

2018 ANALYSIS AND RECOMMENDATIONS

NEW HAMPSHIRE

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 or commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute child sex trafficking crimes.*

Legal Analysis¹:

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

N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) clearly defines human trafficking victims to include any minor under the age of 18 used in a commercial sex act or sexually explicit performance without regard to the use of force, fraud, or coercion. N.H. Rev. Stat. Ann. § 633:7(II)–(III-a) states in relevant part,

II. A person shall be guilty of a class A felony if such person maintains or makes available an individual under 18 years of age for the purpose of engaging the individual in a commercial sex act² or sexually-

¹ This report includes legislation enacted as of August 1, 2018.

² N.H. Rev. Stat. Ann. § 633:6(I) defines “commercial sex act” as “any sex act because of which anything of value is given, promised to, or received, directly or indirectly, by any person.” N.H. Rev. Stat. Ann. § 633:6(II) defines “sex act” as “any act of sexual contact as defined in RSA 632-A:1, IV [Definitions], any act of sexual penetration as defined in RSA 632-A:1, V, or any other sexually explicit conduct as defined in RSA 649-A:2 [Definitions].” N.H. Rev. Stat. Ann. § 632-A:1(IV) defines “sexual contact” as “the intentional touching whether directly, through clothing, or otherwise, of the victim’s or actor’s sexual or intimate parts Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification.” N.H. Rev. Stat. Ann. § 632-A:1(V) states,

explicit performance for the benefit of another. A person convicted under this paragraph shall be sentenced to a minimum term of imprisonment of not less than 7 years and a maximum term of not more than 30 years. Knowledge of the individual's actual age shall not be required as an element of this offense. Consent of the individual shall not constitute a defense to a charge under this paragraph. III. It is a class A felony to recruit, entice, harbor, transport, provide, obtain, or otherwise make available a person, knowing or believing it likely that the person will be subjected to trafficking as defined in paragraph I³ or II. Notwithstanding RSA 651:2,⁴ a person convicted of an offense under this paragraph involving a victim under the age of 18 shall be subject to a minimum term

(a) "Sexual penetration" means:

- (1) Sexual intercourse; or
- (2) Cunnilingus; or
- (3) Fellatio; or
- (4) Anal intercourse; or
- (5) Any intrusion, however slight, of any part of the actor's body, including emissions, or any object manipulated by the actor into genital or anal openings of the victim's body; or
- (6) Any intrusion, however slight, of any part of the victim's body, including emissions, or any object manipulated by the victim into the oral, genital, or anal openings of the actor's body; or
- (7) Any act which forces, coerces, or intimidates the victim to perform any sexual penetration as defined in subparagraphs (1)–(6) on the actor, on another person, or on himself.

(b) Emissions include semen, urine, and feces. Emission is not required as an element of any form of sexual penetration.

(c) "Objects" include animals as defined in RSA 644:8, II [Cruelty to animals]. N.H. Rev. Stat. Ann. § 649-A:2(III) defines "sexually explicit conduct" as human masturbation, the touching of the actor's or other person's sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, or any lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture. Sexual intercourse is simulated when it depicts explicit sexual intercourse that gives the appearance of the consummation of sexual intercourse, normal or perverted.

³ N.H. Rev. Stat. Ann. § 633:7(I)(a) criminalizes sex and labor trafficking by force, fraud or coercion. It states,

It is a class A felony to knowingly subject a person to compel³ a person against his or her will to perform a service or labor, including a commercial sex act or a sexually-explicit performance, for the benefit of another, where the compulsion is accomplished by any of the following means:

- (1) Causing or threatening to cause serious harm to any person.
- (2) Confining the person unlawfully as defined in RSA 633:2, II [Criminal restraint], or threatening to so confine the person.
- (3) Abusing or threatening abuse of law or legal process.
- (4) Destroying, concealing, removing, confiscating, or otherwise making unavailable to that person any actual or purported passport or other immigration document, or any other actual or purported government identification document.
- (5) Threatening to commit a crime against the person.
- (6) False promise relating to the terms and conditions of employment, education, marriage, or financial support.
- (7) Threatening to reveal any information sought to be kept concealed by the person which relates to the person's legal status or which would expose the person to criminal liability.
- (8) Facilitating or controlling the person's access to an addictive controlled substance.
- (9) Engaging in any scheme, plan, or pattern, whether overt or subtle, intended to cause the person to believe that, if he or she did not perform such labor, services, commercial sex acts,³ or sexually explicit performances, that such person or any person would suffer serious harm or physical restraint.
- (10) Withholding or threatening to withhold food or medication that the actor has an obligation or has promised to provide to the person.
- (11) Coercing a person to engage in any of the foregoing acts by requiring such in satisfaction of a debt owed to the actor.

of not less than 7 years and a maximum term of not more than 30 years, if the offender knew or believed it likely that the victim would be involved in a commercial sex act or sexually-explicit performance.

III-a. A person is guilty of a class B felony if the person pays, agrees to pay, or offers to pay to engage in sexual contact, as defined in RSA 632-A:1 or sexual penetration, as defined in RSA 632-A:1, V with a person under the age of 18, or to observe a sexually explicit performance involving a person under the age of 18. The payment or offer or agreement to pay may be made to the person under the age of 18 or a third party. Neither the actor's lack of knowledge of the other person's age nor consent of the other person shall constitute a defense to a charge under this paragraph.

A violation of N.H. Rev. Stat. Ann. § 633:7(II) or (III) is a Class A felony punishable by 7–30 years imprisonment, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 633:7(II), (III), 651:2(IV)(a). A violation of N.H. Rev. Stat. Ann. § 633:7(III-a) is a Class B felony punishable by up to 7 years imprisonment, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 633:7(III-a), 651:2(I), (II)(b), (IV)(a).

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 statute specifically prohibits CSEC in New Hampshire:

1. N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses) makes it a crime if a person

- (a) Solicits, agrees to perform, or engages in sexual contact⁵ as defined in RSA 632-A:1, IV or sexual penetration as defined in RSA 632-A:1, V, in return for consideration; or
- (b) Induces or otherwise purposely causes another to violate subparagraph (a); or
- (c) Transports another into or within this state with the purpose of promoting or facilitating such other in engaging in conduct in violation of subparagraph (a); or
- (d) Not being a legal dependent incapable of self support, knowingly is supported in whole or in part by the proceeds of violation of subparagraph (a); or
- (e) Knowingly permits a place under such person's control to be used for violation of subparagraph (a); or
- (f) Pays, agrees to pay, or offers to pay another person to engage in sexual contact as defined in RSA 632-A:1, IV or sexual penetration as defined in RSA 632-A:1, V, with the payor or with another person.

A conviction under this statute is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a). If the offense involves a minor under the age of 18, however, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(f) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

Several other New Hampshire laws, while not expressly commercial in nature, may also be applicable in cases involving the commercial sexual exploitation of a child. Some of those statutes are as follows:

⁴ N.H. Rev. Stat. Ann. § 651:2 (Sentences and limitations) states, "If a sentence of imprisonment is imposed, the court shall fix the maximum thereof which is not to exceed:

- (a) Fifteen years for a class A felony,
- (b) Seven years for a class B felony,
- (c) One year for a class A misdemeanor,
- ...

⁵ See *supra* note 2 for the definition of "sexual contact."

1. N.H. Rev. Stat. Ann. § 632-A:4(I) (Sexual assault) states,

A person is guilty of a class A misdemeanor under any of the following circumstances:

- (a) When the actor subjects another person who is 13 years of age or older to sexual contact under any of the circumstances named in RSA 632-A:2 [Aggravated felonious sexual assault].
- (b) When the actor subjects another person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age to sexual contact where the age difference between the actor and the other person is 5 years or more.
- (c) In the absence of any of the circumstances set forth in RSA 632-A:2, when the actor engages in sexual penetration with a person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 4 years or less.

A conviction under N.H. Rev. Stat. Ann. § 632-A:4(I) is punishable as a Class A misdemeanor by imprisonment up to 1 year, a fine not to exceed \$2,000, or both. N.H. Rev. Stat. Ann. §§ 632-A:4(I), 651:2(I), (II)(c), (IV)(a).

2. N.H. Rev. Stat. Ann. § 632-A:3(II), (III) (Felonious sexual assault) states,

A person is guilty of a class B felony if such person:

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- II. Engages in sexual penetration with a person, other than his legal spouse, who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 4 years or more; or
- III. Engages in sexual contact with a person other than his legal spouse who is under 13 years of age.

A first or second conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 632-A:3, 651:2(I), (II)(b), (IV)(a). Under certain circumstances, a third conviction is punishable by an extended term of life imprisonment. N.H. Rev. Stat. Ann. § 651:6(I), (III)(f).

3. N.H. Rev. Stat. Ann. § 632-A:2 (Aggravated felonious sexual assault) states,

I. A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances:

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- (I) When the victim is less than 13 years of age.
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II. A person is guilty of aggravated felonious sexual assault without penetration when he intentionally touches whether directly, through clothing, or otherwise, the genitalia of a person under the age of 13 under circumstances that can be reasonably construed as being for the purpose of sexual arousal or gratification.

III. A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault⁶ against another person, not the actor's legal spouse, who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.

....

⁶ Pursuant to N.H. Rev. Stat. Ann. § 632-A:1(I-c) (Definitions), “[p]attern of sexual assault’ means committing more than one act under RSA 632-A:2 [Aggravated felonious sexual assault] or RSA 632-A:3 [Felonious sexual assault], or both, upon the same victim over a period of 2 months or more and within a period of 5 years.”

First convictions under this statute are punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both; second convictions⁷ are punishable by imprisonment for 20–40 years, a fine not to exceed \$4,000, or both, while third and subsequent convictions are punishable by life imprisonment without the possibility of parole. N.H. Rev. Stat. Ann. §§ 632-A:10-a(I)–(III), 651:2(I), (IV)(a). Under certain circumstances, convictions under N.H. Rev. Stat. Ann. § 632-A:2(I)(I) (Aggravated felonious sexual assault when the victim is under the age of 13) are subject to enhanced punishments including 25 years to life imprisonment for a first conviction, life imprisonment for subsequent convictions, and life-time supervision by the department of corrections. N.H. Rev. Stat. Ann. § 651:6(I)(m), (III)(e), (IV)(a), (b).⁸

4. N.H. Rev. Stat. Ann. § 639:3 (Endangering welfare of child or incompetent) states,

I. A person is guilty of endangering the welfare of a child or incompetent if he knowingly endangers the welfare of a child under 18 years of age . . . by purposely violating a duty of care, protection or support he owes to such child . . . , or by inducing such child . . . to engage in conduct that endangers his health or safety.

....

⁷ For purposes of this statute, prior convictions include previous convictions under N.H. Rev. Stat. Ann. § 632-A:2 “or any other statute prohibiting the same conduct in another state, territory or possession of the United States” N.H. Rev. Stat. Ann. § 632-A:10-a(II). Additionally, N.H. Rev. Stat. Ann. § 632-A:10-a(IV) states that “the phrase ‘previously convicted’ shall mean any conviction obtained by trial on the merits, or negotiated plea with the assistance of counsel and evidencing a knowing, intelligent, and voluntary waiver of the defendant’s rights, provided, however, that previous imprisonment is not required.”

⁸ See *supra* note 4 for the substantive provisions of N.H. Rev. Stat. Ann. § 651:6(I)(m), (III)(e), (IV)(a), (b). Additionally, N.H. Rev. Stat. Ann. § 651:6 states,

VI. A person shall be sentenced [to imprisonment for life without the possibility of parole] if the court finds, and includes such findings in the record, that such person:

- (a) (1) Committed a violation of RSA 632-A:2, I(I), RSA 632-A:2, II, or RSA 632-A:2, III, in which one or more of the acts comprising the pattern of sexual assault was an offense under RSA 632-A:2, I(I) or RSA 632-A:2, II, or both, after having previously been convicted of an offense in violation of one of the aforementioned offenses or any other statute prohibiting the same conduct in another state, territory or possession of the United States, and
(2) The person committed the subsequent offense while released on bail on the earlier offense or the sentence for the earlier conviction involved a term of incarceration, probation, parole, or other supervised release; or
- (b) (1) Committed a violation of RSA 631:1 [First degree assault] after having previously been convicted of an offense in violation of RSA 631:1, or any other statute prohibiting the same conduct in another state, territory or possession of the United States, if the earlier offense also involved a victim under 13 years of age where the serious bodily injury resulted in brain damage or physical disability to the child that is likely to be permanent; and
(2) The person committed the subsequent offense while released on bail on the earlier offense or the sentence for the earlier conviction involved a term of incarceration, probation, parole, or other supervised release; or
- (c) (1) Committed a violation of RSA 630:1-b [Second degree murder] after having previously been convicted of an offense in violation of RSA 630:1-b, or any other statute prohibiting the same conduct in another state, territory, or possession of the United States; and
(2) The person committed the subsequent offense while released on bail on the earlier offense or the sentence for the earlier conviction involved a term of incarceration, probation, parole, or other supervised release.

VII. If the court has made the findings authorized by RSA 651:6, VI, and if notice of the possible application of this section is given to the defendant prior to the commencement of trial, a person shall be sentenced to an extended term of imprisonment of life without parole.

III. In the prosecution of any person under this section, the solicitation by any person of a child under the age of 16 to engage in sexual activity as defined by RSA 649-A:2, III [Definitions]⁹ for the purpose of creating a visual representation as defined in RSA 649-A:2, IV,¹⁰ or to engage in sexual penetration as defined by RSA 632-A:1, V [Definitions],¹¹ constitutes endangering the welfare of such child.

....

A conviction under N.H. Rev. Stat. Ann. § 639:3(I) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 639:3(V), 625:9(IV)(c), 651:2(IV)(a). A conviction under N.H. Rev. Stat. Ann. § 639:3(III), however, is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 639:3(V), 651:2(I), (II)(b), (IV)(a).

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

New Hampshire's prostitution law refers to the human trafficking statute to provide an affirmative defense when the minor is a victim of trafficking. Under N.H. Rev. Stat. Ann. § 645:2(IV) (Prostitution and related offenses), "[i]t shall be an affirmative defense to a [prostitution] charge under subparagraph I(a) that the defendant engaged in the conduct because he or she was the victim of trafficking in persons, as defined in RSA 633:7 [Trafficking in persons]."

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

New Hampshire has not enacted a racketeering statute. Additionally, sex trafficking and commercial sexual exploitation of children are not included among the crimes for which sentence enhancements are authorized when committed by criminal street gangs. N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) (Extended term of imprisonment) states,

A convicted person may be sentenced according to paragraph III¹² if the jury also finds beyond a reasonable doubt that such person . . . [h]as knowingly committed any of the following offenses

⁹ See *supra* note 2 for the definition of "sexually explicit conduct."

¹⁰ N.H. Rev. Stat. Ann. § 649-A:2(IV) defines "visual representation" as the following:

[A]ny visual depiction, including photograph, film, video, digital image, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

- (a) The production of such visual depiction involves the use of a child engaging in or being engaged in sexually explicit conduct; or
- (b) Such visual depiction is a digital image, computer image, or computer-generated image of a child engaging in or being engaged in sexually explicit conduct; or
- (c) Such visual depiction has been created, adapted, or modified to appear that an identifiable child is engaging in or being engaged in sexually explicit conduct.

¹¹ See *supra* note 2 for the definition of "sexual penetration."

¹² N.H. Rev. Stat. Ann. § 651:6(III) provides,

If authorized by paragraph I or II, and if written notice of the possible application of this section is given the defendant at least 21 days prior to the commencement of jury selection for his or her trial, a defendant may be sentenced to an extended term of imprisonment. An extended term is, for a person convicted of:

- (a) Any felony, other than murder or manslaughter, a minimum to be fixed by the court of not more than 10 years and a maximum to be fixed by the court of not more than 30 years;
- (b) A misdemeanor, a minimum to be fixed by the court of not more than 2 years and a maximum to be fixed by the court of not more than 5 years;

as a criminal street gang member, or for the benefit of, at the direction of, or in association with any criminal street gang, with the purpose to promote, further, or assist in any such criminal conduct by criminal street gang members:

- (1) Violent crime as defined in RSA 651:5, XIII [Annulment of criminal records]

However, N.H. Rev. Stat. Ann. § 651:5(XIII)(g), (h) does define “violent crime” to include “endangering the welfare of a child by solicitation under RSA 639:3 [and] [a]ny felonious offense involving child sexual abuse images under RSA 649-A.”

- 1.4.1 Recommendation: Enact a racketeering statute that includes CSEC and trafficking offenses, including N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons), § 645:2(I) (Prostitution and related offenses), and § 649-B:3(I) (Computer pornography prohibited), as predicate crimes so the racketeering law may be used to prosecute trafficking enterprises.

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Legal Components:

- 2.1 *The state sex trafficking law can be applied to 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 between soliciting sex acts with an adult and soliciting 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 images of child sexual exploitation carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors are required to register as sex offenders.*

Legal Analysis:

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

New Hampshire’s human trafficking law applies to the conduct of buyers of sex with minors. Pursuant to N.H. Rev. Stat. Ann § 633:7(III-a) (Trafficking in persons),

A person is guilty of a class B felony if the person pays, agrees to pay, or offers to pay to engage in sexual contact, as defined in RSA 632-A:1 (Definitions) or sexual penetration, as defined in RSA 632-A:1, V with a person under the age of 18, or to observe a sexually explicit performance involving a person under the age of 18. The payment or offer or agreement to pay may be made to the person under the age of 18 or a third party

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

N.H. Rev. Stat. Ann. § 645:2 (Prostitution and related offenses)¹³ applies to buyers of sex with minors, stating,

(I) A person is guilty . . . if the person:

. . . .

(f) Pays, agrees to pay, or offers to pay another person to engage in sexual contact as defined in RSA 632-A:1, IV or sexual penetration as defined in RSA 632-A:1, V, with the payor or with another person.

(II) A person is guilty of a class B felony if such person violates the provisions of subparagraphs (b), (c), (d), (e), or (f) of paragraph I and the violation:

(a) Involves another person who is under the age of 18

. . . .

¹³ See N.H. Rev. Stat. Ann. §645:2(I)(f) where the application of this subsection was held unconstitutionally overbroad when applied to the facts in *State v. Theriault*, 158 N.H. 123, where the defendant offered to remunerate a couple for video-taping themselves having sex.

N.H. Rev. Stat. Ann. § 645:2(II)(a) enhances the penalty when a violation of N.H. Rev. Stat. Ann. § 645:2(I)(f) involves a minor under 18. Specifically, a conviction under this statute is punishable as a Class B felony by up to 7 years imprisonment, a fine not to exceed \$4,000, or both, if the victim is a minor. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a). Otherwise, a conviction under N.H. Rev. Stat. Ann. § 645:2(f) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a).

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

N.H. Rev. Stat. Ann. § 645:2(I) (Prostitution and related offenses) distinguishes between soliciting sex with an adult and soliciting sex with a minor by enhancing the penalty if a minor victim is involved. A conviction under N.H. Rev. Stat. Ann. § 645:2(I)(f) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a). If the offense involves a minor under the age of 18, however, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(f) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

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

A conviction under N.H. Rev. Stat. Ann. § 633:7 (III-a) (Trafficking in persons) is punishable as Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both.

When the victim is a minor, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

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 offense¹⁴ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,¹⁵ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.¹⁶

¹⁴ 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).

¹⁵ 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).

¹⁶ 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);

2.4.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7(III-a) (Trafficking in persons) and § 645:2(II) (Prostitution and related offenses) to increase the penalty to reflect the seriousness of the offense.

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.*

N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited) states,

No person shall knowingly:

.....

(d) Buy, sell, receive, exchange, or disseminate by means of computer, any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any child,¹⁷ or the visual depiction of such conduct.

This law applies to buyers who use a computer to solicit sexual conduct with a minor. The law, however, does not explicitly refer to commercial sex acts. A conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

Additionally, N.H. Rev. Stat. Ann. § 649-B:4(I) (Certain uses of computer services prohibited) states,

No person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to commit any of the following:

- (a) Any offense under RSA 632-A, relative to sexual assault and related offenses.
- (b) Indecent exposure and lewdness under RSA 645:1.
- (c) Endangering a child as defined in RSA 639:3, III.

If the victim is under 16 or the offender believes the child to be 13–15 years old, a first conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both, while a second conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (b), (IV)(a), 649-B:2. If the offender believed the child to be under the age of 13, however, a first conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while a second conviction is punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (IV)(a), 649-B:2. Third and any subsequent convictions, regardless of whether the defendant believed the victim to be under 13, are punishable by imprisonment up to 30 years. N.H. Rev. Stat. Ann. § 649-B:4(II)(c).

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

N.H. Rev. Stat. Ann. § 633:7(III-a) (Trafficking in persons) prohibits a mistake of age defense, stating in part, “Neither the actor’s lack of knowledge of the other person’s age nor consent of the other person shall constitute a defense to a charge under this paragraph.” Similarly, N.H. Rev. Stat. Ann. § 645:2(VI) (Prostitution and related offenses) states, “In a prosecution under subparagraph II(a), the actor’s lack of knowledge of the other person’s age shall not constitute a defense.”

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).

¹⁷ *See supra* Component 1.2.

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

New Hampshire's buyer-applicable trafficking and CSEC laws do not stagger penalties based on a minor's age, but penalties are not sufficiently high under either offense. A conviction under N.H. Rev. Stat. Ann. § 633:7(III-a) (Trafficking in persons) or § 645:2(I)(f) (Prostitution and related offenses) is punishable as a Class B felony by imprisonment for up to 7 years. N.H. Rev. Stat. Ann. §§ 633:7(III-a), 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

2.7.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7(III-a) (Trafficking in persons) and § 645:2(II)(a) (Prostitution and related offenses) to increase the base penalty to reflect the seriousness of the offense.

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.*

Pursuant N.H. Rev. Stat. Ann. § 651:2(IV)(a) (Sentences and limitations), a buyer convicted of any felony, which includes N.H. Rev. Stat. Ann. § 633:7 (III-a) (Trafficking in persons), § 645:2(I)(f) (Prostitution and related offenses), § 649-B:3(I)(d) (Computer pornography prohibited), and § 649-B:4(I) (Certain uses of computer services prohibited), is subject to a possible fine not to exceed \$4,000. N.H. Rev. Stat. Ann. §§ 633:7(III-a), 645:2(II)(a), 649-B:3(II), 649-B:4(II).

Buyers convicted of any offense may be ordered to pay restitution under New Hampshire's general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to sentence any offender¹⁸ "to make restitution in an amount determined by the court." A buyer will also be subject to civil asset forfeiture proceedings if convicted under N.H. Rev. Stat. Ann. § 633:7(III-a). N.H. Rev. Stat. Ann. § 633:8 (Forfeiture of items used in connection with trafficking in persons) states in part,

I. All offenses under this section shall qualify as offenses for forfeiture and thereby upon petition of the attorney general, shall be subject to forfeiture to the state and said property interest shall be vested in the state:

- (a) All materials, products, and equipment of any kind used in violation of this section.
- (b) Any property interest in any conveyance used in furtherance of an act which violates this section.
- (c) Any moneys, coin, currency, negotiable instruments, securities, or other investments knowingly used or intended for use in violation of this section.
- (d) Any books, records, ledgers, and research material, including formulae, microfilm, tapes, and any other data which are used or intended for use in felonious violation of this section.
- (e) Any real property, including any right, title, leasehold interest, and other interest in the whole of any lot or tract of land and any appurtenances or improvements, which real property is knowingly used or intended for use, in any manner or part, in felonious violation of this section.

...
XI. The court may order forfeiture of all items or property interests under this section, except no item or property interest shall be subject to forfeiture unless the owner or owners thereof were consenting parties to a felonious violation of this section and had knowledge thereof.

Property that is subject to forfeiture may be seized upon process, without process in certain circumstances or constructively, pursuant to N.H. Rev. Stat. Ann. §633:8 (III). Final orders of forfeiture shall be implemented by the department of justice and shall provide for disposition of the items or property interests in any manner not prohibited by law, including payment of restitution or sale of the property. The department of justice shall

¹⁸ N.H. Rev. Stat. Ann. § 651:62(IV) defines "offender" as "any person convicted of a criminal or delinquent act."

first pay the reasonable expenses of the forfeiture proceeding and sale. N.H. Rev. Stat. Ann. § 633:8(XVI). Following the payment of costs, “any forfeited money and the proceeds of any sale or public auction of forfeited items shall first be used to satisfy any order of restitution or compensation imposed by the court. Any remaining funds shall go to the victims' assistance fund as defined in RSA 21-M:8-i.”

N.H. Rev. Stat. Ann. § 633:9(I) (Administrative forfeiture of items used in connection with trafficking in persons) further states,

Interests in property subject to forfeiture under the provisions of RSA 633:8, I(a), I(b), I(c) excepting proceeds, and I(d), but not real property, shall be subject to administrative forfeiture by the department of justice provided that the total amount or value of such property does not exceed \$75,000. The provisions of RSA 633:8 shall apply in any case of administrative forfeiture except as otherwise provided in this section.

2.9 *Buying and possessing images of child sexual exploitation carries penalties as high as similar federal offenses.*

N.H. Rev. Stat. Ann. § 649-A:3(I)(a) (Possession of child sexual abuse images) makes it illegal for a person to knowingly “[b]uy, procure, possess, or control any visual representation of a child engaging in sexually explicit conduct.”¹⁹ A first conviction under this statute is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while subsequent convictions are punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3(II), 651:2(I), (II)(a), (IV)(a).

A conviction under N.H. Rev. Stat. Ann. § 649-B:3(I)(d) (Computer pornography prohibited) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

In comparison, a federal conviction for possession of images of child sexual exploitation (ICSE)²⁰ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²²

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

Buyers convicted under N.H. Rev. Stat. Ann. § 645:2(I)(f) (Prostitution and related offenses), § 649-B:3(I)(d) (Computer pornography prohibited), § 649-A:3(I)(a) (Possession of child sexual abuse images), or § 649-B:4(I)

¹⁹ See *supra* note 2 for the definition of “sexually explicit conduct.”

²⁰ 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).

²¹ 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).

²² 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).

(Certain uses of computer services prohibited) are required to register as a sexual offender. N.H. Rev. Stat. Ann. §§ 651-B:1(VII)(b), 651-B:2(I).

N.H. Rev. Stat. Ann. § 651-B:2(I) (Registration) states that “[e]very sexual offender or offender against children shall be registered with the department of safety, division of state police” N.H. Rev. Stat. Ann. § 651-B:1(IV) (Definitions) defines “sexual offender” as “a person who is required to register for any sexual offense,” while N.H. Rev. Stat. Ann. § 651-B:1(V) defines a “sex offense” in part to include convictions under N.H. Rev. Stat. Ann. § 632-A:2 (Aggravated felonious sexual assault), § 632-A:4(I)(a) (Sexual assault) § 632-A:3 (Felonious sexual assault), or “[a]ny other criminal offense . . . if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register.”

N.H. Rev. Stat. Ann. § 651-B:1(VI) defines an “offender against children” as “a person who is required to register for an offense against a child” and N.H. Rev. Stat. Ann. § 651-B:1(VII) explains that “offense against a child”

means the following offenses, including an accomplice to, or an attempt, conspiracy, or solicitation to commit, any of the following offenses:

- (a) Any of the following offenses, where the victim was under the age of 18 at the time of the offense: . . . aggravated felonious sexual assault, RSA 632-A:2; felonious sexual assault, RSA 632-A:3; sexual assault, RSA 632-A:4, I(a) or RSA 632-A:4, III; . . . or prostitution, RSA 645:2.
- (b) Intentional contribution to the delinquency of a minor, RSA 169-B:41, II; sexual assault, RSA 632-A:4, I(b) if the actor was 18 years of age or older at the time of the offense; endangering the welfare of a child, RSA 639:3, III; child pornography, RSA 649-A:3, RSA 649-A:3-a and RSA 649-A:3-b; computer pornography, RSA 649-B:3; certain uses of computer services prohibited, RSA 649-B:4; or obscene matters, RSA 650:2, II.
-
- (e) Any other criminal offense which is not specifically listed in subparagraph (a) if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register

While N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) is not specifically enumerated in the definitions of “sex offense” and “offense against a child” under N.H. Rev. Stat. Ann. § 651-B:1(VI) and (VII), respectively, “Tier II offender” is defined under N.H. Rev. Stat. Ann. § 651-B:1 (VIII)(a) as “a sexual offender or offender against children who is required to register pursuant to RSA 651-B:1, V(d) or RSA 651-B:1, VII(e), or is required to register as a result of any of the following offenses . . . RSA 633:7 [Trafficking in persons]”

Legal Components:

- 3.1 Penalties for trafficking a child for sexual exploitation are as high as federal penalties.
- 3.2 Creating and distributing images of child sexual exploitation 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 parental custody and termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for sole custody or termination in order to prevent traffickers from exploiting their parental rights as a form of control.

Legal Analysis:

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

Traffickers convicted under N.H. Rev. Stat. Ann. § 633:7(I) (Trafficking in persons)²³ are guilty of a Class A felony punishable by imprisonment up to 30 years, a fine not to exceed \$4,000, or both, and if the offense involves “a commercial sex act or sexually-explicit performance” by a victim under the age of 18 “for the benefit of another,” a conviction is punishable as a Class A felony by imprisonment for 7–30 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (c), 651:2(I), (II)(a), (IV)(a).

Traffickers may also be prosecuted under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e) (Prostitution and related offenses).²⁴ A conviction under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e) is punishable as a Class B misdemeanor by a fine not to exceed \$1,200. N.H. Rev. Stat. Ann. §§ 645:2(I), 625:9(IV)(c), 651:2(IV)(a). If the offense involves a minor under the age of 18, however, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

A conviction under N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited)²⁵ is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(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 offense²⁶ against a minor. 18 U.S.C. § 3559(e)(1).

²³ See *supra* Component 1.1 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:7.

²⁴ See *supra* Component 1.2 for the provisions of N.H. Rev. Stat. Ann. § 645:2(I)(b)–(e).

²⁵ See *supra* Component 1.2 for the provisions of N.H. Rev. Stat. Ann. § 649-B:3(I).

²⁶ See *supra* note 14.

3.2 *Creating and distributing images of child sexual exploitation carries penalties as high as similar federal offenses.*

New Hampshire expressly prohibits manufacturing and distributing images of child sexual exploitation (ICSE). Pursuant to N.H. Rev. Stat. Ann. § 649-A:3-b(I) (Manufacture of child sexual abuse images),

No person shall knowingly create, produce, manufacture, or direct a visual representation of a child engaging in or being engaged in sexually explicit conduct,²⁷ or participate in that portion of such visual representation that consists of a child engaging in or being engaged in sexually explicit conduct.

A first conviction under this statute is punishable by imprisonment for 15–30 years, a fine not to exceed \$4,000, or both, while subsequent convictions are punishable by “life imprisonment or for such term as the court may order.” N.H. Rev. Stat. Ann. §§ 649-A:3-b(II), 651:2(I), (IV)(a). Additionally, certain penalty enhancements may be available under N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) (Extended term of imprisonment).²⁸

Pursuant to N.H. Rev. Stat. Ann. § 649-A:3-a(I) (Distribution of child sexual abuse images),

No person shall:

- (a) Knowingly sell, exchange, or otherwise transfer, or possess with intent to sell, exchange, or otherwise transfer any visual representation of a child engaging in or being engaged in sexually explicit conduct;
- (b) Knowingly publish, exhibit, or otherwise make available any visual representation of a child engaging in or being engaged in sexually explicit conduct.

A first conviction under this statute is punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both, but a first conviction under N.H. Rev. Stat. Ann. § 649-A:3-a(I)(b) by an offender with “less than 3 images or visual representations,” is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II), 651:2(I), (II)(b), (IV)(a). All subsequent convictions are punishable by imprisonment for 15–30 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II)(a), 651:2(I), (IV)(a). Additionally, certain penalty enhancements may be available under N.H. Rev. Stat. Ann. § 651:6(I)(q)(1).

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 offense²⁹ against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of ICSE³⁰ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³¹

²⁷ See *supra* note 2 for the definition of “sexually explicit conduct.”

²⁸ See *supra* note 4 for the substantive provisions of N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) as well as other possible penalty enhancements.

²⁹ See *supra* note 14.

³⁰ 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).

³¹ 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).

Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³²

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.*

According to N.H. Rev. Stat. Ann. § 649-B:3(I) (Computer pornography prohibited),

No person shall knowingly:

- (a) Compile, enter into, or transmit by means of computer;
- (b) Make, print, publish, or reproduce by other computerized means;
- (c) Cause or allow to be entered into or transmitted by means of computer; or
- (d) Buy, sell, receive, exchange, or disseminate by means of computer, any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any child, or the visual depiction of such conduct.

A conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

Additionally, although not directly commercial, N.H. Rev. Stat. Ann. § 649-B:4(I) (Certain uses of computer services prohibited) states,

No person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to commit any of the following:

- (a) Any offense under RSA 632-A, relative to sexual assault and related offenses.
- (b) Indecent exposure and lewdness under RSA 645:1.
- (c) Endangering a child as defined in RSA 639:3, III.

If the victim is under 16 or the offender believes the child to be 13–15 years old, a first conviction under this statute is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both, while a second conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (b), (IV)(a), 649-B:2. If the offender believed the child to be under the age of 13, however, a first conviction is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while a second conviction is punishable by imprisonment for 10–20 years, a fine up to \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:4(II)(a), (b), 651:2(I), (II)(a), (IV)(a), 649-B:2. Third and any subsequent convictions, regardless of whether the defendant believed the victim to be under 13, are punishable by imprisonment up to 30 years. N.H. Rev. Stat. Ann. § 649-B:4(II)(c).

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

Traffickers are subject to a possible fine not to exceed \$4,000 for any felony conviction. N.H. Rev. Stat. Ann. § 651:2(I), (IV)(a). Therefore, a trafficker convicted of N.H. Rev. Stat. Ann. § 633:7(I)(a), (II) (Trafficking in persons), § 645:2(I)(b)–(e) (Prostitution and related offenses) (when the victim is under 18), § 649-B:3(I)

³² 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).

(Computer pornography prohibited), § 649-B:4(I) (Certain uses of computer services prohibited), § 649-A:3-b(I) (Manufacture of child sexual abuse images), or § 649-A:3-a(I) (Distribution of child sexual abuse images) is subject to a possible fine not to exceed \$4,000. N.H. Rev. Stat. Ann. §§ 633:7(I)(a), (II), 645:2(II)(a), 649-B:3(II), 649-B:4(II), 649-A:3-b(II), 649-A:3-a(II), 651:2(I), (IV)(a).

In addition to fines, convicted traffickers are subject to mandatory restitution orders. N.H. Rev. Stat. Ann. § 633:10 (Restitution and compensation), specifically requires persons convicted under N.H. Rev. Stat. Ann. § 633:7 to make restitution to their victims. N.H. Rev. Stat. Ann. § 633:10(I), (II) states,

I. A person convicted under this section shall be ordered by the court to pay restitution to the victim. Such restitution may include but not be limited to:

- (a) Any economic loss³³ compensable under RSA 651:62 [Definitions], in accordance with the provisions of RSA 651:61-a through RSA 651:67; and
 - (b) The value of the victim's labor as guaranteed under the minimum wage law and overtime provisions of the Fair Labor Standards Act or the state minimum wage law, whichever is greater.
- II. To the extent not included in economic loss that is compensable under paragraph I, the court may also order a person convicted under this section to pay compensation as follows:
- (a) Costs of medical and psychological treatment, including physical and occupational therapy and rehabilitation, at the court's discretion;
 - (b) Costs of necessary transportation, temporary housing, and child care, at the court's discretion;
 - (c) Return of property, cost of damage to property, or full value of property if destroyed or damaged beyond repair;
 - (d) Expenses incurred by a victim and any household members or other family members in relocating away from the defendant or his or her associates, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items; and
 - (e) Any and all other losses suffered by the victim as a result of an offense under this section.

Traffickers convicted of other offenses may be subject to restitution payments under New Hampshire's general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to sentence any offender³⁴ "to make restitution in an amount determined by the court." Although restitution is not mandatory, "[i]n any case in which restitution is not ordered, the court shall state its reasons therefor on the record or in its sentencing order." N.H. Rev. Stat. Ann. § 651:63(I).

³³ N.H. Rev. Stat. Ann. § 651:62(III) (Definitions) defines "economic loss" as

out-of-pocket losses or other expenses incurred as a direct result of a criminal offense, including:

- (a) Reasonable charges incurred for reasonably needed products, services and accommodations, including but not limited to charges for medical and dental care, rehabilitation, and other remedial treatment and care including mental health services for the victim or, in the case of the death of the victim, for the victim's spouse and immediate family;
- (b) Loss of income by the victim or the victim's dependents;
- (c) The value of damaged, destroyed, or lost property;
- (d) Expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured or deceased victim would have performed, if the crime had not occurred, for the benefit of the victim or the victim's dependents;
- (e) Reasonable expenses related to funeral and burial or crematory services for the decedent victim.

³⁴ N.H. Rev. Stat. Ann. § 651:62(IV) defines "offender" as "any person convicted of a criminal or delinquent act."

Additionally, a person convicted under N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) shall be subject to asset forfeiture proceedings that are civil in nature.³⁵ N.H. Rev. Stat. Ann. § 633:8 (Forfeiture of items used in connection with trafficking in persons) states in part,

I. All offenses under this section shall qualify as offenses for forfeiture and thereby upon petition of the attorney general, shall be subject to forfeiture to the state and said property interest shall be vested in the state:

- (a) All materials, products, and equipment of any kind used in violation of this section.
- (b) Any property interest in any conveyance used in furtherance of an act which violates this section.
- (c) Any moneys, coin, currency, negotiable instruments, securities, or other investments knowingly used or intended for use in violation of this section.
- (d) Any books, records, ledgers, and research material, including formulae, microfilm, tapes, and any other data which are used or intended for use in felonious violation of this section.
- (e) Any real property, including any right, title, leasehold interest, and other interest in the whole of any lot or tract of land and any appurtenances or improvements, which real property is knowingly used or intended for use, in any manner or part, in felonious violation of this section.

....
XI. The court may order forfeiture of all items or property interests under this section, except no item or property interest shall be subject to forfeiture unless the owner or owners thereof were consenting parties to a felonious violation of this section and had knowledge thereof.

Property that is subject to forfeiture may be seized upon process, without process in certain circumstances or constructively, pursuant to N.H. Rev. Stat. Ann. §633:8 (III). Final orders of forfeiture shall be implemented by the department of justice and shall provide for disposition of the items or property interests in any manner not prohibited by law, including payment of restitution or sale of the property. The department of justice shall first pay the reasonable expenses of the forfeiture proceeding and sale. N.H. Rev. Stat. Ann. § 633:8(XVI). Following the payment of costs, “any forfeited money and the proceeds of any sale or public auction of forfeited items shall first be used to satisfy any order of restitution or compensation imposed by the court. Any remaining funds shall go to the victims' assistance fund as defined in RSA 21-M:8-i.”

N.H. Rev. Stat. Ann. § 633:9(I) (Administrative forfeiture of items used in connection with trafficking in persons) further states,

Interests in property subject to forfeiture under the provisions of RSA 633:8, I(a), I(b), I(c) excepting proceeds, and I(d), but not real property, shall be subject to administrative forfeiture by the department of justice provided that the total amount or value of such property does not exceed \$75,000. The provisions of RSA 633:8 shall apply in any case of administrative forfeiture except as otherwise provided in this section.

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

Traffickers convicted under N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons), § 645:2(I) (Prostitution and related offenses), § 649-B:3(I) (Computer pornography prohibited), or § 649-B:4(I) (Certain uses of computer services prohibited) are required to register as a sexual offender. N.H. Rev. Stat. Ann. §§ 651-B:1(VII)(b), 651-B:2(I).

N.H. Rev. Stat. Ann. § 651-B:2(I) (Registration) states that “[e]very sexual offender or offender against children shall be registered with the department of safety, division of state police” N.H. Rev. Stat. Ann. § 651-

³⁵ For additional information on asset forfeiture laws and procedure, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

B:1(IV) (Definitions) defines “sexual offender” as “a person who is required to register for any sexual offense,” while N.H. Rev. Stat. Ann. § 651-B:1(V) defines a “sex offense” in part to include convictions for certain sex offenses, or “[a]ny other criminal offense . . . if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register.”

N.H. Rev. Stat. Ann. § 651-B:1(VI) defines an “offender against children” as “a person who is required to register for an offense against a child” and N.H. Rev. Stat. Ann. § 651-B:1(VII) explains that “offense against a child”

means the following offenses, including an accomplice to, or an attempt, conspiracy, or solicitation to commit, any of the following offenses:

(a) Any of the following offenses, where the victim was under the age of 18 at the time of the offense: . . . aggravated felonious sexual assault, RSA 632-A:2; felonious sexual assault, RSA 632-A:3; sexual assault, RSA 632-A:4, I(a) or RSA 632-A:4, III; . . . or prostitution, RSA 645:2.

(b) Intentional contribution to the delinquency of a minor, RSA 169-B:41, II; sexual assault, RSA 632-A:4, I(b) if the actor was 18 years of age or older at the time of the offense; endangering the welfare of a child, RSA 639:3, III; child pornography, RSA 649-A:3, RSA 649-A:3-a and RSA 649-A:3-b; computer pornography, RSA 649-B:3; certain uses of computer services prohibited, RSA 649-B:4; or obscene matters, RSA 650:2, II.

. . . .
(e) Any other criminal offense which is not specifically listed in subparagraph (a) if the court finds by clear and convincing evidence at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and protection of the public would be furthered by requiring the person to register

While N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) is not specifically enumerated in the definitions of “sex offense” and “offense against a child” under N.H. Rev. Stat. Ann. § 651-B:1(VI) and (VII), respectively, “Tier II offender” is defined under N.H. Rev. Stat. Ann. § 651-B:1 (VIII)(a) as “a sexual offender or offender against children who is required to register pursuant to RSA 651-B:1, V(d) or RSA 651-B:1, VII(e), or is required to register as a result of any of the following offenses . . . RSA 633:7 [Trafficking in persons]”

3.6 *Laws relating to parental custody and termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for sole custody or termination in order to prevent traffickers from exploiting their parental rights as a form of control.*

Convictions under N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) or New Hampshire’s CSEC law are not expressly included as grounds for termination of parental rights. N.H. Rev. Stat. Ann. § 170-C:5 (Grounds for termination of the parent-child relationship) authorizes the termination of parental rights under any of the following circumstances:

. . . .
III. The parents, subsequent to a finding of child neglect or abuse under RSA 169-C [Child Protection Act], have failed to correct the conditions leading to such a finding within 12 months of the finding despite reasonable efforts under the direction of the district court to rectify the conditions.

. . . .
V. The parent knowingly or willfully caused or permitted another to cause severe sexual, physical, emotional, or mental abuse of the child. Subsequent to a finding of such abuse pursuant to RSA 169-C, the parent-child relationship may be terminated if return of the child to the parent would result in a substantial possibility of harm to the child. A substantial possibility of harm to the child shall be established by testimony of at least 2 of the following factors:

- (a) The parent’s conduct toward the child has resulted in severe harm to the child.
- (b) The parent’s conduct toward the child has continued despite the reasonable efforts of authorized

agencies in obtaining or providing services for the parent to reduce or alleviate such conduct.

(c) The parent's conduct has continued to occur either over a period of time, or many times, or to such a degree so as to indicate a pattern of behavior on the part of the parent which indicates a complete disregard for the child's health and welfare.

(d) Such conduct is likely to continue with no change in parental behavior, attitude or actions.

Testimony shall be provided by any combination of at least 2 of the following people: a licensed psychiatrist, a clinical psychologist, a physician, or a social worker who possesses a master's degree in social work and is a member of the Academy of Certified Social Workers.

VI. If the parent or guardian is, as a result of incarceration for a felony offense, unable to discharge his responsibilities to and for the child and, in addition, has been found pursuant to RSA 169-C to have abused or neglected his child or children, the court may review the conviction of the parent or guardian to determine whether the felony offense is of such a nature, and the period of incarceration imposed of such duration, that the child would be deprived of proper parental care and protection and left in an unstable or impermanent environment for a longer period of time than would be prudent

VII. The parent has been convicted of one or more of the following offenses:

. . . .

(d) A felony assault under RSA 631:1 [First degree assault], 631:2 [Second degree assault], 632-A:2 [Aggravated felonious sexual assault], or 632-A:3 [Felonious sexual assault] which resulted in injury to the child, a sibling or step-sibling of the child, the child's other parent, or other persons related by consanguinity or affinity, including a minor child who resided with the defendant.

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 images of child sexual exploitation carries penalties as high as similar federal offenses.*

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.*

N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) does not specifically prohibit assisting, enabling, or financially benefitting from domestic minor sex trafficking, but N.H. Rev. Stat. Ann. § 633:7(III) may apply to facilitators who “harbor” or “transport” a minor, “knowing or believing it likely that the [minor] will be subjected to trafficking as defined in paragraph I or (II).” If the victim is under the age of 18 and “the offender knew or believed it likely that the victim would be coerced into engaging in a commercial sex act or sexually explicit performance,” a conviction under N.H. Rev. Stat. Ann. § 633:7(II) is punishable as a Class A felony by imprisonment for 10—30 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 633:7(II), 651:2(I), (II)(a), (IV)(a).

A facilitator who transports a minor “with the purpose of promoting or facilitating” the minor to engage in prostitution, or who “[k]nowingly permits a place under such person’s control to be used” for purposes of prostitution of a child, may also be prosecuted under N.H. Rev. Stat. Ann. § 645:2(I)(c), (e) (Prostitution and related offenses).³⁶ If the offense involves a minor under the age of 18, a conviction under N.H. Rev. Stat. Ann. § 645:2(I)(c), (e) is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, both. N.H. Rev. Stat. Ann. §§ 645:2(II)(a), 651:2(I), (II)(b), (IV)(a).

A facilitator who “disseminat[e]s by means of computer, any notice, statement, or advertisement, or any minor’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating . . . sexual conduct of or with any child” may be convicted under N.H. Rev. Stat. Ann. § 649-B:3(I)(d) (Computer pornography prohibited),³⁷ which is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-B:3(II), 651:2(I), (II)(b), (IV)(a).

- 4.1.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) to specifically criminalize aiding, assisting or financially benefitting from sex trafficking.

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

Facilitators are subject to a possible fine not to exceed \$4,000 for any felony conviction. N.H. Rev. Stat. Ann. § 651:2(I), (IV)(a). Therefore, a facilitator convicted under N.H. Rev. Stat. Ann. § 633:7(II) (Trafficking in persons), § 645:2(I)(c), (e) (Prostitution and related offenses), § 649-B:3(I)(d) (Computer pornography

³⁶ See *supra* Component 1.2 for the provisions of N.H. Rev. Stat. Ann. § 645:2(I).

³⁷ See *supra* Component 1.2 for the provisions of N.H. Rev. Stat. Ann. § 649-B:3(I).

prohibited), § 649-A:3-b(I) (Manufacture of child sexual abuse images), or § 649-A:3-a(I) (Distribution of child sexual abuse images) is subject to a possible fine not to exceed \$4,000. N.H. Rev. Stat. Ann. §§ 633:7(II), 645:2(II)(a), 649-B:3(II), 649-A:3-b(II), 649-A:3-a(II), 651:2(I), (IV)(a).

In addition to fines, convicted facilitators of trafficking are subject to mandatory orders of restitution. N.H. Rev. Stat. Ann. § 633:10(I), (II) (Restitution and compensation),³⁸ specifically requires persons convicted under N.H. Rev. Stat. Ann. § 633:7 to make restitution to their victims for any compensable economic loss³⁹ and other costs, including medical treatment. Traffickers convicted of other offenses may be subject to discretionary restitution orders under New Hampshire’s general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to sentence any offender “to make restitution in an amount determined by the court.”

Additionally, pursuant to N.H. Rev. Stat. Ann. § 633:8(I) (Forfeiture of items used in connection with trafficking in persons),⁴⁰ a person convicted under N.H. Rev. Stat. Ann. § 633:7 may be subject to asset forfeiture for any equipment, property, or money used in the commission of the crime.

N.H. Rev. Stat. Ann. § 633:9(I) (Administrative forfeiture of items used in connection with trafficking in persons) further states,

Interests in property subject to forfeiture under the provisions of RSA 633:8, I(a), I(b), I(c) excepting proceeds, and I(d), but not real property, shall be subject to administrative forfeiture by the department of justice provided that the total amount or value of such property does not exceed \$75,000. The provisions of RSA 633:8 shall apply in any case of administrative forfeiture except as otherwise provided in this section.

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

New Hampshire does not specifically prohibit sex tourism.

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

4.4 *Promoting and selling images of child sexual exploitation carries penalties as high as similar federal offenses.*

Although promoting images of child sexual exploitation (ICSE) is not a distinct crime under New Hampshire law, selling, publishing, exhibiting, or making available ICSE is prohibited under N.H. Rev. Stat. Ann. § 649-A:3-a(I) (Distribution of child sexual abuse images).⁴¹ A first conviction under this statute is punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both, but a first conviction under N.H. Rev. Stat. Ann. § 649-A:3-a(I)(b) by an offender with “less than 3 images or visual representations,” is punishable as a Class B felony by imprisonment up to 7 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II), 651:2(I), (II)(b), (IV)(a). All subsequent convictions are punishable by imprisonment for 15–30 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3-a(II)(a), 651:2(I), (IV)(a). Additionally, certain penalty enhancements may be available under N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) (Extended term of imprisonment).⁴²

³⁸ See *supra* Component 3.4 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:10(I), (II).

³⁹ See *supra* note 33.

⁴⁰ See *supra* Component 3.4 for the substantive provisions of N.H. Rev. Stat. Ann. § 633:8(I).

⁴¹ See *supra* Component 3.2 for the provisions of N.H. Rev. Stat. Ann. § 649-A:3(I).

⁴² See *supra* note 4 for the substantive provisions of N.H. Rev. Stat. Ann. § 651:6(I)(q)(1) as well as other possible penalty enhancements.

Additionally, N.H. Rev. Stat. Ann. § 649-A:3(I)(b) (Possession of child sexual abuse images) makes it illegal for a person to knowingly “[b]ring or cause to be brought into this state any visual representation of a child engaging in sexually explicit conduct.”⁴³ A first conviction under this statute is punishable as a Class A felony by imprisonment up to 15 years, a fine not to exceed \$4,000, or both, while subsequent convictions are punishable by imprisonment for 10–20 years, a fine not to exceed \$4,000, or both. N.H. Rev. Stat. Ann. §§ 649-A:3(II), 651:2(I), (II)(a), (IV)(a).

⁴³ See *supra* note 2 for the definition of “sexually explicit conduct.”

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 a minor under 18 to 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 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*
- 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 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.*⁴⁴

All commercially sexually exploited minors are included as victims of sex trafficking under the core sex trafficking law, N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons). Proof of force, fraud, or coercion is not required to establish the crime of sex trafficking in New Hampshire.⁴⁵ Additionally, because the human trafficking law provides criminal liability for buyers of sex with minors under N.H. Rev. Stat. Ann. § 633:7(III), (III-a), third party control of a minor victim is not necessary to establish the crime of sex trafficking.

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

N.H. Rev. Stat. Ann. § 633:7(II) (Trafficking in persons) prohibits a defendant from asserting a defense based on the minor’s willingness to engage to the commercial sex act, stating, “Consent of the individual shall not constitute a defense to a charge under [N.H. Rev. Stat. Ann. § 633:7(II)].” Similarly, N.H. Rev. Stat. Ann. § 633:7(III-a) states in part, “Neither the actor’s lack of knowledge of the other person’s age nor consent of the other person shall constitute a defense to a charge under [N.H. Rev. Stat. Ann. § 633:7(III-a)].”

However, New Hampshire’s CSEC law does not expressly prohibit such a defense.

⁴⁴ 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 (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).

⁴⁵ See *supra* Component 1.1.

5.3 State law prohibits the criminalization of minors under 18 for prostitution offenses.⁴⁶

N.H. Rev. Stat. Ann. § 645:2(V) (Prostitution and related offenses) prohibits the prosecution of minors for prostitution, stating,

A person under 18 years of age shall not be subject to a juvenile delinquency proceeding under RSA 169-B or criminal prosecution for the commission of an offense under subparagraph I(a).⁴⁷

Further, N.H. Rev. Stat. Ann. § 633:7(VI) (Trafficking in persons) emphasizes that child sex trafficking victims cannot be prosecuted for prostitution, stating,

A victim under this section who was under 18 years of age at the time of the offense shall not be subject to a juvenile delinquency proceeding under RSA 169-B, or prosecuted for conduct chargeable as indecent exposure and lewdness under RSA 645:1 or prostitution under RSA 645:2, where the conduct was committed as a direct result of being trafficked.

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

A juvenile sex trafficking victim is not subject to delinquency charges for prostitution.⁴⁸ Regardless of whether the child is identified as abused, neglected,⁴⁹ in need of services,⁵⁰ or delinquent,⁵¹ however, New Hampshire law does not provide a statutory avenue to specialized services.

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

5.5 Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.⁵²

Child sex trafficking is expressly identified as a form of abuse within New Hampshire's Child Protection Act.⁵³ Additionally, the definition of "abused child" includes certain other acts of commercial sexual exploitation based on the internal definition of "sexual abuse."

⁴⁶ For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

⁴⁷ N.H. Rev. Stat. Ann. § 645:2(I)(a) (Prostitution and related offenses) makes it a crime if any person "[s]olicits, agrees to perform, or engages in sexual contact . . . or sexual penetration . . . in return for consideration."

⁴⁸ See *supra* Component 5.3 for provisions concerning the non-criminalization of minors for prostitution offenses.

⁴⁹ See *infra* Component 5.5 for provisions concerning child abuse and neglect.

⁵⁰ N.H. Rev. Stat. Ann. § 169-D:2(II) defines a "child in need of services" as

a child under the age of 18 with a diagnosis of severe emotional, cognitive, or other mental health issues who engages in aggressive, fire setting, or sexualized behaviors that pose a danger to the child or others and who is otherwise unable or ineligible to receive services under RSA 169-B or RSA 169-C.

⁵¹ N.H. Rev. Stat. Ann. § 169-B:2(IV) defines a "delinquent" as

a person who has committed an offense before reaching the age of 17 years which would be a felony or misdemeanor under the criminal code of this state if committed by an adult . . . and is expressly found to be in need of counseling, supervision, treatment, or rehabilitation as a consequence thereof.

⁵² For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

⁵³ N.H. Rev. Stat. Ann. §§ 169-C:1 to C:28.

Specifically, N.H. Rev. Stat. Ann. § 169-C:3(II)(e)⁵⁴ (Definitions) defines “abused child” in part as “any child who has been . . . [s]ubjected, by any person, to human trafficking as defined in RSA 633:7. Further, pursuant to N.H. Rev. Stat. Ann. § 169-C:3(II)(a), an “abused child” includes any child who has been “sexually abused,” which is defined under N.H. Rev. Stat. Ann. § 169-C:3(XXVII-b) as follows,

“Sexual abuse” means the following activities under circumstances which indicate that the child’s health or welfare is harmed or threatened with harm: the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct or any simulation of such conduct for the purpose of producing any visual depiction of such conduct; or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. With respect to the definition of sexual abuse, the term “child” or “children” means any individual who is under the age of 18 years.

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.*

While the definition of “neglected child” under N.H. Rev. Stat. Ann. § 169-C:3(XIX) (Definitions) specifically requires fault or absence of a parent, guardian or custodian,⁵⁵ the definition of “abused child” under N.H. Rev. Stat. Ann. § 169-C:3(II)(3)⁵⁶ does not require that a parent or caregiver be responsible for the abuse. Under this definition of “abused child,” there is no parent or caregiver requirement that creates a barrier to child welfare involvement on behalf of a child sex trafficking victim who was not subjected to familial abuse or neglect.

Similarly, N.H. Rev. Stat. Ann. § 169-C:6 (Protective custody), regarding when a child may be taken into protective custody, does not indicate a barrier based on the identity of the perpetrator of abuse. N.H. Rev. Stat. Ann. § 169-C:6(I) authorizes law enforcement to take a child into custody, “if the child is in such circumstances or surroundings as would present an imminent danger to the child’s health or life unless immediate action is taken N.H. Rev. Stat. Ann. § 169-C:6(II)(d) clarifies that removal of a child in danger is not limited to only situations in which the abuser is a “parent or other person legally responsible for the child” by stating “when the child is removed from an individual other than a parent or a person legally responsible for the child, [the officer shall] make every reasonable effort to inform both parents or other persons legally responsible for the child’s care where the child has been taken.”

⁵⁴ The text of N.H. Rev. Stat. Ann. § 169-C:3 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1683 during the 2018 Session of the New Hampshire Legislature (effective July 14, 2018).

⁵⁵ N.H. Rev. Stat. Ann. § 169-C:3(XIX) (Definitions) provides,

“Neglected child” means a child:

- (a) Who has been abandoned by his parents, guardian, or custodian; or
- (b) Who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, when it is established that his health has suffered or is very likely to suffer serious impairment; and the deprivation is not due primarily to the lack of financial means of the parents, guardian or custodian; or
- (c) Whose parents, guardian or custodian are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization or other physical or mental incapacity;

Provided, that no child who is, in good faith, under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a neglected child under this chapter.

⁵⁶ See *supra* note 54.

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

Commercially sexually exploited children may be eligible to receive crime victim compensation. N.H. Rev. Stat. Ann. § 21-M:8-h(I)(a) (Claimant eligibility; compensation) states,

Victims eligible for compensation are:

- (1) Any person who sustains personal injury as a result of a felony or misdemeanor;
.....
- (3) Any person who is a victim of sexual abuse and is under the age of 18 at the time the claim is filed;
- (4) Any person who is a victim of human trafficking and has been tattooed with an identifying mark of human trafficking by a person who has forced him or her into trafficking.

Although victims of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire's CSEC law may qualify as eligible victims, certain other requirements for receiving compensation could present difficulties. N.H. Rev. Stat. Ann. § 21-M:8-h(II) requires a claim for compensation to be filed "within 2 years of the crime, unless good cause is shown," but does not explain what constitutes good cause. Additionally, under N.H. Rev. Stat. Ann. § 21-M:8-h(IV), if the Victims' Assistance Commission determines that a victim was contributorily at fault, the commission may deny or reduce a victim's award. N.H. Rev. Stat. Ann. § 21-M:8-h(V) also imposes a "\$30,000 maximum recovery per claimant per incident."

5.7.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 21-M:8-h (Claimant eligibility; compensation) to create exceptions to the listed criteria for commercially sexually exploited children.

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

Limited victim-friendly criminal justice procedures are afforded specifically to victims of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons). N.H. Rev. Stat. Ann. § 633:7(IV) provides a "rape shield" protection specifically for victims of N.H. Rev. Stat. Ann. § 633:7, stating that

[e]vidence of a trafficking victim's personal sexual history, history of commercial sexual activity, or reputation evidence regarding the victim's past sexual behavior shall not be admissible at trial unless the evidence is:

-
- (b) Offered by the prosecution to prove a pattern of trafficking by the defendant.

Other protections afforded to victims of sexual assault may be provided to victims of N.H. Rev. Stat. Ann. § 633:7 and New Hampshire's CSEC law. For example, N.H. Rev. Stat. Ann. § 632-A:8 (In camera testimony) states in part, "In [sexual assault and other related] cases where the victim is under 16 years of age, the victim's testimony shall be heard in camera unless good cause is shown by the defendant."

N.H. Rev. Stat. Ann. § 517:13-a(I) (Videotape trial testimony authorized) allows a victim of any crime, who is under 16 years of age at the time of the crime, to give videotaped testimony, provided the court finds by a preponderance of the evidence that "[t]he child will suffer emotional or mental strain if required to testify in open court," or "[f]urther delay will impair the child's ability to recall and relate the facts of the alleged offense." The videotaped testimony "shall be conducted before the judge at such a place as ordered by the court in the presence of the prosecutors, the defendant and his attorneys, and such other persons as the court allows." N.H. Rev. Stat. Ann. § 517:13-a(II). N.H. Rev. Stat. Ann. § 517:13-a(IV) allows any witness 16 years of age or younger to have his or her parent or other appropriate adult present during the taping of the testimony, and N.H. Rev. Stat. Ann. § 517:13-a(III) provides that a witness whose testimony is videotaped under this section "shall [not] be required to appear or testify at trial" unless the court orders it for good cause.

Lastly, N.H. Rev. Stat. Ann. § 21-M:8-k(II) (Rights of crime victims) affords crime victims the following rights:

- (a) The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
- (b) The right to be informed about the criminal justice process and how it progresses.
- (c) The right to be free from intimidation and to be reasonably protected from the accused throughout the criminal justice process.
-
- (g) The right to have inconveniences associated with participation in the criminal justice process minimized.
-
- (i) The right to be informed about available resources, financial assistance, and social services.
- (j) The right to restitution
- (k) The right to be provided a secure, but not necessarily separate, waiting area during court proceedings.
-
- (m) The right of confidentiality of the victim’s address, place of employment, and other personal information.
-

Trafficking victims are also entitled to protection of their identity during criminal proceedings. N.H. Rev. Stat. Ann. § 633:7(V) (Trafficking in persons) states that

In any investigation or prosecution for an offense under this section, the identity of the victim and the victim’s family, and images of the victim and the victim’s family, shall be confidential except to the extent disclosure is necessary for the purpose of investigation, prosecution, or provision of services and benefits to the victim and the victim’s family, or if disclosure is required by a court order.

5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*

New Hampshire law does not provide a mechanism for minors to vacate delinquency adjudications related to trafficking victimization, and juvenile records will only be closed and made inactive after a waiting period.

N.H. Rev. Stat. Ann. § 169-B:35 (Juvenile case and court records) mandates that a minor reach 21 years of age before records are closed and made inactive. Specifically, N.H. Rev. Stat. Ann. § 169-B:35(I), (II) (Juvenile case and court records) provides that “[a]ll case records, as defined in RSA 170-G:8-a [Record content; confidentiality; rulemaking], relative to delinquency, shall be confidential and access shall be provided pursuant to RSA 170-G:8-a.” The case records must be kept separate from other court records, and must “be withheld from public inspection but shall be open to inspection by officers of the institution where the minor is committed, juvenile probation and parole officers, a parent, a guardian, a custodian, the minor’s attorney, the relevant county, and others entrusted with the corrective treatment of the minor.” N.H. Rev. Stat. Ann. § 169-B:35(II) further provides that once the person turns 21, “all court records and individual institutional records, including police records, shall be closed and placed in an inactive file.”

Because N.H. Rev. Stat. Ann. § 169-B:35 mandates a waiting period before records are closed and made inactive, a child sex trafficking victim may face collateral consequences associated with having an accessible delinquency record during that time.

Regarding vacatur, N.H. Rev. Stat. Ann. § 633:7(VI) (Trafficking in persons) states,

.....

(b) An individual convicted of an offense under RSA 645:1 [Indecent exposure and lewdness] or RSA 645:2 [Prostitution] for conduct committed as a direct result of being a victim of human trafficking may file a motion with the circuit court, district division, to vacate the conviction

(c) The defendant shall not be required to provide any official documentation indicating that he or she was a victim of trafficking, but such documentation, if provided, shall create the presumption that the defendant's participation in the offense was a direct result of being a victim of trafficking.

Because N.H. Rev. Stat. Ann. § 633:7(VI)(b) applies specifically to “convictions,” however, this protection does not clearly extend to delinquency adjudications.

Further, N.H. Rev. Stat. Ann. § 633:7(VI) applies only to violations of New Hampshire's prostitution-related offenses, foreclosing the law's applicability to other offenses related to trafficking victimization. Finally, record expungement is not automatic upon granting vacatur, making separate proceedings necessary to obtain both forms of relief.

5.9.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 633:7(VI) (Trafficking in persons) to allow child sex trafficking victims to vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.

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.*

Victims of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) are entitled to civil remedies. N.H. Rev. Stat. Ann. § 633:11 (Civil remedy) states,

I. A victim may bring a civil action against a person that commits an offense under this subdivision for damages, injunctive relief, or other appropriate relief.

II. In an action under this section, the court shall award a prevailing plaintiff reasonable attorney's fees and costs.

III. An action under this section shall be commenced not later than 10 years after the date on which the victim was released from the human trafficking situation or 10 years after the date on which the victim attains 18 years of age, whichever is later.

IV. Any damages awarded to the victim under this section shall be offset by any restitution paid to the victim pursuant RSA 633:10.

V. This section shall not preclude the victim from pursuing any other remedy available to the victim under federal or state law.

Victims of N.H. Rev. Stat. Ann. § 633:7 are entitled to receive restitution from their offenders. N.H. Rev. Stat. Ann. § 633:10(I), (II) (Restitution and compensation) states,

I. A person convicted under this section shall be ordered by the court to pay restitution to the victim. Such restitution may include but not be limited to:

(a) Any economic loss⁵⁷ compensable under RSA 651:62 [Definitions], in accordance with the provisions of RSA 651:61-a through RSA 651:67; and

(b) The value of the victim's labor as guaranteed under the minimum wage law and overtime provisions of the Fair Labor Standards Act or the state minimum wage law, whichever is greater.

II. To the extent not included in economic loss that is compensable under paragraph I, the court may also order a person convicted under this section to pay compensation as follows:

(a) Costs of medical and psychological treatment, including physical and occupational therapy and rehabilitation, at the court's discretion;

⁵⁷ See *supra* note 33 for the definition of “economic loss.”

- (b) Costs of necessary transportation, temporary housing, and child care, at the court’s discretion;
- (c) Return of property, cost of damage to property, or full value of property if destroyed or damaged beyond repair;
- (d) Expenses incurred by a victim and any household members or other family members in relocating away from the defendant or his or her associates, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items; and
- (e) Any and all other losses suffered by the victim as a result of an offense under this section.

Victims of other offenses may also be able to receive restitution under New Hampshire’s general restitution statute, N.H. Rev. Stat. Ann. § 651:63(I) (Restitution authorized), which allows the court to sentence any offender, regardless of his ability to pay, “to make restitution in an amount determined by the court.” Although restitution is not mandatory, “[i]n any case in which restitution is not ordered, the court shall state its reasons therefor on the record or in its sentencing order.” N.H. Rev. Stat. Ann. § 651:63(I).

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 to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.

Pursuant to N.H. Rev. Stat. Ann. § 625:8(III)(i) (Limitations), prosecutions of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) must occur “within 20 years, except where the victim was under 18 years of age when the alleged offense occurred, in which case within 20 years of the victim’s eighteenth birthday.” Under N.H. Rev. Stat. Ann. § 625:8(I)(a), (b), prosecutions for Class A or Class B felonies, including New Hampshire’s felony CSEC offense, must commence within 6 years of the crime. Although these statutes of limitations toll “[d]uring any time when the accused is continuously absent from the state or has no reasonably ascertained place of abode or work within this state . . . [or] when a prosecution is pending against the accused in this state based on the same conduct,” no tolling is provided if the victim of the offense is a minor under the age of 18. N.H. Rev. Stat. Ann. § 625:8(VI)(a), (b).

Generally, under N.H. Rev. Stat. Ann. § 508:4 (Personal actions), actions for personal injuries must be commenced within 3 years. N.H. Rev. Stat. Ann. § 508:4(I) states, in part,

Except as otherwise provided by law, all personal actions . . . may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

Pursuant to N.H. Rev. Stat. Ann. § 508:8 (Disabilities), “An infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed.” Additionally, pursuant to N.H. Rev. Stat. Ann. § 508:4-g (Actions based on sexual assault and related offenses),

A person, alleging to have been subjected to any offense under RSA 632-A [Sexual assault and related offenses] . . . or who was under 18 years of age when the alleged offense occurred, may commence a personal action based on the incident within the later of:

- I. Twelve years of the person’s eighteenth birthday; or
- II. Three years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

5.11.1 Recommendation: Eliminate the statute of limitations for prosecutions of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire’s CSEC offense and extend the statute of

limitations for child victims to file civil claims arising from injury caused by commercial sexual exploitation.

Legal Components:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking and commercial sexual exploitation of children (CSEC).*
- 6.4 *Using a law enforcement decoy to investigate buying or selling commercial sex 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 *State law requires reporting of missing children and located missing children.*

Legal Analysis:

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

New Hampshire does not require or authorize law enforcement to receive training on human trafficking or domestic minor sex trafficking.

- 6.1.1 **Recommendation:** Amend New Hampshire law to specifically require or authorize training and education for law enforcement in the area of domestic minor sex trafficking and the commercial sexual exploitation of children to ensure law enforcement can adequately identify these crimes.

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

Single party consent to audiotaping generally is not permitted in New Hampshire. N.H. Rev. Stat. Ann. § 570-A:2 (Interception and disclosure of telecommunication or oral communications prohibited) requires the consent of all parties to the communication. N.H. Rev. Stat. Ann. § 570-A:2(I-a) states,

A person is guilty of a misdemeanor if, except as otherwise specifically provided in this chapter or without consent of all parties to the communication, the person knowingly intercepts a telecommunication or oral communication when the person is a party to the communication or with the prior consent of one of the parties to the communication, but without the approval required by RSA 570-A:2, II(d).

Pursuant to N.H. Rev. Stat. Ann. § 570-A:2(I-a)(II)(d),

An investigative or law enforcement officer in the ordinary course of the officer’s duties pertaining to the conducting of investigations of organized crime,⁵⁸ offenses enumerated in this chapter [Wiretapping and Eavesdropping], solid waste violations under RSA 149-M:9, I and II, or harassing or obscene telephone calls to intercept a telecommunication or oral communication, when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the attorney general, the deputy attorney general, or an assistant attorney general designated by the attorney general determines

⁵⁸ N.H. Rev. Stat. Ann. § 570-A:1(XI) defines “organized crime” as “the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to . . . prostitution . . . and other unlawful activities of members of such organizations.”

that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. Oral authorization for the interception may be given and a written memorandum of said determination and its basis shall be made within 72 hours thereafter. The memorandum shall be kept on file in the office of the attorney general.

Since the authorization for law enforcement to intercept communications with single party consent provided under N.H. Rev. Stat. Ann. § 570-A:2(I-a)(II)(d) only applies to “investigations of organized crime, offenses enumerated in this chapter [Wiretapping and Eavesdropping], solid waste violations under RSA 149-M:9, I and II, or harassing or obscene telephone calls,” this exception would not be available in investigations of sex trafficking and CSEC offenses.

- 6.2.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 570-A:2(I-a)(II)(d) (Interception and disclosure of telecommunication or oral communications prohibited) to extend the authorization for law enforcement to intercept communications with single party consent to investigations under N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire’s CSEC law.

6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking and commercial sexual exploitation of children (CSEC).*

N.H. Rev. Stat. Ann. § 570-A:7 (Authorization for interception of telecommunications or oral communications) states,

The attorney general, deputy attorney general, or a county attorney, upon the written approval of the attorney general or deputy attorney general, may apply to a judge of competent jurisdiction for an order authorizing or approving the interception of telecommunications or oral communications, and such judge may grant in conformity with RSA 570-A:9 [Procedure for interception of telecommunication or oral communications], an order authorizing or approving the interception of telecommunications or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offenses as to which the application is made, when such interception may provide, or has provided, evidence of the commission of organized crime⁵⁹ . . . or evidence of the commission of the offenses of . . . kidnapping, . . . child sexual abuse images under RSA 649-A, computer pornography and child exploitation under RSA 649-B, . . . aggravated felonious sexual assault as defined in RSA 632-A:2, felonious sexual assault as defined in RSA 632-A:3, . . . or any conspiracy to commit any of the foregoing offenses.

Pursuant to N.H. Rev. Stat. Ann. § 570-A:9(III) (Procedure for interception of telecommunication or oral communications) a judge may enter an order approving an application

if the judge determines on the basis of the facts submitted by the applicant that:

- (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in RSA 570-A:7;
- (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
- (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) There is probable cause for belief that the facilities from which, or the place where, the telecommunications or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

⁵⁹ See *supra* note 58.

6.3.1 Recommendation: Amend N.H. Rev. Stat. Ann. § 570-A:7 (Authorization for interception of telecommunications or oral communications) to allow wiretapping in investigations of offenses under N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and § 645:2(I) (Prostitution and related offenses) when a minor is involved.

6.4 *Using a law enforcement decoy to investigate buying or selling commercial sex is not a defense to soliciting, purchasing, or selling sex with a minor.*

New Hampshire's human trafficking statute, N.H. Rev. Stat. Ann. § 633:7(III-a) (Trafficking in persons) does not prohibit a defense based on the use of a law enforcement decoy. Pursuant to N.H. Rev. Stat. Ann. § 633:7(III-a), it is a crime when a person "agrees to pay, or offers to pay to engage in sexual contact . . . or sexual penetration . . . with a person under the age of 18" This provision further provides that "[t]he payment or offer or agreement to pay may be made to the person under the age of 18 or a third party" While, the offer may be made to a third party, a defendant may still be able to raise a defense based on the fact that the agreement was not to engage in sex acts with an actual minor. However, New Hampshire criminalizes attempts by buyers to purchase sexual contact with minors by using the phrases "agrees to pay" and "offers to pay" within the statute.

Additionally, certain non-commercial sex offenses permit use of a decoy. N.H. Rev. Stat. Ann. § 649-B:4 (Certain uses of computer services prohibited) implies that law enforcement may be able to use a decoy to detect sex crimes with a minor facilitated through the Internet because it only requires that the offender believed the person was a child.⁶⁰ Additionally, N.H. Rev. Stat. Ann. § 649-B:4(III) states, "It shall not be a defense to a prosecution under this section that the victim was not actually a child so long as the person reasonably believed that the victim was a child."

6.4.1 Recommendation: Enact a law prohibiting a defense based on the use of a law enforcement decoy in the investigation of N.H. Rev. Stat. Ann. § 633:7 (Trafficking in persons) and New Hampshire's CSEC law.

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

New Hampshire's trafficking and CSEC laws do not specifically allow law enforcement to use the Internet or electronic communications to investigate offenders, but the non-commercial sex offense under N.H. Rev. Stat. Ann. § 649-B:4 (Certain uses of computer services prohibited) may, however, provide law enforcement with the ability to use the Internet to investigate buyers and traffickers. N.H. Rev. Stat. Ann. § 649-B:4(I) states that "[n]o person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to commit" sexual assault or other specified non-commercial sexual offenses.

6.6 *State law requires reporting of missing children and located missing children.*

The reporting of missing and located children is required under New Hampshire law. N.H. Rev. Stat. Ann. § 169-E:2 (Report) directs law enforcement to accept a missing child report from the child's parents, guardian, legal custodian, or another person responsible for the child and to "take reasonable and appropriate action to locate the missing child." Additionally, N.H. Rev. Stat. Ann. § 169-E:2-a (Hotline for missing children; rulemaking) establishes a "toll-free statewide hotline for the purpose of reporting information on missing children." N.H. Rev. Stat. Ann. § 169-E:1 (Definition) defines a "missing child" as "any person under the age of 16 years missing from his normal and ordinary place of residence and whose whereabouts cannot be determined by a person responsible for the child's care."

⁶⁰ See *supra* Component 2.5 for text of N.H. Rev. Stat. Ann. § 649-B:4.

Upon receipt of a missing child report, N.H. Rev. Stat. Ann. § 169-E:3(I) (Procedure) directs law enforcement to gather “information about the missing child and integrate it into the national crime information center computer within 12 hours following the making of the report, unless extraordinary circumstances cause a delay.”

Pursuant to N.H. Rev. Stat. Ann. § 169-E:6 (Recovery of a child),

A missing child’s parents, custodial parent, guardian, or legal custodian, or any other person responsible for a missing child, shall immediately notify the law enforcement agency with which they filed the missing child report whenever the child has returned to their home or to their care, custody, and control, has been released if he was the victim of an offense under RSA 633 [Interference with freedom], or has otherwise been located. Upon such notification or upon otherwise learning that a missing child has returned to the home of, or to the care, custody, and control of his parents, custodial parent, guardian, or legal custodian, or other person responsible for him, or has been released if he was the victim of an offense under RSA 633, or otherwise has been located, the law enforcement agency involved shall promptly integrate the fact that the minor is no longer a missing child into the national crime information center computer.

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