

## 2019 ANALYSIS AND RECOMMENDATIONS

### MASSACHUSETTS

#### 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.*

Massachusetts law criminalizes child sex trafficking without requiring proof of force, fraud, or coercion. Pursuant to Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude),

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity,<sup>2</sup> a sexually-explicit performance<sup>3</sup> or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20

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

<sup>2</sup>“Commercial sexual activity” is defined as “any sexual act on account of which anything of value is given, promised to or received by any person.” Mass. Gen. Laws. Ch. 265, § 49.

<sup>3</sup>“Sexually-explicit performance” is defined as “an unlawful live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.”

years and by a fine of not more than \$25,000.<sup>4</sup> Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.

Additionally, if a person is convicted of second or subsequent violations, the person shall be punished by imprisonment from 10 years to life, and the offender is not eligible for parole in the first 10 years. Mass. Gen. Laws ch. 265, § 52(a) (Human trafficking—Subsequent violations of section 50 or 51).

Massachusetts's trafficking of persons for forced services law under Mass. Gen. Laws ch. 265, § 51 (Human trafficking—Forced services) may also apply since the definition of services includes “commercial sexual activity and sexually-explicit performances.” Mass. Gen. Laws ch. 265, § 49 (Human trafficking—Definitions). Pursuant to Mass. Gen. Laws ch. 265, § 51 (Human trafficking—Forced services),

(a) Whoever knowingly: (i) subjects, or attempts to subject, another person to forced services,<sup>5</sup> or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person, intending or knowing that such person will be subjected to forced services; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of trafficking of persons for forced services and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000.<sup>6</sup> Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work

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<sup>4</sup> Pursuant to Mass. Gen. Laws ch. 265, § 54 (Transmittal of fines to state treasurer), “The court shall transmit fines collected pursuant to subsection (c) and subsection (d) of section 26D and sections 50 and 51 to the state treasurer. The treasurer shall deposit such fines into the Victims of Human Trafficking Trust Fund established in section 66A of chapter 10.”

<sup>5</sup> Pursuant to Mass Gen. Laws 265, § 49,

"Forced services", services performed or provided by a person that are obtained or maintained by another person who: (i) causes or threatens to cause serious harm to any person; (ii) physically restrains or threatens to physically restrain another person; (iii) abuses or threatens to abuse the law or legal process; (iv) knowingly destroys, conceals, removes, confiscates or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person; (v) engages in extortion under section 25; or (vi) causes or threatens to cause financial harm to any person.

"Services", acts performed by a person under the supervision of or for the benefit of another including, but not limited to, commercial sexual activity and sexually-explicit performances.

<sup>6</sup> Pursuant to Mass. Gen. Laws ch. 265, § 54 (Transmittal of fines to state treasurer), “The court shall transmit fines collected pursuant to subsection (c) and subsection (d) of section 26D and sections 50 and 51 to the state treasurer. The treasurer shall deposit such fines into the Victims of Human Trafficking Trust Fund established in section 66A of chapter 10.”

release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for forced services upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for forced labor services shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of person for forced labor or services shall be civilly liable for an offense under this section.

Additionally, if a person is convicted of a second or subsequent violations, the person shall be punished by imprisonment from 10 years to life, and the offender is not eligible for parole in the first 10 years. Mass. Gen. Laws ch. 265, § 52(a). (Human trafficking—Subsequent violations of section 50 or 51).

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

The following state laws create separate and specific crimes of commercial sexual exploitation of children:

1. Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties) states,

Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than \$3,000 and not more than \$10,000,<sup>7</sup> or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.

2. Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) makes it illegal for

Any one [sic] who entices<sup>8</sup> a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that he or another person will violate section 13B [Indecent assault and battery on child under fourteen], 13B 1/2 [Indecent assault and battery on child under —aggravating factors], 13B 3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . 23 [Rape and abuse of child ], 23A [Rape and abuse of a child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], . . . of chapter 265, section 4A [Promoting child prostitution; mandatory sentence], . . . 28 [Matter harmful to minors—dissemination or possession with intent], . . . 29A [Child

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<sup>7</sup> Pursuant to Mass. Gen. Laws ch. 272, § 107 (Fines to be directed to victims of human trafficking), “The court shall transmit fines collected pursuant to section 8 and subsection (b) and subsection (c) of section 53A to the state treasurer. The treasurer shall deposit such fines into the Victims of Human Trafficking Trust Fund established pursuant to section 66A of chapter 10.”

<sup>8</sup> Mass. Gen. Laws ch. 265, § 26C(a) defines “entice” as “to lure, induce, persuade, tempt, incite, solicit, coax, or invite.”

pornography—enticement, solicitation, employment of children], 29B [child pornography—dissemination], 29C [child pornography—purchase or possession], 35A [Obscene material/acts—acts with child under sixteen], 53 [Common night walkers, disorderly persons and disturbers of the peace<sup>9</sup>] or 53A [Engaging in sexual conduct for a fee; payors and payees; penalties] of chapter 272, or any offense that has as an element the use or attempted use of force . . . .

A conviction under Mass. Gen. Laws ch. 265, § 26C(b) is punishable by imprisonment up to 5 years in the state prison<sup>10</sup> or imprisonment up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000.<sup>11</sup>

3. Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse) provides, “Whoever fraudulently and deceitfully entices or takes away a person from the house of his parent or guardian or elsewhere, for the purpose of prostitution or for the purpose of unlawful sexual intercourse, and whoever aids and assists in such abduction for such purpose, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment in jail.”
4. Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) makes it a crime if a person “induces a minor to become a prostitute, or . . . knowingly aids and assists in such inducement.” A conviction under Mass. Gen. Laws ch. 272, § 4A is punishable by imprisonment for 3–5 years in the state prison and a fine of \$5,000.<sup>12</sup> Mass. Gen. Laws ch. 272, § 4A.

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<sup>9</sup> Mass. Gen. Laws ch. 272, § 53 (Penalty for certain offenses) states,

(a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.

(b) Disorderly persons and disturbers of the peace shall, for a first offense, be punished by a fine of not more than \$150. For a second or subsequent offense, disorderly persons and disturbers of the peace shall be punished by imprisonment in a jail or house of correction for not more than 6 months or by a fine of not more than \$200 or by both such fine and imprisonment . . . .

<sup>10</sup> Mass. Ann. Laws ch. 274, § 1 (Felony and Misdemeanor) states, “A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.” In determining whether a crime is a felony or misdemeanor, “[T]he issue is how the crime itself may *potentially* be punished, not how a particular defendant before a particular court may be punished.” *United States v. Sousa*, 468 F.3d 42, 45 (1st Cir. 2006) (quoting *Commonwealth v. Smith*, 829 N.E.2d 1090, 1092 n.1 (Mass. 2005)). In other words, an offense is classified as a felony if the offense is punishable by imprisonment in a state prison and not whether the offender is actually sentenced to a term of imprisonment in state prison. Here and elsewhere in this report that a potential punishment of imprisonment in state prison is mentioned, the offense is classified as a felony.

<sup>11</sup> Mass. Gen. Laws ch. 279, § 6 (Sentence to jail or house of correction) states, “Whoever is convicted of a crime punishable wholly or in part by imprisonment in jail may be sentenced to such imprisonment in the house of correction or to confinement at hard labor either in the jail or house of correction; and if convicted of a crime punishable by imprisonment in the house of correction may be sentenced to such imprisonment in a jail.” Mass. Gen. Laws ch. 126, § 8 (Houses of correction provided by county) explains that a house of correction is operated by the county. Here and elsewhere in this report that imprisonment in a jail or house of correction is mentioned, it appears that those two terms are used interchangeably.

<sup>12</sup> The statute also specifies that the sentence “shall not be reduced to less than three years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served three years of such sentence.” Mass. Gen. Laws ch. 272, § 4A.

5. Mass. Gen. Laws ch. 272, § 4B (Deriving support from child prostitution; mandatory sentence) makes it a crime if a person “lives or derives support or maintenance, in whole or in part, from the earnings or proceeds of prostitution committed by a minor, knowing the same to be earnings or proceeds of prostitution, or shares in such earnings, proceeds or monies.” A conviction under Mass. Gen. Laws ch. 272, § 4B is punishable by imprisonment for at least 5 years in the state prison and a fine of \$5,000.<sup>13</sup> Mass. Gen. Laws ch. 272, § 4B.
6. Mass. Gen. Laws ch. 272, § 29A (Child pornography—enticement, solicitation, employment of children) states,

(a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material, shall be punished . . . .

(b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or engage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct, shall be punished . . . .

Convictions under Mass. Gen. Laws ch. 272, § 29A are punishable by imprisonment for 10–20 years, a fine of \$10,000–\$50,000, or both imprisonment and a fine.

7. Mass. Gen. Laws ch. 265, § 26D(c) (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity) makes it unlawful for “[w]hoever, by electronic communication,<sup>14</sup> knowingly entices<sup>15</sup> a child under the age of 18 years, to engage in prostitution in violation of section 50 [Human trafficking—Sexual servitude] or section 53A [Engaging in sexual conduct for fee; payors and payees; penalties] of chapter 272, human trafficking in violation of section 50 [Human trafficking—Sexual servitude], 51 [Human trafficking—Forced service], 52 [Human trafficking—Subsequent violations of 50 or 51] or 53 [Human trafficking—organ trafficking] or commercial sexual activity as defined in section 49 [Definitions for Secs. 49 to 57] . . . .”

A conviction under Mass. Gen. Laws ch. 265, § 26D is punishable by “imprisonment in a house of correction for not more than 2 ½ years or in or in the state prison for not more than 5 years or by a fine of not less than \$2,500,<sup>16</sup> or by both such fine and imprisonment.” Mass. Gen. Laws ch. 265, § 26D(c).

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<sup>13</sup> The statute also specifies that the sentence “shall not be reduced to less than five years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served five years of such sentence.” Mass. Gen. Laws ch. 272, § 4B.

<sup>14</sup> “Electronic communication” is defined under Mass. Gen. Laws ch. 265, § 26D(b) as including, but not limited to “any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or 270 photo-optical system.”

<sup>15</sup> “Entice” is defined under Mass. Gen. Laws ch. 265, § 26D(a) as “to lure, induce, persuade, tempt, incite, solicit, coax or invite.”

<sup>16</sup> Pursuant to Mass. Gen. Laws ch. 265, § 54 (Transmittal of fines to state treasurer), “The court shall transmit fines collected pursuant to subsection (c) and subsection (d) of section 26D and sections 50 and 51 to the state treasurer. The treasurer shall deposit such fines into the Victims of Human Trafficking Trust Fund established in section 66A of chapter 10.”

Sexual offense laws that may apply in cases of commercial sexual exploitation of a child include the following:

1. Mass. Gen. Laws ch. 265, § 13B (Indecent assault and battery on child under fourteen) states,

Whoever commits an indecent assault and battery<sup>17</sup> on a child under the age of 14 shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years . . . .

In a prosecution under this section, a child under the age of 14 years shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.

2. Mass. Gen. Laws ch. 265, § 13B 1/2 (Indecent assault and battery on child under fourteen—aggravating factors) states,

Whoever commits an indecent assault and battery on a child under the age of 14 and:

(a) the indecent assault and battery was committed during the commission or attempted commission of the following offenses: . . . (6) kidnapping as set forth in section 26 of chapter 265; . . . (11) posing or exhibiting child in state of nudity or sexual conduct as set forth in section 29A of chapter 272; or

(b) at the time of commission of said indecent assault and battery, the defendant was a mandated reporter as is defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 10 years of such sentence . . . .

3. Mass. Gen. Laws ch. 265, § 13L (Reckless endangerment of children) makes it a crime if a person “wantonly or recklessly<sup>18</sup> engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse<sup>19</sup> to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act.” A conviction under Mass. Gen. Laws ch. 265, §13L is punishable by imprisonment up to 2½ years in the house of correction.
4. Mass. Gen. Laws ch. 265, § 23 (Rape and abuse of child) makes it a crime if a person “unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age.” A conviction under Mass. Gen. Laws ch. 265, § 23 generally will “be punished by imprisonment in the state prison for life or for any term of years or, except as otherwise provided, for any term in a jail or house of correction,” except that Mass. Gen. Laws Ch. 265, § 23A (Rape and abuse of child—aggravating factors) provides enhanced penalties in the following circumstances:

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<sup>17</sup> See *infra* note 19 for the definition of “sexual abuse” under Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children), which explains that “sexual abuse” includes “an indecent assault and battery on a child under 14.”

<sup>18</sup> Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children) states, “For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”

<sup>19</sup> Mass. Gen. Laws ch. 265, §13L (Reckless endangerment of children) defines “sexual abuse” as “an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under 14 under section 13B1/2 of said chapter 265; . . . indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; . . . rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; . . . rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; . . . and assault of a child with intent to commit rape under section 24B of said chapter 265.”

- (a) there exists more than a 5 year age difference between the defendant and the victim and the victim is under 12 years of age;
- (b) there exists more than a 10 year age difference between the defendant and the victim where the victim is between the age of 12 and 16 years of age; or
- (c) at the time of such intercourse, was a mandated reporter as defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 10 years of such sentence . . . .

5. Mass. Gen. Laws ch. 265, § 24B (Assault on child under sixteen with intent to commit rape) makes it a crime if a person “assaults a child under sixteen with intent to commit a rape, as defined in [ch. 277, § 39].”<sup>20</sup> A conviction under Mass. Gen. Laws ch. 265, § 24B will “be punished by imprisonment in the state prison for life or for any term of years; and whoever over the age of eighteen commits a subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years but not less than five years.”
6. Mass. Gen. Laws ch. 272, § 4 (Enticing to unlawful intercourse) makes it a crime if a person “induces any person under 18 years of age of chaste life to have unlawful sexual intercourse.” A conviction under Mass. Gen. Laws ch. 272, § 4 is punishable by imprisonment up to 3 years in the state prison or imprisonment up to 2½ years in a jail or house of correction, a fine up to \$1,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 4.
7. Mass. Gen. Laws ch. 272, § 35A (Obscene material/acts—acts with child under sixteen) makes it a crime if a person “commits any unnatural and lascivious act<sup>21</sup> with a child under the age of sixteen.” An offender’s first conviction under Mass. Gen. Laws ch. 272, § 35A is punishable by imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in jail or the house of correction, or a fine of \$100–\$1,000, while subsequent convictions by adult offenders (persons over the age of eighteen) are punishable by imprisonment for at least 5 years in the state prison. Mass. Gen. Laws ch. 272, § 35A.

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<sup>20</sup> Mass. Gen. Laws ch. 277, § 39 (Meaning of certain words and phrases) defines “rape” as “[s]exual intercourse or unnatural sexual intercourse by a person with another person who is compelled to submit by force and against his will or by threat of bodily injury, or sexual intercourse or unnatural sexual intercourse with a child under sixteen years of age.”

<sup>21</sup> Mass. Gen. Laws ch. 272, § 31 (Obscene material/acts—definitions) defines, “Lascivious intent” as

a state of mind in which the sexual gratification or arousal of any person is an objective. For the purposes of prosecution under this chapter, proof of lascivious intent may include, but shall not be limited to, the following:

- (1) whether the circumstances include sexual behavior, sexual relations, infamous conduct of a lustful or obscene nature, deviation from accepted customs and manners, or sexually oriented displays;
- (2) whether the focal point of a visual depiction is the child’s genitalia, pubic area, or breast area of a female child;
- (3) whether the setting or pose of a visual depiction is generally associated with sexual activity;
- (4) whether the child is depicted in an unnatural pose or inappropriate attire, considering the child’s age;
- (5) whether the depiction denotes sexual suggestiveness or a willingness to engage in sexual activity;
- (6) whether the depiction is of a child engaging in or being engaged in sexual conduct, including, but not limited to, sexual intercourse, unnatural sexual intercourse, bestiality, masturbation, sado-masochistic behavior, or lewd exhibition of the genitals.

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

Massachusetts' prostitution statute, Mass. Gen. Laws ch. 272, § 53A (Engaging in sexual conduct for fee; payors and payees; penalties) does not refer to Mass. Gen. Laws ch. 265, § 50 (Human trafficking – Sexual servitude) when a minor is involved in prostitution. However, Mass. Gen. Laws ch. 265, § 57 (Human Trafficking—Victims Accused of Common Night Walking or Streetwalking—Affirmative Defense) provides an “affirmative defense to charges of engaging in common night walking or common streetwalking in violation of section 53 of chapter 272 and to charges of violating sections 26 or 53A of said chapter 272 that, while a human trafficking victim, such person was under duress or coerced into committing the offenses for which such person is being prosecuted or against whom juvenile delinquency proceedings have commenced.”

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.*

Mass. Gen. Laws ch. 271A (Enterprise Crime) defines “Criminal enterprise activity” under Mass. Gen. Laws ch. 271A, § 1(1) (Definitions) as

the commission, attempt to commit or conspiracy to commit or the solicitation, coercion, aiding, abetting or intimidation of another to commit any of the following criminal activities under the laws of the commonwealth or equivalent crimes under the laws of any other jurisdiction: . . . child exploitation; assault and battery on a child; rape of a child; rape and abuse of a child; enticement of a child under 16; human trafficking . . . prostitution under sections 2, 3, 4A, 4B, 6, 7, 12 and 13 of chapter 272 . . . .

However, Mass. Gen. Laws ch. 271A, § 2 only criminalizes criminal enterprise activity if it results in an interest or control of “an enterprise which is engaged in, or the activities of which affect, licensed gaming under chapter 23K or ancillary industries which do business with a gaming establishment.” Thus, although human trafficking and some CSEC crimes are included in the definition of predicate acts, the activity is not penalized under Mass. Gen. Laws ch. 271A unless the enterprise is also involved with gambling establishments in some way.

Penalties include “imprisonment in the state prison for not more than 15 years or by a fine of not more than \$25,000 or by both such imprisonment and fine,” Mass. Gen. Laws ch. 271A, § 2(4), and asset forfeiture, Mass. Gen. Laws ch. 271A, § 3.



**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.*

Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking—Sexual servitude) holds buyers liable for “causing” a minor to engage in commercial sex acts, stating, in part,

Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity,<sup>22</sup> a sexually-explicit performance<sup>23</sup> or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; . . . shall be guilty of the crime of trafficking of persons for sexual servitude . . . .

Additionally, Mass. Gen. Laws ch. 265, § 50(a) can apply to buyers of sex with minors following federal precedent through the term “obtain.”<sup>24</sup>

<sup>22</sup> “Commercial sexual activity” is defined as “any sexual act on account of which anything of value is given, promised to or received by any person.” Mass. Gen. Laws. Ch. 265, § 49.

<sup>23</sup> “Sexually-explicit performance” is defined as “an unlawful live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.”

<sup>24</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers (*United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F. 3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase

- 2.1.1 Recommendation: Amend Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking—Sexual servitude) to clarify that buyer conduct is included as a violation of Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking—Sexual servitude).

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

Massachusetts criminalizes buying sex acts with a minor through two CSEC laws. Pursuant to Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties),

Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than \$3,000 and not more than \$10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.

A buyer also may be prosecuted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) to the extent that the buyer “entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent” to engage in sexual conduct with a minor in violation of Mass. Gen. Laws ch. 272, § 35A (Obscene material/acts—acts with child under sixteen), or § 53A (Engaging in sexual conduct for fee; payors and payees; penalties). A buyer who is convicted under Mass. Gen. Laws ch. 265, § 26C will receive imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b).

A buyer might also be prosecuted under a range of general sex offenses.<sup>25</sup>

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

Massachusetts’s laws distinguish between soliciting sex with an adult and soliciting sex with a minor under 18 years of age. Specifically, enhanced penalties apply where a person solicits sex with a minor under Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties). Mass. Gen. Laws ch. 272, § 53A(b) states,

Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than 2 and one-half years or by a fine of not less than \$1,000 and not more than \$5,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

Mass. Gen. Laws ch. 272, § 53A(c) imposes enhanced penalties where a buyer “pays, agrees to pay, or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18.” Mass. Gen. Laws

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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>25</sup> See *supra* Component 1.2 for discussion of sex offenses that may be applicable to certain buyers of sex acts with minors.

ch. 272, § 53A(c). A conviction under this statute is punishable by imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction. Mass. Gen. Laws ch. 272, § 53A(b).

In addition, a buyer who “entices”<sup>26</sup> a child under 16 “to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent” to engage in sexual conduct with the child, in violation of Mass. Gen. Laws ch. 272, § 53A(b), may be imprisoned up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children).

By contrast, the age-neutral solicitation law, Mass. Gen. Laws ch. 272, § 8 (Soliciting) makes it illegal to “solicit or receive compensation for soliciting for a prostitute,” and is punishable by up to 2½ years imprisonment in the house of correction, a fine of \$1,000-\$5,000, or both imprisonment or a fine. Mass. Gen. Laws ch. 272, § 8.

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

Under Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking—Sexual servitude), a buyer will face “a fine of not more than \$25,000” and 5–20 years imprisonment. Mass. Gen. Laws ch. 265, § 50(a). While Mass. Gen. Laws ch. 265, § 50(b), which provides an enhanced penalty when the “crime of trafficking of persons for sexual servitude [is committed] upon a person under 18 years of age,” does not enhance the fine provided under subsection (a), a buyer sentenced under subsection (b) for obtaining commercial sex with a minor will face “imprisonment in the state prison for life or for any term of years, but not less than 5 years,” and will not be eligible for “parole, work release or furlough or receive any deduction from his sentence for good conduct until he has served 5 years of such sentence.” Mass. Gen. Laws ch. 265, § 50(b).

Buyers convicted under Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties) for paying, agreeing to pay, or offering to pay to engage in sexual conduct with a child under 18 may be imprisoned up to 10 years in the state prison or imprisoned up to 2½ years in the house of correction and face a fine not less than \$3,000 and not more than \$10,000. Mass. Gen. Laws ch. 272, § 53A(c). Buyers convicted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be imprisoned by up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000. Mass. Gen. Laws ch. 265, § 26C(b). Lastly, buyers convicted under Mass. Gen. Laws ch. 265, § 26D(c) (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity) face imprisonment for not more than 2½ years in a house of correction or up to 5 years in a state prison or a fine not less than \$2,500.

In comparison, if the victim is under the age of 14, a conviction under the federal Trafficking Victims Protection Act (TVPA)<sup>27</sup> 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>28</sup> against a minor.

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<sup>26</sup> See *supra* note 8 for the definition of “entice” as used in Mass. Gen. Laws ch. 265, § 26C, which includes “solicit.”

<sup>27</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>28</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

18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>29</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>30</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.*

Massachusetts has a law specifically directed at the use of the Internet or electronic communications to purchase commercial sex acts with a minor. Pursuant to Mass. Gen. Laws ch. 265, § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity),

(a) As used in this section, the term “entice” shall mean to lure, induce, persuade, tempt, incite, solicit, coax or invite.

(b) As used in this section, the term “electronic communication” shall include, but not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system.

(c) Whoever, by electronic communication, knowingly entices a child under the age of 18 years, to engage in prostitution in violation of section 50 or section 53A of chapter 272, human trafficking in violation of section 50, 51, 52 or 53 or commercial sexual activity as defined in section 49, or attempts to do so, shall be punished by imprisonment in a house of correction for not more than 2 ½ years or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment.

(d) Whoever, after having been convicted of, or adjudicated delinquent by reason of a violation of this section, commits a second or subsequent such violation, shall be punished by imprisonment in the state prison for not less than 5 years and by a fine of not less than \$10,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release or furlough or receive any deduction from the sentence for good conduct until that person has served 5 years of such sentence.

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

Mass. Gen. Laws ch. 265, § 50(b) (Human trafficking—Sexual servitude), Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties), Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties), and Mass. Gen. Laws ch. 265, § 26C (Enticement of children) do not expressly prohibit a buyer from asserting a mistake of age defense.

2.6.1 Recommendation: Include a prohibition on asserting an age mistake defense in prosecutions under Mass. Gen. Laws ch. 265, § 50(b) (Human trafficking—Sexual servitude), Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties), Mass. Gen. Laws

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coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

<sup>29</sup> 18 U.S.C. § 2251A(b) (Selling or buying of children); 18 U.S.C. § 2251(a) (Sexual exploitation of children); 18 U.S.C. § 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity); 18 U.S.C. § 2422(a) (Coercion and enticement); 18 U.S.C. § 2252(a)(2), (4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>30</sup> 18 U.S.C. § 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine); 18 U.S.C. § 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine); 18 U.S.C. § 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine); 18 U.S.C. § 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both); 18 U.S.C. § 2252(b) (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); 18 U.S.C. § 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties), and Mass. Gen. Laws ch. 265, § 26C (Enticement of children)

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

Massachusetts's buyer-applicable trafficking and CSEC laws do not stagger penalties based on a minor's age and provide sufficiently high penalties. Mass. Gen. Laws ch. 265, § 50(b) (Human trafficking—Sexual servitude) states, "Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years." Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties) punishes a violation by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years . . . ."

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.*

A buyer of commercial sex with a minor convicted under Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking—Sexual servitude) will face "a fine of not more than 25,000" Buyers convicted of violating Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be required to pay a fine up to \$5,000, while those convicted under Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties), where the victim is 18 years of age or older may be required to pay a fine up to \$500. However, buyers convicted under Mass. Gen. Laws ch. 272, § 53A(c), criminalizing the purchase of commercial sex acts with a minor 18 and younger, are required to pay a fine not less than \$3,000 and not more than \$10,000. Mass. Gen. Laws ch. 272, § 53A(c).

Buyers also may be required to make restitution. Mass. Gen. Laws ch. 258B, § 3(o), (u) (Rights of victims and witnesses of crime) states that victims of crime shall have the right "to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim's losses" and "to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim."

If convicted of human trafficking or trafficking for sexual servitude, buyers are subject to mandatory asset forfeiture. Pursuant to Mass. Gen. Laws ch. 265, § 55 "[a]ll monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 or 51 shall be subject to forfeiture . . . ." These monies "shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B." Mass. Gen. Laws ch. 265, §55.

Additionally, pursuant to Mass. Gen. Laws ch. 265, § 56(a) (Human trafficking—Property subject to forfeiture),

The following property shall be subject to forfeiture to the commonwealth and all property rights therein shall be in the commonwealth:

- (i) all conveyances, including aircraft, vehicles or vessels used, or intended for use, to transport, conceal or otherwise facilitate a violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services];
- (ii) all books, records and research, including microfilm, tapes and data which are used, or intended for use, in violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services];;
- (iii) all negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, all proceeds traceable to such an exchange, including real estate and any other thing of value, and all negotiable instruments and securities used or intended to be used to facilitate any violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services]; and

(iv) all real property, including any right, title and interest in the whole of any lot or tract of land and any appurtenances or improvements thereto, which is used in any manner or part to commit or to facilitate any violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services] . . . .

(ii) no conveyance shall be forfeited by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, of the commonwealth or of any state; and

(iii) no conveyance or real property shall be subject to forfeiture unless the owner thereof knew or should have known that such conveyance or real property was used in violation of section 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services].

. . . .

Seizure of forfeitable property is governed by Mass. Gen. Laws ch. 265, §56(g), which states, “During the pendency of the proceedings, the court may issue at the request of the commonwealth ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody.” The final order of the court shall be deposited into the Victims of Human Trafficking Trust Fund<sup>31</sup> established in section 66A of chapter 10. Mass. Gen. Laws ch. 265, §56(e).

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

Buying and possessing child sexual abuse material (CSAM) is prohibited under Mass. Gen. Laws ch. 272, § 29C (Child pornography—purchase or possession). Specifically, Mass. Gen. Laws ch. 272, § 29C makes it illegal when a person,

[K]nowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:

- (i) actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- (iii) actually or by simulation engaged in any act of masturbation;
- (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;
- (v) actually or by simulation engaged in any act of excretion or urination within a sexual context;
- (vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or

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<sup>31</sup> Pursuant to Mass. Gen. Laws ch. 10, § 66A (Victims of human trafficking trust fund),

There shall be established and set up on the books of the commonwealth a separate fund to be known as the Victims of Human Trafficking Trust Fund. The fund shall consist of proceeds of assets seized and forfeited pursuant to sections 55 and 56 of chapter 265 and fines and assessments collected pursuant to sections 50, 51 and 54 of said chapter 265 and section 107 of chapter 272, together with any interest or earnings accrued on such monies through investment or deposit. The state treasurer shall be the custodian of the fund and shall receive, deposit and invest all monies transmitted to him under this section in accordance with sections 34 and 38 of chapter 29 in such a manner as to secure the highest rate of return available consistent with the safety of the fund, and shall credit interest and earnings on the trust fund corpus to the trust fund. The state treasurer shall transfer funds from the income and receipts of the fund to the victim and witness assistance board, as established in section 4 of chapter 258B, from time to time, at the request of the board. The board shall award and administer grants from the fund, without further appropriation, to public, private non-profit or community-based programs in the commonwealth to provide services to victims of offenses under said sections 50 and 51 of said chapter 265.

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child; with knowledge of the nature or content thereof . . . .

. . . .

An offender's first conviction under Mass. Gen. Laws ch. 272, § 29C is punishable by imprisonment up to 5 years in the state prison or imprisonment up to 2½ years in a jail or house of correction or a fine of \$1,000–\$10,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29C. Upon conviction of a second violation, a convicted offender may receive imprisonment not less than 5 years or a fine of \$5,000–\$20,000, or both imprisonment and a fine, while any subsequent convictions are punishable by imprisonment not less than 10 years or a fine of \$10,000–\$30,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29C(vii).

In comparison, a federal conviction for possession of CSAM<sup>32</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>33</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>34</sup>

2.9.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 29C (Child pornography—purchase or possession) to increase penalties to reflect the seriousness of the offense.

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

Buyers convicted of Mass. Gen. Laws ch. 265, § 26C (Enticement of children), ch. 265, § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), ch. 265, § 50 (Trafficking of persons for sexual servitude), and ch. 265, § 52 (Subsequent violations of Sec. 50 or 51; penalties; evidence of prior adjudication or conviction) are required to register as sex offenders; however, those convicted under Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) and Mass. Gen. Laws ch. 272, § 8 (Soliciting) are not required to register. Mass. Gen. Laws ch. 6, §§ 178C, 178D. Pursuant to Mass. Gen. Laws ch. 6, § 178D (Establishment and maintenance of sex offender registry), the sex offender registry board is required to “establish and maintain a central computerized registry of all sex offenders required to register pursuant to section 178C [Definitions] to 178P [Police officer's authority to arrest for sex offender's failure to comply with registration requirements], inclusive, known as the sex offender registry.” Mass. Gen. Laws ch. 6, § 178C (Definitions) defines “sex offender” in part as “a person . . . who has been convicted of a sex offense . . . .” “Sex offense” is defined in Mass. Gen. Laws ch. 6, § 178C (Definitions) in relevant part as

an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B1/2 of said chapter 265; a

<sup>32</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>33</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>34</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).

repeat offense under section 13B 3/4 of said chapter 265; . . . indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; . . . rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265 [Rape and abuse of child—previous youthful offender]; . . . enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265, . . . dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272 [Child pornography—dissemination]; . . .<sup>35</sup>

Additionally, the definitions of “sex offense involving a child” and “sexually violent offense” under Mass. Gen. Laws ch. 6, § 178C include,

enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265 . . . .

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<sup>35</sup> Mass. Gen. Laws ch. 6, § 178C (Definitions) contains a definition for “sex offense involving a child,” and the offenses listed as a “sex offense involving a child” are all also listed as “sex offenses.”



**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.

A conviction under Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking – Sexual servitude) shall result in:

imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

Additionally, a person convicted under Mass. Gen. Laws ch. 265, § 50(b) when committed against a person under 18 years of age

shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

Traffickers may also be prosecuted under several of Massachusetts’s CSEC laws. Traffickers convicted under Mass. Gen. Laws ch. 272, § 2<sup>36</sup> (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), which is punishable by imprisonment up to 3 years in the state prison or imprisonment by 1 year in jail, a fine of up to \$1,000, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 4A<sup>37</sup> (Promoting child prostitution; mandatory sentence) is punishable by imprisonment for 3–5 years in the state prison and a fine of \$5,000.<sup>38</sup> Mass. Gen. Laws ch. 272, § 4A.

Traffickers may be prosecuted under Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties) if the trafficker was “paid . . . in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18.” Mass. Gen. Laws ch. 272, § 53A(c) is punishable by up to 10 years imprisonment in the state prison or in the house of correction for not more than 2 ½ years and by a \$3,000—10,000 fine.

<sup>36</sup> See *supra* Component 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 2.

<sup>37</sup> See *supra* Component 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 4A.

<sup>38</sup> The imprisonment “shall not be reduced to less than three years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served three years of such sentence.” Mass. Gen. Laws ch. 272, § 4A.

Traffickers also may be prosecuted under Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) to the extent that the trafficker “entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that he or another person will violate . . . [Mass. Gen. Laws ch. 272] section 4A [Promoting child prostitution; mandatory sentence] . . . 29A [Child pornography–enticement, solicitation, employment of children], 29B [Child pornography–dissemination], 29C [Child pornography–purchase or possession], 35A [Obscene material/acts–acts with child under sixteen] . . . or 53A [Engaging in sexual conduct for fee; payors and payees; penalties] of chapter 272, or any offense that has as an element the use or attempted use of force . . .” A trafficker convicted of Mass. Gen. Laws ch. 265, § 26C (Enticement of children) may be imprisoned up to 5 years in the state prison or imprisoned up to 2½ years in the house of correction, or by imprisonment and a fine up to \$5,000.

Mass. Gen. Laws ch. 272, § 4B<sup>39</sup> (Deriving support from child prostitution; mandatory sentence) may also be used to prosecute traffickers and a conviction is punishable by imprisonment for at least 5 years in the state prison and a fine of \$5,000.<sup>40</sup> Mass. Gen. Laws ch. 272, § 4B. Traffickers who are “paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18” may be convicted under Mass. Gen. Laws ch. 272, § 53A(c)<sup>41</sup> (Engaging in sexual conduct for fee; payors and payees; penalties), which is punishable by imprisonment up to 10 years in the state prison or imprisonment up to 2½ years in the house of correction and a fine of \$3,000–\$10,000. Mass. Gen. Laws ch. 272, § 53A(b). Lastly, convictions under Mass. Gen. Laws ch. 272, § 29A(b)<sup>42</sup> (Child pornography—enticement, solicitation, employment of children) are punishable by imprisonment for 10–20 years in the state prison, by a fine of \$10,000–\$50,000, or by both such fine and imprisonment. Mass. Gen. Laws ch. 272, § 29A(a), (b).

Lastly, a trafficker could be prosecuted under Mass. Gen. Laws ch. 265, § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), which is punishable by “imprisonment in a house of correction for not more than 2 1/2 years or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment,” and “a second or subsequent . . . [offense] shall be punished by imprisonment in the state prison for not less than 5 years and by a fine of not less than \$10,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release or furlough or receive any deduction from the sentence for good conduct until that person has served 5 years of such sentence.” Mass. Gen. Laws ch. 265, § 26D(c), (d). In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>43</sup> 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>44</sup> against a minor. 18 U.S.C. § 3559(e)(1).

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<sup>39</sup> See *supra* Component 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 4B.

<sup>40</sup> The imprisonment “shall not be reduced to less than five years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served five years of such sentence.” Mass. Gen. Laws ch. 272, § 4B

<sup>41</sup> See *supra* Component 1.2 for substantive provisions of Mass. Gen. Laws ch. 272, § 53A.

<sup>42</sup> See *supra* Component 1.2 for the substantive provisions of Mass. Gen. Laws ch. 272, § 29A.

<sup>43</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>44</sup> See *supra* note 28.

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

Massachusetts law criminalizes the creation and distribution of child sexual abuse material (CSAM). Creating CSAM is prohibited under Mass. Gen. Laws ch. 272, § 29A(a), (b) (Child pornography—enticement, solicitation, employment of children), which states,

(a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material . . . .

(b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or engage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct . . . .

Convictions under Gen. Laws ch. 272, § 29A(a), (b) are punishable by imprisonment for 10–20 years or a fine of \$10,000–\$50,000, or by both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29A(a), (b).

Disseminating CSAM is prohibited under Mass. Gen. Laws ch. 272, § 29B (Child pornography—dissemination), which states,

(a) Whoever, with lascivious intent, disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity involving the use of a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished . . . .

(b) Whoever with lascivious intent disseminates any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished . . . .

Convictions under Mass. Gen. Laws ch. 272, § 29B(a), (b) are punishable by imprisonment for 10–20 years or a fine the greater of \$10,000–\$50,000 or 3 times “the monetary value of any economic gain derived from said dissemination,” or by both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 29B(a), (b).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>45</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of CSAM<sup>46</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed

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<sup>45</sup> See *supra* note 28.

<sup>46</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).

\$250,000.<sup>47</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>48</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.*

Massachusetts has a law specifically directed at the use of the Internet or electronic communications to commit domestic minor sex trafficking. Pursuant to Mass. Gen. Laws ch. 265, § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity),

(a) As used in this section, the term “entice” shall mean to lure, induce, persuade, tempt, incite, solicit, coax or invite.

(b) As used in this section, the term “electronic communication” shall include, but not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system.

(c) Whoever, by electronic communication, knowingly entices a child under the age of 18 years, to engage in prostitution in violation of section 50 or section 53A of chapter 272, human trafficking in violation of section 50 [Human trafficking—Sexual servitude], 51 [Human trafficking—Forced services], 52 [Human trafficking—Subsequent violations of sections 50 or 51] or 53 [Human trafficking—Organ trafficking] or commercial sexual activity as defined in section 49, or attempts to do so, shall be punished by imprisonment in a house of correction for not more than 2 ½ years or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment.

(d) Whoever, after having been convicted of, or adjudicated delinquent by reason of a violation of this section, commits a second or subsequent such violation, shall be punished by imprisonment in the state prison for not less than 5 years and by a fine of not less than \$10,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release or furlough or receive any deduction from the sentence for good conduct until that person has served 5 years of such sentence.

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

Traffickers are subject to various criminal fines, restitution orders, and asset forfeiture. Traffickers convicted under Mass. Gen. Laws ch. 265, § 50 (Human trafficking – Sexual servitude) are subject to a fine not to exceed \$25,000 and “[a] business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.” Mass. Gen. Laws ch. 265, § 50(a), (c).

Traffickers convicted of violating Mass. Gen. Laws ch. 272, § 29A (Child pornography—enticement, solicitation, employment of children) may be required to pay a fine of \$10,000–\$50,000, while those who violate Mass. Gen. Laws ch. 272, § 29B(a), (b) (Child pornography—dissemination) may be required to pay a

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<sup>47</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>48</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).

fine of the greater of \$10,000–\$50,000 or 3 times “the monetary value of any economic gain derived from said dissemination.” Mass. Gen. Laws ch. 272, § 29A(a), (b). Traffickers who violate any of Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), or Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) may be required to pay up to a \$5,000 fine. Mass. Gen. Laws ch. 272, §§ 4A, 4B, ch. 265, § 26C(b). Those convicted under Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse) may be required to pay a \$1,000 fine. Mass. Gen. Laws ch. 272, § 2.

Convicted traffickers may also be required to make restitution to their victims, as Mass. Gen. Laws ch. 258B, § 3(o), (u) (Rights of victims and witnesses of crime) specifies that victims shall have the right “to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim’s losses” and “to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.”

Traffickers face mandatory asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 55, which states, “[a]ll monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 or 51 shall be subject to forfeiture . . . .” These monies “shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B.” Mass. Gen. Laws ch. 265, §55.

Additionally, traffickers face asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 56 (Human trafficking—Property subject to forfeiture).<sup>49</sup> Seizure of forfeitable property is governed by Mass. Gen. Laws ch. 265, §56(g), which states “During the pendency of the proceedings, the court may issue at the request of the commonwealth ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody.”

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

Traffickers convicted of violating Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude), ch. 265, § 26D (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity), a second or subsequent conviction of ch. 265, § 52 (Human trafficking—Subsequent Violation of Sections 50 or 51), ch. 265, § 26C (Enticement of children), ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), ch. 272, § 4A (Promoting child prostitution; mandatory sentence), ch. 272, § 4B (Deriving support from child prostitution; mandatory sentence), § 29A (Child pornography—enticement, solicitation, employment of children), ch. 272, § 29B (Child pornography—dissemination) are required to register as sex offenders pursuant to Mass. Gen. Laws ch. 6, § 178D (Establishment and maintenance of sex offender registry), and Mass. Gen. Laws ch. 6, § 178C (Definitions).<sup>50</sup> Traffickers convicted of Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for a fee; payors and payees; penalties) or ch. 272, § 24 (Keeping house of prostitution) are not required to register as these offenses are not included within the definition of “sex offense” under Mass. Gen. Laws ch. 6, § 178C.

### 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.*

Although Massachusetts law does not expressly provide that violations of state CSEC laws are grounds for terminating parental rights, parental rights potentially may be terminated for sexual abuse or exploitation, depending on whether the definition of abuse applicable to mandatory reporters under Mass. Gen. Laws ch. 119, § 51A(a) (Mandated reporter—responsibilities)—which includes trafficking and CSEC offenses—applies when

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<sup>49</sup> See *supra* Component 2.8 for full discussion of Mass. Gen. Laws ch. 265, § 56<sup>49</sup> (Human Trafficking—Property subject to forfeiture).

<sup>50</sup> See *supra* Component 2.10 for the provisions of Mass. Gen. Laws ch. 6, § 178C.

determining parental rights. Massachusetts handles termination through its laws on adoption and custody in Chapter 210, which does not define abuse or neglect. Mass. Gen. Laws ch. 210, § 3 (Consent not required in certain cases) states,

- (a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section 2, other than that of the child, shall not be required if: . . . (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child pursuant to paragraph (c).
- (b) . . . A juvenile court or a district court shall enter a decree dispensing with the need for consent of any person named in section 2 to the adoption of a child named in a petition filed pursuant to section 24 of chapter 119 in such court upon a finding that such child is in need of care and protection pursuant to section 26 of said chapter 119 and that the best interests of the child as defined in paragraph (c) will be served by such decree. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. Facts may be set forth either in the care and protection petition filed pursuant to said section 24 of said chapter 119 or upon a motion made in the course of a care and protection proceeding, alleging that the allowance of the petition or motion is in the best interests of the child.

The department of children and families shall file a petition or, in the alternative, a motion to amend a petition pending pursuant to section 26 of chapter 119 to dispense with parental consent to adoption, custody, guardianship or other disposition of the child under the following circumstances: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of any assault constituting a felony which results in serious bodily injury to the child or to another child of the parent . . . . For the purposes of this paragraph, “serious bodily injury” shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

. . . .

(c) . . . In considering the fitness of the child’s parent or other person named in section 2, the court shall consider, without limitation, the following factors:

. . . .

(ii) the child or another member of the immediate family of the child has been abused or neglected as a result of the acts or omissions of one or both parents, the parents were offered or received services intended to correct the circumstances which led to the abuse or neglect and refused, or were unable to utilize such services on a regular and consistent basis so that a substantial danger of abuse or neglect continues to exist, or have utilized such services on a regular and consistent basis without effectuating a substantial and material or permanent change in the circumstances which led to the abuse or neglect;

. . . .

(ix) severe or repetitive conduct of a physically, emotionally or sexually abusive or neglectful nature toward the child or toward another child in the home;

. . . .

(xiii) the conviction of a parent or other person named in section 2 of a felony that the court finds is of such a nature that the child will be deprived of a stable home for a period of years. Incarceration in and of itself shall not be grounds for termination of parental rights; or

(xiv) whether or not there has been a prior pattern of parental neglect or misconduct or an assault constituting a felony which resulted in serious bodily injury to the child and a likelihood of future harm to the child based on such prior pattern or assault.

. . . .

***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.*

Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) includes all facilitators as it applies to a person who “benefits, financially or by receiving anything of value, as a result of a violation of clause (i),” which states,

subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272 . . . .

A facilitator convicted under Mass. Gen. Laws ch. 265, § 50(a) “shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.” Additionally, a facilitator who “commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.” Mass. Gen. Laws ch. 265, § 50(b).

A business entity may also be prosecuted for a violation of Mass. Gen. Laws ch. 265, § 50(a) and punished by a fine of not more than \$1,000,000. Mass. Gen. Laws ch. 265, § 50(c).

A facilitator may also face prosecution under Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for a fee; engaging in sexual conduct with child under age 14 for a fee; penalties), which provides in part,

whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than \$3,000 and not more than \$10,000, or by both such imprisonment and fine . . . .

Several CSEC laws may be used to prosecute facilitators. Facilitators may be prosecuted for violating Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse)<sup>51</sup> where the facilitator “aids and assists in such abduction” for the purpose of prostitution. A conviction under Mass. Gen. Laws ch. 272, § 2 is punishable by imprisonment up to 3 years in the state prison or up to 1 year imprisonment in jail, a fine of up to \$1,000, or both imprisonment and a fine. If convicted under Mass. Gen. Laws ch. 272, § 53A(c), a facilitator faces a mandatory fine of at least \$3,000 and up to \$10,000.

Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) could be used to prosecute a facilitator who “knowingly aids and assists” in inducing a minor to become a prostitute. A facilitator may also be prosecuted under ch. 272, § 4B (Living off or sharing earnings of minor prostitute). A conviction under Mass. Gen. Laws ch. 272, § 4A is punishable by imprisonment for 3–5 years in the state prison and a fine of \$5,000.<sup>52</sup> Mass. Gen. Laws ch. 272, § 4A.

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

Facilitators may be subject to fines ranging from \$1,000–\$1,000,000 for convictions related to their activities. Facilitators convicted under Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) are subject to fines. Mass. Gen. Laws ch. 265, § 50 is punishable by a fine not to exceed \$25,000. Corporations shall also be fined for facilitation of Mass. Gen. Laws ch. 265, § 50, which requires that “[a] business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.” Mass. Gen. Laws ch. 265, § 50(c). Additionally, facilitators who violate Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence) or § 4B (Living off or sharing earnings of minor prostitute) may be required to pay a fine of \$5,000, and facilitators who violate Mass. Gen. Laws ch. 272, § 2 may be required to pay a fine of \$1,000.

Facilitators may also be required to make restitution to their victims, as Mass. Gen. Laws ch. 258B, § 3(o), (u) (Rights of victims and witnesses of crime) specifies that victims shall have the right “to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim’s losses” and “to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.”

Facilitators face mandatory asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 55, which states, “[a]ll monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 or 51 shall be subject to forfeiture . . . .” These monies “shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B.” Mass. Gen. Laws ch. 265, §55.

Additionally, facilitators face asset forfeiture pursuant to Mass. Gen. Laws ch. 265, § 56 (Human Trafficking—Property subject to forfeiture).<sup>53</sup> Seizure of forfeitable property is governed by Mass. Gen. Laws ch. 265, § 56(g), which states “During the pendency of the proceedings, the court may issue at the request of the commonwealth ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody.” The final order of the court shall be deposited into the Victims of Human Trafficking Trust Fund<sup>54</sup> established in section 66A of chapter 10. Mass. Gen. Laws ch. 265, § 56(e).

<sup>51</sup> See *supra* Component 1.2 for the provisions of Mass. Gen. Laws ch. 272, § 2.

<sup>52</sup> See *supra* note 38.

<sup>53</sup> See *supra* Component 2.8 for full discussion of Mass. Gen. Laws ch. 265, § 56<sup>53</sup> (Human Trafficking—Property subject to forfeiture).

<sup>54</sup> See *supra* note 31.



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

No specific provision in the Massachusetts code expressly prohibits promoting or selling child sex tourism.

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

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

Disseminating child sexual abuse material (CSAM) is prohibited under Mass. Gen. Laws ch. 272, §29B (Child pornography—dissemination). Mass. Gen. Laws ch. 272, §29B(a) makes it illegal to disseminate, or possess with the intent to disseminate

with lascivious intent . . . any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity involving the use of a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof . . . .

Additionally, Mass. Gen. Laws ch. 272, §29B(b) makes it a crime if a person disseminates, or possesses with the intent to disseminate

with lascivious intent . . . any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof . . . .

Convictions under Mass. Gen. Laws ch. 272, §29B (a), (b) are punishable by imprisonment for 10–20 years in the state prison or fines of the greater of \$10,000–\$50,000 or 3 times “the monetary value of any economic gain derived from” the dissemination of CSAM, or both imprisonment and fines. Mass. Gen. Laws ch. 272, §29B (a), (b).

**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>55</sup>

Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude), Massachusetts's human trafficking offense, includes all commercial sexual exploitation of minors. Under Mass. Gen. Laws ch. 265, § 50, when the victim is a minor, means of force, fraud, or coercion are not required.<sup>56</sup> In addition, the human trafficking law applies to buyers who "cause" a minor to engage in commercial sex acts or who "obtain" a minor for that purpose; thus, buying commercial sex with a person who is under the age of eighteen constitutes human trafficking.<sup>57</sup> Finally, the offense of human trafficking under Mass. Gen. Laws ch. 265, § 50 does not require that a trafficker or controlling third party be identified. Consequently, Massachusetts's human trafficking offense includes any child who is bought for sex, regardless of whether force, fraud, or coercion is used, regardless of whether a buyer exploited the youth without a trafficker's involvement, and regardless of whether the victim identifies a trafficker. Mass. Gen. Laws ch. 265, § 50.

- 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.*

Massachusetts’s human trafficking law does not expressly prohibit a defendant from asserting a defense to prosecution based on the willingness of the minor to engage in the commercial sex act. Mass. Gen. Laws ch. 265, §§ 50 (Human trafficking—Sexual servitude).

<sup>55</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 buyer conduct in core sex trafficking offense regardless of whether victim is under control of a third party and explaining negative impact on victims and victim-identification when buyers are excluded as sex trafficking offenders).

<sup>56</sup> See *supra* discussion in Component 1.1.

<sup>57</sup> See *supra* discussion of buyer applicability in Component 2.1.

5.2.1 Recommendation: Amend Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) to clarify that a minor’s willingness to engage in the commercial sex act is not a defense.

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>58</sup>

Massachusetts law does not prohibit the criminalization of minors for prostitution offenses. Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties) makes it illegal if anyone “engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee . . . .” A conviction under this statute is punishable by imprisonment up to 1 year<sup>59</sup> in the house of correction or a fine up to \$500, or both imprisonment and a fine. Mass. Gen. Laws ch. 272, § 53A(a).

The offense of prostitution in Mass. Gen. Laws ch. 272, § 53 (Penalty for certain offenses) also does not protect minors from criminalization, stating only,

(a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.

(b) Disorderly persons and disturbers of the peace shall, for a first offense, be punished by a fine of not more than \$150. For a second or subsequent offense, disorderly persons and disturbers of the peace shall be punished by imprisonment in a jail or house of correction for not more than 6 months or by a fine of not more than \$200 or by both such fine and imprisonment . . . .

Under Mass. Gen. Laws ch. 272, § 62 (Nightwalking—third conviction), a third conviction for “being a common nightwalker” is punishable by imprisonment of 2½ years in the house of correction, the reformatory for women, if the offender is female, or in the Massachusetts reformatory, if the offender is male.

However, under Mass. Gen. Laws ch. 265, § 57 (Human trafficking—Victims accused of common night walking or streetwalking—Affirmative defense),

In any prosecution or juvenile delinquency proceeding of a person who is a human trafficking victim, as defined by section 20M of chapter 233<sup>60</sup> [Confidential communication between human trafficking victim and the victim’s caseworker], it shall be an affirmative defense to charges of engaging in common night walking or common streetwalking in violation of section 53 of chapter 272 and to charges of violating sections 26 or 53A of said chapter 272 that, while a human trafficking victim, such person was under duress or coerced into committing the offenses for which such person is being prosecuted or against whom juvenile delinquency proceedings have commenced.

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<sup>58</sup> For more information regarding recent federal legislation impacting this component see:

<http://go.sharedhope.org/stateimpactmemo>.

<sup>59</sup> Pursuant to Mass. Gen. Laws ch. 119, § 52 (Definitions), the definition of “delinquent child” excludes minors who commit “a civil infraction, a violation of any municipal ordinance or town by-law or a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than 6 months or both such fine and imprisonment.” Because prostitution is punishable by up to 1 year imprisonment, minors would not be protected from criminalization under that provision. Mass. Gen. Laws ch. 272, § 53A.

<sup>60</sup> Mass. Gen. Laws ch. 233, § 20M (Disclosure of confidential communication regarding human trafficking victim by caseworker) defines “Human trafficking victim” or “victim” as a person who is subjected to the conduct prohibited under sections 50 [Trafficking of persons for sexual servitude; trafficking of persons under 18 years for sexual servitude; trafficking by business entities; penalties; tort actions brought by victims] or 51 [Trafficking of persons for forced service; victims under 18 years; trafficking by business entities; penalties; tort actions brought by victims] of chapter 265.”

- 5.3.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 53A(a) (Engaging in sexual conduct for fee; payors and payees; penalties) and ch. 272, § 53 (Penalty for certain offenses) to ensure that all minors are protected from criminalization for prostitution offenses.<sup>61</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*

Mass. Gen. Laws ch. 119, § 51A(a) (Mandated reporter—responsibilities) mandates that certain individuals report cases of sexual exploitation and juvenile sex trafficking to the department of children and families (DCF).<sup>62</sup> After receiving a 51A report,<sup>63</sup> Mass. Gen. Laws ch. 119, § 51B(a) (Duties of department as to child abuse reports) requires DCF to investigate. Mass. Gen. Laws ch. 119, § 51B further provides,

(a) . . . The department shall immediately report to the district attorney and local law enforcement authorities, a sexually exploited child<sup>64</sup> or a child who is otherwise a human trafficking victim, regardless of whether the child is living with a parent, guardian or other caretaker.

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<sup>61</sup> See generally SHARED HOPE INTERNATIONAL, “Seeking Justice: Legal approaches to eliminate criminal liability for child sex trafficking victims” (2018), [https://sharedhope.org/wp-content/uploads/2018/08/ANALYSIS-OF-STATUTORY-APPROACHES\\_ver7.pdf](https://sharedhope.org/wp-content/uploads/2018/08/ANALYSIS-OF-STATUTORY-APPROACHES_ver7.pdf) (discussing need to eliminate a minor’s criminal liability for prostitution and other offenses committed pursuant to trafficking victimization and to establish a statutory avenue to specialized services).

<sup>62</sup> Mass. Gen. Laws ch. 119, § 21 (Definitions applicable to Secs. 21 to 51H) defines a “mandated reporter” as

a person who is: (i) a physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, optometrist, osteopath, allied mental health and human services professional licensed under section 165 of chapter 112, drug and alcoholism counselor, psychiatrist or clinical social worker; (ii) a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licenser of the department of early education and care or school attendance officer; (iii) a probation officer, clerk-magistrate of a district court, parole officer, social worker, foster parent, firefighter, police officer or animal control officer; (iv) a priest, rabbi, clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis; (v) in charge of a medical or other public or private institution, school or facility or that person’s designated agent; or (vi) the child advocate.

<sup>63</sup> Mass. Gen. Laws ch. 119, § 21 (Definitions applicable to Secs. 21 to 51H) defines “51A report” as “a report filed with the department under section 51A that details suspected child abuse or neglect.”

<sup>64</sup> Mass. Gen. Laws ch. 119, § 21 defines “sexually exploited child” as,

any person under the age of 18 who has been subjected to sexual exploitation because such person:

- (1) is the victim of the crime of sexual servitude pursuant to section 50 of chapter 265 or is the victim of the crime of sex trafficking as defined in 22 United States Code 7105;
- (2) engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, in violation of subsection (a) of section 53A of chapter 272, or in exchange for food, shelter, clothing, education or care;
- (3) is a victim of the crime, whether or not prosecuted, of inducing a minor into prostitution under by section 4A of chapter 272; or

....  
(c) If the department has reasonable cause to believe a child's health or safety is in immediate danger from abuse or neglect, the department shall take a child into immediate temporary custody if it has reasonable cause to believe that the removal is necessary to protect the child from abuse or neglect . . . .  
....

(k) The department shall notify and shall transmit copies of substantiated 51A reports and its written evaluations and written determinations under subsection (a) or (b) to the district attorney for the county in which the child resides and for the county in which the suspected abuse or neglect occurred, and to the local law enforcement authorities in the city or town in which the child resides and in the city or town in which the suspected abuse or neglect occurred when the department has reasonable cause to believe that 1 of the conditions listed below resulted from abuse or neglect.

....  
(3) a child has been sexually exploited, which shall include a violation of section 4A [Promoting child prostitution; mandatory sentence], 4B [Deriving support from child prostitution; mandatory sentence] or 29A [Child pornography—enticement, solicitation, employment of children] of said chapter 272 or is a sexually exploited child or a child who is otherwise a human trafficking victim.

Once a 51A or 51B report has been filed identifying a child as sexually exploited, Mass. Gen. Laws ch. 119, § 51D authorizes multi-disciplinary response teams to assess the child's case and make recommendations. Pursuant to Mass. Gen. Laws ch. 119, § 51D,

Each team shall consist of the department's caseworker for the particular case, representative of the appropriate district attorney, and at least 1 other member appointed by the area director who is not an employee of either office. The additional member shall have training and experience in the fields of child welfare or criminal justice and, as far as practicable, be involved with the provision of services to these families. No members of a team shall receive any compensation, or in the case of a state employee, any additional compensation, for service on the team.

For 51A reports specifically involving a sexually exploited child or a child who is otherwise a human trafficking victim, the multi-disciplinary service team may consist of a team of professionals trained or otherwise experienced and qualified to assess the needs of sexually exploited children or children who are otherwise human trafficking victims including, but not limited to, a police officer, as defined by section 1 of chapter 90C, or other person designated by a police chief, as defined in said section 1 of said chapter 90C, an employee of the department of children and families, a representative of the appropriate district attorney, a social service provider, a medical professional or a mental health professional.

The team shall review and monitor the service plan developed by the department under subsection (g) of section 51B. The team shall evaluate the effectiveness of the service plan in protecting the child from further abuse or neglect. The team shall make recommendations regarding amendments to the service plan, the advisability of prosecuting members of the family, and the possibility of utilizing diversionary alternatives. If the team finds that services required under such plan are not provided to the family, the case shall be referred to the commissioner.

....  
For 51B reports specifically involving a sexually exploited child, the purpose of the multi-disciplinary service team shall be to determine whether the child has been sexually exploited or is otherwise a human trafficking victim and to recommend a plan for services to the department that may include, but shall not be limited to, shelter or placement, mental health and medical care needs and other social services . . . .

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(4) engages in common night walking or common streetwalking under section 53 of chapter 272.

Further, a specialized process is available for children identified as sexually exploited. Under Mass. Gen. Laws ch. 119, § 39K (Sexually exploited children – child welfare services),

- (a) Notwithstanding any general or special law to the contrary, the department of children and families, in collaboration with the department of mental health and other appropriate state agencies, shall: (i) provide for the child welfare services needs of sexually exploited children including, but not limited to, services for sexually-exploited children residing in the commonwealth at the time they are taken into custody by law enforcement or are identified by the department as sexually-exploited children, for the duration of any legal or administrative proceeding in which they are either the complaining witness, defendant or the subject child; and (ii) provide appropriate services to a child reasonably believed to be a sexually exploited child in order to safeguard the child's welfare. If a child reasonably believed to be a sexually exploited child declines services or is unable or unwilling to participate in the services offered, the department or any person may file a care and protection petition under section 24. Sexually exploited children shall have access to an advocate.<sup>65</sup> The advocate or a member of the multi-disciplinary service team established under section 51D shall accompany the child to all court appearances and may serve as a liaison between the service providers and the court.
- (b) The services that shall be provided under this section shall be available to all sexually exploited children, whether they are accessed voluntarily, through a court proceeding under this section or through a referral, which may be made by any person.
- (c) In determining the need for and capacity of the services that may be provided under this section, the department of children and families shall recognize that sexually exploited youth have separate and distinct service needs according to gender and appropriate services shall be made available while ensuring that an appropriate continuum of services exists.
- (d) The commissioner of the department may, subject to appropriation, contract with non-governmental organizations or entities with experience working with sexually exploited children to train law enforcement officials likely to encounter sexually exploited children in the course of their law enforcement duties. The training shall include, but not be limited to, awareness and compliance with the provisions of this section, identification of, access to, and the provision of services for sexually-exploited children and any other services the department deems necessary.
- (e) The department may apply to the victim and witness assistance board for grants from the Victims of Human Trafficking Trust Fund, established in section 66A of chapter 10, grants from the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention or any other federal agency, or grants from any other private source to fund the law enforcement training and services for sexually-exploited children.
- (f) The department shall adopt regulations to carry out this section.

Additionally, a task force must identify and review existing services and benefits available to juvenile sex trafficking victims. Pursuant to section 31 of Enacted House Bill 3808,<sup>66</sup> the task force requires, subject to appropriation, various agencies<sup>67</sup> to

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<sup>65</sup> Mass. Gen. Laws ch. 119, § 21 defines “advocate” as “an employee of a governmental or non-governmental organization or entity providing appropriate services, or a similar employee of the department of children and families who has been trained to work and advocate for the needs of sexually exploited children.”

<sup>66</sup> See 2011 Mass. Acts ch. 178, § 31 (concerning commercial exploitation of people).

<sup>67</sup> Pursuant to Enacted House Bill 3808,

[t]he task force shall consist of the attorney general or the attorney general's designee, who shall serve as the chair, the colonel of state police or the colonel's designee, a representative of the Massachusetts police chiefs association, a representative of the Massachusetts district attorneys' association, the commissioner of the Boston police department or the commissioner's designee, the director of the division of professional licensure or the director's designee, a representative of the Massachusetts office for victim assistance, the director of the department of labor standards or the director's designee, the commissioner of the department of children and families or the commissioner's designee, the secretary of the executive office of public

....  
(iii) identify and review the existing services and facilities that meet the needs of victims of human trafficking including, but not limited to, health and mental health services, housing, education and job training, legal services and victim compensation;

....  
(vi) examine the costs associated with establishing a safe house pilot program for adult and child victims of human trafficking and identify public and private funding sources that may be used to develop and implement a safe house pilot program;

(vii) examine cost-effective notices, announcements or advertisements that may be displayed in public places, such as airports, train stations, bus stations, hotels, massage parlors, spas, strip clubs and other sexually-oriented businesses providing information relating to services for human trafficking victims;

....

## *II. Services through juvenile justice*

State law does not prohibit a minor from being prosecuted for the crime of prostitution. Instead, sexually exploited children may be diverted from the delinquency process, and either a care and protection petition or a child in need of services petition should be filed. Under Mass. Gen. Laws ch. 119, § 39L (Sexually exploited children – safeguarding welfare during criminal proceedings),

(a) Before or after arraignment in any juvenile delinquency or criminal proceeding against a sexually exploited child alleging that such juvenile or such defendant violated the prohibition against common night walking or common streetwalking under section 53 of chapter 272 or the provisions of subsection (a) of section 53A of said chapter 272, there shall be a presumption that a care and protection petition on behalf of such child, or a child in need of services petition under section 39E, shall be filed. Any person, including the juvenile, may file a care and protection petition on behalf of such child, including a petition for emergency commitment under section 24, or a parent or a police officer may file a child in need of services petition under section 39E.

(b) The court may appoint a guardian ad litem and shall hold a hearing on such petition. The court may allow a reasonable delay in the proceedings, including any arraignment, to consider the petition. The necessary findings of fact to support the court's decision shall be reduced to writing and made part of the court record.

(c) Upon a motion by a party to the juvenile delinquency or criminal proceeding or by a guardian ad litem, unless the district attorney or the attorney general objects, and upon a finding that a child alleged to be a juvenile delinquent by reason of violating section 53 of chapter 272 or subsection (a) of section 53A of said chapter 272 is a child in need of care and protection or a child in need of services, the court shall, if arraignment has not yet occurred, indefinitely stay arraignment and place the proceeding on file. If the court finds that the child has failed to substantially comply with the requirements of services or that the child's welfare or safety so requires, the court may remove the proceeding from file, arraign the child and restore the delinquency or criminal complaint to the docket for trial or further proceedings in accordance with the regular course of such proceedings. If arraignment has already occurred, unless the district attorney or the attorney general objects, the court shall place the child on pretrial probation

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safety or the secretary's designee, the commissioner of the office of probation or the commissioner's designee; a representative of a group dedicated to immigrant and refugee issues appointed by the governor; a representative of a group dedicated to the prevention of violence against women appointed by the governor; a representative of an entity dedicated to prevention of and intervention in the trafficking of children appointed by the governor; a survivor of human trafficking appointed by the governor; a human trafficking attorney appointed by the governor; a human trafficking caseworker appointed by the governor; a mental health professional appointed by the governor and a university researcher with a background in human trafficking appointed by the governor.

under section 87 of chapter 276. If appropriate, the conditions of such probation shall include, but not be limited to, requiring the child to substantially comply with all lawful orders of the court, including orders relating to any care and protection or child in need of services proceeding, and the child shall also comply with the guidance and services of the department or any designated non-governmental service provider. If the child fails to substantially comply with the conditions of probation or if the child's welfare or safety so requires, the court may in its discretion restore the delinquency or criminal complaint to the docket for trial or further proceedings in accordance with the regular course of such proceedings.

A juvenile sex trafficking victim may be placed in the specialized program designed for sexually exploited children discussed above. Mass. Gen. Laws ch. 119, § 39K(a), (b).

## Summary

Under Massachusetts law, DCF must provide victims of sexual exploitation and juvenile sex trafficking with a specialized service response. Further, victims who entered the juvenile justice system may be diverted based on a presumption of being in need of care and protection or services. However, diversion is an inherently punitive response; if the victim does not substantially comply with program requirements, the court may restore the delinquency complaint.

5.4.1 Recommendation: Amend Massachusetts's protective response to direct child sex trafficking victims away from the juvenile justice system and to specialized services.

## 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>68</sup>

Despite the absence of a definition of abuse or neglect under Mass. Gen. Laws ch. 119, § 21<sup>69</sup> (Definitions Applicable to Sections 21 to 55H), a child sex trafficking victim is likely to be identified as abused or neglected and directed to child protective services under the mandatory reporting requirements in Mass. Gen. Laws ch. 119, § 51A(a) (Mandated reporter—responsibilities).

Mass. Gen. Laws ch. 119, § 51A(a) (Mandated reporter—responsibilities) requires mandated reporters who have “reasonable cause to believe that a child is suffering physical or emotional injury resulting from: (i) abuse inflicted upon him which causes harm or substantial risk of harm to the child’s health or welfare, including sexual abuse; . . . (iv) being a sexually exploited child; or (v) being a human trafficking victim as defined by section 20M of chapter 233,” to immediately report the abuse to the Department. Mass. Gen. Laws ch. 119, §

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<sup>68</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>69</sup> 110 Mass. Code Regs. § 2.00 (Glossary) defines “abuse” as

the non-accidental commission of any act by a caretaker upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. Abuse is not dependent upon location (i.e., abuse can occur while the child is in an out-of-home or in-home setting.)

Additionally, 110 Mass. Code Regs. § 2.00 (Glossary) defines “neglect” as

failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition. This definition is not dependent upon location (i.e., neglect can occur while the child is in an out-of-home or in-home setting).



51B(k)(3) (Investigation of report of abuse filed under Sec. 51A; removal of child; transmission and filing of written reports; notice to district attorney; disclosure of information by mandated reporter) provides that the Department must advise the district attorney and local law enforcement of any evidence indicating “there is reasonable cause to believe that . . . (3) a child has been sexually exploited, which shall include a violation of section 4A [Promoting child prostitution; mandatory sentence], 4B [Deriving support from child prostitution; mandatory sentence] or 29A [Child pornography—enticement, solicitation, employment of children] of said chapter 272 or is a sexually exploited child or a child who is otherwise a human trafficking victim.”

Additionally, the definition of a “child requiring assistance” includes children who are commercially sexually exploited, and pursuant to Mass. Gen. Laws ch. 119, § 39K (Sexually exploited children – child welfare services), state agencies must provide services.

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.*

Although Chapter 119 (Protection and care of children and proceedings against them) of the Massachusetts General Laws does not define the term “caretaker,” this is not a barrier to accessing services from child welfare agencies because Mass. Gen. Laws ch. 119, § 39K(a) (Sexually exploited children – child welfare services) extends the jurisdiction of the department of children and families to commercially sexually exploited children by requiring the department to “provide for the child welfare service needs” of all sexually exploited children.

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

Domestic minor sex trafficking victims may be eligible to receive crime victims’ compensation if they meet certain eligibility requirements, some of which may present special difficulties for children who are sexually exploited for commercial purposes.

Pursuant to Mass. Gen. Laws ch. 258C, § 2(a) (Eligibility for compensation; assistance of counsel), victims<sup>70</sup> of crimes will receive compensation if the division<sup>71</sup> “finds that a crime was committed and that such crime directly resulted in personal physical or psychological injury to, or death of, the victim.”

Mass. Gen. Laws ch. 258C, § 2(c) requires the claimant to “cooperate[] with law enforcement authorities in the investigation and prosecution of the crime in which the victim was injured or killed unless the claimant demonstrates that he possesses or possessed a reasonable excuse for failing to cooperate.” Furthermore, Mass. Gen. Laws ch. 258C, § 2(e) states,

An offender or an accomplice of an offender shall not be eligible to receive compensation with respect to a crime committed by an offender. To the extent that the victim’s acts or conduct provoked or contributed to the injuries, the division may reduce or deny an award to the claimant or claimants in accordance with regulations enacted pursuant to section four . . . .

Finally, Mass. Gen. Laws ch. 258C, § 2(b) makes compensation available only if the claimant

[D]emonstrates that the crime was reported to the police or other law enforcement authorities or to an agency or entity obligated by law to report complaints of criminal misconduct to law enforcement authorities. Except in the case where the division finds such report to have been delayed for good cause, such report shall have been made within five days after the occurrence of such crime . . . .

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<sup>70</sup> See *supra* Component 5.1 for definition of “victim.”

<sup>71</sup> Mass. Gen. Laws ch. 258C, § 1 (Definitions) defines “division” as “the division of victim compensation and assistance within the department of the attorney general, established in section 11K of chapter 12.”

However, all minors, including child sex trafficking victims, are exempt from this last eligibility criteria. Mass. Gen. laws ch. 258C, § 2(b) states in part, “a claimant who was a victim under 18 years of age shall not be required to file such report within 5 days.”

- 5.7.1 Recommendation: Include exceptions from all listed ineligibility factors for commercially sexually exploited children in Mass. Gen. Laws ch. 258C, § 2 (Eligibility for compensation; assistance of counsel).

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

Confidential communications<sup>72</sup> between a human trafficking victim<sup>73</sup> and a human trafficking victim’s caseworker<sup>74</sup> are expressly protected under Mass. Gen. Laws ch. 233, § 20M(b) (Disclosure of confidential communication regarding human trafficking victim by caseworker), which states,

A human trafficking victims’ caseworker shall not disclose any confidential communication without the prior written consent of the victim, or the victim’s guardian in the case of a child, except as hereinafter provided. Such confidential communication shall not be subject to discovery in any civil, legislative or administrative proceeding without the prior written consent of the victim, or victim’s guardian in the case of a child, to whom such confidential communication relates. In criminal actions such confidential communication shall be subject to discovery and shall be admissible as evidence but only to the extent of information contained therein which is exculpatory in relation to the defendant; provided, however, that the court shall first examine such confidential communication and shall determine whether or not such exculpatory information is contained in the communication before allowing such discovery or the introduction of such evidence.

Additionally, human trafficking victims are notified of their right to confidentiality under Mass. Gen. Laws ch. 233, § 20M(c) which requires that “[d]uring the initial meeting between a caseworker and victim, the caseworker shall inform the human trafficking victim and any guardian thereof of the confidentiality of communications between a caseworker and victim and the limitations thereto.”

Victims of certain CSEC offenses (Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 29A (Child pornography—enticement, solicitation, employment of children)), as well as victims of certain sexual and prostitution-related offenses, who are under 15, will receive certain protections in the court system process.

Mass. Gen. Laws ch. 278, § 16D(b)(1) (Definitions; alternative procedure for taking testimony of child witness; order; presence of counsel and defendant; filming, videotaping, or transmitting of testimony) provides,

At any time after the issuance of a complaint or indictment alleging an offense punished by any of the statutes listed herein, the court on its own motion or on motion of the proponent of a child witness,<sup>75</sup>

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<sup>72</sup> “Confidential communication” is defined under Mass. Gen. Laws ch. 233, § 20M(a) as “information transmitted in confidence by and between a victim and a victim’s caseworker by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term confidential communication shall include all information received by a victim’s caseworker which arises out of and in the course of such counseling and assisting including, but not limited to, reports, records, working papers or memoranda.”

<sup>73</sup> See *supra* Component 5.1.

<sup>74</sup> Mass. Gen. Laws ch. 233, § 20M(a) defines “Human trafficking victim’s caseworker” as “a person who is employed by or volunteers with a program serving human trafficking victims, who has undergone a minimum of 25 hours of training and who reports to and is under the direct control and supervision of a direct service supervisor of a human trafficking victim program, and whose primary purpose is the rendering of advice, counseling or assistance to human trafficking victims.”

<sup>75</sup> Mass. Gen. Laws ch. 278, § 16D(a) defines a “child witness” as

and after a hearing, may order the use of a suitable alternative procedure for taking the testimony of the child witness, in proceedings pursuant to said complaint or indictment, provided that the court finds by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in the presence of the defendant, or as a result of both testifying in open court and testifying in the presence of the defendant. If the court orders the use of a suitable alternative for taking the testimony of a child witness pursuant to this section, the court shall make and enter specific findings upon the record describing with particularity the reasons for such order.

Mass. Gen. Laws ch. 278, § 16D(b)(2) allows the child’s testimony to “be recorded on videotape or film to be shown in court at a later time or that the testimony be transmitted to the courtroom by simultaneous electronic means,” while Mass. Gen. Laws ch. 278, § 16D(b)(6) clarifies,

The film, videotape or transmission of testimony taken by an alternative procedure . . . shall be admissible as substantive evidence to the same extent as and in lieu of live testimony by the child witness in any proceeding for which the order is issued or in any related criminal proceeding against the same defendant when consistent with the interests of justice, provided that such an order is entered or re-entered based on current findings at the time when or within a reasonable time before the film, videotape or transmission is offered into evidence . . . .

As an additional protection for child victim-witnesses, Mass. Gen. Laws ch. 278, § 16D(b)(3) provides,

Testimony taken by an alternative procedure pursuant to an order issued under paragraph (1) shall be taken in the presence of the judge, the prosecutor, defense counsel and such other persons as the court may allow. The defendant shall also have the right to be present unless the court’s order under paragraph (1) is based wholly or in part upon a finding that the child witness is likely to suffer trauma as a result of testifying in the presence of the defendant. If the order is based on such a finding, the testimony of the child witness shall not be taken in the presence of the defendant except as provided in paragraph (4).

While not specifically applicable to victims of CSEC offenses, Mass. Gen. Laws ch. 278, § 16A (Public may be excluded at trials of certain crimes involving minors under age of eighteen), states, “At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.” Also, pursuant to Mass. Gen. Laws ch. 278, § 16C (Exclusion of public from trial

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a person who is under the age of fifteen years and who is alleged to have been a victim of, or a witness to an alleged violation of section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . thirteen H [Indecent assault and battery on person over fourteen], . . . twenty-three [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], twenty-four [Assault with intent to commit rape], twenty-four B [Assault on child under sixteen with intent to commit rape] or 50 [Human trafficking – sexual servitude] of chapter two hundred and sixty-five, or section two [Abduction of persons for the purpose of prostitution or unlawful sexual intercourse], . . . four [Enticing to unlawful intercourse], four A [Promoting child prostitution; mandatory sentence], four B [Deriving support from child prostitution; mandatory sentence], . . . six [Maintaining a house of prostitution], seven [Deriving support from an inmate of a house of prostitution], eight [Solicitation], twelve [Penalty for sending a person to a house of prostitution], thirteen [Detaining a person in house of prostitution], . . . twenty-eight [Matter harmful to minors—dissemination or possession with intent], twenty-nine [Obscene matter—dissemination or possession with intent], twenty-nine A [Child pornography—enticement, solicitation, employment of children], twenty-nine B [Child pornography—dissemination], . . . or thirty-five A [Obscene materials/acts—acts with child under sixteen] of chapter two hundred and seventy-two.

involving crime of incest or rape), “[t]o protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testimony is to be presented; provided, that either of the parties requests that all spectators be so excluded at the trial or portions thereof; and provided further, that the defendant in such trial by a written statement waives his right to a public trial for those portions from which spectators are so excluded.”

Some additional protections are provided to children who are the victims of sex crimes. Mass. Gen. Laws ch. 278, § 16F (Expedited trials for sex crimes involving minor victims or witnesses) provides that, in criminal proceedings involving

an alleged sex crime perpetrated upon a minor child, or in which a minor child is expected to testify as a witness to a sex crime, the court shall, in order to minimize stress on such child, take action to expedite trial and give precedence to the case over any other case . . . .

Additionally, Mass. Gen. Laws ch. 233, § 21B (Evidence of victim’s sexual conduct) limits the admissibility of certain evidence related to prior sexual behavior, stating,

Evidence of the reputation of a victim’s sexual conduct shall not be admissible in any investigation or proceeding before a grand jury or any court of the commonwealth for a violation of sections 13B [Indecent Assault and Battery on Child Under Fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], . . . 13 H [Indecent assault and battery on person over fourteen], 22 [Rape], 22A [Rape of child], 22B [Rape of child—aggravating factors], 22C [Rape of child—previous youthful offender], 23 [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], 24 [Assault with intent to commit rape] and 24B [Assault on child under sixteen with intent to commit rape] 50 [Human trafficking—Sexual servitude] or 51 [Human trafficking—Forced services] of chapter 265 . . . . Evidence of specific instances of a victim’s sexual conduct in such an investigation or proceeding shall not be admissible except evidence of the victim’s sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim; provided, however, that such evidence shall be admissible only after an in camera hearing on a written motion for admission of same and an offer of proof. If, after said hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim, the evidence shall be admitted; otherwise not . . . .

Mass. Gen. Laws ch. 9A, § 2 (Address confidentiality program; application and certification procedures; false information; penalty) establishes an address confidentiality program under which “an adult person, a parent or guardian acting on behalf of a minor, or a guardian acting on behalf of an incapacitated person may apply to the secretary to have an address designated by the secretary serve as the person’s address or the address of the minor or incapacitated person.” Mass. Gen. Laws ch. 9A, § 2(1). For purposes of this program, Mass. Gen. Laws ch. 9a, § 1 defines “sexual assault” to include human trafficking under Mass. Gen. Laws ch. 265, § 50.

Mass. Gen. Laws ch. 258B, § 3 (Rights of victims and witnesses of crime) also generally affords various rights and services to victims and witnesses of crime, such as the right to be informed about their rights, protective services, social services, available civil remedies, and restitution, and to be notified about when proceedings will take place. Additionally, Mass. Gen. Laws ch. 265, § 24C (Confidentiality of records containing name of victim of rape; disclosure unlawful; penalties) protects the identity of victims in an arrest, investigation, or complaint for certain crimes<sup>76</sup> from public inspection, “except with the consent of a justice of such court where

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<sup>76</sup> Pursuant to Mass. Gen. Laws ch. 265, § 24C, the identity of a victim “shall be withheld from public inspection” when “an arrest, investigation or complaint is for rape or assault with intent to rape under section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful

the complaint or indictment is or would be prosecuted.” Disclosing the “name of any individual identified as an alleged victim of any of the offenses” is unlawful and punishable by “a fine of not less than \$2,500 nor more than \$10,000.”

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.*

Massachusetts law allows child sex trafficking victims to immediately vacate delinquency adjudications for prostitution and other offenses related to their victimization; however, juvenile records may only be sealed or expunged after a waiting period.

Regarding vacatur, Mass. Gen. Laws ch. 265, § 59 (Human trafficking—Victim participation in crime—Motion to vacate) provides,

(a) At any time after the entry of a judgment of disposition on an indictment or criminal or delinquency complaint for an offense under section 26 [Resorting to restaurants or taverns for immoral purposes], subsection (a) of section 53 [Penalty for certain offenses] or subsection (a) of 53A [Engaging in sexual conduct for a fee; engaging in sexual conduct with child under age 18 for a fee; penalties] of chapter 272 or under section 34 of chapter 94C [Unlawful possession of particular controlled substances, including heroin and marihuana] for simple possession of a controlled substance, the court in which it was entered shall, upon motion of the defendant, vacate any conviction, adjudication of delinquency or continuance without a finding and permit the defendant to withdraw any plea of guilty, plea of nolo contendere, plea of delinquent or factual admission tendered in association therewith upon a finding by the court of a reasonable probability that the defendant’s participation in the offense was a result of having been a human trafficking victim as defined by section 20M of chapter 233<sup>77</sup> or a victim of trafficking in persons under 22 U.S.C. 7102; provided that:

(1) Except as provided in paragraphs (2) and (3) of this subsection, the defendant shall have the burden to establish a reasonable probability that the defendant’s participation in the offense was the result of having been a victim of human trafficking.

(2) Where a child under the age of 18 was adjudicated delinquent for an offense under section 26, subsection (a) of section 53 or subsection 53A of chapter 272, based on allegations of prostitution, there shall be a rebuttable presumption that the child’s participation in the offense was a result of having been a victim of human trafficking or trafficking in persons.

....

(d) A conviction, adjudication of delinquency or continuance without a finding vacated under this section shall be deemed to have been vacated on the merits.

Regarding the sealing of juvenile records, Mass. Gen. Laws ch. 276, § 100B (Sealing of certain juvenile record files; conditions; effect) provides,

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offender), twenty two [Rape], twenty-two A [Rape of Child], 22B [Rape of child—aggravating factors], 22C [Rape of a child—previous youthful offender], twenty-three [Rape and abuse of a child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of a child—previous youthful offender], twenty-four [Assault with intent to commit rape] or twenty-four B [Assault on child under sixteen with intent to commit rape], inclusive of chapter two hundred and sixty-five, or an arrest, investigation, complaint for trafficking of persons under section 50 of said chapter 265 [Human trafficking—Sexual servitude].”

<sup>77</sup> Mass. Gen. Laws ch. 233, § 20M (Disclosure of confidential communication regarding human trafficking victim by caseworker) defines “Human trafficking victim” or “victim” as a person who is subjected to the conduct prohibited under sections 50 [Trafficking of persons for sexual servitude; trafficking of persons under 18 years for sexual servitude; trafficking by business entities; penalties; tort actions brought by victims] or 51 [Trafficking of persons for forced service; victims under 18 years; trafficking by business entities; penalties; tort actions brought by victims] of chapter 265.”

Any person having a record of entries of a delinquency court appearance in the commonwealth on file in the office of the commissioner of probation may, on a form furnished by the commissioner, signed under the penalties of perjury, request that the commissioner seal such file. The commissioner shall comply with such request provided (1) that any court appearance or disposition including court supervision, probation, commitment or parole, the records for which are to be sealed, terminated not less than three years prior to said request; (2) that said person has not been adjudicated delinquent or found guilty of any criminal offense within the commonwealth in the three years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars nor been imprisoned under sentence or committed as a delinquent within the commonwealth within the preceding three years; and (3) said form includes a statement by the petitioner that he has not been adjudicated delinquent or found guilty of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses as aforesaid, and has not been imprisoned under sentence or committed as a delinquent in any state or county within the preceding three years.

....

Because Mass. Gen. Laws ch. 276, § 100B mandates a minimum 3 year waiting period, child sex trafficking victims may face collateral consequences associated with having accessible delinquency records during that time. Similarly, child sex trafficking victims may face collateral consequences while waiting to expunge juvenile records under Mass. Gen. Laws ch. 276, § 100F (Petition for expungement—Youthful offender), which states,

(a) A petitioner who has a record as an adjudicated delinquent or adjudicated youthful offender may . . . petition that the commissioner expunge the record. Upon receipt of a petition for an expungement, the commissioner shall certify whether the petitioner is eligible for an expungement under sections 100I and 100J . . . .

....

(d) . . . The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 100I and 100J.

....

Mass. Gen. Laws ch. 276, § 100I(a)(3) (Petition for expungement—Petition eligibility requirements) mandates a waiting period for expunging juvenile records under Mass. Gen. Laws ch. 276, § 100F, stating,

The commissioner shall certify that a record that is the subject of the petition filed pursuant to section 100F . . . is eligible for expungement provided that:

....

(3) the offense that is the subject of the petition to expunge the record, including any period of incarceration, custody or probation, occurred not less than 7 years before the date on which the petition was filed if the offense that is the subject of the petition is a felony, and not less than 3 years before the date on which the petition was filed if the offense that is the subject of the petition is a misdemeanor.

Additionally, Mass. Gen. Laws ch. 276, § 100J(a) (Petition for expungement—Ineligible offenses) further limits the offenses for which expungement is available.

5.9.1 Recommendation: Amend Mass. Gen. Laws ch. 265, § 59 (Human trafficking—Victim participation in crime—Motion to vacate) to provide for the expungement of juvenile records upon granting vacatur.

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

Victims of Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking—Sexual servitude) “may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.” Mass. Gen. Laws ch. 265, §50(d). Victims of Mass. Gen. Laws ch. 265, § 51(a), which may include minor victims of sex trafficking, are afforded an identical civil remedy under Mass. Gen. Laws ch. 265, § 51(d).

Commercially sexually exploited children who are the victims of specified sexual assault or CSEC crimes, including Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude), ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), and § 29A (Child pornography—enticement, solicitation, employment of children), may also be able to bring a civil action for injuries resulting from the crimes. Mass. Gen. Laws ch. 260, § 4C. The action must “be commenced within three years of the acts alleged to have caused an injury or condition or within three years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act.” Mass. Gen. Laws ch. 260, § 4C. However, time is tolled until the victim is 18. Mass. Gen. Laws ch. 260, § 4C.

Additionally, pursuant to Mass. Gen. Laws ch. 260, § 4D (Actions by victims of sexual servitude, or forced labor or services),

(a) A victim of trafficking of persons for sexual servitude under section 50 of chapter 265 or of trafficking of persons for forced services under section 51 of said chapter 265 may bring a civil action for trafficking of persons for forced labor or services or sexual servitude. The court may award actual damages, compensatory damages, punitive damages, injunctive relief or any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages may be awarded on proof of actual damages if the defendant's acts were willful and malicious.

....

(f) Any legal guardian, family member, representative of the human trafficking victim or court appointee may represent the human trafficking victim's rights, in the event the human trafficking victim is deceased or otherwise unable to represent his own interests in court.

Victims of domestic minor sex trafficking may also receive restitution from asset forfeiture. Pursuant to Mass. Gen. Laws ch. 265, § 55 (Human trafficking—Monies to be directed to victim restitution),

All monies furnished or intended to be furnished by any person in exchange for forced labor or services or sexual servitude, and all monies used or intended to be used to facilitate any violation of section 50 [Trafficking for sexual servitude] or 51[Human trafficking] shall be subject to forfeiture to the commonwealth and shall be made available by the court to any victim ordered restitution by the court pursuant to section 3 of chapter 258B.

Commercially sexually exploited children also may have the right to receive restitution under Chapter 258B (Rights of victims and witnesses of crime) of the Massachusetts Code. Mass. Gen. Laws ch. 258B, § 3(o) states that victims have the right:

[T]o request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim's losses. If restitution is ordered as part of a case disposition, the victim has the right to receive from the probation department a copy of the schedule of restitution payments and the name and telephone number of the probation officer or other official who is responsible for supervising the defendant's payments. If the offender seeks to modify the restitution order, the offender's supervising probation officer shall provide notice to the victim and the victim shall have the right to be heard at any hearing relative to the proposed modification.

5.10.1 Recommendation: Amend Chapter 258B (Rights of victims and witnesses of crime) to provide for mandatory restitution when a defendant is convicted of child sex trafficking under Mass. Gen. Laws ch. 265, § 50(a) (Human trafficking—Sexual servitude).

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.*

Mass. Gen. Laws ch. 277, § 63 (Limitation of criminal prosecutions) sets a 6 year limitation for most CSEC crimes, unless otherwise noted in the statute. It also tolls the statute of limitations applicable to criminal prosecutions for violations of Mass. Gen. Laws ch. 272, § 4A (Promoting child prostitution; mandatory sentence), § 4B (Deriving support from child prostitution; mandatory sentence), § 29A (Child pornography—enticement, solicitation, employment of children), where the victim was under 16 at the time of the offense, until the earlier of the time the victim reaches 16 or the time the crime was reported to law enforcement.<sup>78</sup> Mass. Gen. Laws ch. 277, § 63. Mass. Gen. Laws ch. 272, § 53A(b) (Engaging in sexual conduct for fee; payors and payees; penalties) is subject to the 6-year statute of limitations.

However, Mass. Gen. Laws ch. 277, § 63 eliminates the statute of limitations for prosecutions of child sex trafficking offenses under Mass. Gen. Laws ch. 265, § 50(b) and extends the statute of limitations for sex trafficking prosecutions under ch. 265, § 50(a). Mass. Gen. Laws ch. 277, § 63 provides in part,

An indictment or complaint for an offense set forth in . . . subsection (b) of section 50 of chapter 265 [Human trafficking—Sexual servitude] . . . may be found and filed at any time after the date of the commission of such offense<sup>79</sup> . . . . An indictment for an offense set forth in . . . subsection (a) of section 50 of chapter 265 . . . may be found and filed within 15 years of the date of commission of such offense.

The civil statute of limitations for domestic minor sex trafficking cases is tolled. Pursuant to Mass. Gen. Laws ch. 260, § 4D(b)–(e) (Actions by victims of sexual servitude, or forced labor or services),

(b) A civil action for trafficking of persons for forced labor or services or sexual servitude shall be commenced within 3 years of the date on which the human trafficking victim was freed from human trafficking or, if the victim was a child during the commission of the offense, within 3 years after the date the plaintiff attains the age of 18.

(c) If a person entitled to sue is under a disability at the time the cause of action accrues, such that it is impossible or impracticable for such person to bring an action, the time during which the plaintiff is under a disability shall toll the statute until the disability ceases.

(d) In the event that a child plaintiff is under a disability, the failure of the child's guardian ad litem to bring a plaintiff's action within the applicable limitation period shall not prejudice the plaintiff's right to do so after his disability ceases.

(e) A defendant shall be estopped from asserting a defense of the statute of limitations if the expiration of the statute is due to the defendant inducing the plaintiff to delay the filing of the action, preventing

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<sup>78</sup> Other offenses tolled by Mass. Gen. Laws ch. 277, § 63 include in relevant part Mass. Gen. Laws ch. 272, § 2 (Abduction of persons for the purpose of prostitution or unlawful sexual intercourse), § 4 (Enticing to unlawful intercourse), § 6 (Maintaining a house of prostitution), § 7 (Deriving support from an inmate of a house of prostitution), § 8 (Soliciting), § 12 (Penalty for sending a person to a house of prostitution), § 13 (Detaining a person in house of prostitution), § 29B (Child pornography—dissemination), or § 35A (Obscene material/acts—acts with child under sixteen).

<sup>79</sup> Mass. Gen. Laws ch. 277, § 63 also provides, with regard to the statute of limitations for prosecutions under Mass. Gen. Laws ch. 265, 50(b), “any indictment or complaint found and filed more than 27 years after the date of commission of such offense shall be supported by independent evidence that corroborates the victim's allegation. Such independent evidence shall be admissible during trial and shall not consist exclusively of the opinions of mental health professionals.”



the plaintiff from filing the action or threats made by the defendant that caused duress upon the plaintiff.

To the extent that a domestic minor sex trafficking victim has a tort claim for personal injuries resulting from their commercial sexual exploitation, Mass. Gen. Laws ch. 260, § 2A (Limitation of three years in certain cases) establishes a 3 year statute of limitations for actions of tort and contracts to recover for personal injuries. Additionally, Mass. Gen. Laws ch. 260, § 4C (Statute of limitations on civil action for assault and battery by sexual abuse of minor) imposes a 3 year statute of limitations for bringing civil claim to recover damages related to the sexual abuse<sup>80</sup> of a minor. Mass. Gen. Laws ch. 260, § 4C states,

Actions for assault and battery alleging the defendant sexually abused a minor shall be commenced within three years of the acts alleged to have caused an injury or condition or within three years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act, whichever period expires later; provided, however, that the time limit for commencement of an action under this section is tolled for a child until the child reaches eighteen years of age . . . .

However, Mass. Gen. Laws ch. 260, § 7 (Disabilities) tolls any statute of limitation otherwise applicable to a civil claim if the person entitled to bring the claim was a minor at the time the injury occurred. Instead, Mass. Gen. Laws ch. 260, § 7 provides that the “the action may be commenced within the time hereinbefore limited after the disability is removed.”

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<sup>80</sup> Mass. Gen. Laws ch. 260, § 4C states, “For purposes of this section, ‘sexual abuse’ shall mean the commission of any act against a minor as set forth in section thirteen B [Indecent assault and battery on child under fourteen], 13B1/2 [Indecent assault and battery on child under fourteen—aggravating factors], 13B3/4 [Indecent assault and battery on child under fourteen—previous youthful offender], thirteen H [Indecent assault and battery on person over fourteen], twenty-two [Rape], twenty-two A [Rape of child], 22B [Rape of child—aggravating factors], 22C [Rape of child—previous youthful offender], twenty-three [Rape and abuse of child], 23A [Rape and abuse of child—aggravating factors], 23B [Rape and abuse of child—previous youthful offender], 24 [Assault with intent to commit rape], 24B [Assault on child under sixteen with intent to commit rape] or subsection (b) of section 50 [Human trafficking—sexual servitude] of chapter two hundred and sixty-five or section two [Abduction of persons for the purpose of prostitution or unlawful sexual intercourse], three [Administering drug], four [Enticing unlawful intercourse], four A [Promoting child prostitution; mandatory sentence], four B [Deriving support from child prostitution; mandatory sentence], seven [Deriving support from an inmate of a house of prostitution], eight [Soliciting], thirteen [Detaining a person in house of prostitution], seventeen [Incest], twenty-nine A [Child pornography—enticement, solicitation, employment of children], thirty-four [Obscene materials/acts—sodomy and buggery], thirty-five [Obscene material/acts—unlawful and lascivious Acts] or thirty-five A [Obscene material/acts—acts with child under sixteen] of chapter two hundred and seventy-two.”

***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.*

Massachusetts authorizes law enforcement training on issues related to sexually exploited children. Pursuant to Mass. Gen. Laws ch. 119, § 39K(d) (Sexually exploited children – child welfare services),

The commissioner of the department may, subject to appropriation, contract with non-governmental organizations or entities with experience working with sexually exploited children to train law enforcement officials likely to encounter sexually exploited children in the course of their law enforcement duties. The training shall include, but not be limited to, awareness and compliance with the provisions of this section, identification of, access to, and the provision of services for sexually exploited children and any other services the department deems necessary.

Further, Enacted House Bill 3808, § 31(b)<sup>81</sup> specifically authorizes training on human trafficking, stating that the task force shall:

- (i) coordinate the collection and sharing of human trafficking data among government agencies; provided, however, that such data collection shall respect the privacy of victims of human trafficking; coordinate strategies and make recommendations for law enforcement to share information for the purposes of detecting individuals and groups engaged in human trafficking;
- (ii) review and recommend policies and procedures to enable state government to work with non-governmental organizations and other elements of civil society to prevent human trafficking and to protect and provide assistance to victims of trafficking;
- ....
- (iv) evaluate approaches to increase public awareness of human trafficking and offer recommendations for programs and educational and training opportunities for law enforcement and social service providers including, but not limited to, methods used to identify human trafficking victims including preliminary interviewing and questioning techniques, methods of protecting the special needs of women and child human trafficking victims, developments in state and federal laws regarding human trafficking and methods to increase effective collaboration between state and local agencies, law enforcement, social service providers and non-governmental organizations;

<sup>81</sup> See 2011 Mass. Acts ch. 178, § 31 (concerning commercial exploitation of people).

....  
(viii) recommend strategy and relevant methodologies for training providers in health and human services in the recognition of signs and circumstances indicating that an individual is the victim of human trafficking and the appropriate steps to report the individual to the appropriate law enforcement personnel or agencies;  
....

Training on other special topics, including domestic violence, minors, and hate crimes, is required. Mass. Gen. Laws ch. 6, § 116A (Training of law enforcement personnel in domestic violence), ch. 6, § 116B (Training of law enforcement personnel regarding hate crimes). Additionally, under Mass Gen. Laws ch. 6, § 118, “[n]o municipal police training school shall be approved unless it provides for training members of the rape prevention and prosecution unit established by section ninety-seven B of chapter forty-one.” Mass. Gen. Laws ch. 41, § 97B (Rape reporting and prosecution unit; preservation of evidence) states in part that “[t]here shall be within the police department of every city and town . . . a rape reporting and prosecution unit which shall be designed to improve the quality of rape reporting, counselling, and prosecution.”

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

Massachusetts generally requires two-party consent to audiotape conversations. Mass. Gen. Laws ch. 272, § 99(C)(1) (Eavesdropping, wiretapping, and other interception of communications) makes it a crime to record any conversation, whether oral or wire, without the consent of all parties in Massachusetts. Mass. Gen. Laws ch. 272, § 99(C)(1) states that whoever

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

....

Mass. Gen. Laws ch. 272, § 99(B)(4) defines an “interception” as

to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

Under this definition of “interception” and the provisions of Mass. Gen. Laws ch. 272, § 99(C)(1), the consent of all parties to a communication is required unless one of the parties is a law enforcement officer or has given prior authorization to a law enforcement officer to record the communication, the communication does not occur in a home or a place that has a reasonable expectation of privacy,<sup>82</sup> and the recording is a part of the investigation of a “designated offense,”<sup>83</sup> which includes an investigation related to prostitution when it is part of organized crime activity. Mass. Gen. Laws ch. 272, § 99(C)(1), (B)(7).

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<sup>82</sup> See *Commonwealth v. Blood*, 507 N.E. 2d 1029, 1034 (Mass. 1987) (holding that conversations held in private homes have a reasonable expectation of privacy and that one-party consent allowed under Mass. Gen. Laws ch. 272, § 99(B)(4) does not “obviate the need for a warrant requirement” in such instances).

<sup>83</sup> Mass. Gen. Laws ch. 272, § 99(B)(7) (Eavesdropping, wiretapping, and other interception of communications) defines a “designated offense” as

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

Massachusetts law permits the use of wiretapping in certain circumstances. Exemptions to the prohibition on interception of wire or oral communications under Mass. Gen. Laws ch. 272, § 99(C)(1) (Eavesdropping, wiretapping, and other interception of communications)<sup>84</sup> are provided in Mass. Gen. Laws ch. 272, § 99(D), which states,

1. Permitted interception of wire or oral communications. It shall not be a violation of this section—  
    . . . .
  - c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.
  - d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.
  - e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.    . . . .
2. Permitted disclosure and use of intercepted wire or oral communications.
  - a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.
  - b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.    . . . .
  - d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.    . . . .

A warrant authorizing an interception will be issued pursuant to Mass. Gen. Laws ch. 272, § 99(E) only for the following reasons:

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the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

Mass. Gen. Laws ch. 272, § 99(A) states,

Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living . . . .

<sup>84</sup> See *supra* Component 6.2 for the substantive provisions of Mass. Gen. Laws ch. 272, § 99(C)(1).

1. Upon a sworn application in conformity with this section; and
2. Upon a showing by the applicant that there is probable cause to believe that a designated offense<sup>85</sup> has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and
3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

Under the provisions of Mass. Gen. Laws ch. 272, § 99(D), (E), an order authorizing wiretapping may be issued in some investigations related to CSEC as Mass. Gen. Laws ch. 272, § 99(B)(7) includes kidnapping and prostitution within the definition “designated offense.” Since several of Massachusetts CSEC offenses are included within the prostitution chapter, wiretapping should be available in investigations of those offenses. However, wiretapping is not specifically authorized in sex trafficking investigations.

6.3.1 Recommendation: Amend Mass. Gen. Laws ch. 272, § 99(B)(7) (Eavesdropping, wiretapping, and other interception of communications) to expressly permit wiretapping in sex trafficking investigations.

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.*

Mass. Gen. Laws ch. 265, § 26C(b) (Enticement of children) prohibits a defense to prosecution based on the use of a law enforcement decoy posing as a minor to investigate commercial sexual exploitation. Specifically, Mass. Gen. Laws ch. 265, § 26C(b) makes it unlawful for “[a]ny one who entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building or other outdoor space with the intent that he or another person will violate” a range of CSEC and sexual offenses, implying that a perpetrator enticing a law enforcement officer whom he believes to be a child under the age of 16 could be prosecuted under this statute.

However, a defendant may still be able to assert a defense based on a law enforcement decoy posing as a minor to investigate other buyer-applicable offenses through reverse sting operations, which are the most likely situations in which a defendant would try to use such a defense. Mass. Gen. Laws ch. 265, § 50 (Human trafficking—Sexual servitude) and Mass. Gen. Laws ch. 272, § 53A(c) (Engaging in sexual conduct for fee; payors and payees; penalties) are buyer-applicable CSEC and sex-trafficking offenses<sup>86</sup> that do not prohibit this defense, meaning that buyers charged for attempting to solicit or purchases sex with a minor under Mass. Gen. Laws ch. 265, § 50 or Mass. Gen. Laws ch. 272, § 53A(c) would not be prohibited from raising a defense based on the fact that an actual minor was not involved.

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

Although Mass. Gen. Laws ch. 265, § 26D(c), (d) (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity) provides enhanced penalties for buyers and traffickers who use electronic communications, it does not expressly permit law enforcement to use electronic communications as an investigative technique. Mass. Gen. Laws ch. 265, § 26D(c), (d) states in part,

<sup>85</sup> See *supra* note 83 for the definition of “designated offense.”

<sup>86</sup> See *supra* Component 2.1 for more information about Mass. Gen. Laws ch. 265, § 50 and Component 2.2 for more information about Mass. Gen. Laws ch. 272, § 53A(c).

(c) Whoever, by electronic communication,<sup>87</sup> knowingly entices a child under the age of 18 years, to engage in prostitution in violation of section 50 or section 53A of chapter 272, human trafficking in violation of section 50 [Human trafficking—Sexual servitude], 51 [Human trafficking—Forced services], 52 [Human trafficking—Subsequent violations of sections 50 or 51] or 53 [Human trafficking—Organ trafficking] or commercial sexual activity as defined in section 49, or attempts to do so, shall be punished by imprisonment in a house of correction for not more than 2 ½ years or in the state prison for not more than 5 years or by a fine of not less than \$2,500, or by both such fine and imprisonment.

(d) Whoever, after having been convicted of, or adjudicated delinquent by reason of a violation of this section, commits a second or subsequent such violation, shall be punished by imprisonment in the state prison for not less than 5 years and by a fine of not less than \$10,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release or furlough or receive any deduction from the sentence for good conduct until that person has served 5 years of such sentence.

6.5.1 Recommendation: Amend Mass. Gen. Laws ch. 265, § 26D (Enticement of child under 18 to engage in prostitution, human trafficking or commercial sexual activity) to expressly permit use of the Internet or electronic communications during investigations of this crimes.

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

Mass. Gen. Laws ch. 22A, § 2 (Establishment of statewide central register) directs the executive director of the criminal history systems board to establish a “statewide central register containing all available identifying data of any missing child,<sup>88</sup> including, but not limited to, fingerprints and blood types. The director may use existing data processing and data communications systems of the criminal justice information system.” Mass. Gen. Laws ch. 22A, § 4 (Reports of missing children; entry into central register; search for missing children) requires any police officer who receives a report of a missing child to immediately enter information regarding the missing child into the central register and begin looking for the missing child. Pursuant to Mass. Gen. Laws ch. 22A, § 9 (Notice by law enforcement agency to last known school of missing child; marking of child’s record; notice that child has been located), when a law enforcement agency receives a report of a missing child, it must notify the child’s last known school of the child’s disappearance. Furthermore, Mass. Gen. Laws ch. 22A, § 9, states in part,

Upon notification by a law enforcement authority of a child’s disappearance, each elementary and secondary school, either public or private, in which such child is currently or was previously enrolled shall mark the record of such child in such a manner that whenever a copy of or information regarding the record is requested, said school shall be alerted to the fact that the record is that of a missing child. The school shall immediately report to the appropriate law enforcement authority any request concerning such marked records or knowledge as to the whereabouts of such missing child.

Upon learning that a missing child has been located, such law enforcement authority shall notify any school previously informed of such child’s disappearance that such child has been located, and the school shall remove such mark from the record of such child.

Mass. Gen. Laws ch. 22A, § 7 (Department of children and families, youth services, public health and mental health to report missing children) requires government agencies, including the Department of Children and

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<sup>87</sup> Mass. Gen. Laws ch. 265, § 26D(c) (Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity) states, “As used in this section, the term ‘electronic communication’ shall include, but not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system.”

<sup>88</sup> Mass. Gen. Laws ch. 22A, § 1 (Definitions) defines “Missing child or children” as “any person under the age of eighteen years missing from his normal and ordinary place of residence and whose whereabouts cannot be determined by the person responsible for such child’s care.”

Families (Department), to report any children under their custody who are missing. 110 Mass. Code Regs. 7.115(5), (6) (Runaway foster children) expressly requires that the Department to notify law enforcement upon obtaining information about the possible whereabouts of the child. 110 Mass. Code Regs. 7.115(5) states in part,

Whenever the Department receives information concerning the possible or suspected current whereabouts of a child who has run away or is missing from a foster/pre-adoptive home, or from any temporary substitute care placement, the Department shall immediately notify the appropriate law enforcement agencies and provide such information to them . . . .

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