

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2016 ANALYSIS AND RECOMMENDATIONS NEW MEXICO

### FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

#### *Legal Components:*

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

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

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

N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) states that knowingly “recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity”<sup>2</sup> is a human trafficking violation. The law does not require proof of force, fraud, or coercion to induce the minor’s involvement in the commercial sex act.

In contrast, the provision applicable to facilitators, N.M. Stat. Ann. § 30-52-1(A)(3), does require proof of force, fraud, or coercion, regardless of the victim’s age, and states that knowingly “benefiting, financially

<sup>1</sup> This report includes legislation enacted as of August 1, 2016.

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

or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services, or commercial sexual activity” is human trafficking.

If the victim is 16–17, a conviction under N.M. Stat. Ann. § 30-52-1(A)(2) or (3), is punishable as a third degree felony by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(11), (E)(11).<sup>3</sup> If the victim is 13–15, the offense increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000, and if the victim is under 13, the offense further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(1)–(2), 31-18-15(A)(3), (A)(7), (E)(3), (E)(7). In addition to criminal penalties, N.M. Stat. Ann. § 30-52-1.1 (A) provides civil remedies for victims of trafficking discussed in detail in 5.10 and 5.11 below.

1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*

The following statutes treat CSEC as distinct crimes:

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

Under N.M. Stat. Ann. § 30-6A-4(A), “Any person knowingly receiving any pecuniary profit as a result of a child under the age of sixteen engaging in a prohibited sexual act<sup>4</sup> with another is guilty of a second degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a first degree felony.” A second degree felony is punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. § 31-18-15(A)(7), (E)(7).<sup>5</sup> A first degree felony is punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. § 31-18-15(A)(3), (E)(3).

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<sup>3</sup> N.M. Stat. Ann. § 31-18-15 varies the punishment level for second and third degree felonies based on whether the offense is a “sexual offense against a child” or “sexual exploitation of a child.” Unless the statute expressly states the offense is a “sexual offense against a child,” or a “sexual exploitation of a child” this report assumes that the offense is neither a “sexual offense against a child” nor a “sexual exploitation of a child.” N.M. Stat. Ann. § 30-52-1 does not state whether the offense of human trafficking is a “sexual offense against a child” or “sexual exploitation of child.” However, if it were considered a sexual offense against a child, a second degree felony sexual offense against a child is punishable by 15 years imprisonment and a possible fine not to exceed \$12,500, and a third degree felony sexual offense against a child is punishable by 6 years’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(5), (A)(9), (E)(5), (E)(9). If it were considered sexual exploitation of a child, a second degree felony sexual exploitation of a child is punishable by 12 years’ imprisonment and a possible fine not to exceed \$5,000, and a third degree felony sexual exploitation of a child is punishable by 11 years’ imprisonment and a fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(6), (A)(10), (E)(6), (E)(10). The text of N.M. Stat. Ann. § 31-18-15 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 65 during the 2016 2nd Regular Session of the New Mexico Legislature (effective Feb. 25, 2016).

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

<sup>5</sup> See *supra* note 3.

N.M. Stat. Ann. § 30-6A-4(B) states that “hiring or offering to hire a child under the age of sixteen to engage in any prohibited sexual act” is punishable as a second degree felony by imprisonment for 9 years and a fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15(A)(7), (E)(7).

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

Any parent, legal guardian or person having custody or control of a child under sixteen years of age who knowingly permits that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print medium<sup>6</sup> depicting such an act is guilty of a third degree felony.

A third degree felony is punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(11), (E)(11).

2. N.M. Stat. Ann. § 30-6A-3(D)<sup>7</sup> (Sexual exploitation of children) states that it is illegal to “intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly.”<sup>8</sup> A conviction under N.M. Stat. Ann. § 30-6A-3(D) is punishable as a third degree felony for sexual exploitation of children by imprisonment for 11 years and a possible fine not to exceed \$5,000; however, if the victim is under 13, the crime is a second degree felony for sexual exploitation of children punishable by imprisonment for 12 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(D), 31-18-15(A)(6), (A)(10), (E)(6), (E)(10).

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

Enticement of child consists of:

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

Whoever commits enticement of child is guilty of a misdemeanor.

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

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

<sup>7</sup> The text of N.M. Stat. Ann. § 30-6A-3 (Sexual exploitation of children) cited here and elsewhere in this report includes amendments made by the enactment of House Bill 65 during the 2016 2nd Regular Session of the New Mexico Legislature (effective Feb. 25, 2016).

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

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

A misdemeanor is punishable by a definite term of less than 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. § 31-19-1(A).

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

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

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

A person is guilty of criminal sexual penetration in the second degree if the act involves, among other things, “the use of force or coercion on a child thirteen to eighteen years of age.” N.M. Stat. Ann. § 30-9-11(E)(1).<sup>10</sup> A violation of N.M. Stat. Ann. § 30-9-11(E), as a second degree felony for a sexual offense against a child, is punishable by imprisonment for 15 years, with a mandatory minimum term of 3 years that may not be “suspended or deferred,” and a possible fine not to exceed \$12,500. N.M. Stat. Ann. §§ 30-9-11(E), 31-18-15(A)(5), (E)(5).

Criminal sexual penetration is a fourth degree felony when, among other things, it is “perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child” and criminal sexual penetration in the first through third degrees does not apply. N.M. Stat. Ann. § 30-9-11(G). A conviction under N.M. Stat. Ann. § 30-9-11(G) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-9-11(G), 31-18-15 (A)(13), (E)(11).

2. N.M. Stat. Ann. § 30-9-13(A) (Criminal sexual contact of a minor) defines “Criminal sexual contact of a minor” as “the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts.”<sup>11</sup> If the victim is 13–18 years old and certain aggravating conditions are present or anytime the victim is under 13, a violation is punishable as a third degree felony for a sexual offense against a child. N.M.

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

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

<sup>11</sup> “[I]ntimate parts’ means the primary genital area, groin, buttocks, anus or breast.” N.M. Stat. Ann. § 30-9-13(A).

Stat. Ann. § 30-9-13(C).<sup>12</sup> However, if the minor’s “intimate parts” are unclothed, the violation is punishable as a second degree felony for a sexual offense against a child. N.M. Stat. Ann. § 30-9-13(B). A violation of N.M. Stat. Ann. § 30-9-13(B) is a second degree felony for a sexual degree felony for a sexual offense against a child punishable by imprisonment for 15 years, with a mandatory minimum term of 3 years that may not be “suspended or deferred,” and a possible fine not to exceed \$12,500. N.M. Stat. Ann. §§ 30-9-13(B), 31-18-15(A)(5), (E)(5). A violation of N.M. Stat. Ann. § 30-9-13(C) is punishable as a third degree felony for a sexual offense against a child by imprisonment for 6 years and possible a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-9-13(C), 31-18-15(A)(9), (E)(9).

3. Lastly, criminal sexual contact is a fourth degree felony if, among other things, force or coercion was used on a 13–18 year old victim and none of the specifications listed in N.M. Stat. Ann. § 30-9-13(B), (C) apply. N.M. Stat. Ann. § 30-9-13(D). A violation of N.M. Stat. Ann. § 30-9-13(D) is punishable by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(13), (E)(11).

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

Child solicitation by electronic communication device<sup>13</sup> consists of a person knowingly<sup>14</sup> and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct<sup>15</sup> when the perpetrator is at least four years older than the child.

Where the victim is 13–15 years old, a conviction under N.M. Stat. Ann. § 30-37-3.2(A) is punishable as a fourth degree felony by 18 months’ imprisonment and a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(A),(B), 31-18-15(A)(13)(E)(11). If, however, the defendant “attends or is present at a meeting that the person arranged pursuant to the solicitation,” the crime is punishable as a third degree felony by imprisonment for 3 years and a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(1), (C)(1), 31-

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<sup>12</sup> The conditions listed in N.M. Stat. Ann. § 30-9-13(C)(2) include when

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

<sup>13</sup> N.M. Stat. Ann. 30-37-3.2(F) defines “electronic communication device” as “a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.”

<sup>14</sup> N.M. Stat. Ann. 30-37-1(G) defines “knowingly” as,

- [H]aving general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or both, of:
- (1) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant;
  - (2) the age of the minor.

<sup>15</sup> N.M. Stat. Ann. § 30-37-1(C) defines “sexual conduct” as an “act of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast[.]”

18-15(A)(9), (A)(11), (E)(11). Where the victim is under 13, a conviction under N.M. Stat. Ann. § 30-37-3.2(A) is punishable as a third degree felony by imprisonment for 3 years and a fine not to exceed \$5,000, except that when the defendant “attends or is present at a meeting that the person arranged pursuant to the solicitation,” the crime is punishable as a second degree felony by imprisonment for 9 years and a fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(2), (C)(2), 31-18-15(A)(7),(A)(11), E(7),(E)(11).

*1.3 Prostitution statutes refer to the sex trafficking statute to acknowledge the intersection of prostitution with trafficking victimization.*

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

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

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

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

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

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

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

. . . .

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

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

Pursuant to N.M. Stat. Ann. § 30-42-3(A),

“racketeering” means any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving any of the following cited offenses:

. . . .

(15) promoting prostitution, as provided in Section 30-9-4 NMSA 1978;

. . . .

Accordingly, N.M. Stat. Ann. § 30-9-1 (Enticement of child) and § 30-52-1(A)(2) (Human trafficking) appear

to fall within the definition of “racketeering” because both involve conduct criminalized under N.M. Stat. Ann. § 30-42-4 (Promoting Prostitution).

A violation of N.M. Stat. Ann. § 30-42-4(A)–(C) (Prohibited activities; penalties) constitutes a second degree felony and carries a fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-42-4(A)–(C), 31-18-15(E)(7). A defendant who violates N.M. Stat. Ann. § 30-42-4 may be liable to “[a] person who sustains injury to his person, business or property” for three times the actual damages. N.M. Stat. Ann. § 30-42-6(A). Additionally, a defendant who violates N.M. Stat. Ann. § 30-42-4(A)–(D)<sup>16</sup> will be required to forfeit assets under N.M. Stat. Ann. § 30-42-4(E), which states that a violator “shall forfeit to the state of New Mexico:

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

- 1.4.1 Recommendation: Amend the definition of “racketeering” in N.M. Stat. Ann. § 30-42-3(A) to include violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking of a minor), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-37-3.2 (Child solicitation by electronic communication device), and § 30-6A-3 (Sexual exploitation of children).

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

**Legal Components:**

- 2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts with a minor.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
- 2.3 *Solicitation laws differentiate buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet 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 the buyers of commercial sex acts with a minor.*

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

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

<sup>17</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers (*United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F.3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.” *Id.* at Sec. 109. The Eighth Circuit decision in *United States v. Jungers* and the federal sex trafficking law as amended by the Justice for Victims of Trafficking Act establish persuasive authority when state courts interpret the string of verbs constituting prohibited conduct in state sex trafficking laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.

2.1.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) to clarify that buyer conduct is included as a violation of N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking).<sup>18</sup>

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

N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) states that “hiring or offering to hire a child under the age of sixteen to engage in any prohibited sexual act”<sup>20</sup> is a second degree felony, punishable by imprisonment for 12 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-5(A)(6), (E)(6).<sup>21</sup>

N.M. Stat. Ann. § 30-9-1(B) (Enticement of child) may be used to prosecute buyers “having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [Sexual offenses] of the Criminal Code.”<sup>22</sup> A conviction under N.M. Stat. Ann. § 30-9-1 is punishable as a misdemeanor by a definite term of less than 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A).

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

New Mexico differentiates between buying sex with an adult and buying sex with minors who are under 16 by making each a separate crime. Under N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution), buying sex with a minor under 16 years old is a second degree felony punishable by imprisonment for 12 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-5(A)(6), (E)(6).<sup>23</sup> It is also likely that N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor) could also be used to prosecute a person who pays for sexual acts with a minor.

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

2.3.1 Recommendation: Amend § 30-6A-4 to include buying sex with all minors under the age of 18 in order to protect minors 16 and 17 years old from sex trafficking.

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<sup>19</sup> See *supra* Component 1.2 for a discussion of the relevant text of the statutes listed in this component.

<sup>20</sup> See *supra* note 4 for the definition of “prohibited sexual act.”

<sup>21</sup> See *supra* note 3.

<sup>22</sup> See *supra* note 9 for a list of offenses included in Article 9.

<sup>23</sup> See *supra* note 3.

## 2.4 Penalties for buyers of commercial sex acts with minors are as high as federal penalties.<sup>24</sup>

A conviction under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) if the victim is 16–17, is punishable as a third degree felony by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(11), (E)(11).<sup>25</sup> If the victim is 13–15 years old, human trafficking is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(7), (E)(7). If the victim is under 13, the violation further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Knowingly hiring a person under 16 to engage in a prohibited sexual act, under N.M. Stat. Ann. § 30-6A-4(B), (Sexual exploitation of children by prostitution), is a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15 (A)(7), (E)(7). N.M. Stat. Ann. § 30-6A-3(A)<sup>26</sup> (Sexual exploitation of children) regarding possession of child pornography, is a fourth degree felony for sexual exploitation of children, punishable by 10 years' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(12), (E)(12). N.M. Stat. Ann. § 30-9-1 (Enticement of child) is a misdemeanor punishable by a definite term of less than 1 year in county jail, a possible fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A). In contrast, a buyer convicted of N.M. Stat. Ann. § 30-9-3 (Patronizing prostitutes), a petty misdemeanor, may be punished for a first offense by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. §§ 30-9-3, 31-19-1(B).

A buyer who habitually commits any of the above stated noncapital felonies faces enhanced penalties pursuant to N.M. Stat. Ann. § 31-18-17 (Habitual offenders; alteration of basic sentence). A defendant's sentence is increased 1 year if he has 1 prior felony conviction,<sup>27</sup> 4 years if he has 2 prior felony convictions, and 8 years if he has 3 prior felony convictions. N.M. Stat. Ann. § 31-18-17(A)–(C). In all three cases, the prior felonies had to be “parts of separate transactions or occurrences.” N.M. Stat. Ann. § 31-18-17(A)–(C). The 1 year enhancement can be suspended or deferred if “the court makes a specific finding that the prior felony conviction and the instant felony conviction are both for nonviolent felony

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<sup>24</sup> See *supra* Component 1.2 for a discussion of the relevant text of the statutes listed in this component.

<sup>25</sup> See *supra* note 3.

<sup>26</sup> See *supra* note 7.

<sup>27</sup> N.M. Stat. Ann. § 31-18-17(D) defines “prior felony conviction” as

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

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

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

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

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

offenses<sup>28</sup> and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling reasons, stated on the record, for departing from the sentence imposed pursuant to this subsection.” N.M. Stat. Ann. § 31-18-17(A). The other two enhancements “shall not be suspended or deferred.” N.M. Stat. Ann. § 31-18-17(B), (C).

Additionally, the base sentences discussed throughout this report will be increased to life imprisonment subject to parole “[w]hen a defendant is convicted of a second violent sexual offense,<sup>29</sup> and each violent sexual offense conviction is part of a separate transaction or occurrence, and at least the second violent sexual offense conviction is in New Mexico.” N.M. Stat. Ann. § 31-18-25(A). If the victim of both offenses was under 13 at the time of the offense, the enhanced punishment is “life imprisonment without the possibility of parole.” N.M. Stat. Ann. § 31-18-25(B).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>30</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>31</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>32</sup>

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<sup>28</sup> “As used in this section, ‘nonviolent felony offense’ means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense.” N.M. Stat. Ann. § 31-18-17(E).

<sup>29</sup> “Violent sexual offense” is defined in N.M. Stat. Ann. § 31-18-25(F) as “(1) criminal sexual penetration in the first degree, as provided in Subsection D of Section 30-9-11 NMSA 1978; or (2) criminal sexual penetration in the second degree, as provided in Subsection E of Section 30-9-11 NMSA 1978.”

<sup>30</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>31</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>32</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(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.); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

2.5 *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.*

Although not limited in application to commercial sex acts, the use of the Internet or electronic communications to solicit sexual contact with a child under 16 years of age is illegal under N.M. Stat. Ann. § 30-37-3.2(A) (Child solicitation by electronic communication device), which states that it is a crime to “knowingly and intentionally solicit[] a child under sixteen years of age, by means of an electronic communication device,<sup>33</sup> to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.”

If the victim is 13–15, a conviction under N.M. Stat. Ann. § 30-37-3.2(B)(1) (Child solicitation by electronic communication device) is punishable as a fourth degree felony by 18 months’ imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(1), 31-18-15(A)(13), (E)(11).<sup>34</sup> If the victim is under 13, a violation of N.M. Stat. Ann. § 30-72-3.2(B)(2) increases to a third degree felony punishable by imprisonment for 3 years and a fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-37-3.2(B)(2), 31-18-15(A)(11), (E)(11). Or, if the buyer “also appears for, attends or is present at a meeting that the person arranged pursuant to the solicitation,” a violation of N.M. Stat. Ann. § 30-37-3.2(C)(1) where the victim is 13–15 years old increases to a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000, and where the victim is under 13, a violation of N.M. Stat. Ann. § 30-37-3.2(C)(2) increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-37-3.2(C), 31-18-15(A)(7), (A)(11), (E)(7), (E)(11).

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

Nothing in N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), § 30-6A-4(B) (Sexual exploitation of children by prostitution), § 30-6A-3(A)<sup>35</sup> (Sexual exploitation of children), or § 30-9-1 (Enticement of child), expressly prohibits a defendant from using the defense of mistake of age.

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

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

Penalties under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking) vary based on the age of the minor victim. When the minor is 16–17 years old, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15 (A)(11), (E)(11).<sup>36</sup> When the minor is 13–15 years old, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15 (A)(7), (E)(7). When the minor is under 13, a violation of N.M. Stat. Ann. § 30-52-1(A)(2) is a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

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<sup>33</sup> “Electronic communication device” is defined in N.M. Stat. Ann. § 30-37-3.2(F) as “a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.”

<sup>34</sup> See *supra* note 3.

<sup>35</sup> See *supra* note 7.

<sup>36</sup> See *supra* note 3.

Buyer-applicable CSEC statutes do not criminalize purchasing a commercial sex act with a minor over 16. N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) applies when the victim is under 16 years old, and a violation is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15(A)(7), (E)(7). Similarly, N.M. Stat. Ann. § 30-9-1 (Enticement of child) only applies if the victim is under 16, and a violation is a misdemeanor punishable by up to 1 year in county jail, a fine not to exceed \$1,000, or both. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A). The statute that could be used to prosecute buyers of commercial sex with children 16–17 years old would likely be N.M. Stat. Ann. § 30-9-3 (Patronizing Prostitutes). A first violation of N.M. Stat. Ann. § 30-9-3 is generally punishable as a petty misdemeanor by up to 6 months in county jail, a fine not to exceed \$500, or both. N.M. Stat. Ann. § 31-19-1(A), (B).

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

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

Buyers convicted under N.M. Stat. Ann. § 30-52-1(A) (Human trafficking), New Mexico’s CSEC laws and sexual offense laws may be required to pay fines ranging from \$500–\$15,000. Under N.M. Stat. Ann. § 30-52-1(C) (Human trafficking), a buyer may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the age of the victim. N.M. Stat. Ann. § 30-52-1(C), 31-18-15(E)(3),(7),(11).<sup>37</sup> A buyer convicted of violating N.M. Stat. Ann. § 30-6A-4(B) (Sexual exploitation of children by prostitution) may be required to pay a fine of \$10,000. N.M. Stat. Ann. §§ 30-6A-4(B), 31-18-15(E)(7). A buyer convicted of violating N.M. Stat. Ann. § 30-9-1 (Enticement of child) may be required to pay a fine of \$1,000. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A). In the absence of force or other listed circumstances, a buyer convicted of violating N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) may be required to pay a fine not to exceed \$5,000 if the minor is 13–16 or \$15,000 if the minor is under 13. N.M. Stat. Ann. §§ 30-9-11(D)(1), (G)(1), 31-18-15(E)(3), (E)(11). Also in the absence of force or other listed circumstances, a buyer convicted of violating N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor) may be required to pay a fine not to exceed \$12,500 if the minor is under 13 and unclothed. N.M. Stat. Ann. §§ 30-9-13(B)(1), 31-18-15(E)(5).

Under N.M. Stat. Ann. § 30-52-1(A) (Human trafficking), the buyer will be required “to make restitution<sup>38</sup> to the victim<sup>39</sup> for the gross income or value of the victim’s labor or services and any other actual damages<sup>40</sup> in accordance with Section 31-17-1 NMSA 1978 [Victim restitution].” N.M. Stat. Ann. § 30-52-1(F).

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<sup>37</sup> See *supra* note 3.

<sup>38</sup> “Restitution” is defined in N.M. Stat. Ann. § 31-17-1(4) as “full or partial payment of actual damages to a victim.”

<sup>39</sup> “Victim” is defined in N.M. Stat. Ann. § 31-17-1(1) as “any person who has suffered actual damages as a result of the defendant’s criminal activities.”

<sup>40</sup> “Actual damages” is defined in N.M. Stat. Ann. § 31-17-1(2) as “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or events, except punitive damages and damages for pain, suffering, mental anguish and loss of consortium. Without limitation, ‘actual damages’ includes damages for wrongful death.”

Additionally, pursuant to N.M. Stat. Ann. § 31-12-13 (Crime victims reparation fee) individuals convicted of felonies or misdemeanors must pay a crime victims reparation fee of \$75 for a felony conviction and \$50 for a misdemeanor conviction.

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

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

N.M. Stat. Ann. § 30-6A-3(A)<sup>41</sup> (Sexual exploitation of children) criminalizes the possession of child pornography, stating,

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

A violation of N.M. Stat. Ann. § 30-6A-3(A) is punishable as a fourth degree felony for sexual exploitation of children by 10 years imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(12), (E)(12).<sup>42</sup>

In comparison, a federal conviction for possession of child pornography<sup>43</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>44</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>45</sup>

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<sup>41</sup> See *supra* note 7.

<sup>42</sup> See *supra* note 3.

<sup>43</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>44</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>45</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

Pursuant to N.M. Stat. Ann. § 29-11A-4(A) (Registration of sex offenders; information required; verification; criminal penalty for noncompliance), “A sex offender residing in this state shall register with the county sheriff for the county in which the sex offender resides.” N.M. Stat. Ann. § 29-11A-3(H) defines “sex offender” to include certain persons who have been convicted of a “sex offense.” N.M. Stat. Ann. § 29-11A-3(I) (Definitions) defines “sex offense” to include the following crimes:

- (1) aggravated criminal sexual penetration or criminal sexual penetration in the first, second, third or fourth degree, as provided in Section 30-9-11 NMSA 1978;  
.....
- (3) criminal sexual contact of a minor in the second, third or fourth degree, as provided in Section 30-9-13 NMSA 1978;
- (4) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;
- (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;
- (6) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with the intent to inflict a sexual offense;
- (7) false imprisonment, as provided in Section 30-4-1 NMSA 1978, when committed with the intent to inflict a sexual offense;  
.....
- (9) enticement of child, as provided in Section 30-9-1 NMSA 1978;  
.....
- (11) child solicitation by electronic communication device, as provided in Section 30-37-3.2 NMSA 1978, for convictions occurring on or after July 1, 2013;
- (12) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978; or
- (13) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (10) of this subsection, as provided in Section 30-28-1 NMSA 1978.<sup>46</sup>

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

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

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<sup>46</sup> N.M. Stat. § 30-28-1 (Attempt to commit a felony) states in part, “Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.”

**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.*

**Legal Analysis:**

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*<sup>47</sup>

Traffickers convicted under N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), if the victim is 16–17 years old, may be convicted of a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(11), (E)(11). If the victim is 13–15, the penalty increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(7), (E)(7).<sup>48</sup> If the victim is under 13, the penalty further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Traffickers may also be prosecuted under N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution). If the minor is under 16, a violation of N.M. Stat. Ann. § 30-6A-4(A) is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(7), (E)(7). However, if the child is under 13, the penalty increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(3), (E)(3).

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

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

<sup>47</sup> See *supra* Component 1.2 for a discussion of the relevant text of the statutes listed in this component.

<sup>48</sup> See *supra* note 3.

<sup>49</sup> See *supra* note 30.

- 3.1.1 Recommendation: Amend the penalties for violations of N.M. Stat. Ann. § 30-52-1 (Human trafficking of a minor), § 30-6A-4 (Sexual exploitation of children by prostitution), and N.M. Stat. Ann. § 30-9-1 (Enticement of a child) to reflect the seriousness of the offense.

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

N.M. Stat. Ann. § 30-6A-3(D)–(F)<sup>50</sup> (Sexual exploitation of children) criminalizes the creation and manufacturing of child pornography. N.M. Stat. Ann. § 30-6A-3(D) states,

It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly. A person who violates the provisions of this subsection is guilty of a third degree felony for sexual exploitation of children and shall be sentenced [to a maximum of 11 years imprisonment and a maximum fine of \$5,000] pursuant to the provisions of N.M. Stat. Ann. § 31-18-15[A(10), E(10),]<sup>51</sup> unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony for sexual exploitation of children and shall be sentenced to [a maximum of 12 years imprisonment and a maximum fine of \$5,000 pursuant to] the provisions of N.M. Stat. Ann. §31-18-15 [A(6), E(6)].

N.M. Stat. Ann. § 30-6A-3(E) states,

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

Second degree felonies for sexual exploitation of children are punishable by imprisonment for 12 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. § 31-18-15(A)(6), (E)(6).

Regarding producing simulated child pornography that depicts a real child, N.M. Stat. Ann. § 30-6A-3(F) states,

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

A violation of N.M. Stat. Ann. § 30-6A-3(F) is punishable as a regular fourth degree felony by 18 months' imprisonment and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-6A-3(F), 31-18-15(A)(13), (E)(11).

N.M. Stat. Ann. § 30-6A-3(C) criminalizes the distribution of child pornography, stating,

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

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<sup>50</sup> See *supra* note 7.

<sup>51</sup> See *supra* note 3.

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

A violation of N.M. Stat. Ann. § 30-6A-3(C) is a third degree felony for sexual exploitation of children and is punishable by 11 years' imprisonment and a fine up to \$5,000. N.M. Stat. Ann. §§ 30-6A-3(C); 31-18-15(A)(10), (E)(10).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>52</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of child pornography<sup>53</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>54</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>55</sup>

### 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.*

While not limited to commercial sex acts, the use of the Internet or electronic communications to solicit sexual contact with a child under 16 is illegal under N.M. Stat. Ann. § 30-37-3.2 (Child solicitation by electronic communication device). N.M. Stat. Ann. § 30-37-3.2(A) applies to the act of “knowingly and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device,<sup>56</sup> to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.”

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

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

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<sup>52</sup> See *supra* note 30.

<sup>53</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>54</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>55</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>56</sup> See *supra* note 13 for the definition of “electronic communication device.”

Traffickers convicted under N.M. Stat. Ann. § 30-52-1 (Human trafficking) and New Mexico’s CSEC laws may be required to pay fines ranging from \$1,000–\$15,000. Specifically, a trafficker convicted under N.M. Stat. Ann. § 30-52-1(C) may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-52-1(C), 13-18-15(E)(3), (E)(6), (E)(9). A trafficker convicted of violating N.M. Stat. Ann. § 30-6A-4 (Sexual exploitation of children by prostitution) may be required to pay a fine of \$10,000–\$15,000 depending on the age of the victim. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(E)(3),(7). A trafficker convicted of N.M. Stat. Ann. § 30-9-1 (Enticement of child) may be required to pay a fine not to exceed \$1,000. N.M. Stat. Ann. §§ 30-9-1, 31-19-1(A).

Traffickers may also be required “to make restitution<sup>57</sup> to the victim<sup>58</sup> for the gross income or value of the victim’s labor or services and any other actual damages<sup>59</sup> in accordance with Section 31-17-1 NMSA 1978 [Victim restitution], which states “It is the policy of this state that restitution be made by each violator . . . to the victims of his criminal activities to the extent that the defendant is reasonably able to do so.” N.M. Stat. Ann. § 30-52-1(F). Restitution is mandatory for traffickers who violate N.M. Stat. Ann. § 30-52-1(F) (Human trafficking), which states,

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

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

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

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

Additionally, pursuant to N.M. Stat. Ann. § 31-12-13 (Crime victims reparation fee) individuals convicted of felonies or misdemeanors must pay a crime victims reparation fee of \$75 for a felony conviction and \$50 for a misdemeanor conviction.

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<sup>57</sup> See *supra* note 38 the definition of “restitution.”

<sup>58</sup> See *supra* note 39 for the definition of “victim.”

<sup>59</sup> See *supra* note 40 for the definition of “actual damages.”

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

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

- . . . .
- (4) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;
- (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;
- (6) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with the intent to inflict a sexual offense;
- (7) false imprisonment, as provided in Section 30-4-3 NMSA 1978, when committed with the intent to inflict a sexual offense;
- . . . .
- (9) enticement of child, as provided in Section 30-9-1 NMSA 1978;
- . . . .
- (11) child solicitation by electronic communication device, as provided in Section 30-37-3.2 NMSA 1978, for convictions occurring on or after July 1, 2013;
- (12) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978; or
- (13) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (10) of this subsection, as provided in Section 30-28-1 NMSA 1978 . . . .

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

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

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

A violation of N.M. Stat. Ann. § 30-52-1 (Human Trafficking) is not explicitly included as grounds under N.M. Stat. Ann. § 32A-4-28(B) (Termination of parental rights; adoption decree) for authorizing the termination of parental rights, although it appears to fall under the definition of “abused child.” Pursuant to N.M. Stat. Ann. § 32A-4-28(B),<sup>60</sup>

The court shall terminate parental rights with respect to a child when:  
(1) there has been an abandonment of the child by his parents;

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<sup>60</sup> N.M. Stat. Ann. § 32A-4-28(A) states, “In proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated.”

(2) the child has been a neglected or abused<sup>61</sup> child as defined in the Abuse and Neglect Act [32A-4-1 NMSA 1978] and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. The court may find in some cases that efforts by the department or another agency are unnecessary, when:

- (a) there is a clear showing that the efforts would be futile; or
- (b) the parent has subjected the child to aggravated circumstances;<sup>62</sup>

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<sup>61</sup> An “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B) as including one “who has suffered sexual abuse or sexual exploitation inflicted by the child’s parent, guardian or custodian.” “Sexual abuse” includes, but is not limited to criminal sexual contact, incest or criminal sexual penetration, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(I). “Sexual exploitation” is defined as including “(1) allowing, permitting or encouraging a child to engage in prostitution; (2) allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or (3) filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(J).

The text of N.M. Stat. Ann. § 32A-4-2 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 28 during the 2016 2nd Regular Session of the New Mexico Legislature (effective May 18, 2016).

<sup>62</sup> N.M. Stat. Ann. § 32A-4-2(C) defines “aggravated circumstances” as

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

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

**Legal Components:**

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

**Legal Analysis:**

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

Although it is not limited to minor victims, N.M. Stat. Ann. § 30-52-1(A)(3) (Human trafficking) forbids “benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services or commercial sexual activity.”<sup>63</sup> Facilitators convicted under N.M. Stat. Ann. § 30-52-1(A)(3), if the victim is 16 or older, will be guilty of a third degree felony punishable by imprisonment for 3 years and a possible fine not to exceed \$5,000. N.M. Stat. Ann. §§ 30-52-1(C), 31-18-15(A)(11), (E)(11).<sup>64</sup> If the victim is 13–15 the penalty increases to a second degree felony punishable by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-52-1(C)(1), 31-18-15(A)(7), (E)(7). If the victim is under 13, the penalty further increases to a first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-52-1(C)(2), 31-18-15(A)(3), (E)(3).

Facilitators may also be prosecuted under N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution).<sup>65</sup> If the minor is under 16 years old, a violation of N. M. Stat. Ann. § 30-6A-4(A) is punishable as a second degree felony by imprisonment for 9 years and a possible fine not to exceed \$10,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(7), (E)(7). However, if the child is under 13, the violation increases to first degree felony punishable by imprisonment for 18 years and a possible fine not to exceed \$15,000. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(A)(3), (E)(3).

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

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

Facilitators convicted under N.M. Stat. Ann. § 30-52-1 (Human trafficking) and New Mexico’s CSEC laws may be required to pay fines ranging from \$1,000–\$15,000. Specifically, a facilitator convicted under N.M. Stat. Ann. § 30-52-1(C) may be required to pay a fine not to exceed \$5,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-52-1(C), 13-18-15(E)(3), (E)(7), (E)(11).<sup>66</sup> A facilitator convicted of violating N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by

<sup>63</sup> See *supra* note 2 for the definition of “commercial sexual activity.”

<sup>64</sup> See *supra* note 3.

<sup>65</sup> See *supra* Component 1.2.

<sup>66</sup> See *supra* note 3.

prostitution) may be required to pay a fine not to exceed \$10,000–\$15,000, depending on the victim’s age. N.M. Stat. Ann. §§ 30-6A-4(A), 31-18-15(E)(3), (E)(7).

A facilitator convicted of violating N.M. Stat. Ann. § 30-52-1(A)(3) shall also be required “to make restitution<sup>67</sup> to the victim<sup>68</sup> for the gross income or value of the victim’s labor or services and any other actual damages<sup>69</sup> in accordance with Section 31-17-1 NMSA 1978 [Victim restitution].” N.M. Stat. Ann. § 30-52-1(F). A facilitator convicted of violating N.M. Stat. Ann. § 30-6A-4(A) (Sexual exploitation of children by prostitution) may be required to pay restitution pursuant to N.M. Stat. Ann. § 31-17-1, which states “It is the policy of this state that restitution be made by each violator of the Criminal Code . . . to the victims of his criminal activities to the extent that the defendant is reasonably able to do so.”

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

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

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

Additionally, pursuant to N.M. Stat. Ann. § 31-12-13 (Crime victims reparation fee) individuals convicted of felonies or misdemeanors must pay a crime victims reparation fee of \$75 for a felony conviction and \$50 for a misdemeanor conviction.

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

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

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

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<sup>67</sup> See *supra* note 38 the definition of “restitution.”

<sup>68</sup> See *supra* note 39 for the definition of “victim.”

<sup>69</sup> See *supra* note 40 for the definition of “actual damages.”

4.4 *Promoting and selling child pornography is illegal.*

N.M. Stat. Ann. § 30-6A-3(C) and (G) (Sexual exploitation of children) criminalize the distribution of child pornography. N.M. Stat. Ann. § 30-6A-3(C) states in part,

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

A violation of N.M. Stat. Ann. § 30-6A-3(C) is a third degree felony for sexual exploitation of children, punishable by imprisonment for 11 years and a possible fine of \$5,000. N.M. Stat. Ann. §§ 30-6A-3(C), 31-18-15(A)(10), (E)(10).<sup>70</sup>

Regarding simulated child pornography depicting a real child's participation, N.M. Stat. Ann. § 30-6A-3(G) states,

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

A violation of N.M. Stat. Ann. § 30-6A-3(G) is a third degree felony punishable by imprisonment for 3 years and a possible fine of \$5,000. N.M. Stat. Ann. §§ 30-6A-3(G), 31-18-15(A)(11), (E)(11).<sup>71</sup>

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<sup>70</sup> See *supra* note 3.

<sup>71</sup> See *supra* note 3.

**Legal Components:**

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of minor under to 18 engage in the commercial sex act.*
- 5.3 *State law prohibits the 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 *Child 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).*
- 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 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.<sup>72</sup>*

N.M. Stat. Ann §30-52-1(A)(2) (Human trafficking) includes all commercial sexual exploitation of minors. Under N.M. Stat. Ann §30-52-1(A)(2), force, fraud, or coercion is not required when the victim is a minor.<sup>73</sup> The core sex trafficking statutes applies to buyers; thus, buying commercial sex with a person who is under the age of eighteen constitutes human trafficking.<sup>74</sup> Additionally, the offense of human trafficking under N.M. Stat. Ann §30-52-1(A)(2) does not required that a trafficker or controlling third party be identified. Consequently, New Mexico’s human trafficking offense includes any child who is bought for sex, regardless of whether force, fraud or coercion is used, regardless of whether a buyer exploited the youth without a trafficker’s involvement, and regardless of whether the victim identifies a trafficker. N.M. Stat. Ann §30-52-1(A)(2).

- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*

N.M. Stat. Ann. § 30-52-1 (Human trafficking) neither expressly permits or prohibits an offender from raising a defense that a minor consented to the commercial sex act.

<sup>72</sup> See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

<sup>73</sup> See *supra* discussion in Component 1.1.

<sup>74</sup> See *supra* discussion in Component 2.1.

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

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>75</sup>

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

- 5.3.1 Recommendation: Amend N.M. Stat. Ann. § 30-9-2 (Prostitution) to ensure that all minors are protected from criminalization for prostitution offenses.

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

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

### **Child Certified as a Victim of Human Trafficking**

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

#### *I. Initial custody*

a. Authority for initial custody

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

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<sup>75</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

b. Placement

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

*II. Process following initial custody of abused/neglected child*

While this process does not require actual physical custody or placement of the child, once certified as a trafficking victim, the minor shall be provided benefits and services, according to N.M. Stat. Ann. § 30-52-2(A),

as quickly as can reasonably be arranged regardless of immigration status and shall include, when appropriate to a particular case:

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

*III. Placement process pending adjudication/investigation*

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

*IV. Adjudication*

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

*V. Outcomes*

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

**Child Identified as Abused/Neglected<sup>76</sup>**

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<sup>76</sup> Pursuant to N.M. Stat. Ann. § 32A-4-2(B), a sexually exploited child is likely to be identified as abused or neglected. *See supra* Component 5.5. For a discussion of potential barriers to child welfare services for juvenile sex trafficking victims, *see supra* discussion in Components 5.1 and 5.6. *See supra* note 61.

## I. Initial custody

### a. Authority for initial custody

A child protection response may be provided to child victims of commercial sexual exploitation who are considered abused or neglected; however, this is unlikely to include child sex trafficking victims. Additionally, children exploited by non-familial offenders will likely face difficulty in being identified as abused or neglected, thus creating a barrier to accessing specialized services.

As used in Chapter 32A, Article 4 (Child Abuse and Neglect), an “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B)<sup>77</sup> as a child

- (1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child’s parent, guardian or custodian;
- (2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child’s parent, guardian or custodian;
- (3) who has suffered sexual abuse<sup>78</sup> or sexual exploitation<sup>79</sup> inflicted by the child’s parent, guardian or custodian;
- (4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child’s life or health; or
- (5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child . . . .

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

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

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

### b. Placement

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<sup>77</sup> See *supra* note 61.

<sup>78</sup> See *supra* note 61.

<sup>79</sup> See *supra* note 61.

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

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

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

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

## *II. Process following initial custody of abused/neglected child*

A custody hearing must be held within 10 days of the filing of a petition for temporary custody, and the child must be returned to his or her parents or guardian unless, among other things, “the child is in immediate danger from the child’s surroundings, and removal from those surroundings is necessary for the child’s safety or well-being” or “the child will be subject to injury by others if not placed in the custody of the department.” N.M. Stat. Ann. § 32A-4-18(A); (C)(2)–(3).<sup>80</sup>

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

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

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

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

....

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

- (1) retain jurisdiction and, unless the court permits otherwise, order that the respondent and child remain in the jurisdiction of the court pending the adjudication;

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<sup>80</sup> The text of N.M. Stat. Ann. § 32A-4-18 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 28 during the 2016 2nd Regular Session of the New Mexico Legislature (effective May 18, 2016).

- (2) return legal custody of the child to the child's parent, guardian or custodian with conditions to provide for the safety and well-being of the child; and
- (3) order that the child's parent, guardian or custodian allow the child necessary contact with the child's guardian ad litem or attorney.

#### *IV. Adjudication*

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

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

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

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

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

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

#### *V. Outcomes*

In making its disposition judgment, if the court finds the child to be abused or neglected, pursuant to N.M. Stat. Ann. § 32A-4-22(B),<sup>81</sup> the court may

- (1) permit the child to remain with the child's parent, guardian or custodian, subject to those conditions and limitations the court may prescribe;
- (2) place the child under protective supervision of the department; or
- (3) transfer legal custody of the child to any of the following:
  - (a) the noncustodial parent, if it is found to be in the child's best interest;
  - (b) the department.

N.M. Stat. Ann. § 32A-4-22(C) adds,

[i]f a child is found to be neglected or abused, in its dispositional judgment the court shall also order the department to implement and the child's parent, guardian or custodian to cooperate with any case plan approved by the court. Reasonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety. The court may determine that reasonable efforts are not required to be made when the court finds that:

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

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<sup>81</sup> The text of N.M. Stat. Ann. § 32A-4-22 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 28 during the 2016 2nd Regular Session of the New Mexico Legislature (effective May 18, 2016).

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

## **Child Identified as Child in Need of Services**

### *I. Initial custody*

#### a. Authority for initial custody

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

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

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

#### b. Placement

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

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

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

### *II. Process following initial custody of child in need of services*

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

When a child of an alleged family in need of court-ordered services is taken into protective custody by the department or the department petitions the court for protective custody of the child, a custody hearing shall be held within ten days from the date the petition is filed to determine if the child should remain with the family or be placed in the custody of the department pending adjudication. Upon

written request of the respondent, the hearing may be held earlier, but in no event shall the hearing be held sooner than two days after the date the petition was filed.

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

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

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

### *IV. Adjudication*

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

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

### *V. Outcomes*

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

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

C. Unless a child of an adjudicated family in need of court-ordered services is also found to be a delinquent child, the child shall not be confined in an institution established for the long-term care and rehabilitation of delinquent children or in a facility for the detention of alleged delinquent children.

### **Child Identified as Delinquent**

#### *I. Initial custody*

##### a. Authority for initial custody

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

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

##### b. Placement

Under New Mexico’s Children’s Shelter Care Act, N.M. Stat. Ann. § 32A-9 et. seq., an alleged or actual child in need of supervision<sup>82</sup> or an alleged delinquent child when “there is no probable cause to believe that the child will injure others or himself, run away or be taken away so as to be unavailable for proceedings of the court or its officers” may “be placed in a community-based shelter-care facility.” N.M. Stat. Ann. § 32A-9-6.

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

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

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

- (1) release the child to the child's parent, guardian or custodian or an adult authorized by the child's parent, guardian or custodian and issue verbal counsel or warning as may be appropriate;

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<sup>82</sup> N.M. Stat. Ann. § 32A-9-3(C) defines a “child in need of supervision” as

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

- (2) release the child to the child's parent, guardian or custodian or an adult authorized to sign on behalf of the child's parent, guardian or custodian upon written promise to bring the child before the court when requested by the court. If the parent, guardian or custodian or an adult authorized to sign on behalf of the child's parent, guardian or custodian fails, when requested, to bring the child before the court as promised, the court may order the child taken into custody and brought before the court;
- (3) deliver the child to a place of detention as provided in Section 32A-2-12 NMSA 1978;
- (4) deliver the child to a medical facility, if available, if the child is believed to be suffering from a serious illness that requires prompt treatment or prompt diagnosis;
- (5) deliver the child to an evaluation facility, if available, if the person taking the child into custody has reasonable grounds to believe the child presents a likelihood of serious harm to the child's self or others or is suffering from some other serious mental condition or illness that requires prompt treatment or prompt diagnosis; or
- (6) deliver the child to a center or organization that the court or the department recognizes as an alternative to secure detention.

## *II. Process following initial custody*

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

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

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

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

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

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

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

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

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

#### *IV. Adjudication*

##### *a. Adjudicatory/dispositional hearing*

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

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

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

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

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

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

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

#### *V. Outcomes*

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

- (1) transfer legal custody to the department, an agency responsible for the care and rehabilitation of delinquent children, which shall receive the child at a facility designated by the secretary of the department as a juvenile reception facility. The department shall thereafter determine the appropriate placement, supervision and rehabilitation program for the child. The judge may include recommendations for placement of the child. Commitments are subject to limitations and modifications

set forth in Section 32A-2-23 NMSA 1978 [Limitations on dispositional judgments; modification; termination or extension of court orders]. The types of commitments include:

- (a) a short-term commitment of one year in a facility for the care and rehabilitation of adjudicated delinquent children. No more than nine months shall be served at the facility and no less than ninety days shall be served on supervised release, unless: 1) a petition to extend the commitment has been filed prior to the commencement of supervised release; 2) the commitment has been extended pursuant to Section 32A-2-23 NMSA 1978; or 3) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978 [Parole revocation; procedures];
- (b) a long-term commitment for no more than two years in a facility for the care and rehabilitation of adjudicated delinquent children. No more than twenty-one months shall be served at the facility and no less than ninety days shall be served on supervised release, unless: 1) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978; or 2) the commitment is extended pursuant to Section 32A-2-23 NMSA 1978;

....

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

....

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

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

## 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>83</sup>

Although, sexual exploitation is identified as a type of abuse and neglect within New Mexico’s Children’s Code, sex trafficking is not. As used in Chapter 32A, Article 4 (Child Abuse and Neglect), an “abused child” is defined in N.M. Stat. Ann. § 32A-4-2(B)<sup>84</sup> (Definitions) as a child

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

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<sup>83</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>84</sup> See *supra* note 61.

“Sexual abuse” includes, but is not limited to criminal sexual contact, incest or criminal sexual penetration, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(I). “Sexual exploitation” is defined as including “(1) allowing, permitting or encouraging a child to engage in prostitution; (2) allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or (3) filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law.” N.M. Stat. Ann. § 32A-4-2(J).

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

- 5.5.1 Recommendation: Expand the definitions of abuse within N.M. Stat. Ann. § 32A-4-2 (Definitions) to expressly include when a child is victimized through N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking).

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.*

The fault of a parent, guardian or custodian is required to constitute abuse or neglect<sup>85</sup> under N.M. Stat. Ann. § 32A-4-2<sup>86</sup> (Definitions); “Custodian” is defined as “an adult with whom the child lives who is not a parent or guardian<sup>87</sup> of the child.” N.M. Stat. Ann. § 32A-1-4(F).<sup>88</sup> Although for purposes of New Mexico’s Children’s Code, the definition of “custodian” in N.M. Stat. Ann. § 32A-1-4(F) could be broad enough to cover situations of non-familial trafficking in which the offender is in possession of a child, the term would not include buyers, rendering juvenile sex trafficking victims directly exploited by a buyer, without an identified third party trafficker who lived with the child and thereby fulfilled the definition of a “custodian,” potentially without access to services through child welfare.

However, N.M. Stat. Ann. § 30-52-2(A) states, “[h]uman trafficking victims found in the state shall be eligible for benefits and services from the state . . . provided that the victim cooperates in the investigation or prosecution of the person charged with the crime of human trafficking.” A victim’s ability to cooperate is usually determined by the court, but victims of human trafficking who are under the age of 18 are “eligible for benefits and services without a finding [of ability to cooperate] by the court.” N.M. Stat. Ann. § 30-52-2(D). Accordingly, listed service providers include the children, youth and families department and the human services department. N.M. Stat. Ann. § 30-52-2(A).<sup>89</sup> While this provision may allow some child sex trafficking victims to access the protection of child welfare, such access is not mandatory.

- 5.6.1 Recommendation: Amend N.M. Stat. Ann. § 32A-4-2 (Definitions) to allow child welfare protection for juvenile sex trafficking victims irrespective of the perpetrator of the abuse.

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<sup>85</sup> See *supra* discussion in Component 5.5 regarding definitions of “abused child,” “neglected child,” “sexual abuse,” and “sexual exploitation.”

<sup>86</sup> See *supra* note 61.

<sup>87</sup> N.M. Stat. Ann. § 32A-1-4(J) defines “guardian” as “a person appointed as a guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law.”

<sup>88</sup> The text of N.M. Stat. Ann § 32A-1-4 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 49 during the 2016 2nd Regular Session of the New Mexico Legislature (effective July 1, 2016).

<sup>89</sup> See *supra* Component 5.4 for a full discussion of N.M. Stat. Ann. § 30-52-2.

5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*

Only victims of certain enumerated crimes, including N.M. Stat. Ann. § 31-22-8(A)(15) (Human trafficking), § 30-9-11 (Criminal sexual penetration), and § 30-9-13 (Criminal sexual contact of a minor) who have been “injured<sup>90</sup> or killed by any act or omission of any other person coming within the criminal jurisdiction of the state” may receive reparations. N.M. Stat. Ann. §§ 31-22-7(A), 31-22-8(A)(10)–(11). CSEC crimes are not specifically listed as offenses for which victims are eligible to receive awards pursuant to New Mexico’s Crime Reparation Act.

Therefore, to the extent domestic minor sex trafficking victims qualify as victims of N.M. Stat. Ann. § 31-22-8(A)(15) (Human trafficking), § 30-9-11 (Criminal sexual penetration), or § 30-9-13 (Criminal sexual contact of a minor), they may be eligible for compensation; however, several other factors could present difficulties for victims of domestic minor sex trafficking. Specifically, in determining whether to award reparations, “The commission shall consider the behavior of the victim and whether, because of provocation or otherwise, the victim bears responsibility for the crime that caused his injury . . . and shall reduce the amount of reparation in accordance with its assessment of the degree of responsibility attributable to the victim.” N.M. Stat. Ann. § 31-22-7(C).

No award may be made to a victim “unless the commission finds that . . . the claimant or victim fully cooperated with the appropriate law enforcement agencies. N.M. Stat. Ann. § 31-22-7(D)(3). Pursuant to § 30-52-2(A) a human trafficking victim can be eligible for benefits and services by the state until TVPA benefits are authorized “provided that the victim cooperates in the investigation and prosecution of the person charged with the crime of human trafficking.” Additionally, to be eligible for a reparation award, a victim must file an application for an award within 2 years of the date the injury occurs and must report the crime to law enforcement within 30 days after the occurrence of the crime, unless the crime is sexual assault, in which case the victim has 180 days, or if the crime is N.M. Stat. Ann. § 30-6-1 (abandonment or abuse of a child), N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) or N.M. Stat. Ann. § 30-9-13 (Criminal sexual contact of a minor), in which case victims have 2 years from the earlier of the date they turn 18 or the date the crime is reported to law enforcement. N.M. Stat. Ann. § 31-22-14(A), (F)(1). Nothing expressly exempts domestic minor sex trafficking victims from any of these requirements, although N.M. Stat. Ann. § 31-22-14(A) (Limitations on award--collateral recovery--preliminary award) allows a victim to apply for an extension with a showing of good cause. N.M. Stat. Ann. § 31-22-14(A).<sup>91</sup> Additionally, under N.M. Stat. Ann. §31-12-13 (Crime victims reparation fee) individuals convicted of felonies or misdemeanors must pay a crime victims reparation fee of \$75 for each felony conviction and \$50 for each misdemeanor conviction.

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

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<sup>90</sup> “Injury” is defined in N.M. Stat. Ann. § 31-22-3(F) as “actual bodily harm or disfigurement and includes pregnancy and extreme mental distress.”

<sup>91</sup> According to the Victims Reparations Act, victims of human trafficking are included in the crimes enumerated. N.M. Stat. Ann. § 31-22-8.

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

New Mexico law provides special protections for victims of sexual offenses, but victims of human trafficking and CSEC offense are not expressly listed to receive these protections. N.M. Stat. Ann. § 30-9-16 (Testimony; limitations; in camera hearing) establishes limitations on the type of evidence that can be admitted in court. Specifically, in prosecutions for certain offenses, including N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor), “evidence of the victim’s past sexual conduct, opinion evidence of the victim’s past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.” N.M. Stat. Ann. § 30-9-16(A).<sup>92</sup>

Additionally, pursuant to N.M. Stat. Ann. § 30-9-17(A) (Videotaped depositions of alleged victims who are under sixteen years of age), in a prosecution for N.M. Stat. Ann. § 30-9-11 or § 30-9-13, where the victim is under 16,

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

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

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

- (1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- (2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

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<sup>92</sup> N.M. Stat. Ann. § 30-9-16(C) states,

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

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

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

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

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

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

5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*

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

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

- (1) two years have elapsed since the final release of the individual from legal custody and supervision or two years have elapsed since the entry of any other judgment not involving legal custody or supervision; and
- (2) the individual has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or found delinquent by a court, and no proceeding is pending seeking such a conviction or finding.

5.9.1 Recommendation: Amend N.M. Stat. Ann. § 32A-3B-21(A) (Expungement of records) to allow a juvenile sex trafficking victim to expunge juvenile records related to their trafficking victimization upon turning 18 or earlier.

5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*

N.M. Stat. Ann. § 30-52-1 (Human trafficking) expressly authorizes human trafficking victims to receive restitution from their offenders. Specifically, N.M. Stat. Ann. § 30-52-1(F) provides, "A person

convicted of human trafficking shall, in addition to any other punishment, be ordered to make restitution to the victim for the gross income or value of the victim’s labor or services and any other actual damages in accordance with Section 31-17-1 NMSA 1978 [Victim Restitution].”

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

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

Pursuant to N.M. Stat. Ann. § 31-26-4(H) (Victim’s rights), victims of violations of N.M. Stat. Ann. § 30-9-11 and § 30-9-13 are expressly afforded the right to receive restitution. However, a victim may only exercise this right if the victim reports the crime to law enforcement within 5 days of the occurrence or discovery of the offense, “unless the district attorney determines that the victim had a reasonable excuse for failing to do so,” and the victim cooperates completely with the “reasonable requests made by law enforcement agencies and the district attorneys.” N.M. Stat. Ann. § 31-26-5(A), (C).<sup>93</sup>

In addition to restitution available through the criminal process, N.M. Stat. Ann. § 30-52-1.1(A) allows a human trafficking victim to bring a civil action “in any court of competent jurisdiction against an alleged human trafficker for actual damages, compensatory damages, punitive damages, injunctive relief or any other appropriate relief. Where the court finds that a defendant’s actions were willful and malicious, the court may award treble damages to the plaintiff.

Civil remedies are available to victims of childhood sexual abuse<sup>94</sup> for “personal injury caused by childhood sexual abuse.” N.M. Stat. Ann. § 37-1-30. Additionally, victims whose offenders are convicted of violating New Mexico’s racketeering statute, N.M. Stat. Ann. § 30-42-4 (Prohibited activities; penalties) may have a civil cause of action for treble damages. N.M. Stat. Ann. § 30-42-6(A) (Racketeering; civil remedies) provides, “A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three times the actual damages proved and the costs of the suit, including reasonable attorney’s fees.”

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

Civil actions for the other trafficking and CSEC offenses listed in this report are not expressly limited by statute in Chapter 37, Article 1 (Limitations of actions). Nevertheless, N.M. Stat. Ann. § 37-1-10 (Minors; incapacitated persons) generally tolls the applicable statute of limitation for minors until “one year from and after the termination of such incapacity.” In addition, N.M. Stat. Ann. § 30-52-1.1(B)

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<sup>93</sup> For the purposes of Chapter 31, Article 26 (Victims of Crime), a “victim” is defined in part as “an individual against whom a criminal offense is committed.” N.M. Stat. Ann. § 31-26-3(F). The definition of “criminal offense” includes violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration) and § 30-9-13 (Criminal sexual contact of a minor). N.M. Stat. Ann. § 31-26-3(B)(11), (12).

<sup>94</sup> “Childhood sexual abuse” is defined in N.M. Stat. Ann. § 37-1-30(B) as including violations of N.M. Stat. Ann. § 30-9-11 (Criminal sexual penetration), § 30-9-13 (Criminal sexual contact of a minor), § 30-6A-3 (Sexual exploitation of children), and § 30-6A-4 (Sexual exploitation of children by prostitution).

specifically addresses civil actions brought by survivors of human trafficking. Civil actions may be filed within 10 years from the date on which, (1) the defendant’s human trafficking actions occurred; or (2) the victim attains eighteen years of age if the victim was a minor when the defendant’s actions occurred.

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

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

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

An action for damages based on personal injury caused by childhood sexual abuse<sup>95</sup> shall be commenced by a person before the latest of the following dates:

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

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

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<sup>95</sup> See *supra* note 61.

**Legal Components:**

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

**Legal Analysis:**

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

Training on human trafficking and domestic minor sex trafficking for law enforcement is not specifically mandated.<sup>96</sup> Instead, N.M. Stat. Ann. § 29-11-5(A) (Sexual crimes prosecution and treatment program) provides for the development of:

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

This plan shall include, but not be limited to:

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

Additionally, N.M. Stat. Ann. § 29-11-5(D) (Sexual crimes prosecution and treatment program) states,

Training for law enforcement officers in the proper treatment of victims of sexual crimes and collection of evidence and coordination among agencies shall be incorporated in the regular training program for recruits by the New Mexico state police; the basic course taught by the New Mexico law enforcement academy or by other authorized law enforcement agencies.

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

Single-party consent to audio-taping is permitted in New Mexico. N.M. Stat. Ann. § 30-12-1(C) (Interference with communications; exception) permits single-party consent to audio-taping by stating, “[i]nterference with communications consists of knowingly and without lawful authority: . . . (C) reading,

<sup>96</sup> N.M. Stat. Ann. § 30-52-3 (Temporary provision; task force to combat human trafficking; membership; duties) which expressly mandated training for law enforcement and victim service providers expired July 1, 2016.

interrupting, taking or copying any message, communication or report intended for another by telegraph or telephone without the consent of a sender or intended recipient thereof.” No interference with communications occurs where the interference is done “by a person acting under color of law in the investigation of a crime, where such person is a party to the communication, or one of the parties to the communication has given prior consent to such interception, monitoring or recording of such communication.” N.M. Stat. Ann. § 30-12-1(E)(3).

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

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

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

A. evidence may be obtained of the commission of:

- (1) the crime of murder, kidnapping, extortion, robbery, trafficking or distribution of controlled substances or bribery of a witness;
- (2) the crime of burglary, aggravated burglary, criminal sexual penetration, arson, mayhem, receiving stolen property or commercial gambling, if punishable by imprisonment for more than [1] year; or

....

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

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

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

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

6.4 *Using a law enforcement 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.*

New Mexico’s human trafficking law does not contain language indicating the availability of decoys as an investigative technique or prohibiting a defense to prosecution based on the person not in fact being a minor. Pursuant to N.M. Stat. Ann. § 30-52-1(Human trafficking), a person must engage in “knowingly . . . recruiting, soliciting, enticing, transporting, or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity.” While “caused” is a broad term, when a buyer attempts to purchase sex with a minor, the buyer arguably demonstrates “intent” that the offeree would “be caused to engage in commercial sexual activity.”

One buyer applicable, albeit non-CSEC offense, contains language indicating that a defense to the use of a law enforcement decoy, posing as a minor, is unavailable. N.M. Stat. Ann. § 30-37-3.2(D) (Child solicitation by electronic communication device) expressly prohibits the defense, stating, “In a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age.” Furthermore, N.M. Stat. Ann. § 30-37-3.2 provides for heightened penalties if the defendant subsequently “attends or is present at a meeting that the person arranged pursuant to the solicitation . . . .”

6.4.1 Recommendation: Amend N.M. Stat. Ann. § 30-52-1(A)(2) (Human trafficking), § 30-6A-4 (Sexual exploitation of children by prostitution), § 30-6A-3(C) (Sexual exploitation of children), and § 30-9-1 (Enticement of child) to provide that the minor may be “believed to be a minor” thereby allowing for a decoy investigation and prevent a defense based on the minor not in fact being a minor.

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

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

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

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

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

- (1) start an appropriate investigation to determine the present location of the missing person and to determine whether the missing person is an endangered person;
- (2) provide to the clearinghouse all information the law enforcement agency has relating to an investigation regarding or the location or identification of a missing person;
- (3) enter the name of the missing person into the clearinghouse and the national crime information center missing person file; and

(4) if the missing person is determined to be an endangered person, notify the department of public safety in accordance with procedures prescribed by the department.

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

- A. Upon receiving a report of a child believed to be missing, a law enforcement agency shall:
  - (1) no later than two hours after receiving the report, enter identifying and descriptive information about the child into the national crime information center computer . . . ; and
  - (2) notify the state registrar within twenty-four hours, by telephone, facsimile or electronic transmission, of the missing child. Within three days of this initial notification, the law enforcement agency shall make a written notification in a manner and form prescribed by the state registrar.
- B. Immediately after a missing child is located, the law enforcement agency that located or returned the missing child shall notify the law enforcement agency having jurisdiction over the investigation, and the originating agency shall clear the entry from the national crime information center computer and shall, within twenty-four hours, notify the state registrar in writing that the missing child has been located.

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