is living to participate in such programs, cooperate in such treatment or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the child and his parent.
4. Beginning July 1, 1992, in the case of any child fourteen years of age or older, where the court finds that the child is not able to benefit appreciably from further schooling, the court may excuse the child from further compliance with any legal requirement of compulsory school attendance as provided under § 22.1-254 or authorize the child, notwithstanding the provisions of any other law, to be employed in any occupation which is not legally declared hazardous for children under the age of eighteen.
5. Permit the local board of social services or a public agency designated by the community policy and management team to place the child, subject to the provisions of § 16.1-281, in suitable family homes, child caring-institutions, residential facilities, or independent living arrangements with legal custody remaining with the parents or guardians. . . .
6. Transfer legal custody to any of the following:
 - a. A relative or other individual who, after study, is found by the court to be qualified to receive and care for the child;
 - b. A child welfare agency, private organization or facility that is licensed or otherwise authorized by law to receive and provide care for such child. . . .; or
 - c. The local board of social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the child has residence if other than the county or city in which the court has jurisdiction.. . . .
7. Require the child to participate in a public service project under such conditions as the court prescribes.

ii. Children in need of supervision

Va. Code Ann. § 16.1-278.5 addresses the possible dispositions for children in need of supervision. Before disposition, “the appropriate public agency” must “evaluate the child’s service needs using an interdisciplinary team approach.” Va. Code Ann. § 16.1-278.5(A). After receiving the agency’s report, a court may make any of the following dispositions:

B. The court may make any of the following orders of disposition for the supervision, care and rehabilitation of the child:

1. Enter any order of disposition authorized by § 16.1-278.4 for a child found to be in need of services;
2. Place the child on probation under such conditions and limitations as the court may prescribe including suspension of the child's driver's license upon terms and conditions which may include the issuance of a restricted license for those purposes set forth in subsection E of § 18.2-271.1;
3. Order the child and/or his parent to participate in such programs, cooperate in such treatment or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the child;
4. Require the child to participate in a public service project under such conditions as the court may prescribe;
-

5.4.1 Recommendation: Enact a mandatory protective response for juvenile sex trafficking victims that provides an avenue to specialized services outside detention.

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

Under Va. Code Ann. § 63.2-100, the definition of “abused or neglected child” includes a child under the age of 18 “[w]hose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any⁶⁵ sexual act upon a child in violation of the law” and a child under the age of 18 “[w]hose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child alone in the same dwelling, including an apartment . . . , with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902.”

5.5.1 Recommendation: Amend Va. Code Ann. § 16.1-228 and § 63.2-100 definitions of “abused or neglected child” to expressly include violations of Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) and Virginia’s CSEC laws – § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring person; penalties) and § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) – in the definition of “abused or neglected child.”

⁶⁵ The definition in Va. Code Ann. § 16.1-228, while substantially similar in quoted part to the definition in Va. Code Ann. § 63.2-100 does not include the phrase “act of sexual exploitation.”

5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*

Va. Code Ann. § 16.1-278.1 defines “parent” for purposes of Article 9 (Disposition), which contains provisions on abused and neglected children, “Children in Need of Services,” and “Children in Need of Supervision,” to include “parent, guardian, legal custodian, or other person standing in loco parentis.” Also, Va. Code Ann. § 16.1-228 (Juvenile and Domestic Relations District Courts—Definitions) and § 63.2-100 (Welfare (Social Services)—Definitions) refer to “parents or other person responsible for his care” of the child in the definition for “abused or neglected child.” These definitions may be too narrow to allow for child welfare intervention on behalf of child who is exploited by a non-family member.

5.6.1 Recommendation: Amend Va. Code Ann. § 16.1-278.1 (Definitions) to allow child welfare protection for juvenile sex trafficking victims irrespective of the perpetrator of the abuse.

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.*

The Virginia Workers’ Compensation program contains ineligibility criteria that could negatively affect domestic minor sex trafficking victims’ ability to receive compensation. Va. Code Ann. § 19.2-368.4 (Persons eligible for awards) states in subsection (B) that “[a] person who is criminally responsible for the crime upon which a claim is based, or an accomplice or accessory of such person, shall not be eligible to receive an award with respect to such claim.” Va. Code Ann. § 19.2-368.6 (Assignment of claims; investigation; hearing; confidentiality of records; decisions) provides in subsection (D) that “[t]here shall be a rebuttable presumption that the claimant did not contribute to and was not responsible for the infliction of his injury,” reducing the risk that a minor victim of prostitution may be found to have contributed to the injuries sustained through her activities in prostitution. Also, a child victim of sex trafficking, who may be afraid or angry with law enforcement, may have an award denied, reduced or withdrawn if “[t]he Commission . . . find[s] that any claimant or award recipient has not fully cooperated with all law-enforcement agencies.” Va. Code Ann. § 19.2-368.10.

Va. Code Ann. § 19.2-368.10 (When awards to be made; reporting crime and cooperation with law enforcement) also restricts an award to a victim where the crime was reported to the authorities later than “120 hours after the occurrence of such crime, unless the Commission, for good cause shown, finds the delay to have been justified.” An exception is outlined in Va. Code Ann. § 19.2-368.10, which states, “The provisions of this subdivision shall not apply to claims of sexual abuse that occurred while the victim was a minor.” However, “sexual abuse” is defined in Va. Code Ann. § 19.2-368.2 as “sexual abuse as defined in subdivision 6 of § 18.2-67.10⁶⁶ and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.”

Va. Code Ann. § 19.2-368.5(B) gives deadlines for when a claim may be filed by a victim by stating, “A claim shall be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based, or not later than one year after the death of the victim. However, (i) in cases involving claims made on behalf of a minor or a person who is incapacitated, the provisions of subsection A of § 8.01-229 shall apply to toll the one-year period; (ii) in cases involving claims made by a victim against profits of crime held in escrow pursuant to Chapter 21.2 (§ 19.2-368.19 et seq.) of this title, the claim shall be filed within five years of the date of the special order of escrow; and (iii) in cases involving claims of sexual abuse of a minor, the claim shall be filed within 10 years after the minor’s eighteenth birthday. For good cause shown, the Commission may extend the time for filing.” Va. Code Ann. § 19.2-368.8(A) also provides for reconsideration of claims of sexual abuse

⁶⁶ See *supra* note 11 for the definition of “sexual abuse.”

by stating, “The Commission, on its own motion, or upon request of the claimant, may reinvestigate or reopen a decision making or denying an award. Except for claims of sexual abuse that occurred while the victim was a minor, the Commission shall not reopen or reinvestigate a case after the expiration of two years from the date of submission of the original claim. Any claim involving the sexual abuse of a minor that has been denied before July 1, 2001, because it was not timely filed may, upon application filed with the Commission, be reconsidered provided the application for reconsideration is filed within ten years after the minor’s eighteenth birthday.”

Va. Code Ann. § 19.2-368.11:1 sets forth the limits for the amount of the award, allowing for claims including but not limited to unreimbursed medical costs, loss of earnings, and funeral expenses, after being reduced by any amounts received or to be received from another source or an emergency award, with a total cap not to exceed \$25,000. Va. Code Ann. § 19.2-368.11:1.

5.7.1 Recommendation: Amend Va. Code Ann. § 19.2-368.4 and § 19.2-368.10 to stipulate an exception to listed ineligibility factors for minor victims of commercial sexual exploitation.

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

Virginia law provides some victim-friendly provisions for victims of child sex trafficking. Va. Code Ann. § 18.2-67.9 provides a method for the court to order the use of two-way closed circuit television testimony for certain alleged victims of abduction under Va. Code Ann. § 18.2-47 et seq. and other listed crimes upon application by the defendant or prosecutor. Va. Code Ann. § 63.2-1521(A) (Testimony by child using two-way closed-circuit television) also provides for the use of two-way closed circuit television testimony “[i]n any civil proceeding involving alleged abuse or neglect of a child” under certain specified provisions. In both laws, the provisions apply to “[a]n alleged victim who was fourteen years of age or under on the date of the alleged offense and is sixteen or under at the time of the trial” and “[a]ny child witness who is fourteen years of age or under at the time of the trial.” Va. Code Ann. § 63.2-1521(B). The statutes explain that the court has discretion to order the testimony via closed-circuit television if it finds that the child is “unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons: 1. The child’s persistent refusal to testify despite judicial requests to do so; 2. The child’s substantial inability to communicate about the offense; or 3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.” Va. Code Ann. §§ 18.2-67.9(B), 63.2-1521(C). However, this protection does not extend to victims of sex trafficking under Va. Code Ann. § 18.2-357.1 or CSEC offenses under § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring person; penalties) and § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties).

Also, Va. Code Ann. § 63.2-1522(A), (B) allows for out-of-court statements, in certain abuse and neglect civil proceedings, “describing any act of a sexual nature performed with or on the child by another” not otherwise admissible made “by a child the age of twelve or under at the time the statement is offered into evidence” under the following conditions:

1. The child testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:
 - a. The child’s death;
 - b. The child’s absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;
 - c. The child’s total failure of memory;
 - d. The child’s physical or mental disability;
 - e. The existence of a privilege involving the child;

- f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; and
 - g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.
2. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability

Va. Code Ann. § 18.2-67.7 (Admission of evidence) provides protection to the testifying victim of a sexual offense (commonly called "rape shield law"), but this protection does not extend to victims of sex trafficking or most CSEC offenses. Va. Code Ann. § 18.2-67.7 states,

A. In prosecutions under this article [Criminal sexual assault], or under clause (iii) or (iv) [involving minors] of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], 18.2-370 [Taking indecent liberties with children; penalties], 18.2-370.01 [Indecent liberties by children; penalty], or 18.2-370.1 [Taking indecent liberties with child by person in custodial or supervisory relationship; penalties], general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:

1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness's intimate parts; or
2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness's mental incapacity or physical helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or
3. Evidence offered to rebut evidence of the complaining witness's prior sexual conduct introduced by the prosecution.

Subsection (B) of Va. Code Ann. § 18.2-67.7 emphasizes that nothing "shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused." A "written notice generally describing the evidence" must be given "prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs" in order for the accused to present evidence of "past sexual conduct of the complaining witness with a person other than the accused." Va. Code Ann. § 18.2-67.7(B). Subsection (C) mandates that the evidence may not be admitted or referred to "until the court first determines the admissibility of that evidence at an evidentiary hearing to be held before the evidence is introduced." Additionally, pursuant to subsection (C), "If the court initially determines that the evidence is inadmissible, but new information is discovered during the course of the preliminary hearing or trial which may make such evidence admissible, the court shall determine in an evidentiary hearing whether such evidence is admissible."

Also, under Va. Code Ann. § 18.2-67.6, "The Commonwealth need not demonstrate that the complaining witness cried out or physically resisted the accused in order to convict the accused of an offense under this article [Criminal sexual assault], but the absence of such resistance may be considered when relevant to show that the act alleged was not against the will of the complaining witness."

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.*

Va. Code Ann. § 16.1-306(A) (Expungement of court records) directs the automatic annual destruction of records by the clerk of the Juvenile and Domestic Relations Court for any juvenile who has reached 19, if five years have passed from the date of the last hearing. However, the records are kept if the juvenile was found guilty of an offense that would have been a felony if committed by an adult. Va. Code Ann. § 16.1-306(A).⁶⁷

5.9.1 Recommendation: Amend Va. Code Ann. § 16.1-306 (Expungement of court records) to allow for expungement and automatic sealing of records at age eighteen for juveniles charged with prostitution offenses.

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 Va. Code Ann. § 19.2-305.1(B), “[A]ny person who, on or after July 1, 1995, commits, and is convicted of, a crime in violation of any provision in Title 18.2 shall make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses or expenses directly related to funeral or burial incurred by the victim or his estate as a result of the crime, may be compelled to perform community services and, if the court so orders, shall submit a plan for doing that which appears to be feasible to the court under the circumstances.” Title 18.2 includes the CSEC crimes, including Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose), Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties), Va. Code Ann. § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), Va. Code Ann. § 18.2-356 (Receiving money for procuring person; penalties), Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) and Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties). Further, subsection (E1) provides for mandatory restitution to victims of pornography, stating,

A defendant convicted of an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, ‘victim’ means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3. The Commonwealth shall make reasonable efforts to notify victims of offenses under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

5.10.1 Recommendation: Establish a statute that provides a civil cause of action that domestic minor sex trafficking victims could use to sue their exploiters.

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.*

⁶⁷ Additionally, “if the juvenile was found guilty of an offense for which the clerk is required by § 46.2-383 to furnish an abstract to the Department of Motor Vehicles, the records shall be destroyed when the juvenile has attained the age of 29.” Va. Code Ann. § 16.1-306(A).

Va. Code Ann. § 8.01-243(A) provides a statute of limitations for personal injury of two years, unless otherwise provided. Under subsection (B), “Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.” Va. Code Ann. § 8.01-243(B). Va. Code Ann. § 8.01-243(D) provides, “Every action for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person as set forth in subdivision 6 of § 8.01-249 shall be brought within 20 years after the cause of action accrues.” Generally, under Va. Code Ann. § 8.01-230, the limitation period begins when the right of action accrues, which is “the date the injury is sustained in the case of injury to the person . . . and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under . . . §§ 8.01-249, 8.01-250 or other statute.” Va. Code Ann. § 8.01-249(6) provides some statutory relief for victims of sexual abuse, stating,

In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon removal of the disability of infancy or incapacity as provided in § 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, “sexual abuse” means sexual abuse as defined in subdivision 6 of § 18.2-67.10⁶⁸ and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;

With regard to criminal actions against traffickers, there is no general statute of limitations for felonies indicated in the Virginia Code.⁶⁹ Va. Code Ann. § 19.2-8 (Limitation of prosecutions) states, “A prosecution for a misdemeanor, or any pecuniary fine, forfeiture, penalty or amercement, shall be commenced within one year next after there was cause therefor”

⁶⁸ See *supra* note 11 for definition of “sexual abuse.”

⁶⁹ *Statute of Limitations Fact Sheet*, NATIONAL CENTER FOR VICTIMS OF CRIME, http://corsal.org/06SOLNCVC%20Statute_of_Limitations_Fact_Sheet32%5B1%5D.pdf (last visited June 30, 2011).

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 audiotaping is permitted in law enforcement investigations.*
 - 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
 - 6.4 *Using a law enforcement decoy 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 or electronic communications 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.*
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Legal Analysis:

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

Under Va. Code Ann. § 9.1-102(55), the Department of Criminal Justice Services, under the direction of the Criminal Justice Services Board and in conjunction with the Office of the Attorney General, has “the power and duty” to “advise law-enforcement agencies and attorneys for the Commonwealth regarding the identification, investigation, and prosecution of human trafficking offenses using the common law and existing criminal statutes in the Code of Virginia.” Further, “the Department shall publish and disseminate a model policy or guideline for law-enforcement personnel involved in criminal investigations or assigned to vehicle or street patrol duties to ensure that law-enforcement personnel are sensitive to and aware of human trafficking offenses and the identification of victims of human trafficking offenses.”

Additionally, under subsection (37), the department has the power to “[e]stablish training standards and publish a model policy for law-enforcement personnel in the handling of family abuse, domestic violence, sexual assault and stalking cases, including standards for determining the predominant physical aggressor in accordance with Section 19.2-81.3.” Additionally, “The Department shall provide technical support and assistance to law-enforcement agencies in carrying out the requirements set forth in § 9.1-1301 [Sexual assault policies for law-enforcement agencies in the Commonwealth] and shall by December 1, 2009, submit a report on the status of implementation of these requirements to the chairmen of the House and Senate Courts of Justice Committees.” Va. Code Ann. § 9.1-102(37).

Under Va. Code Ann. § 9.1-1301, “The Virginia Department of State Police and the police and sheriff’s departments of every political subdivision in the Commonwealth and every campus police department shall establish written policies and procedures regarding a law-enforcement officer’s response to an alleged criminal sexual assault in violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2. Such policies shall, at a minimum, provide guidance as to the department’s policy on (i) training; (ii) compliance with §§ 19.2-9.1 and 19.2-165.1; (iii) transportation of alleged sexual assault victims; and (iv) the provision of information on legal and community resources available to alleged victims of sexual assault.”

While the Virginia Office of the Attorney General (OAG), in cooperation with the Virginia Department of Criminal Justice Services (DCJS) provides a regional multidisciplinary training to law enforcement officers, prosecutors and victim-witness coordinators in Virginia, this training is not mandatory for law enforcement.⁷⁰

⁷⁰ See <http://www.dcjs.virginia.gov/trainingevents/cple/HTtraining/> (last visited June 19, 2015).

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

Va. Code Ann. § 19.2-62(B)(2) authorizes interception of a wire, electronic, or oral communication if one party gives consent. That section states, “It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”

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

Va. Code Ann. § 19.2-66(A) states in part, “The Attorney General or Chief Deputy Attorney General, if the Attorney General so designates in writing, in any case where the Attorney General is authorized by law to prosecute or pursuant to a request in his official capacity of an attorney for the Commonwealth in any city or county, may apply to a judge of competent jurisdiction for an order authorizing the interception of wire, electronic or oral communications by the Department of State Police, when such interception may reasonably be expected to provide evidence” of certain felony offenses. The relevant felony offenses listed include “any felonies that are not Class 6 felonies in Article 7 (§ 18.2-61 et seq. [Criminal sexual assault]) of Chapter 4 of Title 18.2.” As a result, wiretapping could be authorized in sex trafficking and CSEC investigations involving suspected violations of Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose), § 18.2-370(B) (Taking indecent liberties with children), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), Va. Code Ann. § 18.2-356 (Receiving money for procuring person; penalties), Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) and Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties).

Va. Code § 19.2-68(G) (Application for and issuance of order authorizing interception; contents of order; recording and retention of intercepted communications, applications and orders; notice to parties; introduction in evidence of information obtained) outlines the admissibility into evidence of intercepted communications. That section requires at least 10 days’ notice, which may be judicially waived in some circumstances. Subsection H sets forth the grounds for moving to suppress such evidence.

6.4 *Using a law enforcement decoy 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.*

There is no specific statutory authority for law enforcement to use a decoy in investigating domestic minor sex trafficking, but the provisions in Va. Code Ann. § 18.2-374.3(C)–(E) use the phrase “child he knows or has reason to believe is younger than 15 years of age,” when referring to the offender, indicating that decoys can be used.

6.4.1 Recommendation: Enact a law expressly permitting the use of a decoy to investigate domestic minor sex trafficking related crimes.

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

Va. Code Ann. § 18.2-374.3(E) (Use of communications systems to facilitate certain offenses involving children) uses the phrase “person he knows or has reason to believe is younger than 15 years of age,” when referring to the offender, indicating that law enforcement can use the Internet to pose as minors to investigate the crime.

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

Va. Code Ann. § 52-31 establishes the “Missing Children Information Clearinghouse.”⁷¹ Also, Va. Code Ann. § 15.2-1718 (Receipt of missing child reports) requires law enforcement to promptly enter missing child information into the state and national systems in addition to this, stating,

No police or sheriff’s department shall establish or maintain any policy which requires the observance of any waiting period before accepting a missing child report as defined in § 52-32. Upon receipt of a missing child report by any police or sheriff’s department, the department shall immediately, but in all cases within two hours of receiving the report, enter identifying and descriptive data about the child into the Virginia Criminal Information Network and the National Crime Information Center Systems, forward the report to the Missing Children Information Clearinghouse within the Department of State Police, notify all other law-enforcement agencies in the area, and initiate an investigation of the case.

In addition, Va. Code Ann. § 52-31.1 instructs the Superintendent of State Police to “establish a network to implement reports of the disappearance of children by local law-enforcement agencies to local school division superintendents and the State Registrar of Vital Records.” Va. Code Ann. § 22.1-288.1(B) states, “Upon notification by a local law-enforcement agency of a child’s disappearance, the principal of any school in which the child was enrolled at the time of the disappearance shall indicate, by mark, in the child’s cumulative record that the child has been reported as missing. Upon notification by law enforcement that the child is located, the principal shall remove the mark from the record.” Va. Code Ann. § 32.1-275.2 instructs the State Registrar to indicate on birth records that a child is missing when notified of the disappearance.

Va. Code Ann. § 52-34 (Notification required when missing child located) states that “[a]ny law-enforcement officer who has reported a missing child to the Clearinghouse shall notify the Clearinghouse immediately upon determining the location of the child.”

Additionally, Va. Code Ann. § 9.1-102(57)⁷² (Powers and duties of the Board and the Department) provides that the Department “shall have the power and duty to . . . [e]stablish training standards and publish a model policy for missing children . . . and search and rescue protocol.”

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⁷¹ Va. Code Ann. § 52-32 defines “missing child” as “any person who is under the age of 21 years, whose temporary or permanent residence is in Virginia, or is believed to be in Virginia, whose whereabouts are unknown to any parent, guardian, legal custodian or other person standing in loco parentis of the child, and who has been reported as missing to a law-enforcement agency within the Commonwealth.”

⁷² The text of Va. Code Ann. § 9.1-102 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 1184, 2015 Leg. Reg. Sess. (Va. 2015) (effective July 1, 2015).