

2018 ANALYSIS AND RECOMMENDATIONS

NEW YORK

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.*

New York's sex trafficking statute requires force, fraud, or coercion for all cases of sex trafficking, even when the victim is under 18. Pursuant to N.Y. Penal Law § 230.34 (Sex trafficking),

A person is guilty of sex trafficking if he or she intentionally advances² or profits³ from prostitution by:

1. unlawfully providing to a person who is patronized, with intent to impair said person's judgment: (a) a narcotic drug or a narcotic preparation; (b) concentrated cannabis as defined in paragraph (a) of

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

² N.Y. Penal Law § 230.15(1) (Advance prostitution) is defined as, "A person 'advances prostitution' when, acting other than as a person in prostitution or as a patron thereof, he or she knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution."

³ N.Y. Penal Law § 230.15(2) (Profit from prostitution) is defined as, "A person 'profits from prostitution' when, acting other than as a person in prostitution receiving compensation for personally rendered prostitution services, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity."

- subdivision four of section thirty-three hundred two of the public health law; (c) methadone; or (d) gamma-hydroxybutyrate (GHB) or flunitrazepam, also known as Rohypnol;
2. making material false statements, misstatements, or omissions to induce or maintain the person being patronized to engage in or continue to engage in prostitution activity;
 3. withholding, destroying, or confiscating any actual or purported passport, immigration document, or any other actual or purported government identification document of another person with intent to impair said person's freedom of movement; . . .
 4. requiring that prostitution be performed to retire, repay, or service a real or purported debt;
 5. using force or engaging in any scheme, plan or pattern to compel or induce the person being patronized to engage in or continue to engage in prostitution activity by means of instilling a fear in the person being patronized that, if the demand is not complied with, the actor or another will do one or more of the following:
 - (a) cause physical injury, serious physical injury, or death to a person; or
 - (b) cause damage to property, other than the property of the actor; or
 - (c) engage in other conduct constituting a felony or unlawful imprisonment in the second degree in violation of section 135.05 [Sex offenses; lack of consent] of this chapter; or
 - (d) accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against some person; . . . or
 - (e) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
 - (f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
 - (g) use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
 - (h) perform any other act which would not in itself materially benefit the actor but which is calculated to harm the person who is patronized materially with respect to his or her health, safety, or immigration status.
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A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain⁴ from the commission of the crime.” N.Y. Penal Law §§ 230.34, 70.00(2)(b), (3)(b), 80.00(1).

- 1.1.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking) to eliminate the requirement to prove a form of force, fraud, or coercion in sex trafficking of minor cases or enact a stand-alone sex trafficking of a child statute that eliminates the requirement to prove force, fraud, or coercion.⁵

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.*

CSEC offenses are separate and distinct from general sexual offenses under New York state law. The following statutes criminalize acts of commercial sexual exploitation of children:

1. Under N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree), “A person is guilty of patronizing a person for prostitution in the second degree when, being eighteen

⁴ N.Y. Penal Law § 80.00(2) defines “gain” as “the amount of money or the value of property derived from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed.”

⁵ Subsequent recommendations in this report are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

years old or more, he or she patronizes a person for prostitution⁶ and the person patronized⁷ is less than fifteen years old.” A conviction is punishable as a Class E felony by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.05, 70.00(2)(e), (3)(b), (4), 80.00(1).

2. N.Y. Penal Law § 230.06 (Patronizing a person for prostitution in the first degree) states, “A person is guilty of patronizing a person for prostitution in the first degree when: (1) He or she patronizes a person for prostitution and the person patronized is less than eleven years old; or (2) Being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than thirteen years old.” A conviction is punishable as a Class D felony sex offense⁸ by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.”⁹ N.Y. Penal Law §§ 230.06, 70.80(1)(a), (4)(a)(iii),¹⁰ 80.00(1). Pursuant to N.Y. Penal Law § 60.13 (Authorized dispositions; felony sex offenses), courts are mandated to “sentence the defendant in accordance with the provisions of section 70.80 [Sentences of imprisonment for conviction of a felony sex offense] of this title.”
3. N.Y. Penal Law § 230.08(1) (Patronizing a person for prostitution in a school zone) states, “A person is guilty of patronizing a person for prostitution in a school zone¹¹ when, being twenty-one years old

⁶ Under N.Y. Penal Law § 230.02(1) (Patronizing a person for prostitution; definitions),

A person patronizes a person for prostitution when:

- (a) Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or
- (b) He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him or her; or
- (c) He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

⁷ “Person who is patronized” is defined in N.Y. Penal Law § 230.02(2) as “the person with whom the defendant engaged in sexual conduct or was to have engaged in sexual conduct pursuant to the understanding, or the person who was solicited or requested by the defendant to engage in sexual conduct.”

⁸ “Felony sex offense” is defined in N.Y. Penal Law § 70.80(1)(a) as “a conviction of any felony defined in article one hundred thirty of this chapter, including a sexually motivated felony, or patronizing a person for prostitution in the first degree as defined in section 230.06 of this chapter, patronizing a person for prostitution in the second degree as defined in section 230.05 of this chapter, aggravated patronizing a minor for prostitution in the third degree as defined in section 230.11 of this chapter, aggravated patronizing a minor for prostitution in the second degree as defined in section 230.12 of this chapter, aggravated patronizing a minor for prostitution in the first degree as defined in section 230.13 of this chapter, incest in the second degree as defined in section 255.26 of this chapter, or incest in the first degree as defined in section 255.27 of this chapter, or a felony attempt or conspiracy to commit any of the above.”

⁹ Pursuant to N.Y. Penal Law § 70.80(4)(c), “If the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose a determinate sentence upon a person convicted of a class D or class E felony sex offense, the court may impose a definite sentence of imprisonment and fix a term of one year or less.”

¹⁰ A “predicate felony sex offender” faces certain penalty enhancements under N.Y. Penal Law § 70.80(5). Subsection (5)(a) clarifies that the penalty enhancements “apply to a predicate felony sex offender who stands convicted of a non-violent felony sex offense and who was previously convicted of one or more felonies.” *See supra* note 10 for the definition of “felony sex offense.” N.Y. Penal Law § 70.80(5). Subsection (8) states, “Whenever a juvenile offender stands convicted of a felony sex offense, he or she must be sentenced pursuant to the provisions of sections 60.10 [Authorized disposition; juvenile offender] and 70.05 [Sentence of imprisonment for juvenile offender] of this chapter.” N.Y. Penal Law § 70.80(8).

¹¹ Pursuant to N.Y. Penal Law § 230.03, “school zone” means, “(a) in or on or within any building, structure athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any public sidewalk, street, parking lot, park, playground or private land, located immediately adjacent to the boundary line of such school.”

or more, he or she patronizes a person for prostitution and the person patronized is less than eighteen years old at a place that he or she knows, or reasonably should know, is in a school zone.” A conviction is punishable as a Class E felony by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.08, 70.00(2)(e), (3)(b), (4), 80.00(1).

4. N.Y. Penal Law § 230.11 (Aggravated patronizing a minor for prostitution in the third degree) states, “A person is guilty of aggravated patronizing a minor for prostitution in the third degree when, being twenty-one years old or more, he or she patronizes a person for prostitution and the person patronized is less than seventeen years old and the person guilty of patronizing engages in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual conduct as those terms are defined in section 130.00 of this part, with the person patronized.” A conviction is punishable as a Class E felony by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.11, 70.00(2)(e), (3)(b), (4), 80.00(1). Pursuant to N.Y. Penal Law § 60.13 (Authorized dispositions; felony sex offenses), courts are mandated to “sentence the defendant in accordance with the provisions of section 70.80 [Sentences of imprisonment for conviction of a felony sex offense] of this title.”
5. N.Y. Penal Law § 230.12 (Aggravated patronizing a minor for prostitution in the second degree) states, “A person is guilty of aggravated patronizing a minor for prostitution in the second degree when, being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than fifteen years old and the person guilty of patronizing engages in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual conduct as those terms are defined in section 130.00 of this part, with the person patronized.” A conviction is punishable as a Class D felony sex offense¹² by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.”¹³ N.Y. Penal Law §§ 230.12, 70.80(1)(a), (4)(a)(iii),¹⁴ 80.00(1). Pursuant to N.Y. Penal Law § 60.13 (Authorized dispositions; felony sex offenses), courts are mandated to “sentence the defendant in accordance with the provisions of section 70.80 [Sentences of imprisonment for conviction of a felony sex offense] of this title.”

¹² “Felony sex offense” is defined in N.Y. Penal Law § 70.80(1)(a) as “a conviction of any felony defined in article one hundred thirty of this chapter, including a sexually motivated felony, or patronizing a person for prostitution in the first degree as defined in section 230.06 of this chapter, patronizing a person for prostitution in the second degree as defined in section 230.05 of this chapter, aggravated patronizing a minor for prostitution in the third degree as defined in section 230.11 of this chapter, aggravated patronizing a minor for prostitution in the second degree as defined in section 230.12 of this chapter, aggravated patronizing a minor for prostitution in the first degree as defined in section 230.13 of this chapter, incest in the second degree as defined in section 255.26 of this chapter, or incest in the first degree as defined in section 255.27 of this chapter, or a felony attempt or conspiracy to commit any of the above.”

¹³ Pursuant to N.Y. Penal Law § 70.80(4)(c), “If the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose a determinate sentence upon a person convicted of a class D or class E felony sex offense, the court may impose a definite sentence of imprisonment and fix a term of one year or less.”

¹⁴ A “predicate felony sex offender” faces certain penalty enhancements under N.Y. Penal Law § 70.80(5). Subsection (5)(a) clarifies that the penalty enhancements “apply to a predicate felony sex offender who stands convicted of a non-violent felony sex offense and who was previously convicted of one or more felonies.” See *supra* note 10 for the definition of “felony sex offense.” N.Y. Penal Law § 70.80(5). Subsection (8) states, “Whenever a juvenile offender stands convicted of a felony sex offense, he or she must be sentenced pursuant to the provisions of sections 60.10 [Authorized disposition; juvenile offender] and 70.05 [Sentence of imprisonment for juvenile offender] of this chapter.” N.Y. Penal Law § 70.80(8).

6. N.Y. Penal Law § 230.13 (Aggravated patronizing a minor for prostitution in the first degree) states, “A person is guilty of aggravated patronizing a minor for prostitution in the first degree when he or she patronizes a person for prostitution and the person patronized is less than eleven years old, or being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than thirteen years old, and the person guilty of patronizing engages in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual conduct as those terms are defined in section 130.00 of this part, with the person patronized. A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.13, 70.00(2)(b), (3)(b), 80.00(1). Pursuant to N.Y. Penal Law § 60.13 (Authorized dispositions; felony sex offenses), courts are mandated to “sentence the defendant in accordance with the provisions of section 70.80 [Sentences of imprisonment for conviction of a felony sex offense] of this title.”
7. N.Y. Penal Law § 230.15(1) (Advance prostitution) states, “[a] person ‘advances prostitution’ when, acting other than as a person in prostitution or as a patron thereof, he or she knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.”
8. N.Y. Penal Law § 230.15(2) (Profit from prostitution) states, “[a] person profits from prostitution’ when, acting other than as a person in prostitution receiving compensation for personally rendered prostitution services, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.
9. N.Y. Penal Law § 230.19 (Promoting prostitution in a school zone) states, “[a] person is guilty of promoting prostitution in a school zone when, being nineteen years old or more, he or she knowingly advances or profits from prostitution that he or she knows or reasonably should know is or will be committed in violation of section 230.03 of this article in a school zone during the hours that school is in session.”
10. N.Y. Penal Law § 230.25(2) (Promoting prostitution in the third degree) states, “A person is guilty of promoting prostitution in the third degree when he or she knowingly: (1) Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more persons in prostitution, or a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a person for prostitution, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction; or (2) Advances or profits from prostitution of a person less than nineteen years old.” A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1).
11. Pursuant to N.Y. Penal Law § 230.30(2) (Promoting prostitution in the second degree), “A person is guilty of promoting prostitution in the second degree when he or she knowingly: (1) Advances prostitution by compelling a person by force or intimidation to engage in prostitution, or profits from such coercive conduct by another; or (2) Advances or profits from prostitution of a person less than eighteen years old.” A conviction is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.30, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is

sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii), 80.00(1).

12. Pursuant to N.Y. Penal Law § 230.32 (Promoting prostitution in the first degree), “A person is guilty of promoting prostitution in the first degree when he or she: (1) knowingly advances or profits from prostitution of a person less than thirteen years old; or (2) being twenty-one years old or more, he or she knowingly advances or profits from prostitution of a person less than fifteen years old.” A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.32, 70.00(2)(b), (3)(b), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(i), 80.00(1).
13. Pursuant to N.Y. Penal Law § 230.33 (Compelling prostitution), “A person is guilty of compelling prostitution when, being eighteen years old or more, he or she knowingly advances prostitution by compelling a person less than eighteen years old, by force or intimidation, to engage in prostitution.” A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.33, 70.00(2)(b), (3)(b), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(i), 80.00(1).
14. Pursuant to N.Y. Penal Law § 263.05 (Use of a child in a sexual performance),

A person is guilty of the use of a child in a sexual performance¹⁵ if knowing the character and content thereof he employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

A conviction is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.05, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii), 80.00(1).

¹⁵ “Sexual performance” is defined in N.Y. Penal Law § 263.00(1) (Definitions) as “any performance or part thereof which, for purposes of section 263.16 [Possessing a sexual performance by a child] of this article, includes sexual conduct by a child less than sixteen years of age or, for purposes of section 263.05 or 263.15 [Promoting a sexual performance by a child] of this article, includes sexual conduct by a child less than seventeen years of age.” “Sexual conduct” is defined in N.Y. Penal Law § 263.00(3) as “actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” Finally, “performance” is defined in N.Y. Penal Law § 263.00(4) as “any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.”

15. Pursuant to N.Y. Penal Law § 120.70 (Luring a child), “A person is guilty of luring a child when he or she lures a child¹⁶ into a motor vehicle, aircraft, watercraft, isolated area, building, or part thereof, for the purpose of committing against such child” any violation of, among other things, N.Y. Penal Law § 230.30 (Promoting prostitution in the second degree), § 230.33 (Compelling prostitution), § 230.34 (Sex trafficking), § 263.05 (Use of a child in a sexual performance), § 263.10 (Promoting an obscene sexual performance by a child), § 263.15 (Promoting a sexual performance by a child), or any of the sexual offense laws that are felonies listed in Article 130. A conviction, when the underlying offense would have been a Class A or B felony, is punishable as a Class C or D felony by either imprisonment of 1–15 years or imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 120.70(2), 70.00(2)(c), (d), (3)(b), (4), 80.00(1). Otherwise, a conviction is punishable as a Class E felony by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 120.70(2), 70.00(2)(e), (3)(b), (4), 80.00(1).

The following sexual offenses could also apply to cases of commercial sexual exploitation:

1. Pursuant to N.Y. Penal Law § 130.25(2) (Rape in the third degree), “A person is guilty of rape in the third degree when: . . . 2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old.” A conviction is punishable as a Class E felony sex offense¹⁷ by imprisonment of 1.5–4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.25, 70.80(1)(a), (4)(iv), 80.00(1).
2. Under N.Y. Penal Law § 130.30(1) (Rape in the second degree), “A person is guilty of rape in the second degree when: . . . being eighteen years old or more, he or she engages in sexual intercourse with another person less than fifteen years old,” but it is an affirmative defense if the offender was less than four years older than the victim. A conviction is punishable as a Class D felony sex offense¹⁸ by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.30, 70.80(1)(a), (4)(a)(iii), 80.00(1).
3. Pursuant to N.Y. Penal Law § 130.35(3), (4) (Rape in the first degree), “A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person: . . . 3. Who is less than eleven years old; or 4. Who is less than thirteen years old and the actor is eighteen years old or more.” A conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.35, 70.80(1)(a), (4)(a)(i), 80.00(1).
4. Pursuant to N.Y. Penal Law § 130.40(2) (Criminal sexual act in the third degree), “A person is guilty of criminal sexual act in the third degree when: . . . 2. Being twenty-one years old or more, he or she engages in oral sexual conduct or anal sexual conduct with a person less than seventeen years old.” A conviction is punishable as a Class E felony sex offense¹⁹ by imprisonment of 1.5–4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.40, 70.80(1)(a), (4)(a)(iv), 80.00(1).
5. Pursuant to N.Y. Penal Law § 130.45(1) (Criminal sexual act in the second degree), “A person is guilty of criminal sexual act in the second degree when: 1. being eighteen years old or more, he or she engages in oral sexual conduct or anal sexual conduct with another person less than fifteen years old,”

¹⁶ “Child” is defined in N.Y. Penal Law § 120.70(1) as “a person less than seventeen years of age.”

¹⁷ See *supra* note 8.

¹⁸ See *supra* note 8.

¹⁹ See *supra* note 8.

but it is an affirmative defense if the offender was less than four years older than the victim. A conviction is punishable as a Class D felony sex offense²⁰ by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.45, 70.80(1)(a), (4)(a)(iii), 80.00(1).

6. Pursuant to N.Y. Penal Law § 130.50 (Criminal sexual act in the first degree),

A person is guilty of criminal sexual act in the first degree when he or she engages in oral sexual conduct or anal sexual conduct with another person:

....

3. Who is less than eleven years old; or
4. Who is less than thirteen years old and the actor is eighteen years old or more.

A conviction is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.50, 70.80(1)(a), (4)(a)(i), 80.00(1).

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

New York’s prostitution laws, N.Y. Penal Law § 230.00 (Prostitution) and § 240.37 (Loitering for the purpose of prostitution) do not refer to New York’s human trafficking law when the person engaged in prostitution is a minor. However, N.Y. Fam. Ct. Act § 311.4(3) (Substitution of petition or finding) refers to the federal trafficking law in establishing “a presumption that the respondent meets the criteria as a victim of a severe form of trafficking as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection Act of 2000).”

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.*

N.Y. Penal Law § 460.20 (Enterprise corruption), states in part,

1. A person is guilty of enterprise²¹ corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:
 - (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or
 - (b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or
 - (c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.
2. For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise, he engages in conduct constituting, or is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts included in the pattern, provided that:

²⁰ See *supra* note 8.

²¹ “Enterprise” is defined in N.Y. Penal Law § 460.10(2) as “either an enterprise as defined in subdivision one of section 175.00 of this chapter or criminal enterprise as defined in subdivision three of this section.” “Criminal enterprise” is defined in N.Y. Penal Law § 460.10(3) as “a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents.”

- (a) Two of his acts are felonies other than conspiracy;
- (b) Two of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and
- (c) Each of his acts occurred within three years of a prior act.

“Criminal act” is defined in N.Y. Penal Law § 460.10(1) (Definitions) as “conduct constituting . . . or conspiracy or attempt to commit” violations of, among other things, N.Y. Penal Law § 230.25 (Promoting prostitution in the third degree), § 230.30 (Promoting prostitution in the second degree), § 230.32 (Promoting prostitution in the first degree), § 230.34 (Sex trafficking), § 263.10 (Promoting an obscene sexual performance by a child), or § 263.15 (Promoting a sexual performance by a child).

“Pattern of criminal activity” is defined in N.Y. Penal Law § 460.10(4) as

conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts that:

- (a) were committed within ten years of the commencement of the criminal action;
- (b) are neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a criminal offense or criminal transaction, as those terms are defined in section 40.10 of the criminal procedure law; and
- (c) are either: (i) related to one another through a common scheme or plan or (ii) were committed, solicited, requested, importuned or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise.

A conviction under N.Y. Penal Law § 460.20 is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 460.20, 70.00(2)(b), (3)(b), 80.00(1).

Those convicted of racketeering may be subject to additional financial penalties including enhanced fines and asset forfeiture. Pursuant to N.Y. Penal Law §460.30 (Enterprise corruption; forfeiture), “[a]ny person convicted of a violation of section 460.20 of this article through which he derived pecuniary value, or by which he caused personal injury or property damage or other loss, may be sentenced to pay a fine not in excess of three times the gross value he gained or three times the gross loss he caused, whichever is greater. Moneys so collected shall be paid as restitution to victims of the crime for medical expenses actually incurred, loss of earnings or property loss or damage caused thereby. Any excess after restitution shall be paid to the state treasury.”

Pursuant to N.Y. Penal Law § 460.30(1) (Enterprise corruption; forfeiture),

Any person convicted of enterprise corruption may be required pursuant to this section to criminally forfeit to the state:

- (a) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise whose affairs he has controlled or in which he has participated in violation of subdivision one of section 460.20 [Enterprise corruption] of this article and for which he was convicted and the use of which interest, security, claim or right by him contributed directly and materially to the crime for which he was convicted unless such forfeiture is disproportionate to the defendant’s gain from his association or employment with the enterprise, in which event the jury may recommend forfeiture of a portion thereof;
- (b) any interest, including proceeds, he has acquired or maintained in an enterprise in violation of subdivision one of section 460.20 of this article and for which he was convicted unless such forfeiture is disproportionate to the conduct he engaged in and on which the forfeiture is based, in which event the jury may recommend forfeiture of a portion thereof; or
- (c) any interest, including proceeds he has derived from an investment of proceeds in an enterprise in violation of subdivision one of section 460.20 of this article and for which he was convicted

unless such forfeiture is disproportionate to the conduct he engaged in and on which the forfeiture is based, in which event the jury may recommend forfeiture of a portion thereof.

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.*
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Legal Analysis:

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

N.Y. Penal Law § 230.34 (Sex trafficking) does not apply to buyers, as the statute only applies to one who “intentionally advances or profits from prostitution.”

- 2.1.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking) to make the statute clearly applicable to buyers who purchase commercial sex acts with minors.

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

Buyers of commercial sex with minors can be prosecuted under New York’s CSEC offenses. In addition, New York’s general solicitation laws contain provisions specific to buyers of commercial sex acts with minors, providing heightened penalties when a buyer purchases sex with a minor under fifteen years. N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree) states in part, “A person is guilty of patronizing a person for prostitution in the second degree when, being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than fifteen years old.” An offense under N.Y. Penal Law § 230.05 is a class E felony.

Similarly, N.Y. Penal Law § 230.06 (Patronizing a person for prostitution in the first degree) states in part,

A person is guilty of patronizing a person for prostitution in the first degree when:

1. He or she patronizes a person for prostitution and the person patronized is less than eleven years old; or
2. Being eighteen years old or more, he or she patronizes a person for prostitution and the person patronized is less than thirteen years old.

N.Y. Penal Law § 230.11 (Aggravated patronizing a minor for prostitution in the third degree) protects minors under 17 years of age, stating,

[a] person is guilty of aggravated patronizing a minor for prostitution in the third degree when, being twenty-one years old or more, he or she patronizes a person for prostitution and the person patronized is less than seventeen years old and the person guilty of patronizing engages in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual conduct as those terms are defined in section 130.00 of this part with the person patronized.

Persons found to have purchased sex acts with minor less than 15 years of age are further subject to criminalization under N.Y. Penal Law § 230.12 (Aggravated patronizing a minor for prostitution in the second degree). Lastly, offenders who patronize a child less than 13 years of age are subject to N.Y. Penal Law § 230.13 (Aggravated patronizing a minor for prostitution in the first degree).

However, buyers soliciting minors who are 17 years of age for sex acts are not violators of New York CSEC laws. Therefore, such buyers could only be prosecuted under New York’s general solicitation law, N.Y. Penal Law § 230.04 (Patronizing a person for prostitution in the third degree), which states in part, “A person is guilty of patronizing a person for prostitution in the third degree when he or she patronizes a person for prostitution.” For persons found guilty of violating N.Y. Penal Law § 230.04, the offense is a Class A misdemeanor.

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

New York’s solicitation laws differentiate between soliciting an adult for prostitution and soliciting a minor under 15 for prostitution. However, state law does not differentiate between the solicitation of older minors and adults.²²

N.Y. Penal Law § 230.02(1)(c) (Patronizing a person for prostitution; definitions) defines “patroniz[ing] a person for prostitution” to include “solicit[ing] or request[ing] another person to engage in sexual conduct with him or her in return for a fee.” A conviction for patronizing a person for prostitution is generally punishable as a Class A misdemeanor. N.Y. Penal Law § 230.04 (Patronizing a person for prostitution in the third degree). In contrast, if the offender is 18 years of age or older and the victim is under 15, patronizing a person for prostitution is a Class E felony. N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree). If the victim is under 11 or the offender is 18 years of age or older and the victim is under 13, patronizing a person for prostitution is a Class D felony. N.Y. Penal Law § 230.06 (Patronizing a person for prostitution in the first degree).

- 2.3.1 Recommendation: Amend N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree) to include all minors under 18, making the crime of soliciting sex with any minor victim distinct from the crime of soliciting sex with an adult.

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

A conviction under N.Y. Penal Law § 230.06 (Patronizing a person for prostitution in the first degree), which applies when the victim is under 11, or when the offender is older than 18 years old and the victim is less than 13 years old, is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.06, 70.80(1)(a), (4)(a)(iii), 80.00(1). A conviction under N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree), which applies when the offender is over 18 and the victim is under 15, is punishable as a Class E felony punishable by imprisonment up to 4 years and a

²² New York’s aggravated patronizing a minor for prostitution offenses do differentiate between patronizing a minor under 17 for prostitution and patronizing an adult for prostitution, but these offenses require the victim to engage in sexual conduct with the offender rather than criminalizing solicitation in and of itself. N.Y. Penal Law §§ 230.11, 230.12, 230.13.

possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.05, 70.00(2)(e), (3)(b), (4), 80.00(1).

A conviction under N.Y. Penal Law § 230.04 (Patronizing a person for prostitution in the third degree), which applies when the victim is 14 or older, is punishable as a Class A misdemeanor by up to 1 year imprisonment and a possible fine not to exceed \$1,000. N.Y. Penal Law §§ 230.04, 70.15(1), 80.05(1).

A conviction under N.Y. Penal Law § 230.13 (Aggravated patronizing a minor for prostitution in the first degree), which applies when the victim is under 11 or under 13 (depending on the age of the offender), is punishable as a Class B felony by imprisonment for 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.13, 70.00(2)(b), (3)(b), 80.00(1). A conviction under N.Y. Penal Law § 230.12 (Aggravated patronizing a minor for prostitution in the second degree), which applies when the victim is under 15, is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.12, 70.80(1)(a), (4)(a)(iii), 80.00(1). A conviction under N.Y. Penal Law § 230.11 (Aggravated patronizing a minor for prostitution in the third degree), which applies when the victim is under 17, is punishable as a Class E felony by imprisonment up to 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.11, 70.00(2)(e), (3)(b), (4), 80.00(1).

Several sexual offense laws could also be used to prosecute certain buyers of commercial sex acts with minors, but they do not specifically criminalize the commercial sexual exploitation of a child, nor do they refer to N.Y. Penal Law § 230.34 (Sex trafficking).²³

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)²⁴ 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 offense²⁵ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,²⁶ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²⁷

²³ See *supra* Component 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

²⁴ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

²⁵ 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).

²⁶ 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).

²⁷ 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,

- 2.4.1 Recommendation: Amend the definition of felony sex offense in N.Y. Penal Law § 70.80 (Sentences of imprisonment for conviction of a felony sex offense) to include all CSEC crimes to reflect the seriousness of these offenses.

- 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.*

New York does not have a separate crime or enhanced penalties for using the Internet or electronic communications to lure, entice, recruit, or purchase commercial sex. However, buyers using the Internet to purchase commercial sex acts with minors may be prosecuted under N.Y. Penal Law § 235.22 (Disseminating indecent material to minors in the first degree), which is violated when a person

1. knowing the character and content of the communication which, in whole or in part, depicts or describes, either in words or images actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, . . . intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
2. by means of such communication . . . importunes, invites or induces a minor to engage in sexual intercourse, oral sexual conduct or anal sexual conduct, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

For purposes of N.Y. Penal Law § 235.22, “minor” means “any person less than seventeen years old.” N.Y. Penal Law § 235.20 (Disseminating indecent material to minors; definitions of terms). A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 235.22, 70.00(2)(d), (3)(b), (4), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(iii), 80.00(1).

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

New York permits a mistake of age defense to charges brought under two of its prostitution statutes. Pursuant to N.Y. Penal Law § 230.07 (Patronizing a person for prostitution; defense), “In any prosecution for patronizing a person for prostitution in the first or second degrees or patronizing a person for prostitution in a school zone, it is a defense that the defendant did not have reasonable grounds to believe that the person was less than the age specified.”

- 2.6.1 Recommendation: Eliminate the age mistake defense allowed in N.Y. Penal Law § 230.07 (Patronizing a prostitute; defense) and expressly prohibit such a defense in all cases involving minors in N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree) and § 230.06 (Patronizing a person for prostitution in the first degree).

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

New York’s CSEC laws vary in degree and penalty based on a minor’s age; however, none of these laws prohibit a buyer from purchasing sex with a minor age 17, and not all base penalties are sufficiently high.

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

A conviction under N.Y. Penal Law § 230.06 (Patronizing a person for prostitution in the first degree), which applies when the victim is under 11 or when the offender is at least 18 and the victim is under 13, is punishable as a Class D felony sex offense by imprisonment for 2–7 years. N.Y. Penal Law §§ 230.06, 70.80(1)(a), (4)(a)(iii). A conviction under N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree), which applies when the offender is at least 18 and the minor is under 15, is punishable as a Class E felony by imprisonment for up to 4 years. N.Y. Penal Law §§ 230.05, 70.00(2)(e), (3)(b), (4).

A conviction under N.Y. Penal Law § 230.13 (Aggravated patronizing a minor for prostitution in the first degree), which applies when the victim is under 11 or when the offender is at least 18 and the victim is under 13, is punishable as a Class B felony by imprisonment for 1–25 years. N.Y. Penal Law §§ 230.13, 70.00(2)(b), (3)(b). A conviction under N.Y. Penal Law § 230.12 (Aggravated patronizing a minor for prostitution in the second degree), which applies when the offender is at least 18 and the minor is under 15, is punishable as a Class D felony by imprisonment for 2–7 years. N.Y. Penal Law §§ 230.12, 70.80(1)(a), (4)(a)(iii). A conviction under N.Y. Penal Law § 230.11 (Aggravated patronizing a minor for prostitution in the third degree), which applies when the offender is at least 21 and the minor is under 17, is punishable as a Class E felony by imprisonment for up to 4 years. N.Y. Penal Law §§ 230.11, 70.00(2)(e), (3)(b), (4).

2.7.1 Recommendation: Amend N.Y. Penal Law § 230.05 (Patronizing a person for prostitution in the second degree), § 230.06 (Patronizing a person for prostitution in the first degree), § 230.11 (Aggravated patronizing a minor for prostitution in the third degree), § 230.12 (Aggravated patronizing a minor for prostitution in the second degree), and § 230.13 (Aggravated patronizing a minor for prostitution in the first degree) to raise the age of a minor victim to under 18 to ensure protection under these statutes for all minors.

2.7.2 Recommendation: Amend N.Y. Penal Law §§ 230.05 through 230.06 and §§ 230.11 through 230.13 to eliminate the staggered penalties for minors and provide a sufficiently high base penalty for all minors under the age of 18 or amend N.Y. Penal Law § 230.04 (Patronizing a person for prostitution in the third degree) to provide heightened penalties when the offense involves a victim under the age of 18.

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

Buyers of commercial sex with minors are subject to various fines, restitution, and asset forfeiture. When the victim is under 15, a conviction under either N.Y. Penal Law § 230.06 (Patronizing a person for prostitution in the first degree) or § 230.05 (Patronizing a person for prostitution in the second degree) is punishable as a felony by a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain for commission of the felony from the commission of the crime,” which seems unlikely to apply in cases of buyers. N.Y. Penal Law §§ 230.05, 230.06, 80.00(1). A conviction under N.Y. Penal Law § 230.04 (Patronizing a person for prostitution in the third degree), which applies when the minor is 15 or older, is punishable as a Class A misdemeanor by a possible fine not to exceed \$1,000. N.Y. Penal Law §§ 230.04, 80.05(1).

Where a buyer is convicted of the above counts, the court must consider and may order restitution. Pursuant to N.Y. Penal Law § 60.27(1) (Restitution and reparation),

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense,²⁸ and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to

²⁸ “Offense” is defined in N.Y. Penal Law § 60.27(4)(a) as “the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense.”

make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby

Pursuant to N.Y. Soc. Serv. Law § 483-bb(c) (Services for victims of human trafficking),

An individual who is a victim of the conduct prohibited by section 230.33, 230.34, 135.35 or 135.37 of the penal law may bring a civil action against the perpetrator or whoever knowingly advances or profits from, or whoever should have known he or she was advancing or profiting from, an act in violation of section 230.33, 230.34, 135.35 or 135.37 of the penal law to recover damages and reasonable attorney's fees.

Buyers are also subject to civil, discretionary asset forfeiture. N.Y.C.P.L. §1311(1) (Forfeiture actions) states, in relevant part,

A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime or the real property instrumentality of a crime or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.

Pursuant to N.Y.C.P.L. § 1311(1)(a), in proceedings following a conviction, a “court may not grant forfeiture until such conviction has occurred.” A “post-conviction forfeiture crime” means “any felony defined in the penal law or any other chapter of the consolidated laws of the state.” N.Y.C.P.L. § 1310(5).

N.Y. C.P.L. §§ 1320, 1321 and 1323 provide civil levy procedures for personal and real property. Disposal of forfeited property is governed by N.Y. C.P.L. § 1349, which states that “[a]ny judgment or order of forfeiture issued pursuant to this article shall include provisions for the disposal of the property found to have been forfeited.” However, if other provisions of law expressly govern the disposition of the property, that law shall be controlling. N.Y.C.P.L. § 1349(2).

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

Under N.Y. Penal Law § 263.11 (Possessing an obscene sexual performance by a child), “A person is guilty of possessing an obscene sexual performance²⁹ by a child when, knowing the character and content thereof, he knowingly has in his possession or control, or knowingly accesses with intent to view, any obscene performance which includes sexual conduct by a child less than sixteen years of age.”

Pursuant to N.Y. Penal Law § 263.16 (Possessing a sexual performance by a child), “A person is guilty of possessing a sexual performance³⁰ by a child when, knowing the character and content thereof, he knowingly has in his possession or control, or knowingly accesses with intent to view, any performance which includes sexual conduct by a child less than sixteen years of age.”

A conviction under either N.Y. Penal Law § 263.11 or § 263.16 is punishable as a Class E felony by imprisonment not to exceed 4 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” NY Penal Law §§ 263.11, 263.16, 70.00(2)(e), (3)(b), (4), 80.00(1).

²⁹ “Obscene sexual performance” is defined in N.Y. Penal Law § 263.00(2) as “any performance which . . . includes sexual conduct by a child less than sixteen years of age.”

³⁰ See *supra* note 15 for the definition of “sexual performance.”

In comparison, a federal conviction for possession of images of child sexual exploitation (ICSE)³¹ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³² Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³³

2.9.1 Recommendation: Enact a law that criminalizes the purchase of images of child sexual exploitation.

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

Pursuant to N.Y. Correct. Law § 168-f(1) (Duty to register and to verify), “Any sex offender shall, (a) at least ten calendar days prior to discharge, parole, release . . . or, (b) at the time sentence is imposed for any sex offender released on probation or discharged . . . , register with the division on a form prepared by the division.” N.Y. Correct. Law § 168-a(1) (Definitions) defines “sex offender” as “any person who is convicted of any of the offenses set forth in subdivision two or three of this section,” which includes sex offenses and sexually violent offenses.

Pursuant to N.Y. Correct. Law § 168-a(2)(a)(i) (Definitions), sex offenses relevant to buyers include convictions under: N.Y. Penal Law § 120.70 (Luring a child), § 130.25 (Rape in the third degree), § 130.30 (Rape in the second degree), § 130.40 (Criminal sexual act in the third degree), § 130.45 (Criminal sexual act in the second degree) § 263.11 (Possessing an obscene sexual performance by a child), § 263.16 (Possessing a sexual performance by a child), § 230.04 (Patronizing a person for prostitution in the third degree, where the minor is under 17), § 230.05 (Patronizing a person for prostitution in the third degree), § 230.06 (Patronizing a person for prostitution in the first degree), § 230-11 (Aggravated patronizing of a minor in the third degree), § 230-12 (Aggravated patronizing of a minor for prostitution in the second degree), § 230.13 (Aggravated patronizing of a minor for prostitution in the first degree), § 230.34 (Sex trafficking), § 230.25 (Promoting or compelling prostitution; accomplice), where the person prostituted is less than 17 years of age, § 235.22 (Disseminating indecent material to minors in the first degree), and § 130.55 (Sexual abuse in the third degree, where the minor is under 18). Pursuant to N.Y. Correct. Law § 168-a(2)(d)(iii), a sex offense also includes a conviction under any of the provisions of 18 U.S.C. 2251 [Sexual exploitation of children], 18 U.S.C. 2251A [Selling or buying of children], 18 U.S.C. 2252 [Certain activities relating to material involving the sexual exploitation of minors], 18 U.S.C. 2252A [Certain activities relating to material constituting or containing child pornography], 18 U.S.C. 2260 [Production of sexually explicit depictions of a minor for importation into the United States], 18 U.S.C. 2422(b) [Sexual abuse], 18 U.S.C. 2423 [Sexual abuse of a minor or ward], or 18 U.S.C. 2425 [Offenses resulting in death], provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect.

³¹ 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).

³² 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).

³³ 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).

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.*

Convictions under N.Y. Penal Law § 230.34 (Sex trafficking), § 230.33 (Compelling prostitution), and § 230.32 (Promoting prostitution in the first degree) are all punishable as Class B felonies by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.34, 230.33, 230.32, 70.00(2)(b), (3)(b), 80.00(1). If the offender committed the offense “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” a conviction under either N.Y. Penal Law § 230.33 or § 230.32 is punishable as a Class B felony sex offense by imprisonment of 5–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(i), 80.00(1).

A conviction under either N.Y. Penal Law § 230.30(2) (Promoting prostitution in the second degree) or § 263.05 (Use of a child in a sexual performance) is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.30, 263.05, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits either of these offenses “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii).

A conviction under N.Y. Penal Law § 230.25(2) (Promoting prostitution in the third degree) is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)³⁴ 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.

³⁴ See *supra* note 24.

§§ 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 offense³⁵ against a minor. 18 U.S.C. § 3559(e)(1).

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

New York has multiple statutes dealing with creating and distributing images of child sexual exploitation (ICSE). Pursuant to N.Y. Penal Law § 263.05 (Use of a child in a sexual performance),

A person is guilty of the use of a child in a sexual performance³⁶ if knowing the character and content thereof he employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

....

A conviction is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.05, 70.00(2)(c), (3)(b), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” the offense is sexually motivated, and a conviction is punishable as a Class C felony sex offense by imprisonment of 3.5–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(ii), 80.00(1).

Similarly, promoting ICSE is prohibited under N.Y. Penal Law § 263.10 (Promoting an obscene sexual performance by a child) and § 263.15 (Promoting a sexual performance by a child). Pursuant to N.Y. Penal Law § 263.10, “A person is guilty of promoting³⁷ an obscene sexual performance³⁸ by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct³⁹ by a child less than seventeen years of age.”

Under N.Y. Penal Law § 263.15, “A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.”

A conviction under either statute is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.10, 263.15, 70.00(2)(d), (3)(b), (4), 80.00(1)

If the trafficker uses a controlled substance, penalties are heightened. Pursuant to N.Y. Penal Law § 263.30 (Facilitating a sexual performance by a child with a controlled substance or alcohol), a person is subject to heightened penalties if he knowingly administers a controlled substance⁴⁰ to a minor under 17 with the minor’s consent for the purpose of committing conduct defined in N.Y. Penal Law § 263.05, § 263.10, or § 263.15 if the person actually commits the conduct or attempts to do so. A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.30, 70.00(2)(b), (3)(b), 80.00(1).

³⁵ See *supra* note 25 for the definition of “federal sex offense.”

³⁶ See *supra* note 15 for the definition of “sexual performance.”

³⁷ N.Y. Penal Law § 263.00(5) states, “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.”

³⁸ See *supra* note 29.

³⁹ See *supra* note 15.

⁴⁰ “Controlled substance” is defined in N.Y. Penal Law § 263.30 as “any substance or preparation, compound, mixture, salt, or isomer of any substance defined in section thirty-three hundred six of the public health law.”

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 offense⁴¹ against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of ICSE⁴² is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁴³ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁴⁴

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.*

New York does not have a separate crime or enhanced penalties for using the Internet or electronic communications to lure, entice, recruit, or sell commercial sex. Traffickers may, however, be prosecuted under N.Y. Penal Law § 235.22 (Disseminating indecent material to minors in the first degree), which is violated when a person

1. knowing the character and content of the communication which, in whole or in part, depicts or describes, either in words or images actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, . . . intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
2. by means of such communication . . . importunes, invites or induces a minor to engage in sexual intercourse, oral sexual conduct or anal sexual conduct, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 235.22, 70.00(2)(d), (3)(b), (4), 80.00(1). If the offender commits this crime “for the purpose, in whole or substantial part, of his or her own direct sexual gratification,” then the offense is sexually motivated, and a conviction is punishable as a Class D felony sex offense by imprisonment of 2–7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 130.91(1), 70.80(1)(a), (4)(a)(iii), 80.00(1).

⁴¹ See *supra* note 25 for the definition of “federal sex offense.”

⁴² 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).

⁴³ 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).

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

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

Financial penalties for traffickers include fines, asset forfeiture, and victim restitution. All applicable felonies are subject to possible fines in an amount not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law § 80.00(1).

Traffickers may also be subject to asset forfeiture. Such proceedings are discretionary and civil in nature. Pursuant to N.Y. C.P.L.R. Law § 1311(1) (Forfeiture actions),

A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property⁴⁵ which constitutes the proceeds of a crime,⁴⁶ the substituted proceeds of a crime,⁴⁷ an instrumentality of a crime⁴⁸ or the real property instrumentality of a crime or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.⁴⁹ A civil action may be commenced against a non-criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime provided, however, that a judgment of forfeiture predicated upon clause (A) of subparagraph (iv) of paragraph (b) of subdivision three hereof shall be limited to the amount of the proceeds of the crime. Any action under this article must be commenced within five years of the commission of the crime and shall be civil, remedial, and in personam in nature and shall not be deemed to be a penalty or criminal forfeiture for any purpose

N.Y.C.P.L. §§1320, 1321 and 1323 provide civil levy procedures for personal and real property. Disposal of forfeited property is governed by N.Y. C.P.L. § 1349, which states that “[a]ny judgment or order of forfeiture issued pursuant to this article shall include provisions for the disposal of the property found to have been forfeited.” However, if other provisions of law expressly govern the disposition of the property, that law shall be controlling. N.Y.C.P.L. § 1349(2).

Additionally, traffickers who produce images of child sexual exploitation (ICSE) are subject to mandatory criminal forfeiture of the equipment used. Under N.Y. Penal Law § 410.00(1) (Seizure and forfeiture of equipment used in photographing, filming, producing, manufacturing, projecting or distributing pornographic still or motion pictures),

Any peace officer, acting pursuant to his special duties, or police officer of this state may seize any equipment used in the photographing, filming, printing, producing, manufacturing or projecting of pornographic still or motion pictures and may seize any vehicle or other means of transportation, other than a vehicle or other means of transportation used by any person as a common carrier in the transaction of business as such common carrier, used in the distribution of such obscene prints and articles and such equipment or vehicle or other means of transportation shall be subject to forfeiture

⁴⁵ “Property” is defined in N.Y. C.P.L.R. § 1310(1) (Definitions) as “real property, personal property, money, negotiable instruments, securities, or anything of value or any interest in a thing of value.”

⁴⁶ “Proceeds of a crime” is defined in N.Y. C.P.L.R. Law § 1310(2) as “any property obtained through the commission of a felony crime defined in subdivisions five and six hereof, and includes any appreciation in value of such property.”

⁴⁷ “Substituted proceeds of a crime” is defined in N.Y. C.P.L.R. Law § 1310(3) as “any property obtained by the sale or exchange of proceeds of a crime, and any gain realized by such sale or exchange.”

⁴⁸ “Instrumentality of a crime” is defined in N.Y. C.P.L.R. Law § 1310(4) as “any property, other than real property and any buildings, fixtures, appurtenances, and improvements thereon, whose use contributes directly and materially to the commission of a crime defined in subdivisions five and six hereof.”

⁴⁹ “Real property instrumentality of a crime” is defined in N.Y. C.P.L.R. Law § 1310(4-a) as “an interest in real property the use of which contributes directly and materially to the commission of a specified felony offense.”

Restitution must be considered by the court and may be available, pursuant to N.Y. Penal Law § 60.27(1) (Restitution and reparation), which states,

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense,⁵⁰ and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby

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

Pursuant to N.Y. Correct. Law § 168-f(1) (Duty to register and to verify), “Any sex offender shall, (a) at least ten calendar days prior to discharge, parole, release . . . or, (b) at the time sentence is imposed for any sex offender released on probation or discharged . . . , register with the division on a form prepared by the division.” N.Y. Correct. Law § 168-a(1) (Definitions) defines “sex offender” as “any person who is convicted of any of the offenses set forth in subdivision two or three of this section,” which includes sex offenses and sexually violent offenses.

Pursuant to N.Y. Correct. Law § 168-a(2), sex offenses relevant to traffickers include convictions under N.Y. Penal Law § 120.70 (Luring a child), § 230.34 (Sex trafficking), § 263.05–.16 (Crimes involving a sexual performance by a child), § 230.30(2) (Promoting prostitution in the second degree), § 230.32 (Promoting prostitution in the first degree), § 230.33 (Compelling prostitution), or § 235.22 (Disseminating indecent material to minors in the first degree). Pursuant to N.Y. Correct. Law § 168-a(2)(d)(iii), a sex offense also includes a conviction under

any of the provisions of 18 U.S.C. 2251 [Sexual exploitation of children], 18 U.S.C. 2251A [Selling or buying of children], 18 U.S.C. 2252 [Certain activities relating to material involving the sexual exploitation of minors], 18 U.S.C. 2252A [Certain activities relating to material constituting or containing child pornography], 18 U.S.C. 2260 [Production of sexually explicit depictions of a minor for importation into the United States], 18 U.S.C. 2422(b) [Sexual abuse], 18 U.S.C. 2423 [Sexual abuse of a minor or ward], or 18 U.S.C. 2425 [Offenses resulting in death], provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect.

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.*

New York only terminates parental rights for certain crimes and convictions. Trafficking and CSEC offenses are not expressly included as grounds for terminating parental rights. NY Soc. Serv. Law § 384-b(4)(e) (Guardianship and custody of destitute or dependent children; commitment by court order; modification of commitment and restoration of parental rights) states,

An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds:

. . . .

(e) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, severely or repeatedly abused such child. Where a court has determined that reasonable efforts to reunite the child with

⁵⁰ “Offense” is defined in N.Y. Penal Law § 60.27(4)(a) as “the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense.”

his or her parent are not required, pursuant to the family court act or this chapter, a petition to terminate parental rights on the ground of severe abuse as set forth in subparagraph (iii) of paragraph (a) of subdivision eight of this section may be filed immediately upon such determination.

Under NY Soc. Serv. Law § 384-b(8)(a),

(a) For the purposes of this section a child is “severely abused” by his or her parent if

.....

(ii) the child has been found to be an abused child, as defined in paragraph (iii) of subdivision (e) of section ten hundred twelve of the family court act, as a result of such parent’s acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections 130.25 [Rape in the third degree], 130.30 [Rape in the second degree], 130.35 [Rape in the first degree], 130.40 [Criminal sexual act in the third degree], 130.45 [Criminal sexual act in the second degree], 130.50 [Criminal sexual act in the first degree] . . . of the penal law and, for the purposes of this section the corroboration requirements contained in the penal law shall not apply to proceedings under this section . . . [and]

.....

(iv) the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future. Where a court has previously determined in accordance with this chapter or the family court act that reasonable efforts to make it possible for the child to return safely to his or her home are not required, the agency shall not be required to demonstrate diligent efforts as set forth in this section.

3.6.1 Recommendation: Amend N.Y. Soc. Serv. Law § 384-b(8) to include convictions under N.Y. Penal Law § 230.34 (Sex trafficking), when the victim is a minor, and New York’s CSEC offenses as grounds for terminating parental rights.

Legal Components:

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*
- 4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*
- 4.3 *Promoting and selling child sex tourism is illegal.*
- 4.4 *Promoting and selling 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.Y. Penal Law § 230.34 (Sex trafficking) applies to a facilitator who “intentionally advances⁵¹ or profits⁵² from prostitution by” various means of force, fraud, or coercion.⁵³ A conviction is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.34, 70.00(2)(b), (3)(b), 80.00(1).

Pursuant to N.Y. Penal Law § 230.40 (Permitting prostitution), a facilitator could be guilty of permitting prostitution if, “having possession or control of premises or vehicle which he or she knows are being used for prostitution purposes or for the purpose of advancing prostitution, he or she fails to make reasonable effort to halt or abate such use.”

Additionally, a facilitator could commit the offenses of promoting prostitution through advancing or profiting from prostitution. A conviction for promoting prostitution of a minor under 19, pursuant to N.Y. Penal Law § 230.25(2), is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1). A conviction for promoting prostitution of a minor under 18 years of age, under N.Y. Penal Law § 230.30(2), is punishable as a Class C felony by imprisonment of 1–15 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.30, 70.00(2)(c), (3)(b), 80.00(1). A conviction for promoting prostitution of a minor under 13 years of age, or for promoting prostitution of a minor less than 15 years old when the offender is 21 years old or more, under N.Y. Penal Law § 230.32, is punishable as a Class B felony by imprisonment of 1–25 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.32, 70.00(2)(b), (3)(b), 80.00(1).

- 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.*

All applicable felonies are subject to fines in an amount not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law § 80.00(1).

Pursuant to N.Y. Soc. Serv. Law § 483-bb(c) (Services for victims of human trafficking),

⁵¹ See *supra* note 2 for the definition of “advances prostitution.”

⁵² See *supra* note 3 for the definition of “profits from prostitution.”

⁵³ See *supra* Component 1.1.

An individual who is a victim of the conduct prohibited by section 230.33, 230.34, 135.35 or 135.37 of the penal law may bring a civil action against the perpetrator or whoever knowingly advances or profits from, or whoever should have known he or she was advancing or profiting from, an act in violation of section 230.33, 230.34, 135.35 or 135.37 of the penal law to recover damages and reasonable attorney's fees.

Facilitators are also subject to civil discretionary asset forfeiture. Pursuant to N.Y. C.P.L.R. Law § 1311(1) (Forfeiture actions),

A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property⁵⁴ which constitutes the proceeds of a crime,⁵⁵ the substituted proceeds of a crime,⁵⁶ an instrumentality of a crime⁵⁷ or the real property instrumentality of a crime or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.⁵⁸ A civil action may be commenced against a non-criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime provided, however, that a judgment of forfeiture predicated upon clause (A) of subparagraph (iv) of paragraph (b) of subdivision three hereof shall be limited to the amount of the proceeds of the crime. Any action under this article must be commenced within five years of the commission of the crime and shall be civil, remedial, and in personam in nature and shall not be deemed to be a penalty or criminal forfeiture for any purpose

N.Y. C.P.L. §§1320, 1321 and 1323 provide civil levy procedures for personal and real property. Disposal of forfeited property is governed by N.Y. C.P.L. § 1349, which states that “[a]ny judgment or order of forfeiture issued pursuant to this article shall include provisions for the disposal of the property found to have been forfeited.” However, if other provisions of law expressly govern the disposition of the property, that law shall be controlling. N.Y.C.P.L. § 1349(2).

Additionally, facilitators may be subject to mandatory criminal asset forfeiture of any equipment used to produce images of child sexual exploitation (ICSE). Under N.Y. Penal Law § 410.00(1) (Seizure and forfeiture of equipment used in photographing, filming, producing, manufacturing, projecting or distributing pornographic still or motion pictures),

Any peace officer, acting pursuant to his special duties, or police officer of this state may seize any equipment used in the photographing, filming, printing, producing, manufacturing or projecting of pornographic still or motion pictures and may seize any vehicle or other means of transportation, other than a vehicle or other means of transportation used by any person as a common carrier in the transaction of business as such common carrier, used in the distribution of such obscene prints and articles and such equipment or vehicle or other means of transportation shall be subject to forfeiture

Restitution must be considered by the court and may be available to victims, pursuant to N.Y. Penal Law § 60.27(1) (Restitution and reparation), which states,

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence

⁵⁴ See *supra* note 45 for the definition of “property.”

⁵⁵ See *supra* note 46 for the definition of “proceeds of a crime.”

⁵⁶ See *supra* note 47 for the definition of “substituted proceeds of a crime.”

⁵⁷ See *supra* note 48 for the definition of “instrumentality of a crime.”

⁵⁸ See *supra* note 49 for the definition of “real property instrumentality of a crime.”

imposed upon a person convicted of an offense,⁵⁹ and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby

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

Promoting sex tourism is punishable under N.Y. Penal Law § 230.25(1) (Promoting prostitution in the third degree), which states,

A person is guilty of promoting prostitution in the third degree when he or she knowingly:

Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more persons in prostitution, or a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a person for prostitution, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction

A conviction is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 230.25, 70.00(2)(d), (3)(b), (4), 80.00(1).

- 4.3.1 Recommendation: Amend N.Y. Penal Law § 230.25(1) (Promoting prostitution in the third degree) to specifically prohibit selling or offering to sell travel services that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor or prostitution of a minor, if occurring in New York.

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

Promoting images of child sexual exploitation (ICSE) is prohibited under N.Y. Penal Law § 263.10 (Promoting an obscene sexual performance by a child) and § 263.15 (Promoting a sexual performance by a child). Pursuant to N.Y. Penal Law § 263.10, “A person is guilty of promoting⁶⁰ an obscene sexual performance⁶¹ by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct⁶² by a child less than seventeen years of age.”

Under N.Y. Penal Law § 263.15, “A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.”

A conviction under either statute is punishable as a Class D felony by imprisonment not to exceed 7 years and a possible fine not to exceed the greater of \$5,000 or “double the amount of the defendant’s gain from the commission of the crime.” N.Y. Penal Law §§ 263.10, 263.15, 70.00(2)(d), (3)(b), (4), 80.00(1)

- 4.4.1 Recommendation: Amend N.Y. Penal Law § 263.10 (Promoting an obscene sexual performance by a child) and § 263.15 (Promoting a sexual performance by a child) to increase the penalty to reflect the seriousness of the offense.

⁵⁹ See *supra* note 50 for the definition of “offense.”

⁶⁰ See *supra* note 37.

⁶¹ See *supra* note 29.

⁶² See *supra* note 15.

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 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.*⁶³

Not all commercially sexually exploited children are identifiable as child sex trafficking victims under New York’s core sex trafficking offense. Pursuant to N.Y. Penal Law § 230.34 (Sex trafficking), means of force, fraud, or coercion are required even when the victim is a minor. Additionally, N.Y. Penal Law § 230.34 (Sex trafficking) does not apply to buyers; thus, purchasing sex with a minor does not constitute sex trafficking. Lastly, a trafficker or third party must be identified for a sexually exploited child to be identified as a victim of sex trafficking. Resultantly, not all commercially sexually exploited children are victims of sex trafficking under New York state law.

- 5.1.1 Recommendation: Amend the definition of N.Y. Penal Law § 230.34 (Sex trafficking) so that all commercially sexually exploited children are identifiable as victims and eligible for protections pursuant to their victim status.

- 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.*

New York’s sex trafficking statute does not prohibit a defense to prosecution based on the willingness of a minor to engage in the commercial sex act.

- 5.2.1 Recommendation: Amend N.Y. Penal Law § 230.34 (Sex trafficking), § 230.05 (Patronizing a person for prostitution in the second degree), § 230.06 (Patronizing a person for prostitution in the

⁶³ 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).

first degree), § 230.25(2) (Promoting prostitution in the third degree), § 230.30(2) (Promoting prostitution in the second degree), § 230.32 (Promoting prostitution in the first degree), § 230.33 (Compelling prostitution), and § 263.05 (Use of a child in a sexual performance) to expressly prohibit a defense based on the minor's willingness to engage in the commercial sex act.

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*⁶⁴

Prostitution laws apply to both adults and minors; neither N.Y. Penal Law § 230.00 (Prostitution) nor § 240.37 (Loitering for the purpose of prostitution) prohibit the criminalization of minors for prostitution.

However, upon an arrest for prostitution, there is a presumption that a minor under the age of 16 is a victim, and upon first arrest for such an offense, should receive services, if cooperative. Pursuant to N.Y. Fam. Ct. Act § 311.4(3) (Substitution of petition or finding),

In any proceeding under this article [Juvenile delinquency] based upon an arrest for an act of prostitution, there is a presumption that the respondent meets the criteria as a victim of a severe form of trafficking as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection Act of 2000). Upon the motion of the respondent, without the consent of the presentment agency, a petition alleging that the respondent is in need of supervision shall be substituted for the delinquency petition. If, however, the respondent has been previously adjudicated as a juvenile delinquent under this article for an act which would be a crime pursuant to article two hundred thirty [Prostitution offenses] of the penal law, if the respondent was an adult, or expresses a current unwillingness to cooperate with specialized services for sexually exploited youth, continuing with the delinquency proceeding shall be within the court's discretion

A separate process allows 16 and 17 year old juvenile sex trafficking victims, who are otherwise subject to the adult criminal justice process, to avoid a criminal proceeding and possible conviction for prostitution offenses. N.Y. Criminal Procedure Law § 170.80 (Proceedings regarding certain prostitution charges; certain persons aged sixteen or seventeen) states,

1. Notwithstanding any other provision of law, at any time at or after arraignment on a charge of prostitution pursuant to section 230.00 of the penal law or loitering for the purposes of prostitution pursuant to subdivision two of section 240.37 of the penal law, provided that the person does not stand charged with loitering for the purpose of patronizing a prostitute, where such offense allegedly occurred when the person was sixteen or seventeen years of age except where, after consultation with counsel, a knowing and voluntary plea of guilty has been entered to such charge, any judge or justice hearing any stage of such case may, upon consent of the defendant after consultation with counsel:
 - (a) conditionally convert such charge in accordance with subdivision three of this section and retain it as a person in need of supervision proceeding for all purposes, and shall make such proceeding fully subject to the provisions and grant any relief available under article seven of the family court act; and/or
 - (b) order the provision of any of the specialized services enumerated in title eight-A of article six of the social services law, as may be reasonably available.
2. In the event of a conviction by plea or verdict to such charge or charges of prostitution or loitering for the purposes of prostitution as described in subdivision one of this section, the court must find that the person is a youthful offender for the purpose of such charge and proceed in accordance with article seven hundred twenty of this chapter
3. (a) When a charge of prostitution or loitering for the purposes of prostitution has been conditionally converted to a person in need of supervision proceeding pursuant to subdivision one of this section, the defendant shall be deemed a "sexually exploited child" as defined in subdivision one of section

⁶⁴ For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

four hundred forty-seven-a of the social services law and therefore shall not be considered an adult for purposes related to the charges in the person in need of supervision proceeding. Sections seven hundred eighty-one, seven hundred eighty-two, seven hundred eighty-two-a, seven hundred eighty-three and seven hundred eighty-four of the family court act shall apply to any proceeding conditionally converted under this section.

(b) The court after hearing from the parties shall state the condition or conditions of such conversion, which may include the individual's participation in specialized services provided pursuant to title eight-A of article six of the social services law and other appropriate services available to persons in need of supervision in accordance with article seven of the family court act.

Additionally, N.Y. Criminal Procedure Law § 170.30(4) (Motion to dismiss information, simplified information, prosecutor's information or misdemeanor complaint) provides,

After arraignment upon an information, a simplified information, a prosecutor's information or misdemeanor complaint on a charge of prostitution pursuant to section 230.00 of the penal law or loitering for the purposes of prostitution pursuant to subdivision two of section 240.37 of the penal law, provided that the person does not stand charged with loitering for the purpose of patronizing a prostitute, where such offense allegedly occurred when the person was sixteen or seventeen years of age, the local criminal court may dismiss such charge in its discretion in the interest of justice on the ground that a defendant participated in services provided to him or her.

Furthermore, pursuant to N.Y. Penal Law § 230.01 (Prostitution; affirmative defense), an affirmative defense is available for sex trafficking victims. N.Y. Penal Law § 230.01 states, “[i]n any prosecution under section 230.00, section 230.03 or subdivision two of section 240.37 of this part, it is an affirmative defense that the defendant’s participation in the offense was a result of having been a victim of compelling prostitution under section 230.33, a victim of sex trafficking under section 230.34 of this article or a victim of trafficking in persons under the Trafficking Victims Protection Act (United States Code, Title 22, Chapter 78).”

5.3.1 Recommendation: Amend N.Y. Penal Law § 230.00 (Prostitution) and § 240.37 (Loitering for the purpose of prostitution) to eliminate criminal liability for these offenses for minors under 18 years of age.⁶⁵

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

System response to child engaged in commercial sex act⁶⁶

⁶⁵ See generally SHARED HOPE INTERNATIONAL, “Seeking Justice: Legal approaches to eliminate criminal liability for child sex trafficking victims” (2018), https://sharedhope.org/wp-content/uploads/2018/08/ANALYSIS-OF-STATUTORY-APPROACHES_ver7.pdf (discussing need to eliminate a minor’s criminal liability for prostitution and other offenses committed pursuant to trafficking victimization and to establish a statutory avenue to specialized services).

⁶⁶ In addition to provisions focusing on sexually exploited youth, a juvenile sex trafficking victim may receive services pursuant to N.Y. Soc. Serv. Law § 483-bb (Services for victims of human trafficking), which states,

- (a) The office of temporary and disability assistance may coordinate with and assist law enforcement agencies and district attorney’s offices to access appropriate services for human trafficking victims.
- (b) In providing such assistance, the office of temporary and disability assistance may enter into contracts with non-government organizations for providing services to pre-certified victims of human trafficking as defined in subdivision (b) of section four hundred eighty-three-aa of this article, insofar as funds are available for that purpose. Such services may include, but are not limited to, case management, emergency temporary housing, health care, mental health counseling, drug addiction screening and treatment, language interpretation and translation services, English language instruction, job training and placement assistance, post-employment services for job retention, and services to assist the individual and any of his or her family members to establish a permanent residence in New York state or the United States. Nothing in this section shall preclude the office of temporary and disability assistance, or any local social services district,

Under the “Safe Harbour for Exploited Children Act,”⁶⁷ New York establishes some specialized services for juvenile sex trafficking victims and sexually exploited children,⁶⁸ including placing such children in safe houses with specialized advocates trained to work with sexually exploited children and providing necessary services such as “housing, assessment, case management, medical care, legal, mental health and substance and alcohol abuse services,” and “[w]here appropriate . . . counseling and therapeutic services, educational services including life skills services and planning services to successfully transition residents back to the community.” N.Y. Soc. Serv. Law §§ 447-a(4), 447-b(1).

Pursuant to N.Y. Soc. Serv. Law § 447-b(1) (Services for exploited children),

Notwithstanding any inconsistent provision of law, pursuant to regulations of the office of children and family services, every local social services district shall as a component of the district's multi-year consolidated services child welfare services plan address the child welfare services needs of sexually exploited children and to the extent that funds are available specifically therefor ensure that a short-term safe house⁶⁹ or another short-term safe placement⁷⁰ such as an approved runaway and homeless youth program, approved respite or crisis program providing

from providing human trafficking victims who are United States citizens or human trafficking victims who meet the criteria pursuant to section one hundred twenty-two of this chapter with any benefits or services for which they otherwise may be eligible.

. . . .

For purposes of N.Y. Soc. Serv. Law § 483-bb, “human trafficking victim” is defined in N.Y. Soc. Serv. Law § 483-aa(a) (Definitions) as “a person who is a victim of sex trafficking as defined in section 230.34 of the penal law or a victim of labor trafficking as defined in section 135.35 of the penal law.” “Pre-certified victim of human trafficking” is defined in N.Y. Soc. Serv. Law § 483-aa(b) as “a person who has a pending application for federal certification as a victim of a severe form of trafficking in persons as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection) but has not yet obtained such certification, or a person who has reported a crime to law enforcement and it reasonably appears to law enforcement that the person is such a victim.”

Further, an administrative directive authored and disseminated by New York’s Office of Child and Family Services (OCFS), requires mandatory and automatic screening of all children within OCFS care who are “determined to be a child sex trafficking victim or at risk of being a sex trafficking victim,” to determine active involvement with commercial sex or for a history of commercial sexual exploitation. New York Office of Children and Family Services, 15-OCFS-ADM-16 (revised March 30, 2016). Pursuant to 15-OCFS-16, OCFS’ initial and mandated screening serves as a means of identifying child trafficking victims or those at risk of trafficking, as well as identifying “crisis needs and longer-term needs to assist in stabilizing the child and preventing re-victimization.” Additionally, following the identification of a child victim of sex trafficking or commercial sexual exploitation, all local department of social services or voluntary authorize agency staff are required to report such findings to local law enforcement agencies and provide appropriate services.

⁶⁷ N.Y. Soc. Serv. Law §§ 447-a to -b.

⁶⁸ See *supra* Component 5.1 for the definition of “sexually exploited child.”

⁶⁹ “Short-term safe house” is defined in N.Y. Soc. Serv. Law § 447-a(2) as

a residential facility . . . that provides emergency shelter, services and care to sexually exploited children including food, shelter, clothing, medical care, counseling and appropriate crisis intervention services at the time they are taken into custody by law enforcement and for the duration of any legal proceeding or proceedings in which they are either the complaining witness or the subject child

⁷⁰ N.Y. Soc. Serv. Law § 447-b(5) states in part,

To the extent funds are specifically appropriated therefore, the office of children and family services shall contract with an appropriate not-for-profit agency with experience working with sexually exploited children to operate at least one long-term safe house . . . which shall provide safe and secure long term housing and specialized services for sexually exploited children throughout the state

crisis intervention or respite services or community-based program to serve sexually exploited children is available to children residing in such district

Existing youth programs may also be utilized for this purpose, so long as the staff has received training on child sexual exploitation. N.Y. Soc. Serv. Law § 447-b(1).

II. Services through juvenile justice

a. Referral/Screening

A juvenile sex trafficking victim who is arrested for prostitution may be identified as a person in need of supervision (PINS) and, resultantly, receive specialized services following the filing of a petition and the court's approval. However, a child seeking diversion from a delinquency process into a PINS process faces various hurdles. A child is identifiable as a "person in need of supervision" when the child is "less than eighteen years of age who . . . appears to be a sexually exploited child"; however, such a determination requires consent of the child to file a petition for the determination to be made. N.Y. Fam. Ct. Act § 732(a)–(b) (Originating proceeding to adjudicate need for supervision).

In addition to the requirement that a child consents to the filing of the PINS petition under N.Y. Fam. Ct. Act § 732(a)–(b), substitution of the petition requires that the child make a motion on their own behalf. N.Y. Fam. Ct. Act § 311.4(3) (Substitution for petition or finding). Furthermore, N.Y. Fam. Ct. Act § 311.4(3) prohibits a delinquency petition from being substituted for a PINS petition when a child has previous prostitution offenses or for children who do cooperate with specialized services.

Furthermore, under N.Y. Criminal Procedure Law § 170.80 (Proceedings regarding certain prostitution charges; certain teenagers), in order for older minors arrested for a prostitution offense to be directed away from criminal prosecution and into PINS proceedings, the minor must comply with mandatory services. If a minor does not comply with services or enters a voluntary plea of guilty to the original prostitution charge, the minor is considered a "youthful offender" for purposes of youthful offender proceedings. N.Y. Criminal Procedure Law § 170.80(2). N.Y. Criminal Procedure Law § 170.80 provides,

(1) Notwithstanding any other provision of law, at any time at or after arraignment on a charge of prostitution pursuant to section 230.00 of the penal law or loitering for the purposes of prostitution pursuant to subdivision two of section 240.37 of the penal law . . . where such offense allegedly occurred when the person was sixteen or seventeen years of age except where, after consultation with counsel, a knowing and voluntary plea of guilty has been entered to such charge, any judge or justice hearing any stage of such case may, upon consent of the defendant after consultation with counsel:

(a) conditionally convert such charge in accordance with subdivision three of this section and retain it as a person in need of supervision proceeding for all purposes, and shall make such proceeding fully subject to the provisions and grant any relief available under article seven of the family court act; and/or

(b) order the provision of any of the specialized services enumerated in title eight-A of article six of the social services law, as may be reasonably available.

(2) In the event of a conviction by plea or verdict to such charge or charges of prostitution or loitering for the purposes of prostitution as described in subdivision one of this section, the court must find that the person is a youthful offender for the purpose of such charge and proceed in accordance with article seven hundred twenty of this chapter, provided, however, that the available sentence shall be the sentence that may be imposed for a violation as defined in subdivision three of section 10.00 of the penal law

(3)(a) When a charge of prostitution or loitering for the purposes of prostitution has been conditionally converted to a person in need of supervision proceeding pursuant to subdivision one

of this section, the defendant shall be deemed a “sexually exploited child” as defined in subdivision one of section four hundred forty-seven-a of the social services law and therefore shall not be considered an adult for purposes related to the charges in the person in need of supervision proceeding. Sections seven hundred eighty-one, seven hundred eighty-two, seven hundred eighty-two-a, seven hundred eighty-three and seven hundred eighty-four of the family court act shall apply to any proceeding conditionally converted under this section.

(b) The court after hearing from the parties shall state the condition or conditions of such conversion, which may include the individual's participation in specialized services provided pursuant to title eight-A of article six of the social services law and other appropriate services available to persons in need of supervision in accordance with article seven of the family court act.

(c) (i) The court may, upon written application by the people at any time during the pendency of the person in need of supervision proceeding or during any disposition thereof, but in no event later than the individual's eighteenth birthday, restore the accusatory instrument if the court is satisfied by competent proof that the individual, without just cause, is not in substantial compliance with the condition or conditions of the conversion.

(ii) Notice of such an application to restore an accusatory instrument shall be served on the person and his or her counsel by the court. The notice shall include a statement setting forth a reasonable description of why the person is not in substantial compliance with the condition or conditions of the conversion and a date upon which such person shall appear before the court. The court shall afford the person the right to counsel and the right to be heard. Upon such appearance, the court must advise the person of the contents of the notice and the consequences of a finding of failure to substantially comply with the conditions of conversion. At the time of such appearance the court must ask the person whether he or she wishes to make any statement with respect to such alleged failure to substantially comply. In determining whether such person has failed to substantially comply with the terms of the conversion, the court shall conduct a hearing at which time such person may cross-examine witnesses and present evidence on his or her own behalf. Any findings the court shall make, shall be made on the court record. If the court finds that such person did not substantially comply, it may restore the accusatory instrument pursuant to subparagraph (i) of this paragraph, modify the terms of conversion in accordance with this section or otherwise continue such terms as in its discretion it deems just and proper.

(iii) If such accusatory instrument is restored pursuant to subparagraph (i) of this paragraph, the proceeding shall continue in accordance with subdivision two of this section. If the individual does not comply with services or does not return to court, the individual shall be returned in accordance with the provisions of article seven of the family court act.

In addition, there may be a variety of responses within the PINS process depending on the age of the child. Pursuant to N.Y. Fam. Ct. Act § 739 (Release or detention after filing of petition and prior to order of disposition),

(a) After the filing of a petition under section seven hundred thirty-two of this part, the court in its discretion may release the respondent or direct his or her detention. If the respondent may be a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as an alternative to detention. However, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained there is a substantial probability that the respondent will not appear in court on the return date and all available alternatives to detention have been exhausted.

(b) Unless the respondent waives a determination that probable cause exists to believe that he is a person in need of supervision, no detention under this section may last more than three days

- (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or
- (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays.
- (c) Upon a finding of facts and reasons which support a detention order pursuant to subdivision (a) of this section, the court shall also determine and state in any order directing detention:
 - (i) whether continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent based upon, and limited to, the facts and circumstance available to the court at the time of the court's determination in accordance with this section; and
 - (ii) where appropriate, whether reasonable efforts were made prior to the date of the court order directing detention in accordance with this section, to prevent or eliminate the need for removal of the respondent from his or her home or, if the respondent had been removed from his or her home prior to the court appearance pursuant to this section, where appropriate, whether reasonable efforts were made to make it possible for the respondent to safely return home.

If a determination is made under N.Y. Fam. Ct. Act § 732(a)–(b) that the child is indeed in need of supervision, the child may be directed into the “person in need of supervision” process under N.Y. Criminal Procedural Law § 170.80 if the minor is 16 or 17 years old or under N.Y. Fam. Ct. Act § 311.4(3) if the minor is less than 16 years of age.

If the minor is adjudicated in need of supervision, the minor may be discharged with a warning, have the judgment suspended, placed on probation, placed in his/her home, placed in the custody of a relative, placed in the custody of an “other suitable private person or a commissioner of social services,” or, under certain circumstances, may be ordered to complete an “education reform program.” N.Y. Fam. Ct. Act §§ 754(1), 756(a)(i).

In addition to these PINS-related processes, N.Y. Soc. Serv. Law § 483-cc(a) (Confirmation as a victim of human trafficking) states,

- (a) As soon as practicable after a first encounter with a person who reasonably appears to a law enforcement agency, district attorney’s office, or an established provider of social or legal services designated by the office of temporary and disability assistance, the office for the prevention of domestic violence or the office of victim services to be a human trafficking victim, that law enforcement agency or district attorney’s office shall notify the office of temporary and disability assistance and the division of criminal justice services that such person may be eligible for services under this article or, in the case of an established provider of social or legal services, shall notify the office of temporary and disability assistance and the division of criminal justice services if such victim consents to seeking services pursuant to this article.

After the initial identification as a possible victim, N.Y. Soc. Serv. Law § 483-cc requires the division of criminal justice services to initiate an investigation to assess the child’s status as a victim. N.Y. Soc. Serv. Law § 483-cc(b) states,

Upon receipt of such a notification, the division of criminal justice services, in consultation with the office of temporary and disability assistance and the referring agency or office, shall make a preliminary assessment of whether such victim or possible victim appears to meet the criteria for certification as a victim of a severe form of trafficking in persons as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection)⁷¹ or appears to be otherwise

⁷¹ However, reference to the federal definition of “severe forms of trafficking” in 22 U.S.C. § 7105, combined with the term “certification” in N.Y. Soc. Serv. Law § 483-cc could prove problematic in application of this presumption. 22 U.S.C § 7105(b)(1)(C), which applies to victims in the U.S., provides a definition of victim of a severe form of

eligible for any federal, state or local benefits and services. If it is determined that the victim appears to meet such criteria, the office of temporary and disability assistance shall report the finding to the victim, and to the referring law enforcement agency or district attorney's office, and may assist that agency or office in having such victim receive services from a case management provider who may be under contract with the office of temporary and disability assistance, or from any other available source. If the victim or possible victim is under the age of eighteen, the office of temporary and disability assistance also shall notify the local department of social services in the county where the child was found.

b. Services

A child identified as a person in need of supervision pursuant to either N.Y. Criminal Procedure Law § 170.80 or N.Y. Fam. Ct. Act § 311.4(3) may receive an optional referral to specialized services. Pursuant to N.Y. Fam. Ct. Act § 720(5)(c) (Detention), a child under the age of 16 years who is suspected of being “a sexually exploited child as defined under subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as defined in subdivision two of section four hundred forty-seven-a of the social services law as an alternative to detention.”

Additionally, pursuant to N.Y. Fam. Ct. Act § 756(a)(ii) (Placement),

Where the child is placed with the commissioner of the local social services district, the court may direct the commissioner to place the child with an authorized agency or class of authorized agencies, including, if the court finds that the respondent is a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, an available long-term safe house

A child taken into custody as a child in need of supervision, pursuant to N.Y. Fam. Ct. Act § 720, “shall not be directed under any of the provisions of this article,” but shall be instead placed in a foster care program, a family boarding program, or a non-secure detention facility. In order to be held in detention, the court shall first determine that there “is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services and that all available alternatives to detention have been exhausted,” and if the child is 16 or older, the court must demonstrate the existence of exigent circumstances in order to detain the child. N.Y. Fam. Ct. Act § 720(5). Pursuant to N.Y. Fam. Ct. Act § 720(5)(c), “If the respondent may be a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as defined in subdivision two of section four hundred forty-seven-a of the social services law as an alternative to detention.”

Additionally, for all commercially sexually exploited children who enter the juvenile justice system, following a probable cause hearing, a fact-finding hearing, and a dispositional hearing, the court must “consider the needs and best interests of the respondent as well as the need for protection of the community” when determining where to place the child. N.Y. Fam. Ct. Act § 352.2(2) (Order of disposition). Under N.Y. Fam. Ct. Act § 352.2(2) (Order of disposition), a court decides whether to, among other things, conditionally discharge the juvenile, place the child on probation, or continue with the proceedings and place the child as specified in N.Y. Fam. Ct. Act § 353.3 (Placement), which states,

trafficking to include a person “subjected to an act or practice” defined in 22 U.S.C. § 7102(8) who is a minor or subject to certification under (E). Subsection (E) requires the person to be willing to assist in the investigation and prosecution of the trafficker and to have made an application for a T visa that has not been denied or be “a person whose continued presence in the United States the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.” Clarification that “certification” is not required by amending N.Y. Soc. Serv. Law § 483-cc to refer solely to domestic minors as victims of severe forms of trafficking is needed.

1. In accordance with section 352.2 of this part, the court may place the respondent in his or her own home or in the custody of a suitable relative or other suitable private person or the commissioner of the local social services district or the office of children and family services
2. Where the respondent is placed with the commissioner of the local social services district, the court may
 - (i) In a social services district operating an approved Juvenile Justice Services Close to Home Initiative pursuant to section four hundred four of the social services law [Juvenile justice services close to home initiative] direct the commissioner to provide services necessary to meet the needs of the respondent, provided that such services are authorized or required to be made available pursuant to the approved plan to implement a Juvenile Justice Close to Home Initiative then in effect . . . ; or
 - (ii) In a social services district that is not operating an approved Juvenile Justice Services Close to Home Initiative . . . , direct the commissioner to place him or her with an authorized agency or class of authorized agencies; and if the court finds that the respondent placed with a social services district pursuant to this subdivision is a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law [Safe harbour for exploited children act], the court may place such respondent in an available long-term safe house
- 2-A. Notwithstanding any inconsistent provision of law to the contrary, and pursuant to subdivision two of this section in a district operating an approved Juvenile Justice Services Close to Home Initiative . . . :
 - (A) Beginning on the effective date of the District's approved plan that only covers juvenile delinquents placed in non-secure settings, the court may only place the respondent:
 - (I) In the custody of the commissioner of the local social services district for placement in a non-secure level of care; or
 - (II) In the custody of the commissioner of the Office of Children and Family Services for placement in a limited secure or secure level of care; and
 - (B) Beginning on the effective date of the district's approved plan to implement programs for youth placed in limited secure settings, the court may only place the respondent:
 - (I) In the custody of the commissioner of the local social services district for placement in:
 - (A) A non-secure level of care;
 - (B) A limited secure level of care; or
 - (C) Either a non-secure or limited secure level of care, as determined by such commissioner; or
 - (II) In the custody of the commissioner of the Officer of Children and Family Services for placement in a secure level of care.
3. Where the respondent is placed with the office of children and family services, the court shall, unless it directs the office to place him or her with an authorized agency or class of authorized agencies, including if the court finds that the respondent is a sexually exploited child . . . , authorize the office to do one of the following:
 - (a) place the respondent in a secure facility without a further hearing at any time or from time to time during the first sixty days of residency in office of children and family services facilities. Notwithstanding the discretion of the office to place the respondent in a secure facility at any time during the first sixty days of residency in a[n] office of children and family services facility, the respondent may be placed in a non-secure facility. In the event that the office desires to transfer a respondent to a secure facility at any time after the first sixty days of residency in office facilities, a hearing shall be held . . . ; or
 - (b) place the respondent in a limited secure facility. The respondent may be transferred by the office to a secure facility after a hearing is held . . . ; provided, however, that during the first twenty days of residency in office facilities, the respondent shall not be transferred to a secure facility unless the respondent has committed an act or acts which are exceptionally dangerous to the respondent or to others; or

(c) place the respondent in a non-secure facility. No respondent placed pursuant to this paragraph may be transferred by the office of children and family services to a secure facility.

4. Where the respondent is placed with the office of children and family services, the court may direct the office to place the respondent with an authorized agency or class of authorized agencies, including, if the court finds that the respondent is a sexually exploited child . . . , an available long-term safe house, and in the event the office is unable to so place the respondent or, discontinues the placement with the authorized agency, the respondent shall be deemed to have been placed with the office pursuant to paragraph (b) or (c) of subdivision three of this section

.....

Summary

Commercially sexually exploited children may receive specialized services through several, non-punitive avenues; however, New York does not have mandatory referral and diversion to specialized services for all children suspected of committing prostitution offenses.

Children who enter the juvenile justice system for suspected commercial sexual activity may receive diversion to specialized services in lieu of delinquency proceedings; however, such a diversion is not automatic and requires the juvenile to meet and maintain compliance with numerous conditions of the person in need of services (PINS) process. Furthermore, older minors must voluntarily plead guilty to the prostitution offense and motion the court to have a pending delinquency petition converted to a PINS petition.

5.4.1 Recommendation: Amend New York’s protective response for juvenile sex trafficking victims to include a mandatory mechanism to prevent delinquency adjudications.

5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*⁷²

Child sex trafficking is identified as a type of abuse within New York’s Family Court Act.⁷³ “Abused child” is defined in N.Y. Fam. Ct. Act § 1012(e)(iii) (Definitions) as

a child less than eighteen years of age whose parent or other person legally responsible for his care

.....

- (iii)(a) commits, or allows to be committed an offense against such child defined in article one hundred thirty [Sexual offenses] of the penal law;
- (b) allows, permits or encourages such child to engage in any act described in sections 230.25 [Promoting prostitution in the third degree], 230.30 [Promoting prostitution in the second degree] and 230.32 [Promoting prostitution in the first degree] of the penal law;
-
- (d) allows such child to engage in acts or conduct described in article two hundred sixty-three [Sexual performance by a child] of the penal law; or
- (e) permits or encourages such child to engage in any act or commits or allows to be committed against such child any offense that would render such child either a victim of sex trafficking or a victim of severe forms of trafficking in persons pursuant to 22 U.S.C. 7102 as enacted by public law 106-386 or any successor federal statute;
- (f) provided, however, that (1) the corroboration requirements contained in the penal law and (2) the age requirement for the application of article two hundred sixty-three of such law shall not apply to proceedings under this article.

⁷² For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

⁷³ The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

However, for purposes of the section on “care and protection of children” in the Social Services Laws, child sex trafficking is not expressly included in the definitions of abuse or neglect. “Abused child” is defined in N.Y. Soc. Serv. Law § 371(4-b)(iii) (Definitions) as “a child less than eighteen years of age whose parent or other person legally responsible for his care . . . commits, or allows to be committed, an act of sexual abuse against such child as defined in the penal law.”

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.*

New York’s Family Court Act utilizes the term “person legally responsible,” which is defined as “the child’s custodian, guardian, or any other person responsible for the child’s care at the relevant time.” N.Y. Fam. Ct. Act § 1012(g). Pursuant to N.Y. Fam. Ct. Act § 1012(g), a “personal responsible for the child’s care” may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.”

Resultantly, a child victim who is sexually exploited or trafficked by a non-familial offender or person not regularly within the same household as the child would not fall within the care and services of child welfare.

5.6.1 Recommendation: Amend N.Y. Fam. Ct. Act § 1012(g) (Definitions) to allow child welfare protection for juvenile sex trafficking victims irrespective of the perpetrator of the abuse.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC.*

For the purposes of crime victims’ compensation, victims of N.Y. Penal Law § 230.34 (Sex trafficking) are expressly eligible for compensation; other victims also may be eligible. N.Y. Exec. Law § 621(5)(b)(13) (Definitions). “Victim” is defined in N.Y. Exec. Law § 621(5) as “(a) a person who suffers personal physical injury as a direct result of a crime; (b) a person who is the victim of . . . (13) sex trafficking as defined in section 230.34 of the penal law”

Additionally, “child victim” is defined in N.Y. Exec. Law § 621(11) as “a person less than eighteen years of age who suffers physical, mental or emotional injury, or loss or damage, as a direct result of a crime or as a result of witnessing a crime.”

However, a child sex trafficking victim who is determined to be “criminally responsible” or “an accomplice of such person” is ineligible to receive an award. N.Y. Exec. Law § 624(2). Also, N.Y. Exec. Law § 631(1) (Awards) states, in part,

No award shall be made unless the office finds that (a) a crime was committed, (b) such crime directly resulted in personal physical injury to or the exacerbation of a preexisting disability, or condition, or death of, the victim, and (c) criminal justice agency records show that such crime was promptly reported to the proper authorities; and in no case may an award be made where the criminal justice agency⁷⁴ records show that such report was made more than one week after the occurrence of such crime unless the office, for good cause shown, finds the delay to have been justified; provided, however, in cases involving an alleged sex offense as contained in article one hundred thirty of the penal law or . . . sex trafficking as defined in section 230.34 of the penal law . . . , the criminal justice agency report need only be made within a reasonable time considering all the circumstances, including the victim’s physical, emotional and mental condition and family situation

⁷⁴ “Criminal justice agency” is defined in N.Y. Exec. Law § 631(1) (Awards) as including “a police department, a district attorney’s office, and any other governmental agency having responsibility for the enforcement of the criminal laws of the state provided, however, that in cases involving such sex offense a criminal justice agency shall also mean a family court, a governmental agency responsible for child and/or adult protective services . . . , and any medical facility established under the laws of the state that provides a forensic physical examination for victims of rape and sexual assault.”

Additionally, child victims receive special protections, and pursuant to N.Y. Exec. Law § 631(17),

Notwithstanding the provisions of subdivision one of this section, where a child victim has not been physically injured as a direct result of a crime, or has witnessed a crime in which no physical injury occurred, the claimant shall only be eligible for an award that includes the unreimbursed cost of repair or replacement of essential personal property of the child victim that has been lost, damaged or destroyed as a direct result of a crime, transportation expenses incurred by the claimant for necessary court appearances of the child victim in connection with the prosecution of such crimes, and, if counseling is commenced within one year from the date of the incident or its discovery, (1) the unreimbursed cost of counseling provided to the child victim on account of mental or emotional stress resulting from the incident in which the crime occurred, and/or (2) the unreimbursed cost of counseling provided to the claimant eligible under paragraph (h) of subdivision one of section six hundred twenty-four of this article and resulting from the incident in which the crime occurred.

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

New York has created several procedures and practices specifically designed to protect child crime victims. Children under 14 who are “vulnerable child witnesses” may be able to testify via a closed circuit television; however, this definition is limited to certain crimes. “Child witness” is defined in N.Y. Crim. Proc. Law § 65.00(1) (Definitions)⁷⁵ as “a person fourteen years old or less who is or will be called to testify in a criminal proceeding, other than a grand jury proceeding, concerning an offense defined in article one hundred thirty [Sex offenses] of the penal law or section 255.25, 255.26 or 255.27 [Incest in the first, second, and third degrees] of such law which is the subject of such criminal proceeding.”

Under N.Y. Crim. Proc. Law § 65.10 (Closed-circuit television; general rule; declaration of vulnerability),⁷⁶

1. A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20,⁷⁷ determines by clear and convincing evidence that it is likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of, such harm.
2. When the court declares a child witness to be vulnerable, it shall, except as provided in subdivision four of section 65.30 [Closed-circuit television; special testimonial procedures], authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television. Under no circumstances shall the provisions of this article be construed to

⁷⁵ This provision is scheduled to expire and to be repealed on September 1, 2019.

⁷⁶ This provision is scheduled to expire and to be repealed on September 1, 2019.

⁷⁷ N.Y. Crim. Proc. Law § 65.20(1)–(4) (Closed-circuit television) states,

1. Prior to the commencement of a criminal proceeding; other than a grand jury proceeding, either party may apply to the court for an order declaring that a child witness is vulnerable.
2. A child witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness would suffer serious mental or emotional harm that would substantially impair the child witness' ability to communicate with the finder of fact without the use of live, two-way closed-circuit television.
3. A motion pursuant to subdivision one of this section must be made in writing at least eight days before the commencement of trial or other criminal proceeding upon reasonable notice to the other party and with an opportunity to be heard.
4. The motion papers must state the basis for the motion and must contain sworn allegations of fact which, if true, would support a determination by the court that the child witness is vulnerable. Such allegations may be based upon the personal knowledge of the deponent or upon information and belief, provided that, in the latter event, the sources of such information and the grounds for such belief are stated.

authorize a closed-circuit television system by which events in the courtroom are not transmitted to the testimonial room during the testimony of the vulnerable child witness.

.....

For the purpose of grand jury proceedings, some child witnesses are also able to testify via videotaped examination. Pursuant to N.Y. Crim. Proc. Law § 190.32(1)(a) (Videotaped examination; definitions, application, order and procedure), the definition of “child witness” is defined as “a person twelve years old or less whom the people intend to call as witness in a grand jury proceeding to give evidence concerning any crime defined in article one hundred thirty or two hundred sixty or section 255.25, 255.26 or 255.27 of the penal law of which the person was a victim.” N.Y. Crim. Proc. Law § 190.32(2) states, “In lieu of requiring a witness who is a child witness to appear in person and give evidence in a grand jury proceeding, the district attorney may cause the examination of such witness to be videotaped in accordance with the provisions of subdivision five of this section.”

Pursuant to N.Y. Exec. Law § 642-a (Fair treatment of child victims as witnesses),

To the extent permitted by law, criminal justice agencies, crime victim-related agencies, social services agencies and the courts shall comply with the following guidelines in their treatment of child victims:

1. To minimize the number of times a child victim is called upon to recite the events of the case and to foster a feeling of trust and confidence in the child victim, whenever practicable and where one exists, a multi-disciplinary team as established pursuant to subdivision six of section four hundred twenty-three [Child protective service responsibilities and organization; purchase of service and reimbursement of cost; local plan] of the social services law and/or a child advocacy center shall be used for the investigation and prosecution of child abuse cases involving abuse of a child,⁷⁸ as described in paragraph (i), (ii) or (iii) of subdivision (e) of section one thousand twelve [Definitions] of the family court act, sexual abuse of a child or the death of a child.
 2. Whenever practicable, the same prosecutor should handle all aspects of a case involving an alleged child victim.
 3. To minimize the time during which a child victim must endure the stress of his involvement in the proceedings, the court should take appropriate action to ensure a speedy trial in all proceedings involving an alleged child victim. In ruling on any motion or request for a delay or continuance of a proceeding involving an alleged child victim, the court should consider and give weight to any potential adverse impact the delay or continuance may have on the well-being of the child.
 4. The judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying.
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6. In accordance with the provisions of section 190.32 [Videotaped examination; definitions, application, order and procedure] of the criminal procedure law, a person supportive of the “child witness” or “special witness” as defined in such section should be permitted to be present and accessible to a child witness at all times during his testimony, although the person supportive of the child witness should not be permitted to influence the child’s testimony.
 7. A child witness should be permitted in the discretion of the court to use anatomically correct dolls and drawings during his testimony.

Additionally, child victims seeking an order of protection against their trafficker may receive additional protections in relevant court proceedings. Pursuant to N.Y. Fam. Ct. Act § 153-c(1)(b) (Temporary order of protection), victims petition for an order of protection may partake in an authorized pilot program which shall allow for the “filing of petitions for temporary orders of protection by electronic means . . .” when “attendance at court to file for, or obtain, emergency relief would constitute undue hardship . . .” N.Y. Fam. Ct. Act § 153-c(1)(b)(3)(i) specifies that undue hardship to a petitioner includes the “risk of harm to the petitioner.”

⁷⁸ See *supra* Component 5.6 for the definition of “abused child.”

New York's rape shield law does not expressly apply to child victims of sexual exploitation, and moreover, allows for the admission of evidence related to prostitution-related offenses. Pursuant to N.Y. Crim. Proc. Law § 60.42 (Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases),

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence:

1. proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or
2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 [Prostitution] of the penal law within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

Lastly, child victims of CSEC offenses and general sexual offenses are eligible to receive additional psychosocial and advocacy support services. Under N.Y. Pub. Health § 207(1)(k), "The availability of individual, family, and group counseling programs, education programs, and advocacy services provided at no cost by governmental agencies and not-for-profit organizations for victims of any sexual offense which constitutes a crime and for victims of child pornography promotion or possession."

- 5.8.1 Recommendation: Amend N.Y. Crim. Proc. Law § 60.42 (Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases) to apply to domestic minor sex trafficking victims under the age of 18 and to limit the ability to introduce evidence of offenses under N.Y. Penal Law Article 230 (Prostitution) in such cases.⁷⁹

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 York law does not provide a mechanism for minors to vacate delinquency adjudications related to trafficking victimization, and juvenile records may only be sealed after a minor turns 16.

Regarding the sealing of juvenile delinquency records, N.Y. Fam. Ct. Act § 375.2 (Motion to seal after a finding) states,

1. If an action has resulted in a finding of delinquency pursuant to subdivision one of section 352.1 [Findings], other than a finding that the respondent committed a designated felony act, the court may, in the interest of justice and upon motion of the respondent, order the sealing of appropriate records pursuant to subdivision one of section 375.1 [Order upon termination of a delinquency action in favor of the respondent].
2. Such motion must be in writing and may be filed at any time subsequent to the entering of such finding
3. The court shall state on the record its reasons for granting or denying the motion.

⁷⁹ The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

4. If such motion is denied, it may not be renewed for a period of one year, unless the order of denial permits renewal at an earlier time.
5. The court shall not order the sealing of any record except as prescribed by this section or section 375.1.
6. Such a motion cannot be filed until the respondent's sixteenth birthday.

Further, N.Y. Fam. Ct. Act § 375.3 (Expungement of court records) states, "Nothing contained in this article [Juvenile Delinquency] shall preclude the court's use of its inherent power to order the expungement of court records."

Additionally, N.Y. Criminal Procedure Law § 170.80(4) (Proceedings regarding certain prostitution charges; certain persons aged sixteen or seventeen) establishes expungement for an older minor whose prostitution charge has been converted to a PINS proceeding under § 170.80(1)(a), stating, "At the conclusion of a person in need of supervision proceeding pursuant to this section, all records of the investigation and proceedings relating to such proceedings, including records created before the charge was conditionally converted, shall be sealed in accordance with section 720.35 of this chapter."

Expungement is also available when a victim pleads guilty to prostitution charges as a youthful offender pursuant to § 170.80(2), which states, "In the event of a conviction by plea or verdict to such charge or charges of prostitution or loitering for the purposes of prostitution as described in subdivision one of this section, the court must find that the person is a youthful offender for the purpose of such charge and proceed in accordance with article seven hundred twenty of this chapter In such case, the records of the investigation and proceedings relating to such charge shall be sealed in accordance with section 720.35 of this chapter."

Regarding vacatur, N.Y. Crim. Proc. Law § 440.10(1)(i) (Motion to vacate judgment) states,

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

. . . .

(i) The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a person for prostitution or promoting prostitution) or 230.00 (prostitution) or 230.03 (prostitution in a school zone) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law, . . . compelling prostitution under section 230.33 of the penal law, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that

(i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or compelling prostitution crime or has sought services for victims of such trafficking or compelling prostitution crime . . . ; and

(ii) official documentation of the defendant's status as a victim of trafficking, compelling prostitution or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking, compelling prostitution or trafficking in persons, but shall not be required for granting a motion under this paragraph.

Because N.Y. Crim. Proc. Law § 440.10(1)(i) applies specifically to "convictions," however, this protection does not clearly extend to delinquency adjudications.

Further, N.Y. Crim. Proc. Law § 440.10(1)(i) applies only to violations of New York'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.Y. Crim. Proc. Law § 440.10(1)(i) (Motion to vacate judgment) to specifically 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.⁸⁰

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.*

The court must consider and may authorize restitution to a victim under N.Y. Penal Law § 60.27(1) (Restitution and reparation), which states in part,

In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense,⁸¹ and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby In that event, or when the victim impact statement reports that the victim seeks restitution or reparation, the court shall require, unless the interests of justice dictate otherwise, in addition to any of the dispositions authorized by this article that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss In the event that restitution or reparation are not ordered, the court shall clearly state its reasons on the record. Adverse action as used in this subdivision shall mean and include actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offense, and the consequential financial losses from such action.

Where a victim of trafficking is also a victim of a racketeering crime, restitution is available under N.Y. Penal Law § 460.30(5) (Enterprise corruption; forfeiture), which states in part,

Any person convicted of a violation of section 460.20 of this article through which he derived pecuniary value, or by which he caused personal injury or property damage or other loss, may be sentenced to pay a fine not in excess of three times the gross value he gained or three times the gross loss he caused, whichever is greater. Moneys so collected shall be paid as restitution to victims of the crime for medical expenses actually incurred, loss of earnings or property loss or damage caused thereby.

Additionally, “Any payment made as restitution to victims pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment.” N.Y. Penal Law § 460.30(8).

Regarding civil actions, N.Y. Exec. Law § 632-a(3) (Crime victims) provides,

Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim, or the representative of that convicted person, within three years of the discovery of any profits from a crime⁸² or funds of a convicted person

⁸⁰ The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁸¹ See *supra* note 50 for the definition of “offense.”

⁸² Pursuant to N.Y. Exec. Law § 632-a(1)(b),

Further, N.Y. Soc. Serv. Law § 483-bb(c) (Services for victims of human trafficking) states,

An individual who is a victim of the conduct prohibited by section 230.33, 230.34, 135.35 or 135.37 of the penal law may bring a civil action against the perpetrator or whoever knowingly advances or profits from, or whoever should have known he or she was advancing or profiting from, an act in violation of section 230.33, 230.34, 135.35 or 135.37 of the penal law to recover damages and reasonable attorney's fees.

5.10.1 Recommendation: N.Y. Penal Law § 60.27(1) (Restitution and reparation) to ensure that restitution is a mandatory component in all CSEC and trafficking sentences.

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.*

Victims of sex trafficking and certain CSEC offenses are afforded an extended statute of limitations for civil and criminal actions.

Pursuant to N.Y. C.P.L.R. Law § 213-b (Action by a victim of a criminal offense), a 7-year statute of limitations applies for civil actions arising under convictions for crimes in general, and a 10-year statute of limitations applies for civil actions arising under convictions for a “specified crime,”⁸³ including sex trafficking and certain CSEC offenses.

For criminal prosecutions, N.Y. Crim. Proc. Law § 30.10(3)(f) (Timeliness of prosecutions; periods of limitations) provides,

Notwithstanding the provisions of subdivision two, the periods of limitation for the commencement of criminal actions are extended as follows in the indicated circumstances:

.....

(f) For purposes of a prosecution involving a sexual offense as defined in article one hundred thirty of the penal law [Sex offenses], other than a sexual offense delineated in paragraph (a) of subdivision two of this section, committed against a child less than eighteen years of age . . . or use of a child in a sexual performance as defined in section 263.05 [Use of a child in a sexual performance] of the penal law, the period of limitation shall not begin to run until the child has reached the age of eighteen or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier.

In contrast, for criminal actions, pursuant to N.Y. Crim. Proc. Law § 30.10(2), a 5-year statute of limitations exists for most felony prosecutions, and a 2-year statute of limitations exists for misdemeanors.

“Profits from a crime” means (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, a crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

⁸³ “Specified crime” is defined in N.Y. Exec. Law § 632-a(1)(e) as including Class B felonies and violent felony offenses as defined in N.Y. Penal Law § 70.02(1), which includes sex trafficking and certain sex offenses listed in Articles 230 and 130, respectively.

- 5.11.1 Recommendation: Amend N.Y. Crim. Proc. Law § 30.10(3)(f) (Timeliness of prosecutions; periods of limitations) to eliminate the statutes of limitations for prosecutions of N.Y. Penal Law § 230.34 (Sex trafficking) and New York's CSEC offenses.
- 5.11.2 Recommendation: N.Y. C.P.L.R. Law § 213-b (Action by a victim of a criminal offense) to eliminate the statutes of limitations for civil actions arising from violation of N.Y. Penal Law § 230.34 (Sex trafficking) and New York's CSEC offenses.

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 York does not legislatively mandate training, but training is mentioned in N.Y. Soc. Serv. Law § 447-b(g) (Services for exploited children) as an option for certain localities. Additionally, pursuant to N.Y. Exec. Law § 214-d (Human trafficking awareness), the law enforcement superintendent is mandated to create and disseminate information to all state police officers regarding human trafficking policies and procedures.

Specifically, under N.Y. Soc. Serv. Law § 447-b(6),

The local social services commissioner may, to the extent that funds are available, in conjunction with the division of criminal justice services and local law enforcement officials, contract with an appropriate not-for-profit agency with experience working with sexually exploited children to train law enforcement officials who are likely to encounter sexually exploited children in the course of their law enforcement duties on the provisions of this section and how to identify and obtain appropriate services for sexually exploited children. Local social services districts may work cooperatively to provide such training and such training may be provided on a regional basis. The division of criminal justice services shall assist local social services districts in obtaining any available funds for the purposes of conducting law enforcement training from the federal justice department and the office of juvenile justice and delinquency prevention.

N.Y. Exec. Law § 214-d states,

The superintendent, in consultation with the office of temporary and disability assistance and the division of criminal justice services, shall: (1) develop, maintain and disseminate to all members of the state police, including new and veteran officers, written policies, procedures and educational materials relating to human trafficking victims, including services available for victims of human trafficking, as referenced in section four hundred eighty-three-bb of the social services law; and (2) establish and implement written procedures and policies in the event a member of the division of state police encounters an individual believed to be a victim of human trafficking, which shall include, but not be limited to, the provision of information and/or referral to an appropriate provider of social and legal services to human trafficking victims, in accordance with such section four hundred eighty-three-bb.

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

New York allows for single party consent to audio-taping. N.Y. Penal Law § 250.05 (Eavesdropping) states, “A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.” Pursuant to N.Y. Penal Law § 250.00 (Eavesdropping; definition of terms),

1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.

2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.

...

6. "Intercepting or accessing of an electronic communication" and "intentionally intercepted or accessed" mean the intentional acquiring, receiving, collecting, overhearing, or recording of an electronic communication, without the consent of the sender or intended receiver thereof, by means of any instrument, device or equipment, except when used by a telephone company in the ordinary course of its business or when necessary to protect the rights or property of such company.

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

N.Y. Penal Law § 250.05 (Eavesdropping) states, “A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.” N.Y. Penal Law § 250.00(1) (Eavesdropping; definitions of terms) defines “wiretapping” as “the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.”

Pursuant to N.Y. Crim. Proc. Law § 700.10(1), “Under circumstances prescribed in this article, a justice may issue an eavesdropping warrant or a video surveillance warrant upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application.” “Designated offense” is defined in N.Y. Crim. Proc. Law § 700.05(8) to include § 230.34 (Sex trafficking), § 230.32 (Promoting prostitution in the first degree), § 230.30 (Promoting prostitution in the second degree), or § 230.25 (Promoting prostitution in the third degree).

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 York’s trafficking and CSEC laws do not prohibit a defendant from raising a defense as to the use of law enforcement decoy posing as a minor in an investigation of domestic minor sex trafficking. Thus, the defense is likely available for all buyer-applicable offenses, and charges brought against buyers through reverse sting operations are the most likely situations in which a defendant would try to use such a defense. N.Y. Penal Law § 120.70 (Luring a child) is one such buyer-applicable CSEC offense⁸⁴ which does not prohibit the defense, meaning, buyers charged for luring a child for the purposes of commercial sex acts would not be prohibited from raising the defense.

⁸⁴ See *supra* Component 2.2 for more information about N.Y. Penal Law § 120.70 and other buyer-applicable CSEC provisions.

6.4.1 Recommendation: Enact a law specifically preventing a defense to prosecution based on the use of a law enforcement decoy posing as a minor to investigate violations of N.Y. Penal Law § 230.34 (Sex Trafficking) and New York’s CSEC offenses.⁸⁵

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

New York has also not codified the permissibility of the use of the Internet or electronic communications as an investigative technique for sex trafficking.

6.5.1 Recommendation: Amend N.Y. Penal Law § 235.22 (Disseminating indecent material to a minor) to allow law enforcement to use the Internet or other electronic communications to investigate these offenses.

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

New York has established a statewide central register for missing children. N.Y. Exec. Law § 837-e (Statewide central register for missing children) establishes “through electronic data processing and related procedures, a statewide central register for missing children which shall be compatible with the national crime information center register maintained pursuant to the federal missing children act of nineteen hundred eighty-two” Further, N.Y. Exec. Law § 837-e(1-b)⁸⁶ states,

The division shall transmit the report of the missing child to the National Missing and Unidentified Persons System (NamUs) no later than thirty days after entry of a report of a missing child into the register whenever circumstances indicate that the missing child may be at immediate risk of death or injury, or may be a match to a record maintained in the NamUs unidentified person database and within one hundred eighty days in any other case.

Pursuant to N.Y. Exec. Law § 837-m (Reporting duties of law enforcement departments with respect to missing children), law enforcement must also report cases of missing children that have been closed. N.Y. Exec. Law § 837-m states,

The chief of every police department, each county sheriff and the superintendent of state police shall report, at least semi-annually, to the division with respect to specified cases of missing children that are closed. Such reports shall be in the form and manner prescribed by the division and shall contain such information as the division deems necessary including, but not limited to, information regarding recovered children who were arrested, children who were the victims of criminal activity or exploitation and children who were found deceased and information regarding the alleged abductor or killer of such children.

⁸⁵ The recommendation in this component is predicated upon the recommendation in 2.1 being simultaneously or previously enacted.

⁸⁶ The text of N.Y. Exec. Law § 837-e cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 8286 and Senate Bill 7304 during the 2017-2018 Regular Session of the New York Legislature (effective November 29, 2017).

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