

## 2019 ANALYSIS AND RECOMMENDATIONS

### DELAWARE

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

##### *Legal Components:*

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *Prostitution statutes refer to the sex trafficking statute to 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 Analysis<sup>1</sup>:*

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

Delaware’s human trafficking law, codified at Del. Code Ann. tit. 11, § 787 (Trafficking an individual, forced labor and sexual servitude), criminalizes sex trafficking of a minor. Del. Code Ann. tit. 11, § 787(b)(1) states,

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

Del. Code Ann. tit. 11, § 787(b)(3)(a) specifies that force, fraud, or coercion is not required to commit sexual servitude of a minor, stating,

A person commits the offense of sexual servitude if the person knowingly:

<sup>1</sup> This report includes legislation enacted as of August 1, 2019.

1. Maintains or makes available a minor for the purpose of engaging the minor in commercial sexual activity<sup>2</sup>; or
2. Uses coercion or deception to compel an adult to engage in commercial sexual activity.

If the victim is a minor, both trafficking an individual and sexual servitude are Class B felonies punishable by imprisonment<sup>3</sup> for 2–25 years<sup>4</sup>. Del. Code Ann. tit. 11, §§ 787(b)(1), (3)(b), 4205(b)(2). If aggravating circumstances were used in the commission of the crime, including force and recruitment of the victim from a shelter, a conviction is punishable as a Class A felony by imprisonment for 15 years to life.<sup>5</sup>

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

<sup>3</sup> Pursuant to Del. Code Ann. tit. 11, § 4204(c)(1)–(5),

When a person is convicted of any offense other than a class A felony the court may take the following action:

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

Most of the felonies reviewed in this document are expressly restricted to a Level V sanction, therefore, all imprisonment penalties should be interpreted to be subject to Level V, unless it is designated a Class A felony or specifically stated otherwise. Additionally, Del. Code Ann. tit. 11, § 787 (Trafficking of an individual, forced labor and sexual servitude), § 1112A (Sexual solicitation of a child), and § 1112B (Promoting sexual solicitation of a child) are designated as violent felonies under Del. Code Ann. 11, § 4201(c).

<sup>4</sup> Del. Code Ann. tit. 11, § 4205(k) provides, “In addition to the penalties set forth above, the court may impose such fines and penalties as it deems appropriate.” Therefore, in all instances where penalties for a felony conviction are mentioned throughout this document, it should be inferred that an additional indeterminate fine may be imposed at the judge’s discretion.

<sup>5</sup> Convictions under Del. Code Ann. tit. 11, § 787(b)(1)–(3) (Trafficking an individual, forced labor and sexual servitude) may result in an enhanced penalty if aggravating circumstances are present; pursuant to Del. Code Ann. tit. 11, § 787(b)(6), aggravating circumstances occur when:

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

Since the definition of “labor or services” includes “commercial sexual activity,” a trafficker could also be convicted under Del. Code Ann. tit. 11, § 787(b)(3) for forced labor, but the offense must involve coerced commercial sexual activity<sup>6</sup> even when the victim is a minor. Del. Code Ann. tit. 11, § 787(b)(2) states,

*Forced labor.*— A person is guilty of forced labor if the person knowingly uses coercion<sup>7</sup> to compel an individual to perform labor or services<sup>8</sup>, except where such conduct is permissible under federal law or law of this state other than this act. Forced labor is a class C felony unless the individual is a minor, in which case it is a class B felony.

The trafficking law also prohibits patronizing a victim of sexual servitude under Del. Code Ann. tit. 11, § 787(b)(4), which states,

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

Lastly, organizations that commit a human trafficking offense may be prosecuted under Del. Code Ann. tit. 11, § 787(c), which states,

(1) An organization may be prosecuted for an offense under this section pursuant to § 281 of this title (Criminal liability of organizations).

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If aggravated circumstances are found, the offense under Del. Code Ann. tit. 11, § 787(b)(3) is elevated by one felony grade higher than the underlying offense.

<sup>6</sup> Del. Code Ann. tit. 11, § 787(a)(4) defines “[d]ebt bondage” to include “commercial sexual activity in payment toward or satisfaction of a real or purported debt.”

<sup>7</sup> Del. Code Ann. tit. 11, § 787(a)(2) defines “[c]oercion” to include the following:

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

<sup>8</sup> Del. Code Ann. tit. 11, § 787(a)(3) defines “forced labor or services” as “labor, as defined in this section, or services, as defined in this section, that are performed or provided by another person and are obtained or maintained through coercion as enumerated in paragraph (b)(1) of this section.” “Labor or services” is defined as “activity having economic or financial value, including commercial sexual activity. Nothing in this definition should be construed to legitimize or legalize prostitution.” “Sexual activity” is defined as “any of the sex-related acts enumerated in Section 761 if this Title, or in Sections 1342, 1351, 1352(1), 1353(1), 1354 or 1355 of this Title or sexually-explicit performances.” Del. Code Ann. tit. 11, § 787(a)(4), (7).

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

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

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

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

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

- (1) The person knowingly, photographs or films a child engaging in a prohibited sexual act<sup>9</sup> or in the simulation of such an act, or otherwise knowingly creates a visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (2) The person knowingly, finances or produces any motion picture, video or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (3) The person knowingly publishes or makes available for public distribution or sale by any means, including but not limited to computer, any book, magazine, periodical, pamphlet, photograph, Internet site or web page which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly publishes or makes available for public distribution or sale by any means, including computer, any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or
- (4) The person permits, causes, promotes, facilitates, finances, produces or otherwise advances an exhibition, display or performances of a child engaging in a prohibited sexual act or the simulation of such an act.

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A first conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years, while a subsequent conviction is punishable by life imprisonment. Del. Code Ann. tit. 11, §§ 1108, 4205(b)(2), 1110. However, if the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life.

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<sup>9</sup> Del. Code Ann. tit. 11, § 1100(e) (Definitions relating to children) defines “[p]rohibited sexual act” to include:

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

Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders).

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

A person is guilty of promoting prostitution<sup>10</sup> in the second degree when the person knowingly:

- (1) Advances or profits from prostitution<sup>11</sup> by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by 2 or more prostitutes; or
- (2) Advances or profits from prostitution of a person less than 18 years old.

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

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

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

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

- (1) Advances prostitution<sup>13</sup> by compelling a person by force or intimidation to engage in prostitution or profits from such coercive conduct by another; or
- (2) Advances or profits from prostitution of a person less than 16 years old.

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

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

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

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

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

- (1) Solicits, requests, commands, importunes or otherwise attempts to cause any child to engage in a prohibited sexual act;<sup>14</sup> or

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<sup>10</sup> Del. Code. Ann. tit. 11, § 1354 (Promoting prostitution; attempt to promote prostitution; corroboration) provides, “A person shall not be convicted of promoting prostitution or of an attempt to promote prostitution solely on the uncorroborated testimony of a person whose prostitution activity the person is alleged to have advanced or attempted to advance or from whose prostitution activity the person is alleged to have profited or attempted to profit.”

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

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

<sup>12</sup> See *supra* note 10.

<sup>13</sup> See *supra* note 11.

- (2) Uses a computer, cellular telephone or other electronic device to communicate with another person, including a child, to solicit, request, command, importune, entice, encourage or otherwise attempt to cause a child to engage in a prohibited sexual act.
- (b) For purposes of this section, “child” means:
  - (1) An individual who is younger than 18 years of age; or
  - (2) An individual who represents himself or herself to be younger than 18 years of age; or
  - (3) An individual whom the person committing the offense believes to be younger than 18 years of age.

A conviction under this statute is punishable as a Class C felony by imprisonment up to 15 years or as a Class B felony by 2 – 25 years “if the defendant meets in person or attempts to meet in person with the child for the purpose of engaging in a prohibited sexual act.” Del. Code Ann. tit. 11, §§ 1112A(g), (h), 4205(b)(2), (3). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders).

2. Del. Code Ann. tit. 11, § 1112B (Promoting sexual solicitation of a child) states,

- (a) A person is guilty of promoting sexual solicitation of a child if the person, being 18 years of age or older, intentionally or knowingly:
  - (1) Promotes, entices, offers, encourages, solicits or otherwise attempts to cause any child to engage in a prohibited sexual act; or
  - (2) Uses a computer, cellular telephone, or other electronic device to communicate with another person to solicit, request, command, importune, entice, encourage or otherwise attempt to cause that person to engage in a prohibited sexual act with a child.
- (b) For purposes of this section, “child” means:
  - (1) An individual who is younger than 18 years of age; or
  - (2) An individual who represents himself or herself to be younger than 18 years of age; or

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<sup>14</sup> Del. Code Ann. tit. 11, § 1100(e) defines “[p]rohibited sexual act” to include,

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

- (3) An individual whom the person committing the offense believes to be younger than 18 years of age.

A conviction under this statute is punishable as a Class C felony by imprisonment up to 15 years or as a Class B felony by up to 25 years “if the defendant meets in person or attempts to meet in person with another person and a child, or otherwise produces or delivers a child to another person, for the purpose of the person engaging in a prohibited sex act with the child.” Del. Code Ann. tit. 11, §§ 1112A(e), (f), 4205(b)(2), (3). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). Del. Code Ann. tit. 11, § 777(a)–(b). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders).

3. Del. Code tit. 11 § 773(a)(5) (Rape in the first degree) provides that “[a] person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and . . . [t]he victim has not yet reached that victim’s twelfth birthday, and the defendant has reached that defendant’s eighteenth birthday.” A conviction under Del. Code tit. 11 § 773(a)(5) is punishable as a Class A felony by imprisonment for 25 years to life and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, §§ 773, 4205A(a), (c). If, however, among other things, a victim of an offense under Del. Code tit. 11 § 773(a)(5) suffers serious bodily injury or the defendant “has been previously convicted of unlawful sexual intercourse in the first degree, rape in the second degree or rape in the first degree, or any equivalent offense under the laws of this State, any other state or the United States,” a conviction is punishable by imprisonment for life “without benefit of probation, parole or any other reduction.” Del. Code tit. 11, § 773(c)(1), (4).
4. Pursuant to Del. Code tit. 11, § 771(a) (Rape in the third degree),
  - (a) A person is guilty of rape in the third degree when the person:
    - (1) Intentionally engages in sexual intercourse with another person, and the victim has not reached that victim’s sixteenth birthday and the person is at least 10 years older than the victim, or the victim has not yet reached that victim’s fourteenth birthday and the person has reached that person’s nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 [Rape in the second degree] or § 773 [Rape in the first degree] of this title; or
    - (2) Intentionally engages in sexual penetration with another person under any of the following circumstances:
      - . . . .
      - (b) The victim has not reached that victim’s sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury or serious mental or emotional injury to the victim.

A conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 771, 4205(b)(2). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous

crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). A defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 771(a)(2) is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders). Convictions under Del. Code Ann. tit. 11, § 771(a)(1) fall under Del. Code Ann. tit. 11, § 4205A(a) through Del. Code Ann. tit. 11, § 777.

5. Del. Code tit. 11 § 770(a) (Rape in the fourth degree) states,

A person is guilty of rape in the fourth degree when the person:

- (1) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim’s sixteenth birthday; or
- (2) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim’s eighteenth birthday, and the person is 30 years of age or older, except that such intercourse shall not be unlawful if the victim and person are married at the time of such intercourse; or
- (3) Intentionally engages in sexual penetration with another person under any of the following circumstances:
  - a. The sexual penetration occurs without the victim’s consent; or
  - b. The victim has not reached that victim’s sixteenth birthday.

A conviction under this statute is punishable as a Class C felony by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 770, 4205(b)(3). However, if the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, §§ 777(b), 4205(b)(2). Subsequently, a defendant sentenced “pursuant to [Del. Code Ann. tit. 11, § 777] shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders). Del. Code tit. 11 § 768 (Unlawful sexual contact in the second degree) makes it a crime “when the person intentionally has sexual contact<sup>15</sup> with another person who is less than 18 years of

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<sup>15</sup> Pursuant to Del. Code tit. 11 § 761(f) (Definitions generally applicable to sexual offenses),

“Sexual contact” means:

- (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or
- (2) Any intentional touching of another person with the defendant’s anus, breast, buttocks, semen, or genitalia; or
- (3) Intentionally causing or allowing another person to touch the defendant’s anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. Sexual contact shall also include touching when covered by clothing.

age or causes the victim to have sexual contact with the person or a third person.” A conviction under this statute is punishable as a Class F felony by imprisonment up to 3 years. Del. Code Ann. tit. 11, §§ 768, 4205(b)(6).

6. Del. Code tit. 11 § 769(a)(3) (Unlawful sexual contact in the first degree) makes it a crime when a “person intentionally has sexual contact with another person who is less than 13 years of age or causes the victim to have sexual contact with the person or a third person.” A conviction under this statute is punishable as a Class D felony by imprisonment up to 8 years. Del. Code Ann. tit. 11, §§ 769(b), 4205(b)(4). If the victim is under 7 years of age, the defendant shall not be sentenced to less than 5 years. Del. Code Ann. tit. 11, § 4205A(d)(1) (Additional penalty for serious sex offenders or pedophile offenders).
7. Del. Code Ann. tit. 11, § 1100A (Dealing in children) states in part, “A person is guilty of dealing in a child if the person intentionally or knowingly trades, barter, buys or negotiates to trade, barter, buy or sell a child under the age of 18 . . . .” A conviction under this statute is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1100A, 4205(b)(5).

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

Delaware’s prostitution statutes, Del. Code Ann. tit. 11, § 1342 (Prostitution) and § 1343 (Patronizing a prostitute prohibited), do not refer to the human trafficking statute to acknowledge the intersection of prostitution with trafficking victimization. However, an affirmative defense provided under the human trafficking law clarifies the status of commercially sexually exploited youth as victims of sex trafficking. Del. Code Ann. tit. 11, § 787(h) (Trafficking an individual, forced labor and sexual servitude) states, “An individual charged with prostitution or loitering committed as a direct result of being a victim of human trafficking may assert as an affirmative defense that the individual is a victim of human trafficking.”

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

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

- (a) It shall be unlawful for any person employed by, or associated with, any enterprise<sup>16</sup> to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity or collection of an unlawful debt.
- (b) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property or personal property, of any nature, including money.
- (c) It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity in which such person has participated, to use or invest, directly or indirectly, any part of such proceeds or any proceeds derived from the investment or use thereof, in the acquisition of any interest in, or the establishment or operation of, any

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The text of Del. Code Ann. tit. 11, § 761 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 246 during the 150th General Assembly of the Delaware Legislature (effective June 20, 2019).

<sup>16</sup> Pursuant to Del. Code Ann. tit. 11, § 1502(3), “‘Enterprise’ shall include any individual, sole proprietorship, partnership, corporation, trust or other legal entity; and any union, association or group of persons associated in fact, although not a legal entity. The word ‘enterprise’ shall include illicit as well as licit enterprises, and governmental as well as other entities.”

enterprise or real property.

(d) It is unlawful for any person to conspire or attempt to violate any of the provisions of subsection (a), (b) or (c) of this section.

Pursuant to Del. Code Ann. tit. 11, § 1502(5),

“Pattern of racketeering activity” shall mean 2 or more incidents of conduct:

a. That:

1. Constitute racketeering activity;
2. Are related to the affairs of the enterprise;
3. Are not so closely related to each other and connected in point of time and place that they constitute a single event; and

b. Where:

1. At least 1 of the incidents of conduct occurred after July 9, 1986;
2. The last incident of conduct occurred within 10 years after a prior occasion of conduct; and
3. As to criminal charges, but not as to civil proceedings, at least 1 of the incidents of conduct constituted a felony under the Delaware Criminal Code, or if committed subject to the jurisdiction of the United States or any state of the United States, would constitute a felony under the Delaware Criminal Code if committed in the State.

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

a. Any activity defined as “racketeering activity” under 18 U.S.C. § 1961(1)(A), (1)(B), (1)(C) or (1)(D);<sup>17</sup> or

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

....

3. Chapter 5 of Title 11 relating to prostitution;

....

7. Chapter 5 of Title 11 relating to obscenity;

....

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

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

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

In lieu of any fine otherwise authorized by law, any person convicted of engaging in racketeering, or any other conduct in violation of § 1503 of this title, through which such person derived pecuniary value,<sup>18</sup> or by which the person caused personal injury or property damage or other

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<sup>17</sup> 18 U.S.C. § 1961(1)(A), (1)(B), (1)(C) or (1)(D) includes “sections 1581–1592 (relating to peonage, slavery, and trafficking in persons) [and] sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children).”

<sup>18</sup> Pursuant to Del. Code Ann. tit. 11, § 1502(6),

“Pecuniary value” shall mean:

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

loss, may be sentenced to pay a fine that does not exceed 3 times the gross value gained, or 3 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

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

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

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

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

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

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

**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 child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors are required to register as sex offenders.*

**Legal Analysis:**

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

Delaware’s trafficking law, Del. Code Ann. tit. 11, § 787(b) (Trafficking an individual, forced labor and sexual servitude), specifically applies to buyers who patronize a victim of sexual servitude; Del. Code Ann. tit. 11, § 787(b)(4) states,

*Patronizing a victim of sexual servitude.*— A person is guilty of patronizing a victim of sexual servitude if the person knowingly gives, agrees to give, or offers to give anything of value so that the person may engage in commercial sexual activity with another person and the person knows that the other person is a victim of sexual servitude . . . .

When the victim is a minor, Del. Code Ann. tit. 11, § 787(b)(4) is a Class C felony punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 787(b)(4), 4205(b)(3).

Del. Code Ann. tit. 11, § 787(b)(1) also contains the following buyer-applicable terms: “obtains” and “solicits.” It states,

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

Although the term “obtains” could apply to buyers following federal precedent<sup>19</sup> and the term “solicits” could apply to buyers directly, the conduct proscribed as “sexual servitude” under Del. Code Ann. tit. 11, § 787(b)(3)(a) requires control by a third party. Del. Code Ann. tit. 11, § 787(b)(3)(a) states,

<sup>19</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs

A person commits the offense of sexual servitude if the person knowingly:

1. Maintains<sup>20</sup> or makes available a minor for the purpose of engaging the minor in commercial sexual activity<sup>21</sup>; or
2. Uses coercion or deception to compel an adult to engage in commercial sexual activity.

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

None of Delaware’s CSEC laws apply to buyers of commercial sex acts with minors.

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

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

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

A person is guilty of patronizing a prostitute when:

....

- (3) The person solicits or requests another person to engage in sexual conduct with the person in return for a fee.

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

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

<sup>20</sup> Pursuant to Del. Code Ann. tit. 11, § 787(a)(9), “[m]aintain’ means in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the victim to perform such type of service.”

<sup>21</sup> “Commercial sexual activity” is defined as “any sexual activity for which anything of value is given, promised to, or received by any person.” Del. Code Ann. tit. 11, § 787(a)(2).

2.3.1 Recommendation: Amend Del. Code Ann. tit. 11, § 1343(a)(3) (Patronizing a prostitute prohibited) to differentiate soliciting sex acts with a minor and soliciting sex acts with an adult by providing heightened penalties that align with penalties under Del. Code Ann. tit. 11, § 787(b)(1) (Trafficking an individual, forced labor and sexual servitude) when the victim is a minor under 18.

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

Patronizing a victim of sexual servitude under Del. Code Ann. tit. 11, § 787(b)(4) (Trafficking an individual, forced labor and sexual servitude) is a Class C felony punishable by imprisonment up to 15 years when the victim is a minor. Del. Code Ann. tit. 11, § 787(b)(4), 4205(b)(3).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>22</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>23</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>24</sup>

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.*

Del. Code Ann. tit. 11, § 1112A(a) (Sexual solicitation of a child) may reach the conduct of buyers who seek to purchase sex acts with minors through the Internet, although it does not specifically criminalize use of the Internet to purchase or solicit commercial sex acts with a minor. Del. Code Ann. tit. 11, § 1112A(a) states,

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

.....

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<sup>22</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>23</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>24</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

(2) Uses a computer, cellular telephone or other electronic device to communicate with another person, including a child, to solicit, request, command, importune, entice, encourage or otherwise attempt to cause a child to engage in a prohibited sexual act.

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

A mistake of age defense is expressly prohibited for buyers charged with patronizing a victim of sexual servitude under Del. Code Ann. tit. 11, § 787(b)(4) (Trafficking an individual, forced labor and sexual servitude), which states in part, “It is not a defense in a prosecution when the victim of sexual servitude is a minor that . . . the defendant believed the minor was an adult.”

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

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

Additionally, and while not commercial in nature, Del. Code Ann. tit. 11, § 762(a) (Provisions generally applicable to sexual offenses) eliminates the mistake of age defense in sexual offense cases. It provides, “Whenever in the definition of a sexual offense,<sup>25</sup> the criminality of conduct or the degree of the offense depends on whether the person has reached that person’s sixteenth birthday, it is no defense that the actor did not know the person’s age, or that the actor reasonably believed that the person had reached that person’s sixteenth birthday.” Pursuant to Del. Code Ann. tit. 11 § 777(a) (Dangerous crime against a child), however, “For purposes of this section only, and Sec. 762(a) of this title to the contrary notwithstanding, the defendant may use as an affirmative defense that the defendant believed that the victim of the crime was over the age of 16 years of age.” Del. Code Ann. tit. 11 § 777(a) defines a “dangerous crime against a child” to include “any criminal sexual conduct against a minor under the age of 14 years as defined in . . . §§ 1108 through 1112B<sup>26</sup> of this title.”

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

Delaware’s trafficking law, Del. Code Ann. tit. 11, § 787(b)(4) (Trafficking an individual, forced labor and sexual servitude), does not stagger penalties based on a minor’s age, and penalties are sufficiently high. Specifically, Del. Code Ann. tit. 11, § 787(b)(4) makes patronizing a victim of sexual servitude a Class C felony punishable by imprisonment up to 15 years when the victim is a minor. Del. Code Ann. tit. 11, § 787(b)(4), 4205(b)(3).

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<sup>25</sup> Del. Code Ann. tit. 11 § 761(h) (Definitions generally applicable to sexual offenses) defines “sexual offense” as “any offense defined by §§ 763 through 780, § 783(4), § 783(6), § 783A(4), § 783A(6), § 787(b)(3), § 787(b)(4), § 1100A, §§ 1108 through 1112B, § 1335(a)(6), § 1335(a)(7), § 1352(2), and § 1353(2), and § 1361(b) of this title.”

<sup>26</sup> Offenses contained within Del. Code Ann. tit. 11 §§ 1108 through 1112B include: sexual exploitation of a child, dealing in child pornography, possession of child pornography and sexual solicitation of a child.

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

Del. Code Ann. tit. 11, § 4205(k) (Sentence for felonies) provides, “In addition to the [felony] penalties set forth above, the court may impose such fines and penalties as it deems appropriate.” Therefore, any buyer convicted of a felony trafficking, CSEC, or sexual offense is subject to an indeterminate discretionary fine.<sup>27</sup>

Buyers convicted of patronizing a victim of sexual servitude under Del. Code Ann. tit. 11, § 787(b)(4) (Trafficking an individual, forced labor and sexual servitude) do not face mandatory asset forfeiture. Del. Code Ann. tit. 11, § 787(e).<sup>28</sup> Under Del. Code Ann. tit. 11, § 1343 (Patronizing a prostitute prohibited), however, a convicted buyer is subject to vehicle seizure if the vehicle was used in the commission of patronizing a prostitute or the buyer has a prior conviction under Del. Code Ann. tit. 11, § 1343 within the last 5 years. Del. Code Ann. tit. 11, § 1343(c), (d).

Buyers convicted of Del. Code Ann. tit. 11, § 787(b)(4) face mandatory restitution under Del. Code Ann. tit. 11, § 787(d), which states,

(1) In addition to any other amount of loss identified, the court shall order restitution, including the greater of:

- a. The gross income or value to the defendant of the victim’s labor or services; or
- b. The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 201 et seq.] or of Title 19, whichever is greater.

(2) The court shall order restitution under this subsection (d) even if the victim is unavailable to accept payment of restitution.

(3) If the victim is unavailable for 5 years from the date of the restitution order, the restitution ordered under this subsection (d) must be paid to the Victim Compensation Fund established under Section 9016 of this Title.

2.9 *Buying and possessing child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*

Delaware law prohibits buying and possessing child sexual abuse material (CSAM). Del. Code Ann. tit. 11, § 1111 (Possession of child pornography) states,

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<sup>27</sup> Additional financial penalties applicable to all crimes are provided under Del. Code tit. 11, § 9016 (Penalty assessment) and § 9018 (Compensating fine). Del. Code tit. 11, § 9016(a) provides, “In addition to, and at the same time as, any fine is assessed to any criminal defendant or any child adjudicated delinquent, there shall be levied an additional penalty of 18% of every fine, penalty and forfeiture imposed and collected by the courts for crimes or offenses as defined in Sec. 233 of this title. Where multiple offenses are involved, the penalty assessment shall be based upon the total fine for all offenses.” Del. Code tit. 11, § 9018 provides in part, “In any court of the State upon the conviction of any person or the adjudication of delinquency of any child for a crime resulting in the personal injury or death of another person, the court may, and in addition to any other penalty, and in addition to reimbursement to the Victims Compensation Fund, order such person to pay a compensating fine, in lieu of, but greater than, the penalty set forth in Sec. 9016 of this title. The amount of such fine shall be in the discretion of the court and shall be commensurate with the malice shown and the injury done to the victim.” Both the penalty under Del. Code tit. 11, § 9016(a) and the compensating fine under Del. Code tit. 11, § 9018 are to be paid into the Crime Victims’ Compensation Fund. Del. Code tit. 11, §§ 9016(b), 9018.

<sup>28</sup> Del. Code Ann. tit. 11, § 787(e) provides that “the court shall order a person convicted of an offense under paragraphs (b)(1)–(3) of this section to forfeit any interest in real or personal property that was used or intended to be used to commit or facilitate the commission of the offense;” however, buyers may only be charged under subsection (b)(4) of § 787.

A person is guilty of possession of child pornography when:

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

....

A conviction under this statute is punishable as a Class F felony by imprisonment up to 3 years. Del. Code Ann. tit. 11, §§ 1111, 4205(b)(6).

Del. Code Ann. tit. 11, § 1109(4) (Dealing in child pornography) also criminalizes buying and possessing CSAM to the extent it prohibits the conduct of a person who “intentionally . . . accesses . . . receives, exchanges . . . stores . . . prints, reproduces or otherwise possesses any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act.” A conviction under Del. Code Ann. tit. 11, § 1109 is punishable as a Class B felony by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 1109, 4205(b)(2). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders).

In comparison, a federal conviction for possession of CSAM<sup>29</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>30</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>31</sup>

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<sup>29</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>30</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>31</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

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

***Legal Components:***

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
- 3.2 *Creating and distributing child sexual abuse material (CSAM) 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.*

Under Del. Code Ann. tit. 11, § 787(b) (Trafficking an individual, forced labor and sexual servitude),<sup>32</sup> trafficking an individual, sexual servitude, or forced labor involving commercial sexual activity are Class B felonies punishable by imprisonment for 2–25 years when the victim is a minor. Del. Code Ann. tit. 11, §§ 787(b), 4205(b)(2). If aggravating circumstances were involved, including force or recruitment of the victim from a shelter, a conviction under § 787(b) is punishable as a Class A felony by imprisonment for 15 years to life.<sup>33</sup>

A trafficker may also be convicted under Del. Code Ann. tit. 11, § 1108<sup>34</sup> (Sexual exploitation of a child). A first conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years, while a subsequent conviction is punishable by life imprisonment. Del. Code Ann. tit. 11, §§ 1108, 4205(b)(2), 1110. However, if the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders).

Traffickers may also be convicted under Del. Code Ann. tit. 11, § 1352<sup>35</sup> (Promoting prostitution in the second degree). A conviction under this statute is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1352, 4205(b)(5). Additionally, a trafficker convicted under Del. Code

<sup>32</sup> See *supra* Component 1.1 for the substantive provisions of Del. Code Ann. tit. 11, § 787(b).

<sup>33</sup> See *supra* note 5.

<sup>34</sup> See *supra* Component 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1108.

<sup>35</sup> See *supra* Component 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1352.

Ann. tit. 11, § 1353<sup>36</sup> (Promoting prostitution in the first degree) is guilty of a Class C felony punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 1353, 4205(b)(3).

Additionally, a trafficker may be convicted under Del. Code Ann. tit. 11, § 1100A<sup>37</sup> (Dealing in children) which states in part, “A person is guilty of dealing in a child if the person intentionally or knowingly trades, barter, buys or negotiates to trade, barter, buy or sell a child under the age of 18 . . . .” A conviction under this statute is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1100A, 4205(b)(5).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA) for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>38</sup> against a minor. 18 U.S.C. § 3559(e)(1).

### 3.2 *Creating and distributing child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*

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

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

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

. . . .

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

<sup>36</sup> See *supra* Component 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1353.

<sup>37</sup> See *supra* Component 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1100A.

<sup>38</sup> See *supra* note 22.

application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>39</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of CSAM<sup>40</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>41</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>42</sup>

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

Del. Code Ann. tit. 11, § 1112A (Sexual solicitation of a child) and § 1112B (Promoting sexual solicitation of a child) could reach traffickers who use the Internet to recruit or sell minor victims for commercial sexual exploitation. Del. Code Ann. tit. 11, § 1112A(a) states,

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

....

(2) Uses a computer, cellular telephone or other electronic device to communicate with another person, including a child, to solicit, request, command, importune, entice, encourage or otherwise attempt to cause a child to engage in a prohibited sexual act.

Similarly, Del. Code Ann. tit. 11, § 1112B(a) states,

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

....

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<sup>39</sup> See *supra* note 22.

<sup>40</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>41</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>42</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

(2) Uses a computer, cellular telephone, or other electronic device to communicate with another person to solicit, request, command, importune, entice, encourage or otherwise attempt to cause that person to engage in a prohibited sexual act with a child.

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

Del. Code Ann. tit. 11, § 4205(k) (Sentence for felonies) provides, “In addition to the [felony] penalties set forth above, the court may impose such fines and penalties as it deems appropriate.” Therefore, any trafficker convicted under Del. Code Ann. tit. 11, § 787(b) (Trafficking an individual, forced labor and sexual servitude) or any other felony CSEC or sexual offense is subject to an indeterminate discretionary fine.<sup>43</sup>

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

(1) In addition to any other amount of loss identified, the court shall order restitution, including the greater of:

- a. The gross income or value to the defendant of the victim’s labor or services; or
- b. The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 201 et seq.] or of Title 19, whichever is greater.

(2) The Court shall order restitution under this subsection (d) even if the victim is unavailable to accept payment of restitution.

Lastly, traffickers are subject to asset forfeiture if convicted of trafficking an individual, sexual servitude, or forced labor under Del. Code Ann. tit. 11, § 787(b)(1)–(3). Del. Code Ann. tit. 11, § 787(e)(1) states,

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

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

Pursuant to Del. Code Ann. tit. 11, § 4120(b)(1) (Registration of sex offenders), “Any sex offender who is released, discharged or paroled from any Level IV or Level V facility or other custodial institution after that sex offender has completed a sentence imposed following a conviction for any offense specified in § 4121(a)(4) of this title shall be required to register as a sex offender.” Del. Code Ann. tit. 11, § 4121(a)(4)(a) (Community notification of sex offenders on probation, parole, conditional release or release from confinement) defines “sex offender” to include any person convicted of “any of the offenses specified in §§ 765 through 780, § 787(b)(3)–(4), § 1100A, §§ 1108 through 1112B, § 1335(a)(6), § 1335(a)(7), § 1352(2), § 1353(2) or § 1361(b) of this title, or of any attempt or conspiracy to commit any of the aforementioned offenses.” Therefore, a trafficker convicted under Del. Code Ann. tit. 11, § 787(b)(3) (Trafficking an individual, forced labor and sexual servitude), § 1352(2) (Promoting prostitution in the second degree), § 1108 (Sexual exploitation of a child), § 1109 (Dealing in child pornography), § 1100A (Dealing in children), or § 1112A (Sexual solicitation of a child) must register as a sex offender.

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<sup>43</sup> See *supra* note 27 for discussion of additional financial penalties applicable to all crimes provided under Del. Code tit. 11, § 9016 (Penalty assessment) and § 9018 (Compensating fine).

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.*

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

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

. . . .

- (4) The respondent has been found by a court of competent jurisdiction to have:
  - a. Committed a felony level offense against the person, as described within subchapter II of Chapter 5 of Title 11,<sup>44</sup> [which includes Del. Code Ann. tit. 11, § 787(b) (Trafficking an individual, forced labor and sexual servitude),] in which the victim was a child; or
  - b. Aided or abetted, attempted, conspired or solicited to commit an offense set forth in paragraph (a)(4)a. of this section; or
  - c. Committed or attempted to commit the offense of Dealing in Children, as set forth in § 1100A of Title 11; or
  - d. Committed the felony level offense of endangering the welfare of a child as set forth in § 1102 of Title 11.

. . . .

- (7) The parent has subjected a child to torture, chronic abuse, sexual abuse, and/or life-threatening abuse.
- (8) A child has suffered unexplained serious physical injury, near death or death under such circumstances as would indicate that such injuries, near death or death resulted from the intentional or reckless conduct or willful neglect of the parent.

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<sup>44</sup> Subchapter II of Chapter 5 of Title 11 (Offenses against the person) includes all offenses contained in §§ 601[Offensive touching]–792 [Coercion; truth and proper motive as a defense].

***Legal Components:***

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

Del. Code Ann. tit. 11, § 787(b)(1) (Trafficking an individual, forced labor and sexual servitude) does not apply to facilitators who assist, enable, or benefit financially from a trafficking offense; however, a facilitator who “knowingly . . . transports [or] harbors” a minor “in furtherance of forced labor . . . or sexual servitude” faces a Class B felony under Del. Code Ann. tit. 11, § 787(b)(1), which is punishable by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 787(b)(1)(b), 4205(b)(2).

A facilitator may also face penalties under Del. Code Ann. tit. 11, § 1353(2) (Promoting prostitution in the first degree).<sup>45</sup> A facilitator convicted under Del. Code Ann. tit. 11, § 1353(2) is guilty of a Class C felony punishable by imprisonment up to 15 years. Del. Code Ann. tit. 11, §§ 1353, 4205(b)(3). Similarly, a facilitator may face penalties under Del. Code Ann. tit. 11, § 1352 (Promoting prostitution in the second degree),<sup>46</sup> which is punishable as a Class E felony by imprisonment up to 5 years. Del. Code Ann. tit. 11, §§ 1352, 4201(b)(5)<sup>47</sup>.

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

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

Del. Code Ann. tit. 11, § 4205(k) (Sentence for felonies) provides, “In addition to the [felony] penalties set forth above, the court may impose such fines and penalties as it deems appropriate.” Therefore, any facilitator convicted of a felony CSEC or sexual offense is subject to an indeterminate discretionary fine.<sup>48</sup>

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

<sup>45</sup> See *supra* Component 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1352.

<sup>46</sup> See *supra* Component 1.2 for the substantive provisions of Del. Code Ann. tit. 11, § 1353.

<sup>47</sup> See *supra* note 5.

<sup>48</sup> See *supra* note 27 for discussion of additional financial penalties applicable to all crimes provided under Del. Code tit. 11, § 9016 (Penalty assessment) and § 9018 (Compensating fine).

In addition to any other amount of loss identified, the court shall order restitution, including the greater of:

- a. The gross income or value to the defendant of the victim’s labor or services; or
- b. The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 201 et seq.] or of Title 19, whichever is greater.

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

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

An organization involved in the commission of a human trafficking offense is subject to criminal liability and a range of financial penalties. Del. Code Ann. tit. 11, § 787(c)(2) states,

The court may consider the severity of an organization’s offense under this section and order penalties in addition to those otherwise provided for the offense, including:

- a. A fine of not more than \$25,000 per offense;
- b. Disgorgement of profit from illegal activity in violation of this section; and
- c. Debarment from state and local government contracts.

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

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

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

#### 4.4 *Promoting and selling child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*

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

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

....

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

A first conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years, while a subsequent conviction is punishable by life imprisonment. Del. Code Ann. tit. 11, §§ 1108, 4205(b)(2), 1110. If the victim is under the age of 14, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences), which, upon the State’s application, is punishable by imprisonment for 25 years to life; an additional 5 year sentence may be imposed if the victim is under the age of 7. Del. Code. Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders). Further, a defendant sentenced “pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c).

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

- (1) The person knowingly ships, transmits, mails or transports by any means, including by computer or any other electronic or digital method, any book, magazine, periodical, pamphlet, video or film depicting a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly ships, transmits, mails or transports by any means, including by computer or any other electronic or digital method, any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act;
- (2) The person knowingly receives for the purpose of selling or sells any magazine, photograph or film which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, or knowingly receives for the purpose of selling or sells any other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act;
- (3) The person knowingly distributes or disseminates, by means of computer or any other electronic or digital method, or by shows or viewings, any motion picture, video or other visual depiction of a child engaging in a prohibited sexual act or the simulation of such an act. The possession or showing of such motion pictures shall create a rebuttable presumption of ownership thereof for the purposes of distribution or dissemination;
- (4) The person, intentionally compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or otherwise possesses any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act. For the purposes of this subsection, conduct occurring outside the State shall be sufficient to constitute this offense if such conduct is within the terms of § 204 of this title, or if such photograph, image, file or data was compiled, entered, accessed, transmitted, received, exchanged, disseminated, stored, made, printed, reproduced or otherwise possessed by, through or with any computer located within Delaware and the person was aware of circumstances which rendered the presence of such computer within Delaware a reasonable possibility; or
- (5) The person knowingly advertises, promotes, presents, describes, transmits or distributes any visual depiction, exhibition, display or performance with intent to create or convey the impression that such visual depiction, exhibition, display or performance is or contains a depiction of a child engaging in a prohibited sexual act or in the simulation of such an act.

.....

A conviction under this statute is punishable as a Class B felony by imprisonment for 2–25 years. Del. Code Ann. tit. 11, §§ 1109, 4205(b)(3). If the victim is under the age of 14 and the offender is either 18 years of age or older or tried as an adult, however, a conviction is designated a “dangerous crime against a child” under Del. Code Ann. tit. 11, § 777(a) (Dangerous crime against a child, definitions, sentences). A first conviction for a “dangerous crime against a child” is punishable as a Class B felony by imprisonment for 2–25 years, while subsequent convictions are punishable by mandatory imprisonment for life. Del. Code Ann. tit. 11, § 777(b). Subsequently, a defendant sentenced “pursuant to this section shall not be

eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.” Del. Code Ann. tit. 11 § 777(c). Further, upon the State’s application, a conviction under Del. Code Ann. tit. 11, § 777 is punishable by imprisonment for 25 years to life if, among other things, the victim is under 14 and an additional 5 years if the victim is under 7. Del. Code Ann. tit. 11, § 4205A(a), (c) (Additional penalty for serious sex offenders or pedophile offenders).

***Legal Components:***

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*
- 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

***Legal Analysis:***

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.<sup>49</sup>*

Delaware’s core sex trafficking offense, Del. Code Ann. tit. 11, § 787(b) (Trafficking an individual, forced labor and sexual servitude) does not include all commercially sexually exploited children as victims of trafficking.

Pursuant to Del. Code Ann. tit. 11, § 787(b)(3), proof of force, fraud, or coercion is not required when the victim is a minor.<sup>50</sup> Further, buyers may be charged for patronizing a victim of sexual servitude under Del. Code Ann. tit 11, § 787(b)(4).<sup>51</sup> However, Del. Code Ann. tit. 11, § 787(b)(4) requires a buyer to know “that the other person is a victim of sexual servitude,” which is defined as “maintain[ing] or mak[ing] available a minor for the purpose of engaging the minor in commercial sexual activity.” Accordingly, a buyer must know that the victim is under the control of a third party.

Del. Code Ann. tit. 11, § 787(b)(1) also contains buyer-applicable language; the term “solicit” applies directly to buyers while the term “obtain” applies to buyers based on federal precedent. However, Del. Code Ann. tit. 11, § 787(b)(1) requires a person to knowingly obtain or solicit a minor in furtherance of sexual servitude. As noted above, the definition of “sexual servitude” requires involvement as a trafficker or controlling third party.

<sup>49</sup> See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

<sup>50</sup> See *supra* discussion in Component 1.1.

<sup>51</sup> See *supra* discussion of buyer-applicability in Component 2.1.

Consequently, all commercially sexually exploited children will not be identified as human trafficking victims based on the third party control requirement.

- 5.1.1 Recommendation: Amend Del. Code Ann. tit. 11, § 787(b) (Trafficking an individual, forced labor and sexual servitude) 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.*<sup>52</sup>

Delaware’s trafficking offense expressly prohibits a defendant from asserting a defense based on the willingness of the minor to engage in the commercial sex act. Specifically, Del. Code Ann. tit. 11, § 787(b)(3)(c), (b)(4) (Trafficking an individual, forced labor and sexual servitude) states that “it is not a defense in a prosecution [for human trafficking] that the minor consented to engage in commercial sexual activity . . . .”

- 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>53</sup>

Delaware law prohibits the criminalization of minors for prostitution offenses under Del. Code Ann. tit. 11, § 1342(a)(1)<sup>54</sup> (Prostitution), which states, “[a] person, 18 years or older, is guilty of prostitution when the person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”

Notably, although the prostitution law does not apply to minors, a conflicting provision within Delaware’s diversion statute still references charging minors for prostitution offenses. Del. Code Ann. tit. 11, § 787(g)(2) (Trafficking an individual, forced labor and sexual servitude).<sup>55</sup>

- 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 act**

### *I. Services through child welfare*

Delaware law provides trafficking victims with a non-punitive avenue to specialized services. Del. Code tit. 11, § 787(k)(2)a (Trafficking an individual, forced labor and sexual servitude) states that the Human Trafficking Interagency Coordinating Council shall “develop a comprehensive plan to provide victims of human trafficking with services.” Del. Code tit. 11, § 787(m) makes those services available, stating,

- (1) A victim of human trafficking is eligible for a benefit or service, which is available through the State and identified in the plan developed under paragraph (k)(2)a. of this section, including compensation under § 9009 of this title, regardless of immigration status.
- (2) A minor engaged in commercial sexual activity is eligible for a benefit or service, which is available through the State and identified in the plan developed under paragraph (k)(2)a. of this section, regardless of immigration status.

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<sup>52</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>53</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>54</sup> The text of Del. Code Ann. tit. 11, § 1342 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 60 during the 150th General Assembly of the Delaware Legislature (effective June 20, 2019).

<sup>55</sup> See *supra* Component 5.4 for discussion of Delaware’s diversion statute.

(3) As soon as practicable after a first encounter with an individual who reasonably appears to a police officer to be a victim or a minor engaged in commercial sexual activity, the police officer shall notify the appropriate state or local agency, as identified in the plan developed under paragraph (k)(2)a. of this section, that individual may be eligible for a benefit or service under this section.

Notably, however, the comprehensive plan developed pursuant to Del. Code tit. 11, § 787(k)(2)a is only required to be specialized to the needs of trafficking victims, generally. Services are not required to be specialized to the needs of commercially sexually exploited *children*.

Del. Code tit. 11, § 787(g)(1) requires law enforcement officers to immediately report suspected cases of commercial sexual activity involving minors to the Department of Services for Children, Youth and Their Families. Del. Code Ann. tit. 11, § 787(g)(1) further provides that “[a] minor who has engaged in commercial sexual activity is presumed to be a neglected or abused child . . . .” Similarly, Del. Code Ann. tit. 11, § 1342(c)<sup>56</sup> (Prostitution) states,

A minor who, if 18 years or older, could be charged with prostitution as defined in subsection (a) of this section, is presumed to be a neglected or abused child under § 901 of Title 10. Whenever a police officer has probable cause to believe that a minor has engaged in prostitution, the police officer shall make an immediate report to the Department of Services for Children, Youth and Their Families pursuant to § 903 of Title 16.

State law also requires a comprehensive, multidisciplinary team<sup>57</sup> response for all multidisciplinary cases,<sup>58</sup> including cases of child sex trafficking. Del. Code Ann. tit. 16, §§ 902(21), 906(b)(1)(4). As part of that multidisciplinary response, “all suspected child victims of human trafficking[] must be interviewed in a children’s advocacy center.” Del. Code Ann. tit. 16, § 906(d)(6) (State response to reports of abuse or neglect). Further, the Division of Family Services of the Department of Services for Children, Youth and Their Families must investigate. Del. Code Ann. tit. 16, § 906(e)(3).

## II. Services through juvenile justice

Delaware law prohibits the criminalization of minors for prostitution offenses.<sup>59</sup> While juvenile sex trafficking victims should not be directed into a diversion process on prostitution charges, to the extent the child is charged with a loitering offense, he or she may be diverted from the delinquency process under Del. Code Ann. tit. 11, § 787(g)(2), which states in part,

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<sup>56</sup> See *supra* note 54.

<sup>57</sup> Del. Code tit. 16, § 902(22) defines “multidisciplinary team” as

a combination of the following entities as required by law to investigate or monitor multidisciplinary cases: the Division [of Family Services of the Department for Children, Youth and Their Families], the appropriate law enforcement agency, the Department of Justice, and the Investigation Coordinator. ‘Multidisciplinary team’ may also include others deemed necessary for an effective multidisciplinary response, such as medical personnel, the Division of Forensic Science, a children’s advocacy center, the Division of Prevention and Behavioral Health Services, mental health experts, and the child’s attorney.

<sup>58</sup> Del. Code tit. 16, § 902(21) defines “multidisciplinary case” as

a comprehensive investigation by the multidisciplinary team for any child abuse or neglect report involving death, serious physical injury, physical injury, human trafficking of a child, torture or sexual abuse, which if true, would constitute a criminal violation against a child, or an attempt to commit any such crime, even if no crime is ever charged.

<sup>59</sup> See *supra* Component 5.3 for a full discussion on non-criminalization.

A party to a juvenile delinquency proceeding in which a minor is charged with prostitution or loitering, or an attorney guardian ad litem or court-appointed special advocate appointed in a proceeding under § 901 et seq. of Title 10, may file a motion on behalf of a minor in a juvenile delinquency proceeding seeking to stay the juvenile delinquency proceedings. Such motion may be opposed by the Attorney General. The Family Court may consider such a motion and, in its discretion, may stay the juvenile delinquency proceeding indefinitely.

Specialized services are available in conjunction with diversion; Del. Code Ann. tit. 11, § 787(g)(2) continues,

Upon such motion, the Department of Services for Children, Youth and Their Families and/or the Family Court may identify and order available specialized services for the minor that, in the opinion of the Department of Services for Children, Youth and Their Families or Family Court, are best suited to the needs of the juvenile. So long as the minor substantially complies with the requirement of services identified by the Department of Services for Children, Youth and Their Families and/or ordered by the Family Court, the Attorney General shall, upon motion, nolle prosequi the stayed charges no earlier than 1 year after the stay was imposed. Upon motion of the Attorney General that the minor has not substantially complied with the requirement of services identified by the Department of Services for Children, Youth and Their Families and/or ordered by the Family Court, the Family Court shall lift the stay for further proceedings in accordance with the regular course of such proceedings.

## Summary

Delaware law prohibits the criminalization of minors for prostitution offenses and provides trafficking victims with a non-punitive avenue to specialized services. However, those services are not required to be specialized to the needs of commercially sexually exploited *children*.

### 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>60</sup>

Child sex trafficking is included within the definitions of “abuse” and “abused child” based on the definition of “sexual abuse.” Pursuant to Del. Code Ann. tit. 10, § 901(1) (Definitions),

“Abuse” or “abused child” means that a person:

- a. Causes or inflicts sexual abuse on a child; or
- b. Has care, custody or control of a child, and causes or inflicts:

....

4. Exploitation<sup>61</sup> . . . .

....

“‘Sexual abuse’ means any act against a child that is described as a sex offense in § 761(h) of Title 11.” Del. Code Ann. tit. 10, § 901(21). Del. Code Ann. tit. 11, § 761(h) (Definitions generally applicable to sexual offenses) defines “sex offense” to include violations of Del. Code Ann. tit. 11, § 787 (Trafficking an individual, forced labor and sexual servitude), § 1108 (Sexual exploitation of a child), § 1352 (Promoting prostitution in the second degree), and § 1353 (Promoting prostitution in the first degree).

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<sup>60</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>61</sup> Del. Code Ann. tit. 10, § 901(11) defines “exploitation” as “taking advantage of a child for unlawful or unjustifiable personal or sexual gain.”

Further, Del. Code Ann. tit. 11, § 787(g)(1) (Trafficking an individual, forced labor and sexual servitude) specifically provides that a child sex trafficking victim is presumed to be abused or neglected for purposes of initial intervention by the Department of Services for Children, stating,

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

Similarly, Del. Code Ann. tit. 11, § 1342(c)<sup>62</sup> (Prostitution) states,

A minor who, if 18 years or older, could be charged with prostitution as defined in subsection (a) of this section, is presumed to be a neglected or abused child under § 901 of Title 10. Whenever a police officer has probable cause to believe that a minor has engaged in prostitution, the police officer shall make an immediate report to the Department of Services for Children, Youth and Their Families pursuant to § 903 of Title 16.

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

The definition of “care, custody, and control” of a child is not a barrier to a sex trafficked child accessing the protection of child welfare because “sexual abuse,” which includes child sex trafficking, may be committed by “a person” regardless of that person’s relationship to the child. However, DSCYF is only “responsible for the investigation of intrafamilial and institutional child abuse, dependency or neglect.”<sup>63</sup>

5.6.1 Recommendation: Amend Del. Code Ann. tit. 10, § 901(3) (Definitions) to expressly allow child welfare protection of child sex trafficking victims.

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

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

(1) A victim of human trafficking is eligible for a benefit or service, which is available through the State and identified in the plan developed under paragraph (k)(2)a.<sup>64</sup> of this section, including compensation under § 9009 of this title, regardless of immigration status.

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<sup>62</sup> See *supra* note 54.

<sup>63</sup> Del. Code tit. 10, § 901(3) states,

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

<sup>64</sup> Del. Code Ann. tit. 11, § 787(k)(2)a states, “The Council shall . . . [d]evelop a comprehensive plan to provide victims of human trafficking with services . . . .”

(2) A minor engaged in commercial sexual activity is eligible for a benefit or service, which is available through the State and identified in the plan developed under paragraph (k)(2)a. of this section, regardless of immigration status.

(3) As soon as practicable after a first encounter with an individual who reasonably appears to a police officer to be a victim or a minor engaged in commercial sexual activity, the police officer shall notify the appropriate state or local agency, as identified in the plan developed under paragraph (k)(2)a. of this section, that the individual may be eligible for a benefit or service under this section.

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

The Agency<sup>65</sup> shall deny payment of a claim for the following reasons:

....

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

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

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

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

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

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

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

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

....

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

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

(c) If the victim bears any share of responsibility that caused injury or death, the Agency shall reduce the amount of compensation in accordance with its assessment of the degree of such responsibility attributable to the victim. A claim may be denied or reduced if the victim of the

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<sup>65</sup> “Agency” refers to the “Victims’ Compensation Assistance Program.” Del. Code Ann. tit. 11, § 9009.

personal injury in question, either through negligence or through willful and unlawful conduct, substantially provoked or aggravated the incident giving rise to the injury.

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

5.7.1 Recommendation: Amend Del. Code Ann. tit. 11, § 9010(d) (Denial of claim; reduction) to incorporate an exception that exempts all minor trafficking victims under the age of 18 from the ineligibility factors provided in Del. Code Ann. tit. 11, § 9010(a)–(c) that restrict eligibility based on cooperation with law enforcement, criminal culpability arising from the child’s trafficked condition, and time restrictions on reporting and filing claims.<sup>66</sup>

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

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

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

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

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

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

At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and is not

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<sup>66</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

inadmissible, the court may issue an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

Additionally, minor victims testifying in a sex trafficking prosecution are afforded certain rape shield protections. Del. Code Ann. tit. 11, § 787(f)(1) (Trafficking an individual, forced labor and sexual servitude) states,

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

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

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

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

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

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

An out-of-court statement made by a child victim or witness who is under 11 years of age at the time of the proceeding concerning an act that is a material element of the offense relating to sexual abuse, physical injury, serious physical injury, death, abuse or neglect as described in any felony delineated in subpart A, B or D of subchapter II of Chapter 5 of this title, or in any of the felonies delineated in § 782, § 783, § 783A, § 787, § 1100A, § 1102, § 1108, § 1109, § 1111, § 1112A, § 1112B, § 1335(a)(6), § 1335 (a)(7), § 1353(2), or § 1361(b) of this title or in any attempt to commit any felony delineated in this paragraph that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of subsections (b) through (f)<sup>67</sup> of this section are met.

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<sup>67</sup> Under subsection (b), an out-of-court statement is admissible under subsection (a) if the child “found by the court to be unavailable to testify” due to the child's “persistent refusal to testify,” “the child's inability to communicate about the offense because of fear or a similar reason,” or, among others, there is a “substantial likelihood that the

Lastly, Del. Code Ann. tit. 11, § 3514 provides various methods to protect a child throughout the course of courtroom proceedings. Del. Code Ann., tit 11, § 3515(a)(1) (Testimony of victim or witness in child abuse, and victim of domestic violence, sexual assault or stalking cases by means of secured video connection) provides,

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

Furthermore, pursuant to Del. Code Ann. tit. 11, § 3514(b)(1), when a witness less than 11 years of age or any victim of the offenses described in the statute, including child abuse, testifies by closed circuit, only the following persons may be in the room:

- a. The prosecuting attorney;
- b. The attorney for the defendant;
- c. The operators of the closed circuit television equipment; and

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child would suffer severe emotional trauma from testifying.” In order for a child to be deemed “unavailable,” it must be supported by expert testimony. Del. Code Ann. tit. 11, § 3513(c). Additionally, the child must give notice to the adverse party that the out-of-court statement will be used. Del. Code Ann. tit. 11, § 3513(d). Lastly, the child’s statement must be trustworthy. Del. Code Ann. tit. 11, § 3513(b)(2)(b). Pursuant to Del. Code Ann. tit. 11, § 3513(e), (f),

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

d. Any person whose presence, in the opinion of the court, contributes to the well-being of the witness less than 11 years of age or any victim of the offenses described herein, including a person who has dealt with the witness less than 11 years of age and any victim of the offenses described herein in a therapeutic setting concerning the abuse.

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.*

Delaware law allows child sex trafficking victims to vacate delinquency adjudications and expunge related records for nonviolent offenses without mandating a waiting period.

Pursuant to Del. Code Ann. tit. 11, § 787(j)<sup>68</sup> (Trafficking an individual, forced labor and sexual servitude),

- ....
- (2) A person convicted of any crime, except those deemed to be violent felonies pursuant to § 4201 of this title, committed as a direct result of being a victim of human trafficking may file a motion in the court in which the conviction was obtained to vacate the judgment of conviction . . .
- (3) Notwithstanding any provision of Chapter 43 of this title or any other law to the contrary, any person filing a motion under paragraph (j)(2) of this section in Superior Court or Family Court may also seek in that motion expungement of the criminal records related to such conviction. If the court grants the motion to vacate the conviction under paragraph (j)(2) of this section and the movant also requested expungement, the court’s order shall require expungement of the police and court records relating to the charge and conviction . . .
- ....

Although Del. Code Ann. tit. 11, § 787(j) applies specifically to “convictions,” subsection (3) notes that a motion may be filed in the Family Court, which has “exclusive original” civil jurisdiction concerning most delinquency proceedings. Del. Code Ann. tit. 10, § 921(1) (Exclusive original civil jurisdiction). Accordingly, the law appears to apply to delinquency adjudications as well.

Records may also be expunged under Del. Code Ann. tit. 10, § 1017(a)(3) (Mandatory expungement), which states,

- The Family Court shall grant a petition for expungement if . . . :
- ....
- (3) No more than 1 felony, misdemeanor or violation case which resulted in an adjudication of delinquency and at least 3 years have passed since the date of adjudication, provided the adjudication was not for a violent felony, felony sex offense, or misdemeanor sex offense as those terms are defined in § 1016 [Definitions applicable to juvenile expungements] of this title].

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.*<sup>69</sup>

Under Del. Code Ann. tit. 11, § 787(d) (Trafficking an individual, forced labor and sexual servitude), restitution is mandatory for those convicted of violations of human trafficking:

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<sup>68</sup> The text of Del. Code Ann. tit. 11, § 787 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 102 during the 150th General Assembly of the Delaware Legislature (effective June 20, 2019).  
<sup>69</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

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

Civil actions are expressly available for victims of human trafficking. Del. Code Ann. tit. 11, § 787(i) provides,

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

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

Under Del. Code Ann. tit. 11, § 205(b) (Time limitations), the general criminal statute of limitations is 5 years, but under subsection (a), prosecutions for Class A felonies “may be commenced at any time.” Additionally, “a prosecution for any crime that is delineated in § 787 of this title and which the victim is a minor, Subpart D of Subchapter II of Chapter 5 of this title, or is otherwise defined as a ‘sexual offense’ by § 761 of this title except § 763, § 764 or § 765 of this title, or any attempt to commit said crimes, may be commenced at any time.” Del. Code Ann. tit. 11, § 205(e). “Sexual offense,” as defined by Del. Code Ann. tit. 11, § 761(h) (Definitions generally applicable to sexual offenses), includes violations of Del. Code Ann. tit. 11, § 787 (Trafficking an individual, forced labor and sexual servitude), § 1108 (Sexual exploitation of a child), § 1352 (Promoting prostitution in the second degree), and § 1353 (Promoting prostitution in the first degree); accordingly, defendants charged under one of these offenses may be prosecuted at any time.

Regarding civil suits, Del. Code Ann. tit. 11, § 787(i)(3) establishes the statute of limitations for civil actions based on human trafficking offenses, stating,

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

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

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

**Legal Components:**

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

Del. Code Ann. tit. 11, § 787(k) (Trafficking an individual, forced labor and sexual servitude) establishes the Human Trafficking Interagency Coordinating Council and tasks the council with coordinating training that would include training for law enforcement as state and local employees. Del. Code Ann. tit. 11, § 787(k)(2)(f) states that “[t]he Council shall . . . [c]oordinate training on human trafficking prevention and victim services for state and local employees who may have recurring contact with victims or perpetrators . . . .”

Additionally, while Del. Code Ann. tit. 11, § 8405 (Mandatory training; exceptions) does not specifically mandate that law enforcement must be trained on human trafficking and domestic minor sex trafficking, it requires “a component of training for all persons enrolled in an approved school” to have “a course in the detection, prosecution and prevention of sexual assault. Such evidence-based training shall be victim-centered, and trauma-informed.” Del. Code Ann. tit. 11, § 8405(d). Furthermore, Del. Code Ann. tit. 11, § 8404(a)(19) (Powers and Duties) provides that the Council on Police Training may “[m]andate training for all persons seeking permanent or seasonal appointment as a police officer in the detection, prosecution and prevention of child sexual and physical abuse, exploitation and domestic violence . . . .”

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

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

*Lawful acts.*— It is lawful:

. . . .

(4) For a person to intercept<sup>70</sup> a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of

<sup>70</sup> Del. Code Ann. tit. 11, § 2401(10) (Definitions) defines “intercept” as “the aural or other acquisition of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.”

committing any criminal or tortious act in violation of the constitutions or laws of the United States, this State or any other state or any political subdivision of the United States or this or any other state.

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

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

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

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

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

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

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

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

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

Once a communication is lawfully intercepted, Del. Code Ann. tit. 11, § 2406(e) (Lawful disclosure or use of contents of communication) permits evidence of other offenses to be used by law enforcement for purposes of investigation pursuant to Del. Code Ann. tit. 11, § 2406(a) and (b), however, such evidence may only be introduced through testimony “when authorized or approved by a judge authorized to receive intercept applications where the judge finds on subsequent application that the contents were otherwise intercepted in accordance with this chapter. Such application should be made forthwith.” Del. Code Ann.

tit. 11, § 2406(e). Therefore, even if evidence of trafficking was obtained through a wiretap authorized for another offense, that evidence could not be introduced through testimony if the suspected trafficking constituted racketeering violations, or if the court determined that the trafficking was likely to result in personal injury.

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

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

Neither Delaware’s trafficking offense, Del. Code Ann. tit. 11, § 787(b) (Trafficking an individual, forced labor, sexual servitude), nor Delaware’s CSEC offense, Del. Code Ann. tit. 11, § 1108 (Sexual exploitation of a child), prohibit a defense based on the use of a law enforcement decoy posing as a minor. Thus, for charges brought through reverse sting operations against buyers attempting to solicit or purchase sex with a minor, the defendant would not be prevented from raising such a defense based on the fact that an actual minor was not involved.

However, the non-CSEC offense of Del. Code Ann. tit. 11, § 1112A(a)(2) (Sexual solicitation of a child) likely prohibits a buyer from raising the defense, as the statute provides criminal liability when a person, “[u]ses a computer, cellular telephone or other electronic devise to communicate with another person, including a child, to solicit, request, command, importune, entice, encourage or otherwise attempt to cause a child to engage in the prohibited sexual act.” Finding that Del. Code Ann. tit. 11, § 1112A(a)(2) criminalizes the act of “communicat[ing] with another person,” this language likely prohibits a buyer from raising a defense that the person the buyer believes to be a child is actually a decoy.

- 6.4.1 Recommendation: Enact a law that specifically prohibits a defense to prosecution based on the use of a law enforcement decoy posing as a minor to investigate violations of Delaware’s trafficking and CSEC offenses.

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

Although not specific to juvenile sex trafficking, Delaware criminalizes the use of the Internet to commit child sexual exploitation under Del. Code Ann. tit. 11, § 1112A(a)(2) (Sexual solicitation of a child; class C felony; class B felony) and Del. Code Ann. tit. 11, § 1112B(a)(2) (Promoting sexual solicitation of a child). The definition of “child” for purposes of prosecuting under Del. Code Ann. tit. 11, §§ 1112A and 1112B contemplates the use of the Internet in investigations by providing that a child includes “[a]n individual who represents himself or herself to be younger than 18 years of age” and “[a]n individual whom the person committing the offense believes to be younger than 18 years of age.” Del. Code Ann. tit. 11, §§ 1112A(b) and 1112B(b).

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

Del. Code Ann. tit. 11, § 8542(1) (Definitions) defines “missing child” for the purposes of missing child reporting requirements. It states,

“Missing child” means any person who is under the age of 18 years, whose temporary or permanent residence is in Delaware, or is believed to be in Delaware, whose location has not been

determined, and who has been reported as missing to a law-enforcement agency.

Pursuant to Del. Code Ann. tit. 11, § 8543 (Duties), the [Missing Children Information] Clearinghouse<sup>71</sup> is required to,

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

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

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

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

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

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<sup>71</sup> Del. Code tit. 11, § 8541 (Established) states, “The Missing Children Information Clearinghouse, hereinafter referred to as ‘Clearinghouse,’ is created within the State Bureau of Identification. The Clearinghouse is established as a central repository of information regarding missing children. Such information shall be collected and disseminated to assist in the location of missing children. The Director of the State Bureau of Identification shall establish services deemed appropriate by the Superintendent of State Police to aid in the location of missing children.”

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