

## 2017 ANALYSIS AND RECOMMENDATIONS

### CALIFORNIA

#### 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.*

California's human trafficking law directly addresses sex trafficking and does not require proof of the use of force, fraud, or coercion in the commission of the crime against minors. Cal. Penal Code § 236.1 (Human trafficking defined; punishment) states, in relevant part:

- (a) Any person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services,<sup>2</sup> is guilty of human trafficking . . . .
- (b) Any person who deprives or violates the personal liberty of another with the intent to effect or maintain a violation of Section 266 [Procurement], 266h [Pimping], 266i [Pandering], 266j [Procurement of child under age 16 for lewd or lascivious acts] , 267 [Abduction of minor for prostitution], 311.1 [Sent or brought into state for sale or distribution; possessing, preparing, publishing,

<sup>1</sup> This report includes legislation enacted as of August 1, 2017.

<sup>2</sup> Cal. Penal Code § 236.1(e) defines "forced labor or services" as "labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person."

producing, developing, or printing within state; matter depicting sexual conduct by minor] , 311.2 [Sending or bringing into state for sale or distribution; printing, exhibiting, distributing, exchanging, or possession within state; matter depicting sexual conduct by minor], 311.3 [Sexual exploitation of a child], 311.4 [Employment or use of minor to perform prohibited acts], 311.5 [Advertising or promoting sale or distribution; solicitation], 311.6 [Participation in, or production or presentation of, obscene live conduct in public place], or 518 [Definition –extortion] is guilty of human trafficking . . . .  
(c) Any person who causes, induces, or persuades<sup>3</sup>, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act<sup>4</sup>, with the intent to effect or maintain a violation of  
Section 266 [Procurement], 266h [Pimping], 266i [Pandering], 266j [Procurement of child under age 16 for lewd or lascivious acts] , 267 [Abduction of minor for prostitution], 311.1 [Sent or brought into state for sale or distribution; possessing, preparing, publishing, producing, developing, or printing within state; matter depicting sexual conduct by minor] , 311.2 [Sending or bringing into state for sale or distribution; printing, exhibiting, distributing, exchanging, or possession within state; matter depicting sexual conduct by minor], 311.3 [Sexual exploitation of a child], 311.4 [Employment or use of minor to perform prohibited acts], 311.5 [Advertising or promoting sale or distribution; solicitation], 311.6 [Participation in, or production or presentation of, obscene live conduct in public place], or 518 [Definition –extortion] is guilty of human trafficking.

A conviction under Cal. Penal Code § 236.1(a) (Human trafficking defined; punishment) is punishable as a felony<sup>5</sup> by imprisonment in a state prison for 5, 8, or 12 years<sup>6</sup> and a possible fine not to exceed \$500,000.

A conviction under Cal. Penal Code § 236.1(b) (Human trafficking defined; punishment) is punishable as a felony by imprisonment in a state prison for 8, 14, or 20 years, and a possible fine not to exceed \$500,000.

If the victim is under the age of 18, a conviction under Cal. Penal Code § 236.1(c) is punishable by imprisonment for 5, 8, or 12 years and a possible fine not to exceed \$500,000. However, if the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury, then a conviction is

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<sup>3</sup> Cal. Penal Code § 236.1(d) states that “[i]n determining whether a minor was caused, induced, or persuaded to engage in a commercial sex act, the totality of the circumstances, including the age of the victim, his or her relationship to the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be considered.”

<sup>4</sup> Cal. Penal Code § 236.1(h)(2) defines “commercial sex act” to mean “sexual conduct on account of which anything of value is given or received by any person.”

<sup>5</sup> Cal. Penal Code § 17(a) defines “felony” as “a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.”

<sup>6</sup> Regarding which sentence is to be applied, Cal Penal Code § 1170(b) states,

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . .

punishable by imprisonment for 15 years to life, and a possible fine not to exceed \$500,000. Cal Penal Code §236.1(c)(2).

A person convicted under Cal. Penal Code § 236.1 (Human trafficking defined; punishment) is also subject to penalty and fine enhancements specific to human trafficking. Cal. Penal Code § 236.4<sup>7</sup> (Conviction of human trafficking violation; additional fines and penalties) establishes that a person in violation of Cal. Penal Code § 236.1 is subject to an additional fine not to exceed \$1,000,000. Further, a person in violation of Cal. Penal Code § 236.1 who inflicts great bodily injury on a victim shall be punished by an additional term of imprisonment in the state prison for 5, 7, or 10 years. Cal. Penal Code § 236.4(a), (b).

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.*

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

1. Cal. Penal Code § 647(m) (Disorderly conduct; restrictions on probation) specifically criminalizes the solicitation of commercial sex with a minor. Cal. Penal Code § 647(m) states,

- (m) (1) If a crime is committed in violation of subdivision (b) and the person who was solicited was a minor at the time of the offense, and if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for not less than two days and not more than one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both that fine and imprisonment.
- (2) The court may, in unusual cases, when the interests of justice are best served, reduce or eliminate the mandatory two days of imprisonment in a county jail required by this subdivision. If the court reduces or eliminates the mandatory two days' imprisonment, the court shall specify the reason on the record.

The prohibited conduct in Cal. Penal Code § 647(b)<sup>8</sup> includes:

- . . . .
- (3) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, he or she manifests an acceptance of an offer or solicitation by someone who is a minor to so engage, regardless of whether the offer or solicitation was made by a minor who also possessed the specific intent to engage in an act of prostitution.

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<sup>7</sup> Cal. Penal Code § 236.4(a) (Conviction of human trafficking violation; additional fines and penalties) states that

Upon the conviction of a person of a violation of Section 236.1, the court may, in addition to any other penalty, fine, or restitution imposed, order the defendant to pay an additional fine not to exceed one million dollars (\$1,000,000). In setting the amount of the fine, the court shall consider any relevant factors, including, but not limited to, the seriousness and gravity of the offense, the circumstances and duration of its commission, the amount of economic gain the defendant derived as a result of the crime, and the extent to which the victim suffered losses as a result of the crime.

<sup>8</sup> The text of Cal. Penal Code § 647 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bills 420, 1129, and 1322 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

(4) A manifestation of acceptance of an offer or solicitation to engage in an act of prostitution does not constitute a violation of this subdivision unless some act, in addition to the manifestation of acceptance, is done within this state in furtherance of the commission of the act of prostitution by the person manifesting an acceptance of an offer or solicitation to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.

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2. Cal. Penal Code § 266 (Procurement) makes it a crime if a person

inveigles or entices any unmarried female, of previous chaste character,<sup>9</sup> under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; [or] . . . aids or assists in such inveiglement or enticement; [or] . . . by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man . . . .

A conviction under Cal. Penal Code § 266 is punishable as either a misdemeanor or felony.<sup>10</sup> A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$2,000, or both. Cal. Penal Code §§ 266, 17(b). A felony conviction is punishable by imprisonment in a

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<sup>9</sup> The California Supreme Court has stated that whether a victim under the age of 18 is of “previous chaste character” is “a question for the jury.” *People v. Elliott*, 51 P. 955 (Cal. 1898).

<sup>10</sup> Under California law, whether a crime is a felony or misdemeanor is determined by the type and place of punishment. Cal. Penal Code § 17(a), (b). A felony is any crime punished by death, imprisonment in a state prison, or imprisonment in a county jail under Cal. Penal Code § 1170(h), while a misdemeanor is any crime punished by a fine, imprisonment in a county jail, or both. Cal. Penal Code § 17(a); *see also infra* note 38 discussing the test concerning when a crime is a felony or misdemeanor. Several California statutes, however, include a choice of punishments that, depending on which punishment is imposed, determine whether a conviction is a misdemeanor or a felony. *See, e.g.*, Cal. Penal Code §§ 266, 261.5(c), (d). These statutes have been termed “wobblers.” *E.g.*, *People v. Mauch*, 77 Cal. Rptr. 3d 751, 754 (Cal. Ct. App. 2008) (stating that Cal. Penal Code § 17(b) “only applies to offenses, known as ‘wobblers’”). Specifically, Cal. Penal Code § 17(b) states,

When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of [Cal. Penal Code § 1170(h)], or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

- (1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.
- (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.
- (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.
- (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.
- (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

In addition to interpreting the statutory language, California Judges Benchguide 74 was used for clarifying which statutes fall under the “wobbler” category. JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA JUDGES BENCHGUIDE 74, SENTENCING GUIDELINES FOR COMMON MISDEMEANORS AND INFRACTIONS (2011), *available at* <http://www2.courtinfo.ca.gov/protem/pubs/bg74.pdf> (listing misdemeanor statutes and indicating “wobbler” status with an asterisk) (last accessed on September 20, 2016).

state prison for 16 months, 2 years, or 3 years<sup>11</sup> and a possible fine not to exceed \$2,000. Cal. Penal Code §§ 18(a), 266. First time convictions, for either a misdemeanor or felony, are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

3. Cal. Penal Code § 266h(b) (Pimping) states,

Any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, when the prostitute is a minor, is guilty of pimping a minor . . . .

If the victim is a minor 16 years of age or older, a conviction under Cal. Penal Code § 266h(b) is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000.<sup>12</sup> Cal. Penal Code §§ 266h(b)(1), 672. If the minor is under 16, however, a conviction under Cal. Penal Code § 266h(b) is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

4. Cal. Penal Code § 266i(a) (Pandering) makes it a crime if a person

- (1) Procures another person for the purpose of prostitution.
- (2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute.
- (3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state.
- (4) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate.
- (5) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution.

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<sup>11</sup> Cal. Penal Code § 18 (Punishment of felony not otherwise prescribed) provides,

- (a) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.
- (b) Every offense which is prescribed by any law of the state to be a felony punishable by imprisonment or by a fine, but without an alternate sentence to the county jail for a period not exceeding one year, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

<sup>12</sup> Cal. Penal Code § 672 (Conviction of crime for which no fine prescribed) states,

Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.

(6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution.

If the person procured is a minor 16 or older, a conviction under Cal. Penal Code § 266i(a) is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266i(b)(1), 672. If the person procured is a minor under 16, however, a conviction is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266i(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

5. Cal. Penal Code § 267 (Abduction of minor for prostitution) makes it a crime when a person “takes away any other person under the age of 18 years from the father, mother, guardian, or other person having the legal charge of the other person, without their consent, for the purpose of prostitution.” A conviction under Cal. Penal Code § 267 is punishable as a felony by imprisonment in a state prison for 16 months, 2 years, or 3 years and a fine not to exceed \$2,000.<sup>13</sup> Cal. Penal Code §§ 267, 18(a). The court may also order an additional fine not to exceed \$25,000. Cal. Penal Code § 266k(b).
6. Cal. Penal Code § 311.4(b) (Employment of minor in sale or distribution of obscene matter or production of pornography) states that a crime is committed by

[e]very person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years, or any parent or guardian of a minor under the age of 18 years under his or her control who knowingly permits the minor, to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film, filmstrip, or a live performance involving, sexual conduct by a minor under the age of 18 years alone or with other persons or animals, for commercial purposes . . . .

A conviction under Cal. Penal Code § 311.4(b) is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.4(b), 672.

7. Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) makes it a crime if a person

contacts or communicates with<sup>14</sup> a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 261 [Rape; “duress;” “menace”], 264.1 [Punishment for aiding or abetting rape], . . . 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.2 [Sending

<sup>13</sup> See *supra* note 11 discussing penalties applicable to a felony under Cal. Penal Code § 18.

<sup>14</sup> Cal. Penal Code § 288.3(b) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) defines “contacts or communicates with” as including “direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.”

harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; Defenses; Exemption of carrier, broadcaster, or transmitter], 289 [Penetration by foreign object], 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], 311.2 [Production, distribution, or exhibition of obscene matter], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] or 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony] involving the minor . . . .

A conviction under Cal. Penal Code § 288.3(a) is punishable as a felony “by imprisonment in the state prison for the term prescribed for an attempt<sup>15</sup> to commit the intended offense” and a fine not to exceed \$10,000. Cal. Penal Code § 288.3(a), 17(a), 672. Subsequent convictions under this statute are punishable by “an additional and consecutive term of imprisonment in the state prison for five years.” Cal. Penal Code § 288.3(c).

Several other laws, while not expressly commercial in nature, may also apply in cases involving the commercial sexual exploitation of a child. These include the following:

1. Cal. Penal Code § 266j (Procurement of child) provides,

Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288,<sup>16</sup> or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person . . . .

A conviction under Cal. Penal Code § 266j is punishable as a felony by imprisonment for 3, 6, or 8 years in a state prison and a fine not to exceed \$15,000. Cal. Penal Code § 266j. The court may also order an additional fine not to exceed \$25,000. Cal. Penal Code § 266k(b).

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<sup>15</sup> Cal. Penal Code § 664 (Punishment for unsuccessful attempt to commit crime) states,

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

- (a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment pursuant to subdivision (h) of Section 1170, the person guilty of the attempt shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted . . . .
  - (b) If the crime attempted is punishable by imprisonment in a county jail, the person guilty of the attempt shall be punished by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense attempted.
  - (c) If the offense so attempted is punishable by a fine, the offender convicted of that attempt shall be punished by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense attempted.
  - (d) If a crime is divided into degrees, an attempt to commit the crime may be of any of those degrees, and the punishment for the attempt shall be determined as provided by this section.
- . . . .

<sup>16</sup> Cal. Penal Code § 288(a) states,

Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

2. Cal. Penal Code § 261(a)–(c) (Rape; “duress;” “menace”) states,

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

....

(2) Where it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

....

(b) As used in this section, “duress” means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(c) As used in this section, “menace” means any threat, declaration, or act which shows an intention to inflict an injury upon another.

A conviction under Cal. Penal Code § 261(a)–(c) generally is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$70, if the offender is able to pay. Cal. Penal Code §§ 17(a), 264(a), (b). An additional mandatory fine not to exceed \$5,000 also applies if the rape victim is a minor under 14 years of age. Cal. Penal Code § 294(b) (Restitution fine to be imposed on conviction of violation of specified offenses against children). Convictions under Cal. Penal Code § 261(a)(2), however, result in longer prison terms if the victim is a minor. Specifically, if the victim is younger than 14 years of age, a conviction is punishable by imprisonment in a state prison for 9, 11, or 13 years, but if the victim is a minor 14 years of age or older, a conviction is punishable by imprisonment for 7, 9, or 11 years. Cal. Penal Code § 264(c).

3. Cal. Penal Code § 261.5 (Unlawful sexual intercourse with a minor; misdemeanor or felony violation; civil penalties) states,

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a “minor” is a person under the age of 18 years and an “adult” is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 [Determinate sentencing; sentence recall; medical release].<sup>17</sup>

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<sup>17</sup> Cal. Penal Code § 1170(h) (Determinate sentencing; sentence recall; medical release) states,

(1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 [Limitation of plea bargaining] or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5 [Enhancement of prison terms for new offenses], (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement



(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

....

A conviction under Cal. Penal Code § 261.5(b) is punishable as a misdemeanor by imprisonment in a county jail up to 6 months, a fine not to exceed \$1,000, or both. Cal. Penal Code §§ 261.5(b), 19. A conviction under Cal. Penal Code § 261.5(c) or (d) is punishable as either a misdemeanor or felony. A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year and a possible fine not to exceed \$1,000. Cal. Penal Code §§ 261.5(c), (d), 672. A felony conviction under Cal. Penal Code § 261.5(c) is punishable by imprisonment in a county jail for 16 months, 2 years, or 3 years and a possible fine not exceeding \$10,000. Cal. Penal Code §§ 261.5(c), 1170(h)(1),<sup>18</sup> 672. A felony conviction under Cal. Penal Code § 261.5(d) is punishable by imprisonment in a county jail for 2, 3, or 4 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 261.5(d), 1170(h)(2), 672. Additionally, for any conviction under this statute, the court may assess an additional fine not to exceed \$70, if the defendant is able to pay. Cal. Penal Code § 261.5(e)(3).

4. Cal. Penal Code § 269(a) (Aggravated sexual assault of child) provides,

Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child:

- (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.
- (2) Rape or sexual penetration, in concert, in violation of Section 264.1.
- (3) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.
- (4) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.
- (5) Sexual penetration, in violation of subdivision (a) of Section 289.

A conviction under Cal. Penal Code § 269(a) is punishable as a felony by imprisonment of 15 years to life in a state prison and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 269(b), 672. Cal. Penal Code § 269(c) further provides that “[t]he court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6 [Enhancement and fine for prior conviction or prior term for sex offense].”

5. Cal. Penal Code § 288(a) (Lewd or lascivious acts involving children) makes it a crime for

any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . .

A conviction under Cal. Penal Code § 288(a) is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288(a), 672. If the defendant uses “force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or

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pursuant to Section 186.11 [Pattern of related felony conduct] is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

....

<sup>18</sup> See *supra* note 6.

another person,” however, a conviction is punishable by imprisonment in a state prison for 5, 8, or 10 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288(b)(1), 672. If the defendant personally inflicted “bodily harm”<sup>19</sup> on the victim during the commission of Cal. Penal Code § 288(a), the term of imprisonment is extended to life with the possibility of parole. Cal. Penal Code § 288(i)(1). Furthermore, if the victim is 14 or 15 years old and the defendant “is at least 10 years older than the child,” a conviction is punishable as either a misdemeanor by imprisonment in a county jail up to 1 year and a possible fine not to exceed \$1,000, or a felony by imprisonment in a state prison for 1, 2, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288(c)(1), 17(b), 672. Other enhancement provisions may also apply.<sup>20</sup> Lastly, if the victim was under 14 years of age, “[a]ny person convicted of . . . [Cal. Penal Code § 288] shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, as to the mental condition of that person.” Cal. Penal Code § 288.1 (Sentencing for crime against child).

6. Cal. Penal Code § 288.4(a)(1) (Arrangement of meeting with minor for purpose of engaging in certain lewd and lascivious behavior; punishment) makes it a crime if a person

motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor or a person he or she believes to be a minor for the purpose of exposing his or her genitals or pubic or rectal area, having the child expose his or her genitals or pubic or rectal area, or engaging in lewd or lascivious behavior . . . .

A conviction under Cal. Penal Code § 288.4(a)(1) is punishable as a misdemeanor by imprisonment in a county jail up to 1 year, a fine not to exceed \$5,000, or both.<sup>21</sup> Cal. Penal Code §§ 288.4(a)(1), 17(a). If, however, the defendant “goes to the arranged meeting place at or about the arranged time,” a conviction is punishable as a felony by imprisonment in a state prison for 2, 3, or 4 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.4(b), 17(a), 672. First time convictions are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

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

Neither of California’s prostitution-related statutes, Cal. Penal Code § 647 (Disorderly conduct; restrictions on probation) and § 653.22(a) (Loitering with intent to commit prostitution; determination of intent), refer to Cal. Penal Code § 236.1 (Human trafficking defined; punishment). However, Cal. Evid. Code § 1161 (Admissibility of evidence relating to victim of human trafficking) acknowledges the intersection of prostitution with trafficking victimization, stating,

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<sup>19</sup> For the purposes of Cal. Penal Code § 288(a), “bodily harm” is defined as “any substantial physical injury resulting from the use of force that is more than the force necessary to commit the offense.” Cal. Penal Code § 288(i)(3).

<sup>20</sup> A person convicted under Cal. Penal Code § 288 “shall receive a five-year enhancement for a prior conviction” under Cal. Penal Code § 261, § 262, § 264.1, § 269, § 285, § 286, § 288, § 288a, § 288.5 or § 289. Cal. Penal Code § 667.51(a), (b). If, however, the defendant has more than one prior conviction for any of the previously listed offenses, a conviction under Cal. Penal Code § 288 or § 288.5 is punishable by imprisonment in a state prison for 15 years to life. Cal. Penal Code § 667.51(c). Furthermore, a defendant convicted of a felony under Cal. Penal Code § 288(a), or (c)(1) is subject to an additional one-year term of imprisonment in a state prison if “the offense was committed with a minor for money or other consideration.” Cal. Penal Code § 675(a).

<sup>21</sup> If the defendant has “a prior conviction for an offense listed in subdivision (c) of Section 290,” a conviction under this statute is as punishable a felony by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.4(a)(2), 17(a), 18(a), 672.

Evidence that a victim of human trafficking, as defined in Section 236.1 of the Penal Code, has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim’s criminal liability for the commercial sexual act.

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.*

Cal. Penal Code §§ 186–186.8 (California Control of Profits of Organized Crime Act) requires forfeiture of assets derived from a pattern of criminal profiteering activity but does not makes it a separate crime to engage in a pattern of criminal profiteering activity. “Criminal profiteering activity” is defined in Cal. Penal Code § 186.2 and includes the following:

- . . . .  
(3) Child pornography or exploitation, as defined in subdivision (b) of Section 311.2, or Section 311.3 or 311.4, which may be prosecuted as a felony.  
. . . .
- (9) Kidnapping, as defined in Section 207.  
. . . .
- (12) Pimping and pandering, as defined in Section 266.  
. . . .
- (19) Offenses contained in Chapter 7.5 (commencing with Section 311) of Title 9, relating to obscene matter, or in Chapter 7.6 (commencing with Section 313) of Title 9, relating to harmful matter that may be prosecuted as a felony.  
. . . .
- (25) Conspiracy to commit any of the crimes listed above, as defined in Section 182.  
. . . .
- (28) Human trafficking, as defined in Section 236.1.
- (29) Any crime in which the perpetrator induces, encourages, or persuades a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.
- (30) Any crime in which the perpetrator, through force, fear, coercion, deceit, violence, duress, menace, or threat of unlawful injury to the victim or to another person, causes a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.  
. . . .
- (33) Abduction or procurement by fraudulent inducement for prostitution, as defined in Section 266a.  
. . . .

A pattern of criminal profiteering activity is defined in Cal. Penal Code §186.2(b) and means “engaging in at least two incidents of criminal profiteering, as defined by this chapter, that meet the following requirements:

- (A) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics.
- (B) Are not isolated events.
- (C) Were committed as a criminal activity of organized crime.<sup>22</sup>

<sup>22</sup> Pursuant to Cal. Penal Code §186.2(d), “organized crime” is defined as

crime that is of a conspiratorial nature and that is either of an organized nature and seeks to supply illegal goods or services such as . . . prostitution, pimping and pandering, . . . and pornography . . . . “Organized crime” also means crime committed by a criminal street gang, as defined in subdivision (f) of Section 186.22.

Following a conviction of a criminal profiteering offense, the offender is subject to mandatory asset forfeiture pursuant to Cal. Penal Code §§ 186.3–186.5. Cal. Penal Code 186.3 states,

- (a) In any case in which a person is alleged to have been engaged in a pattern of criminal profiteering activity, upon a conviction of the underlying offense, the assets listed in subdivisions (b) and (c) shall be subject to forfeiture upon proof of the provisions of subdivision (d) of Section 186.5.
- (b) Any property interest whether tangible or intangible, acquired through a pattern of criminal profiteering activity.
- (c) All proceeds of a pattern of criminal profiteering activity, which property shall include all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity.

Cal. Penal Code § 186.4 states,

- (a) The prosecuting agency shall, in conjunction with the criminal proceeding, file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense, which shall allege that the defendant has engaged in a pattern of criminal profiteering activity, including the acts or threats chargeable as crimes and the property forfeitable pursuant to Section 186.3.

**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 buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
- 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
- 2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing images of child sexual exploitation carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors are required to register as sex offenders.*

**Legal Analysis:**

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

Cal. Penal Code § 236.1 (Human trafficking defined; punishment) does not apply to buyers who purchase sex with a minor because the list of predicate crimes under Cal. Penal Code § 236.1(a) does not include the statute most applicable to buyers, Cal. Penal Code § 647 (Disorderly conduct; restrictions on probation).<sup>23</sup>

- 2.1.1 Recommendation: Amend Cal. Penal Code § 236.1(a)–(c) (Human trafficking defined; punishment) to make the statute applicable to the actions of buyers of commercial sex with minors.

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

California has one CSEC provision,<sup>24</sup> Cal. Penal Code § 647 (Disorderly conduct; restrictions on probation), that addresses the crime of buying sex with a minor; however, the penalties are minimal and, in some cases, may be eliminated entirely. Cal. Penal Code § 647(b), (m)<sup>25</sup> states,

<sup>23</sup> See *infra* Component 2.2 for the substantive provision of Cal. Penal Code § 647(b).

<sup>24</sup> Case law interpreting Cal. Penal Code § 266i(a) (Pandering) precludes application of this CSEC offense to buyers. In *People v. Dixon*, 191 Cal.App.4th 1154 (2011), the defendant was charged with pandering for soliciting sex with a 17-year old via text message by offering her over \$200. *Id.* at 1156. The defendant was convicted as “a person who ‘[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute’ (§ 266i, subd. (a)(2).)” *Id.* The court agreed with the defendant on appeal that “‘a person who seeks sex for himself, and uses the money as an inducement, is not a panderer.’” *Id.* The court followed the reasoning of California’s Supreme Court that defined a panderer “in a similar context . . . [as] one “‘who procures the gratification of the passion of lewdness for another.’” (*People v. Roderigas* (1874) 49 Cal. 9, 11). *Id.* The court further noted: “As to the sexual desires of others, ‘pandering’ means the business of recruiting a prostitute, finding a place of business for a prostitute, or soliciting customers for a prostitute. (Black’s Law Dict. (7th ed. 1999) p. 1135; see *United States v. Williams* (2008) 553 U.S. 285, 308, fn. 1 [170 L.Ed.2d 650, 672, fn. 1, 128 S.Ct. 1830].)” *Id.* at 1159–1160.

<sup>25</sup> See *supra* note 8.

Except as provided in paragraph (5) of subdivision (b) and subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

- ....
- (b) (3) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by someone who is a minor to so engage, regardless of whether the offer or solicitation was made by a minor who also possessed the specific intent to engage in an act of prostitution.
- (4) A manifestation of acceptance of an offer or solicitation to engage in an act of prostitution does not constitute a violation of this subdivision unless some act, in addition to the manifestation of acceptance, is done within this state in furtherance of the commission of the act of prostitution by the person manifesting an acceptance of an offer or solicitation to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.
- ....
- (m) (1) If a crime is committed in violation of subdivision (b) and the person who was solicited was a minor at the time of the offense, and if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for not less than two days and not more than one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both that fine and imprisonment.
- (2) The court may, in unusual cases, when the interests of justice are best served, reduce or eliminate the mandatory two days of imprisonment in a county jail required by this subdivision. If the court reduces or eliminates the mandatory two days' imprisonment, the court shall specify the reason on the record.

If the state fails to prove that a buyer knew or should have known that the solicited person was a minor, a conviction under Cal. Penal Code § 647(b) is punishable as a misdemeanor by imprisonment in a county jail up to 6 months, a fine not to exceed \$10,000, or both. Cal. Penal Code §§ 647(b), 672, 19. Second convictions under Cal. Penal Code § 647(b) are subject to a mandatory minimum of 45 days in a county jail, while subsequent convictions are subject to a mandatory minimum of 90 days in a county jail. Cal. Penal Code § 647(k).

In instances where a "violation of subdivision (b) . . . was committed within 1,000 feet of a private residence and with the use of a vehicle," the court may also suspend a buyer's driver's license up to 30 days.<sup>26</sup> Cal. Penal Code § 647(k). For any conviction under this statute, the court may also order an additional fine not to exceed \$70, if the defendant is able to pay. Cal. Penal Code § 647.1 (Additional fine to be used for AIDs education).

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<sup>26</sup> Cal. Penal Code § 647(k) states in part,

In lieu of the suspension, the court may order a person's privilege to operate a motor vehicle restricted, for not more than six months, to necessary travel to and from the person's place of employment or education. If driving a motor vehicle is necessary to perform the duties of the person's employment, the court may also allow the person to drive in that person's scope of employment.

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

Cal. Penal Code § 647(m) (Disorderly conduct; restrictions on probation) differentiates between the buying of sex with an adult and a minor by permitting higher penalties when a buyer knows or has reason to know that the person solicited was a minor at the time of the offense.<sup>27</sup>

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

Under Cal. Penal Code § 647(m) (Disorderly conduct; restrictions on probation), if the actor knew or should have known that the person solicited was a minor at the time of the offense, the conviction is punishable by imprisonment for a minimum of two days and a maximum of one year in county jail, a fine up to \$10,000, or both. Cal. Penal Code § 647(m)(1).

If the state fails to prove that a buyer of sex with a minor knew or should have known that the solicited individual was a minor, a conviction under Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation)<sup>28</sup> is punishable as a misdemeanor by imprisonment in a county jail up to 6 months, a fine not to exceed \$1,000, or both. Cal. Penal Code §§ 647(b), 672, 19. Second convictions under Cal. Penal Code § 647(b) are subject to a mandatory minimum of 45 days in a county jail, while subsequent convictions are subject to a mandatory minimum of 90 days in a county jail. Cal. Penal Code § 647(k). When a “violation of subdivision (b) . . . was committed within 1,000 feet of a private residence and with the use of a vehicle,” the court may also suspend the buyer’s driver’s license up to 30 days.<sup>29</sup> Cal. Penal Code § 647(k). For any conviction under Cal. Penal Code § 647(b), the court may also order an additional fine not to exceed \$70, if the defendant is able to pay. Cal. Penal Code § 647.1 (Additional fine to be used for AIDs education).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>30</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>31</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>32</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>33</sup>

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<sup>27</sup> See *supra* Component 2.2 for the substantive provisions of Cal. Penal Code § 647(b), (m).

<sup>28</sup> See *supra* Component 2.2 for the substantive provisions of Cal. Penal Code § 647(b).

<sup>29</sup> See *supra* note 26.

<sup>30</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>31</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as:

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

<sup>32</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>33</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years,

2.4.1 Recommendation: Amend Cal. Penal Code § 647(m) (Disorderly conduct; restrictions on probation) to expressly classify and punish the crime as a felony when sex is purchased with a minor under the age of 18 and to raise the penalty to reflect the seriousness of this offense.

2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*

Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) makes it a crime if a person

contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 261 [Rape; “duress;” “menace”], 264.1 [Punishment for aiding or abetting rape], . . . 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; Defenses; Exemption of carrier, broadcaster, or transmitter], 289 [Penetration by foreign object], 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], 311.2 [Production, distribution, or exhibition of obscene matter], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] or 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony] involving the minor . . . .

Cal. Penal Code § 288.3(b) defines “contacts or communicates with” as including “direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.”

A conviction under Cal. Penal Code § 288.3(a) is punishable as a felony by “imprisonment in the state prison for the term prescribed for an attempt<sup>34</sup> to commit the intended offense” and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.3(a), 17(a), 672. Subsequent convictions under this statute are punishable by “an additional and consecutive term of imprisonment in the state prison for five years.” Cal. Penal Code § 288.3(c).

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

Cal. Penal Code § 647(m) (Disorderly conduct; Restrictions on probation) provides a heightened penalty for soliciting sex acts with a minor “if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense.” Accordingly, a buyer may assert a mistake of age defense in order to escape the heightened penalty.

Additionally, Cal. Penal Code § 288.3 (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) is silent regarding the permissibility of a mistake of age defense. However, Cal. Penal Code § 288.3(a) only applies if an offender “knows or reasonably should know that the person is a minor,” which implies the permissibility of such a defense.

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

<sup>34</sup> *See supra* note 15.



2.6.1 Recommendation: Amend Cal. Penal Code § 647(m) (Disorderly conduct; restrictions on probation) and § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) to expressly prohibit a mistake of age defense and remove the “knows or should’ve known” requirements.

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

California’s CSEC law, Cal. Penal Code § 647(m)<sup>35</sup> (Disorderly conduct; restrictions on probation), does not stagger penalties based on the minor’s age, but buyers face minimal penalty under this provision; California’s trafficking law does not apply to buyers. Cal. Penal Code § 647(b)(3),<sup>36</sup> is punishable by imprisonment in a county jail for not less than two days and not more than one year or by a fine not exceeding \$10,000, or by both, if the defendant knew or should have known that the person solicited was a minor at the time of the offense. Further, the “mandatory” penalty of two days imprisonment can be lessened or withheld “in unusual cases, when the interests of justice are best served.”

2.7.1 Recommendation: Amend Cal. Penal Code § 647(m) (Disorderly conduct; restrictions on probation) to impose further mandatory enhanced penalties for any offense where a person solicits or pays for sex with a minor under the age of 18.

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

Violations of Cal. Penal Code § 647(b)(3)<sup>37</sup> (Disorderly conduct; restrictions on probation) by buyers who knew or should have known that the person solicited was a minor at the time of the offense are subject to a possible fine not to exceed \$10,000. Cal. Penal Code § 647(m).

Buyers also are subject to penalty assessments. Courts are directed to order a person convicted of any crime in California to pay a penalty assessment. Cal. Penal Code § 1202.4(a)(2) states, “Upon a person being convicted of a crime in the State of California, the court shall order the defendant to pay a fine in the form of a penalty assessment in accordance with Section 1464 [Penalty assessment; distribution of funds].” The state penalty assessment is \$10 for every \$10, or fraction of \$10, on “every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.” Cal. Penal Code § 1464(a)(1). Penalty assessments do not apply to restitution fines. Cal. Penal Code § 1464(a)(3)(A).

Additionally, convicted buyers are also subject to a restitution fine. Pursuant to Cal. Penal Code § 1202.4(b) (Restitution; amount; hearing and court order; financial disclosure), “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.” Although the final amount of a restitution fine falls within the court’s discretion, it must be between \$150–\$1,000 for a misdemeanor conviction and \$300–\$10,000 for a felony conviction. Cal. Penal Code § 1202.4(b)(1).

Cal. Penal Code § 1202.4(f) requires a convicted defendant to make restitution to a victim who “has suffered economic loss as a result of the defendant’s conduct,” for either “the amount of loss claimed by the victim or victims or any other showing to the court,” and “[i]f the amount of loss cannot be ascertained at the time of sentencing,” the court shall order that the amount be “determined at the direction of the court.”

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<sup>35</sup> See *supra* Component 2.2 for the substantive provisions of Cal. Penal Code § 647(m).

<sup>36</sup> See *supra* note 8.

<sup>37</sup> See *supra* Component 2.2 for the substantive provisions of Cal. Penal Code § 647(m).  
See *supra* note 8.

Additionally, under Cal. Penal Code § 312.3(a) (Forfeiture and destruction of matter depicting minors engaging in or simulating sexual conduct), to the extent that “[m]atter that depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct as defined in Section 311.4,” comes into “the possession of any city, county, city and county, or state official or agency” it will be “subject to forfeiture.” No specific procedure for effecting the forfeiture is authorized.

While buyers may be subject to some forfeiture provisions regarding property used in connection with prostitution offenses under the Red Light Abatement Law at Cal. Penal Code § 11225–11235, forfeiture regarding property used in violating human trafficking and CSEC offenses is not explicitly included. Pursuant to Cal. Penal Code § 11225(a), “[e]very building or place used for the purpose of . . . lewdness, assignation, or prostitution, and every building or place in or upon which . . . lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.” Pursuant to Cal. Penal Code. § 11230(a)(1), “If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released.”

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

Cal. Penal Code § 311.11(a) (Possession or control of child pornography; persons previously guilty of felony) makes it a crime for any person to possess images of child sexual exploitation (ICSE). Specifically, Cal. Penal Code § 311.11(a) states,

Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony . . . .

A conviction under Cal. Penal Code § 311.11(a) is punishable as either a misdemeanor<sup>38</sup> or felony. Cal. Penal Code §17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$2,500, or both. Cal. Penal Code 17(b). A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 18(a), 672. Buyers who have a prior conviction under Cal. Penal Code § 311.11(a), “an offense requiring registration under the Sex Offender Registration Act, or an attempt to commit any of the above-mentioned offenses,” are guilty of a felony punishable by imprisonment in state prison for 2, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.11(b), 672. First time convictions, for either a

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<sup>38</sup> Although Cal. Penal Code § 311.11(a) specifically states that a violation is a felony, it is also possible for a violation to be a misdemeanor. *See People v. Sacramento Butchers’ Protective Ass’n*, 107 P. 712, 720 (Cal. Ct. App. 1910) (stating, “[I]n the determination whether a certain offense is a felony or a misdemeanor, no material aid is necessarily afforded by the mere characterization of the prohibited and penalized act as either the one or the other, since the nature and extent and mode of the punishment prescribed . . . is the sole test. For illustration, if a statute should denounce a certain act as a felony, but limited the power of punishment . . . to imprisonment in the county jail . . . or a fine . . . or by both such fine and imprisonment, it would readily appear, notwithstanding its designation by the statute as a felony, that, from the nature of the punishment prescribed, the act so denounced and designated could be nothing more than an ordinary misdemeanor . . . .”) (citations omitted).

misdemeanor or a felony, are also subject to an additional mandatory fine of \$300 while subsequent offenses are subject to an additional mandatory fine of \$500, unless the defendant is unable to pay. Cal. Penal Code §§ 290.3(a), 290(c).

A buyer who “exchanges” ICSE may be prosecuted under Cal. Penal Code § 311.3(a) (Sexual exploitation of child), which provides,

A person is guilty of sexual exploitation of a child if he or she knowingly develops, duplicates, prints, or exchanges any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip that depicts a person under the age of 18 years engaged in an act of sexual conduct.<sup>39</sup>

A first conviction under Cal. Penal Code § 311.3(a) is punishable as a misdemeanor by imprisonment in a county jail up to 1 year, a fine not to exceed \$2,000, or both. Cal. Penal Code §§ 311.3(d), 17(a). A conviction for a buyer who has a prior conviction under Cal. Penal Code §§ 311.1–311.11, however, is punishable as a felony by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.3(d), 17(a), 18(a), 672. First time convictions are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

Additionally, Cal. Penal Code § 311.3 (Sexual exploitation of child) is a predicate offense under Cal. Penal Code § 236.1(b) and (c) (Human trafficking defined; punishment), which is punishable by imprisonment in the state prison for 8, 14, or 20 years, or 5, 8, or 12 years, respectively, and a fine of not more than five hundred thousand dollars (\$500,000).<sup>40</sup> Cal. Penal Code §236.1(b) and (c)(1).

In comparison, a federal conviction for possession of ICSE<sup>41</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>42</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>43</sup>

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<sup>39</sup> Cal. Penal Code § 311.3(b) defines “sexual conduct” as the following:

- (1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.
- (2) Penetration of the vagina or rectum by any object.
- (3) Masturbation for the purpose of sexual stimulation of the viewer.
- (4) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.
- (5) Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer.
- (6) Defecation or urination for the purpose of sexual stimulation of the viewer.

<sup>41</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>42</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>43</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

- 2.9.1 Recommendation: Amend Cal. Penal Code § 311.11(a) (Possession or control of child pornography; persons previously guilty of felony) and § 311.3 (Sexual exploitation of child) to increase the penalties for possession of images of child sexual exploitation to reflect the seriousness of this crime and to provide consistent punishment for and deterrent to this crime.

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

Pursuant to Cal. Penal Code § 290(c) (Sex offender registration act; persons required to register) persons required to register as sex offenders include those convicted under

subdivision (b) and (c) of Section 236.1 [human trafficking], . . . paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261 [Rape; “duress;” “menace”], . . . 266c [Inducing consent to sexual act by fraud or fear], . . . 269 [Aggravated sexual assault of child], 285 [Incest], 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.3 [Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation], 288.4 [Arrangement of meeting with minor for purpose of engaging in certain lewd and lascivious behavior; punishment], 288.5 [Continuous sexual abuse of child], 288.7 [Sexual acts with child 10 years old or younger; punishment as felony], 289 [Penetration by foreign object], . . . 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony], or 647.6 [Annoying or molesting children; punishment; probation], . . . any offense involving lewd or lascivious conduct under Section 272 [Contributing to delinquency of minor; luring minor under 14 away from home], or any felony violation of Section 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; defenses; exemption of carrier, broadcaster, or transmitter]; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

Buyers of sex with minors who are convicted under Cal. Penal Code § 647(b)(3) (Disorderly conduct; restrictions on probation) are not required to register under Cal. Penal Code § 290(c) (Sex offender registration act; persons required to register).

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

***Legal Components:***

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
- 3.2 *Creating and distributing images of child sexual exploitation carries penalties as high as similar federal offenses.*
- 3.3 *Using the Internet or electronic communications to lure, entice, recruit or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
- 3.5 *Convicted traffickers are required to register as sex offenders.*
- 3.6 *Laws relating to termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for 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 Cal. Penal Code § 236.1(a) (Human trafficking defined; punishment) is punishable as a felony by imprisonment in a state prison for 5, 8, or 12 years and a fine not to exceed \$500,000. Cal. Penal Code §§ 236.1(a). A conviction under Cal. Penal Code § 236.1 (b) for sex trafficking “shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than five hundred thousand dollars (\$500,000).” However, if the offense involves a commercial sex act<sup>44</sup> and the victim is under the age of 18, then a conviction is punishable by imprisonment for 5, 8, or 12 years and a fine which will generally not exceed \$500,000. Cal. Penal Code § 236.1(c)(1). If the offense is achieved through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, the conviction is punishable by fifteen years to life and a fine which will generally not exceed five hundred thousand dollars (\$500,000). Cal. Penal Code § 236.1 (c)(2). Further, a person in violation of Cal. Penal Code § 236.1 who inflicts great bodily injury on a victim shall be punished by an additional term of imprisonment in the state prison for 5, 7, or 10 years. Cal. Penal Code § 236.4(b).

Additionally, certain crimes for which a trafficker may be convicted are predicate offenses under Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 266 (Procurement), § 266h(b) (Pimping), and § 266j (Procurement of child), are expressly referred to in Cal. Penal Code § 236.1; therefore, the fines and penalties under the human trafficking statute are applicable.

If the victim is an “unmarried, chaste female” who is under the age of 18, a trafficker may be convicted under Cal. Penal Code § 266 (Procurement). A conviction under Cal. Penal Code § 266 is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$2,000, or both. Cal. Penal Code § 266. A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$2,000. Cal. Penal Code §§ 18(a), 266. First time convictions, for either a misdemeanor or felony, are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

<sup>44</sup> For purposes of Cal. Penal Code § 236.1(g), Cal. Penal Code § 236.1(g)(2) defines “commercial sex act” as “any sexual conduct on account of which anything of value is given or received by any person.”

Additionally, traffickers may be convicted under Cal. Penal Code § 266h(b) (Pimping) or Cal. Penal Code § 266i(a) (Pandering).<sup>45</sup> If the victim is a minor 16 years of age or older, a conviction under either of these statutes is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(1), 266i(b)(1), 672. However, if the victim is under 16 years of age, a conviction under either of these statutes is punishable as a felony by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(2), 266i(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

If the victim is under 16 years of age, a trafficker may also be convicted for a felony under Cal. Penal Code § 266j (Procurement of child),<sup>46</sup> punishable by imprisonment in a state prison for 3, 6, or 8 years and a fine not to exceed \$15,000. Cal. Penal Code § 266j. If the crime involves a minor under the age of 18, traffickers may be convicted under Cal. Penal Code § 267 (Abduction of minor for prostitution),<sup>47</sup> a felony punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a fine not to exceed \$2,000. Cal. Penal Code §§ 267, 18(a). For convictions under either of these statutes, the court may also order an additional fine not to exceed \$25,000. Cal. Penal Code § 266k(b).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>48</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>49</sup> against a minor. 18 U.S.C. § 3559(e)(1).

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

Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct) prohibits the distribution of images of child sexual exploitation (ICSE). A violation of Cal. Penal Code § 311.1(a) occurs when a person

knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops, duplicates, or prints any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or to exhibit to, or to exchange with, others, or who offers to distribute, distributes, or exhibits to, or exchanges with, others, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] . . . .

A conviction under Cal. Penal Code § 311.1(a) is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$1,000, or both. Cal. Penal Code § 311.1(a). A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.1(a), 17(a), 18(a). Also, offenders convicted of a first offense are subject to an additional \$300 fine, and

<sup>45</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 266h and § 266i.

<sup>46</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 266j.

<sup>47</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 267.

<sup>48</sup> See *supra* note 30.

<sup>49</sup> See *supra* note 31.

those convicted of any subsequent offense are subject to a \$500 fine, if the offender is able to pay. Cal. Penal Code §§ 290.3, 290(c).<sup>50</sup>

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>51</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of ICSE<sup>52</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>53</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>54</sup>

3.2.1 Recommendation: Amend Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct) to increase the penalties for distribution of images of child sexual exploitation to reflect the seriousness of the offense.

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.*

Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) makes it a crime if a person

contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 261 [Rape; “duress;” “menace”], 264.1 [Punishment for aiding or abetting rape], . . . 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; defenses; exemption of carrier, broadcaster, or transmitter], 289 [Penetration by foreign object], 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], 311.2 [Production, distribution, or exhibition of obscene matter], 311.4 [Employment of

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<sup>50</sup> Additionally, Cal Penal Code § 311.12 (2) provides that a conviction of specified offenses relating to obscene matter involving minors will be subject to an additional fine not exceeding \$2,000 if the offense was committed using a government-owned computer or computer network, or if the production, transportation, or distribution involves government-owned property.

<sup>51</sup> See *supra* note 31.

<sup>52</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>53</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>54</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).

minor in sale or distribution of obscene matter or production of pornography] or 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony] involving the minor . . . .

Cal. Penal Code § 288.3(b) defines “contacts or communicates with” as including “direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.”

A first conviction under Cal. Penal Code § 288.3(a) is a felony punishable by “imprisonment in the state prison for the term prescribed for an attempt<sup>55</sup> to commit the intended offense” and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 288.3(a), 17(a), 672. Subsequent convictions are punishable by “an additional and consecutive term of imprisonment in the state prison for five years.” Cal. Penal Code § 288.3(c).

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

Traffickers are subject to fines up to \$500,000, with a potential enhancement of up to \$1,000,000. Cal. Penal Code § 236.1(a)–(c)(2). Specifically, traffickers convicted under Cal. Penal Code § 236.1 (Human trafficking defined; punishment),<sup>56</sup> if the trafficking involves a commercial sex act with a minor under the age of 18, are subject to a fine not to exceed \$500,000. Cal. Penal Code § 236.1(c). Because Cal. Penal Code § 236.1 references CSEC crimes, traffickers convicted under Cal. Penal Code § 266 (Procurement),<sup>57</sup> § 266j (Procurement of a child), § 266h(b) (Pimping), § 267 (Abduction of minor for prostitution)<sup>58</sup> or § 266i(a) (Pandering)<sup>59</sup> are subject to a fine which will generally not exceed \$500,000. Cal. Penal Code § 236.1 (a)–(c). The court may also order a person convicted under Cal. Penal Code § 236.1 to pay an additional fine of \$1,000,000. Cal. Penal Code § 236.4. Traffickers convicted under Cal. Penal Code § 266f (Selling prostitute) are subject to a possible fine not to exceed \$10,000.

Traffickers convicted under Cal. Penal Code § 266j (Procurement of child)<sup>60</sup> are subject to a fine not to exceed \$15,000. Cal. Penal Code § 266j. Traffickers convicted under Cal. Penal Code § 267 (Abduction of minor for prostitution) face imprisonment in a state prison for 16 months, 2 years, or 3 years and a fine not to exceed \$2,000.<sup>61</sup> Cal. Penal Code §§ 267, 18(a). The court may also order an additional fine not to exceed \$20,000. The court may also order a trafficker convicted under Cal. Penal Code § 266j or § 267 to pay an additional fine not to exceed \$25,000. Cal. Penal Code § 266k(b).

Traffickers are also subject to penalty assessments. Courts are directed to order a person convicted of any crime in California to pay a penalty assessment. Cal. Penal Code § 1202.4(a)(2) states, “Upon a person being convicted of a crime in the State of California, the court shall order the defendant to pay a fine in the form of a penalty assessment in accordance with Section 1464.” The state penalty assessment is \$10 for every \$10, or fraction of \$10, on “every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.” Cal. Penal Code § 1464(a)(1). Penalty assessments do not apply to restitution fines. Cal. Penal Code § 1464(a)(3)(A).

Additionally, convicted traffickers are also subject to a mandatory restitution fine. Pursuant to Cal. Penal Code § 1202.4(b) (Restitution; amount; hearing and court order; financial disclosure), “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.” Although the

<sup>55</sup> See *supra* note 15.

<sup>56</sup> See *supra* Component 1.1 for the substantive provisions of Cal. Penal Code § 236.1.

<sup>57</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 266.

<sup>58</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 267.

<sup>59</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 266h and § 266i.

<sup>60</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 266j.

<sup>61</sup> See *supra* note 11 discussing penalties applicable to a felony under Cal. Penal Code § 18.



final amount of a restitution fine ultimately falls within the court's discretion, it must be between \$150–\$1,000 for a misdemeanor conviction and \$300–\$10,000 for a felony conviction. Cal. Penal Code § 1202.4(b)(1).

Lastly, traffickers convicted under Cal. Penal Code § 236.1 (Human trafficking defined; Punishment) are expressly required to make restitution to their victim. Cal. Penal Code § 1202.4(q) states,

Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, order the defendant to pay restitution to the victim in a case in which a victim has suffered economic loss as a result of the defendant's conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or another showing to the court. In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services or any other appropriate means to provide reparations to the victim.

Regarding other trafficking convictions, Cal. Penal Code § 1202.4(f) requires a convicted defendant to make restitution to a victim who "has suffered economic loss as a result of the defendant's conduct," for either "the amount of loss claimed by the victim or victims or any other showing to the court." Where "the amount of loss cannot be ascertained at the time of sentencing," the court shall order the amount to "be determined at the direction of the court."

While traffickers may be subject to some forfeiture provisions regarding property used in connection with prostitution offenses under the Red Light Abatement Law at Cal. Penal Code § 11225–11235, forfeiture regarding property used in violating human trafficking and CSEC offenses is not explicitly included. Pursuant to Cal. Penal Code § 11225(a), "[e]very building or place used for the purpose of . . . lewdness, assignation, or prostitution, and every building or place in or upon which acts of . . . lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance." Pursuant to Cal. Penal Code § 11230(a)(1), "If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released."

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

Pursuant to Cal. Penal Code § 290(c) (Sex offender registration act; persons required to register), traffickers are required to register as sex offenders if they have been convicted under any of the following:

[Cal. Penal Code §] subdivision (b) and (c) of Section 236.1 [Human trafficking defined; punishment], 266 [Procurement], or 266c [Inducing consent to sex act by fraud or fear], subdivision (b) of Section 266h [Pimping], subdivision (b) of Section 266i [Pandering], Section 266j [Procurement of child], 267 [Abduction of minor for prostitution], . . . 288.3 [Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation], . . . 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], subdivision (b), (c), or (d) of Section 311.2 [Production, distribution, or exhibition of obscene matter], Section 311.3 [Sexual exploitation of child], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography], 311.10 [Advertisement of obscene matters depicting minors], . . . any offense involving lewd or lascivious conduct under Section 272 [Contributing to delinquency of minor; luring minor under 14 away from home], or any

felony violation of Section 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; defenses; exemption of carrier, broadcaster, or transmitter]; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who . . . has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

In addition, Cal. Penal Code § 290.015(a)(4)<sup>62</sup> (Release from incarceration; registration requirement)<sup>63</sup> requires certain registered sex offenders to provide a list of Internet identifiers (email, user names, screen names, or similar identifiers).<sup>64</sup> Cal. Penal Code 290.014(b)<sup>65</sup> (Notice of name change) states,

If any person who is required to register Internet Identifiers pursuant to Section 290.024 [Definitions] adds or changes an Internet identifier, as defined in Section 290.024, the person shall send written notice by mail of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 30 working days of the addition or change. The law enforcement agency or agencies shall make the information available to the Department of Justice.

However, “a designated law enforcement entity shall only use an Internet identifier submitted pursuant to this chapter, or release that Internet identifier to another law enforcement entity, for the purpose of investigating a sex-related crime, kidnapping, or human trafficking.” Cal. Penal Code § 290.45(h)(1)<sup>66</sup> (Law enforcement agency authorized to provide information to public regarding registered sex offender when necessary for public safety; Notification on Internet Web site restricted). Internet Identifiers may not be disclosed to the public. Cal. Penal Code § 290.45(h)(2).

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<sup>62</sup> The text of Cal. Penal Code § 290.015 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 448 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>63</sup> Immediately following passage of the CASE Act, Section 290 was challenged in the United States District Court for the Northern District of California in an action filed by the American Civil Liberty Union on behalf of current and future sex offenders in California. The complaint specifically challenged the requirement for sex offenders to disclose, upon release from incarceration, all Internet identifiers, service providers used, and a statement obliging the offender to update this information. On November 7, 2012, the Court granted a temporary restraining order for section 290.14(b) and 290.015(a)(4)–(6) and, after finding that the Plaintiff was likely to succeed on the merits, the Court granted a preliminary injunction on January 11<sup>th</sup>, 2013. *See* Order granting preliminary injunction at 1, John Doe v. Harris, 2013 U.S. Dist. (N.D. Cal. November. 7, 2012) (No. C12-5713-TEH). *See also* Order granting temporary restraining order at 1, John Doe v. Harris, 2013 U.S. Dist. (N.D. Cal. Jan. 11, 2013) (No. C12-5713-TEH). On September 28, 2016, however, Senate Bill 448 was enacted in response, stating “[i]t is the intent of the Legislature to further the objectives of the [CASE] Act . . . by amending its provisions to conform with the requirements of the court in the case of Doe v. Harris . . .” Amendments made by Senate Bill 448 are reflected in the analysis above.

<sup>64</sup> Pursuant to Cal. Penal Code § 290.024(a),

A person who is convicted of a felony on or after January 1, 2017, requiring registration pursuant to the Act, shall register his or her Internet identifiers if a court determines at the time of sentencing that any of the following apply:

- (1) The person used the Internet to collect any private information to identify the victim of the crime to further the commission of the crime.
- (2) The person was convicted of a felony pursuant to subdivision (b) or (c) of Section 236.1 and used the Internet to traffic the victim of the crime.
- (3) The person was convicted of a felony pursuant to Chapter 7.5 (commencing with Section 311) and used the Internet to prepare, publish, distribute, send, exchange, or download the obscene matter or matter depicting a minor engaged in sexual conduct, as defined in subdivision (d) of Section 311.4.

<sup>65</sup> The text of Cal. Penal Code § 290.014 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 448 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>66</sup> The text of Cal. Penal Code § 290.045 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 448 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

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

California has several provisions that allow for the termination of parental rights, one of which allows for the termination of parental rights based on a conviction under Cal. Penal Code § 236.1(c) (Human trafficking defined; punishment); however, a conviction under the human trafficking law is included as a ground for terminating parental rights only if the offense was committed by a parent or guardian and the child has been adjudged dependent.<sup>67</sup>

If a child is found to be a dependent child, the juvenile court may terminate parental rights pursuant to Cal. Welf. & Inst. Code § 366.26(c)(1) (Procedures for conducting hearings to terminate parental rights, determine adoption of, or guardianship of, children adjudged dependent children of juvenile court), which states,

If the court determines, based on the assessment provided . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption . . . . A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 [Family reunification services] that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months, or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights . . . .

Pursuant to Cal. Welf. & Inst. Code § 361.5(b)(17)<sup>68</sup> (Family reunification services),

(b) Reunification services need not be provided to a parent or guardian . . . when the court finds, by clear and convincing evidence . . .

. . . .

(17) That the parent or guardian knowingly participated in, or permitted, the sexual exploitation, as described in subdivision (c) or (d) of Section 11165.1 [“Sexual abuse;” “sexual assault;” “sexual exploitation”] of, or subdivision (c) of Section 236.1 [Human trafficking defined; punishment] of, the Penal Code, of the child. This shall not include instances in which the parent or guardian demonstrated by a preponderance of the evidence that he or she was coerced into permitting, or participating in, the sexual exploitation of the child.

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<sup>67</sup> Pursuant to Cal. Welf. & Inst. Code § 300(b) (Persons subject to jurisdiction of juvenile court),

A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

. . . .

(b) (1) . . . .

(2) The Legislature finds and declares that a child who is sexually trafficked, as described in Section 263.1 of the Penal Code, or who receives food or shelter in exchange for, or who is paid to perform, sexual acts described in Section 236.1 or 11165.1 of the Penal Code, and whose parent or guardian failed to, or was unable to protect the child, is within the description of this subdivision, and that this finding is declaratory of existing law. These children shall be known as commercially sexually exploited children.

<sup>68</sup> The text of Cal. Welf. & Inst. Code § 361.5 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bills 1702 and 1997 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

According, a parent or guardian's conviction under subsection (c) of the human trafficking law "shall constitute a sufficient basis for termination of parental rights" under Cal. Welf. & Inst. Code § 366.26(c)(1).

For children other than those adjudged dependent children, Cal. Fam. Code § 7820 (Proceeding to declare minor free from parental custody and control) authorizes petitioners to bring "[a] proceeding . . . for the purpose of having a child under the age of 18 years declared free from the custody and control of either or both parents if the child comes within any of the descriptions set out in [chapter 2 (Circumstances where proceeding may be brought)]." Cal. Fam. Code § 7803 (Effect of declaration) provides that "[a] declaration of freedom from parental custody and control pursuant to this part terminates all parental rights and responsibilities with regard to the child."

Parents convicted of a felony are also subject to losing their parental rights. Cal. Fam. Code § 7825 (Parent convicted of felony) states,

- (a) A proceeding under this part may be brought where both of the following requirements are satisfied:
  - (1) The child is one whose parent or parents are convicted of a felony.
  - (2) The facts of the crime of which the parent or parents were convicted are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child. In making a determination pursuant to this section, the court may consider the parent's criminal record prior to the felony conviction to the extent that the criminal record demonstrates a pattern of behavior substantially related to the welfare of the child or the parent's ability to exercise custody and control regarding his or her child.
- (b) The mother of a child may bring a proceeding under this part against the father of the child, where the child was conceived as a result of an act in violation of Section 261 [Rape; "duress;" "menace"] of the Penal Code, and where the father was convicted of that violation. For purposes of this subdivision, there is a conclusive presumption that the father is unfit to have custody or control of the child.

***Legal Components:***

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

***Legal Analysis:***

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

Cal. Penal Code § 236.1 (Human trafficking defined; punishment) does not specifically include assisting, enabling or benefitting financially from human trafficking as prohibited conduct. However, since facilitators may be convicted under several CSEC laws that constitute predicate offenses under Cal. Penal Code § 236.1(c), which specifically addresses domestic minor sex trafficking, facilitators may face liability under the human trafficking law if they “cause[], induce[], or persuade[], or attempt[] to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act.”

Otherwise, if not prosecuted under Cal. Penal Code § 236.1, facilitators may still face prosecution under CSEC laws. Cal. Penal Code § 266 (Procurement) may be used to prosecute a facilitator who “aids or assists in” the “inveiglement or enticement” of “any unmarried female, of previous chaste character, under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution.” A conviction under Cal. Penal Code § 266 is punishable as either a misdemeanor or a felony.<sup>69</sup> If convicted of a misdemeanor, the offender is subject to imprisonment of up to 1 year in a county jail, a fine not to exceed \$2,000, or both. Cal. Penal Code §§ 266, 17(b). If convicted of a felony, an offender is subject to imprisonment in the state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266, 18(a), 672.

A facilitator may be convicted under Cal. Penal Code § 266h(b) (Pimping) if the facilitator, “knowing another person is a prostitute, lives or derives support or maintenance in whole or in part . . . from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed.” If the prostitute is a minor 16 or older, a conviction under Cal. Penal Code § 266h(b) is punishable as a felony by imprisonment in a state prison for 3, 4, or 6 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(1), 672. If the prostitute is a minor under 16 years of age, however, a conviction is punishable by imprisonment in a state prison for 3, 6, or 8 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 266h(b)(2), 672. In either instance, the court may also order an additional fine not to exceed \$5,000. Cal. Penal Code § 266k(a).

Additionally, a facilitator may be convicted under Cal. Penal Code § 266j (Procurement of child) if the facilitator “intentionally . . . transports, provides, or makes available, or . . . offers to . . . transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288.”<sup>70</sup> A conviction under Cal. Penal Code § 266j is punishable as a felony by

<sup>69</sup> See *supra* note 10.

<sup>70</sup> See *supra* note 16.

imprisonment in a state prison for 3, 6, or 8 years and a fine not to exceed \$15,000. Cal. Penal Code § 266j. The court may also order an additional fine not to exceed \$25,000. Cal. Penal Code § 266k(b).

- 4.1.1 Recommendation: Amend Cal. Penal Code § 236.1(a) (Human trafficking defined; punishment) to include assisting, enabling, or financially benefitting from child sex trafficking as prohibited conduct under the human 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.*

Facilitators are subject to fines up to \$500,000. Cal. Penal Code § 236.1(a), (b), (c)(1) and (2). Specifically, when the victim is a minor, facilitators convicted of trafficking involving a commercial sex act under Cal. Penal Code § 236.1 (Human trafficking defined; punishment), are subject to a fine which will generally not exceed \$500,000. Cal. Penal Code § 236.1(c)(1). When the victim is a minor and the offense involves a commercial sex act achieved by force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, facilitators are subject to a fine not to exceed \$500,000. The court may also order a person convicted under Cal. Penal Code § 236.1 to pay an additional fine of \$1,000,000. Cal. Penal Code § 236.4.

Additionally, certain crimes for which a facilitator may be convicted are predicate offenses under Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 266<sup>71</sup> (Procurement), § 266h(b) (Pimping), and § 266j<sup>72</sup> (Procurement of child), are expressly referred to in Cal. Penal Code § 236.1 (Human trafficking defined; punishment), therefore the fines and penalties under the human trafficking statute are applicable.

Facilitators convicted under Cal. Penal Code § 266 (Procurement) are subject to a possible fine not to exceed \$2,000 if punished as a misdemeanor or a fine not to exceed \$10,000 if punished as a felony, while those convicted under Cal. Penal Code § 266h(b) (Pimping) are subject to a fine not to exceed \$10,000, as well as a possible additional fine not to exceed \$5,000. Cal. Penal Code §§ 17(a), 266h(b), 672, 266k(a). Lastly, facilitators convicted under Cal. Penal Code § 266j (Procurement of child) are subject to a fine not to exceed \$15,000, and a possible additional fine up to \$25,000. Cal. Penal Code §§ 266j, 266k(b). Facilitators convicted of any of these crimes may also be ordered to pay a state penalty and additional restitution fines.<sup>73</sup> Cal. Penal Code §§ 1202.4(b), (c), 1464(a)(1).

Courts are mandated to order any person convicted of a crime in California to pay restitution. Facilitators convicted under Cal. Penal Code § 236.1 (Human trafficking defined; punishment) are expressly required to make restitution to their victims. Cal. Penal Code § 1202.4(q)<sup>74</sup> (Restitution; amount; hearing and court order; financial disclosure) states,

Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, order the defendant to pay restitution to the victim in a case in which a victim has suffered economic loss as a result of the defendant's conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or another showing to the court. In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the

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<sup>71</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 266.

<sup>72</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 266j.

<sup>73</sup> See *supra* Component 2.8 for provisions regarding state penalty assessments and restitution fines.

<sup>74</sup> See *supra* Component 3.4 for the provisions of Cal. Penal Code § 1202.4(q).

actual income derived by the defendant from the victim’s labor or services or any other appropriate means to provide reparations to the victim.

Regarding other trafficking convictions, Cal. Penal Code § 1202.4(f) requires a convicted defendant, presumably including facilitators, to make restitution to a victim who “has suffered economic loss as a result of the defendant’s conduct,” for “the amount of loss claimed by the victim or victims or any other showing to the court,” and “[i]f the amount of loss cannot be ascertained at the time of sentencing,” the court’s restitution order shall provide that “the amount shall be determined at the direction of the court.”

While facilitators may be subject to some forfeiture provisions regarding property used in connection with prostitution offenses under the Red Light Abatement Law at Cal. Penal Code § 11225–11235, forfeiture regarding property used in violating human trafficking and CSEC offenses is not explicitly included. Pursuant to Cal. Penal Code § 11225(a), “[e]very building or place used for the purpose of . . . lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.” Pursuant to Cal. Penal Code. § 11230(a)(1), “If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and directing the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released.”

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

There is no specific provision in California’s laws prohibiting child sex tourism.

- 4.3.1 Recommendation: Enact a law that prohibits selling or offering to sell travel services that include or facilitate travel for the purpose of engaging in commercial sexual exploitation or prostitution of a minor under the age of 18, if the offer or sale occurs in California or the travel occurs or is to occur in California.

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

Cal. Penal Code § 311.10(a) (Advertisement of obscene matters depicting minors) makes it illegal for a person to advertise “for sale or distribution any obscene matter knowing that it depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4.”<sup>75</sup> A conviction under this statute is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed \$50,000, or both. Cal. Penal Code §§ 311.10(a), 17(b). A felony conviction is punishable by imprisonment in a state prison for 2, 3, or 4 years and a possible fine not to exceed \$50,000. Cal. Penal Code § 311.10(a). First time convictions are also subject to an additional mandatory fine of \$300 while subsequent convictions are subject to an additional mandatory fine of \$500, if the offender is able to pay. Cal. Penal Code §§ 290.3(a), 290(c).

Additionally, Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging sexual conduct)<sup>76</sup> criminalizes the distribution of images of child sexual exploitation (ICSE). A conviction under this statute is punishable as either a misdemeanor or felony. Cal. Penal Code § 17(a), (b). A misdemeanor conviction is punishable by imprisonment in a county jail up to 1 year, a fine not to exceed

<sup>75</sup> See *supra* Component 1.2 for the substantive provisions of Cal. Penal Code § 311.4.

<sup>76</sup> See *supra* Component 3.2 for the substantive provisions of Cal. Penal Code § 311.1(a).

\$1,000, or both. Cal. Penal Code §§ 311.1(a), 17(b). A felony conviction is punishable by imprisonment in a state prison for 16 months, 2 years, or 3 years and a possible fine not to exceed \$10,000. Cal. Penal Code §§ 311.1(a), 17(a), 18(a).

- 4.4.1 Recommendation: Amend Cal. Penal Code § 311.10(a) (Advertisement of obscene matters depicting minors) and Cal. Penal Code § 311.1(a) (Sale or distribution of obscene matter depicting person under age of 18 years engaging sexual conduct) to increase penalties in order to reflect the seriousness of the offenses.



**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 minor victim's willingness 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>77</sup>*

Under California's core sex trafficking offense, Cal. Penal Code § 236.1(e) (Human trafficking defined; punishment), not all commercially sexually exploited children are included as victims of sex trafficking. Cal. Penal Code § 236.1 does not require that the means of force, fraud or coercion were employed when the victim is a minor. However, Cal. Penal Code § 236.1 does not apply to buyers, so in instances in which a buyer exploits a minor and a trafficker is not identified, the minor victim would not be identified as a sex trafficking victim under Cal. Penal Code § 236.1. Therefore, California's sex trafficking definition is limited in application to traffickers and facilitators and third party control is required.

- 5.1.1 **Recommendation:** Amend the definition of Cal. Penal Code § 236.1 (Human trafficking defined; punishment) so that all commercially sexually exploited children are identifiable as victims and eligible for protections pursuant to their victim status.

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

Cal. Penal Code § 236.1(e) (Human trafficking defined; punishment) expressly states that "consent by a victim of human trafficking who is a minor at the time of the commission of the offense is not a defense to a criminal prosecution under this section." Cal. Penal Code 236.1 (e).

<sup>77</sup> See generally **SHARED HOPE INTERNATIONAL**, "Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims," JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>78</sup>

California law prohibits the criminalization of minors under 18 for prostitution offenses under Cal. Penal Code § 647(b)<sup>79</sup> (Disorderly conduct; restrictions on probation), which states,

Except as provided in paragraph (5) of subdivision (b) . . . , every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

- . . . .
- (b) (1) An individual who solicits, or who agrees to engage in, or who engages in any act of prostitution with the intent to receive compensation, money, or anything of value from another person . . . .
- . . . .
- (5) Notwithstanding paragraphs (1) to (3), inclusive, this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, violate this subdivision . . . .

Similarly, Cal. Penal Code § 653.22(a)<sup>80</sup> (Loitering with intent to commit prostitution; determination of intent) states,

- (1) Except as specified in paragraph (2), it is unlawful for any person to loiter in any public place with the intent to commit prostitution . . . .
- (2) Notwithstanding paragraph (1), this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct that would, if committed by an adult, violate this subdivision . . . .

Accordingly, a minor may not be prosecuted for either of these prostitution-related offenses.

Further, Cal. Penal Code § 236.23(a)<sup>81</sup> (Human trafficking; Affirmative defense; Burden and standard) provides an affirmative defense to other crimes arising from trafficking victimization, but the victim must prove coercion. Cal. Penal Code § 236.23(a) states,

In addition to any other affirmative defense, it is a defense to a charge of a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm. This defense does not apply to a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5, or a violation of Section 236.1.

5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*<sup>82</sup>

**System response to child engaged in commercial sex act**

Juvenile sex trafficking victims may receive specialized services through numerous points of entry, including through identification as dependent children, in association with family justice centers, or through participation

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<sup>78</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>79</sup> See *supra* note 8.

<sup>80</sup> The text of Cal. Penal Code § 653.22 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 1322 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>81</sup> The text of Cal. Penal Code § 236.23 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 1761 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>82</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

in a voluntary diversion program. Further, minors are immune from prosecution for prostitution-related offenses.<sup>83</sup>

### *I. Services through child welfare*

If a juvenile sex trafficking victim is adjudged to be a dependent child of the court based on the definition of abuse<sup>84</sup> and removed from a parent or guardian's custody, Cal. Welf. & Inst. Code § 361.2(e)<sup>85</sup> provides for a number of placement options, including foster care. Under Cal. Health & Safety Code § 1529.2(c)(1), "a foster parent may be required to receive specialized training, as relevant, for the purpose of preparing the foster parent to meet the needs of a particular child in care," including training on "best practices for providing care and supervision to commercially sexually exploited children."

A juvenile sex trafficking victim may also be placed in a short-term residential therapeutic program, which may have a specialized program designed to serve these children. Cal Welf. & Inst. Code § 11462.01(b)(4)(A). Pursuant to Cal. Health & Safety Code § 1562.01(h)(2)(I),<sup>86</sup> staff must receive training on "[a]wareness and identification of commercial sexual exploitation and best practices for providing care and supervision to commercially sexually exploited children."

Additional services may be available in counties that have elected into the Commercially Sexually Exploited Children Program<sup>87</sup> administered by the State Department of Social Services under Cal. Welf. & Inst. Code § 16524.7.<sup>88</sup> Further, counties may be authorized to implement unique service models. Specifically, Cal. Welf. &

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<sup>83</sup> See *supra* Component 5.3 for discussion of the non-criminalization of minors for prostitution-related offenses.

<sup>84</sup> Verified cases of abuse will lead to involvement of the juvenile court, which, pursuant to Cal. Welf. & Inst. Code § 300 (Persons subject to jurisdiction of juvenile court), has jurisdiction over dependent children. Cal. Welf. & Inst. Code § 300(d) states,

A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

.....

(d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 ["Sexual abuse;" "sexual assault;" "sexual exploitation"] of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.

See *infra* Components 5.5 and 5.6 for a complete discussion of California's child abuse statutes.

<sup>85</sup> The text of Cal. Welf. & Inst. Code § 361.2 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 1997 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>86</sup> The text of Cal. Health & Safety Code § 1562.01 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 1997 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>87</sup> A legislative finding listed within Cal. Welf. & Inst. Code § 300(b)(2) states,

The Legislature finds and declares that a child who is sexually trafficked, as described in Section 236.1 of the Penal Code, or who receives food or shelter in exchange for, or who is paid to perform, sexual acts described in Section 236.1 or 11165.1 of the Penal Code, and whose parent or guardian failed to, or was unable to, protect the child, is within the description of this subdivision, and that this finding is declaratory of existing law. These children shall be known as commercially sexually exploited children.

<sup>88</sup> Under Cal. Welf. & Inst. Code § 16524.7(a)(4) participating counties receive funding to be "used for prevention activities, intervention activities, and services to children who are victims, or at risk of becoming victims, of commercial sexual exploitation." In accordance with subsection (d)(2), participating counties must submit plans

Inst. Code § 18259(a)<sup>89</sup> permits the County of Alameda, to “develop a comprehensive, replicative, multidisciplinary model to address the needs and effective treatment of commercially sexually exploited minors<sup>90</sup> who have been arrested or detained by local law enforcement for a violation of” certain prostitution-related offenses “or who have been adjudged a dependent of the juvenile court . . . .” The program may include protocols for identifying and accessing minors, for reporting to child welfare, and for developing a diversion program. Cal. Welf. & Inst. Code § 18259(b), (c).

## *II. Services through family justice centers*

Juvenile sex trafficking victims may have access to multidisciplinary services through family justice centers. Specifically, Cal. Penal Code § 13750(a) (Establishment of family justice center by city, county, city and county, or community-based nonprofit organization; Definitions; Staff members; Operations, policies, and procedures; Confidentiality; Disclosure of victim information) authorizes any “city, county, city and county, or community-based nonprofit organization” to establish a family justice center. Pursuant to Cal. Penal Code § 13750(c),

[F]amily justice centers shall be defined as multiagency, multidisciplinary service centers where public and private agencies assign staff members on a full-time or part-time basis in order to provide services to victims of domestic violence, sexual assault, elder or dependent adult abuse, or human trafficking from one location in order to reduce the number of times victims must tell their story, reduce the number of places victims must go for help, and increase access to services and support for victims and their children. Staff members at a family justice center may be comprised of, but are not limited to, the following:

- (1) Law enforcement personnel.
- (2) Medical personnel.
- (3) District attorneys and city attorneys.
- (4) Victim-witness program personnel.

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indicating the county’s collaboration with county partner agencies and children-focused entities, which shall include the formation of a multidisciplinary team to serve children pursuant to this chapter. A multidisciplinary team serving a child pursuant to this chapter shall include, but is not limited to, appropriate staff from the county child welfare, probation, mental health, substance abuse disorder, and public health departments. Staff from a local provider of services to this population, local education agencies, and local law enforcement, and survivors of commercial sexual exploitation and trafficking may be included on the team.

Pursuant to Cal. Welf. & Inst. Code § 16524.8(a), participating counties

receiv[ing] funds from the Commercially Sexually Exploited Children Program pursuant to this chapter shall develop an interagency protocol to be utilized in serving sexually exploited children. The county protocol shall be developed by a team led by a representative of the county human services department and shall include representatives from each of the following agencies:

- (1) The county probation department.
- (2) The county mental health department.
- (3) The county public health department.
- (4) The juvenile court in the county.

<sup>89</sup> The text of Cal. Welf. & Inst. Code § 18259 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 1064 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>90</sup> Cal. Welf. & Inst. Code § 18259.3(a) defines “commercially sexually exploited minor” to include victims of severe forms of trafficking, those identified as abused under state law, and those adjudged dependent. The text of Cal. Welf. & Inst. Code § 18259.3 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 1064 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

- (5) Domestic violence shelter service staff.
- (6) Community-based rape crisis, domestic violence, and human trafficking advocates.
- (7) Social service agency staff members.
- (8) Child welfare agency social workers.
- (9) County health department staff.
- (10) City or county welfare and public assistance workers.
- (11) Nonprofit agency counseling professionals.
- (12) Civil legal service providers.
- (13) Supervised volunteers from partner agencies.
- (14) Other professionals providing services.

Additionally, “[v]ictims of crime shall not be denied services on the grounds of criminal history. No criminal history search shall be conducted of a victim at a family justice center without the victim's written consent unless the criminal history search is pursuant to an active criminal investigation.” Cal. Penal Code § 13750(e).

Further, receiving services through a family justice center may not be preconditioned on cooperation with the criminal justice system. Cal. Penal Code § 13750(f) states, “[v]ictims of crime shall not be required to participate in the criminal justice system or cooperate with law enforcement in order to receive counseling, medical care, or other services at a family justice center.”

### *III. Services through law enforcement assisted diversion (LEAD)*

Pursuant to Cal. Penal Code §§ 1001.85-88<sup>91</sup> (Law Enforcement Assisted Diversion (LEAD) Pilot Program), persons with a history of involvement in prostitution may, as an alternative to arrest, be eligible to participate in voluntary and immediate crisis and social services. Under Cal. Penal Code § 1001.87(a)(2),

A law enforcement officer may refer an individual to LEAD whom he or she believes is at high risk of arrest in the future for any of the crimes specified in subdivision (b),<sup>92</sup> provided that the individual meets the criteria specified in this paragraph and express interest in the program . . . All social contact referrals to LEAD shall meet the following criteria:

(A) Verification by law enforcement that the individual has had prior involvement with . . . prostitution. Verification shall consist of:

(i) Criminal history records . . .

(ii) Law enforcement has directly observed the individual's . . . prostitution activity on previous occasions.

(iii) Law enforcement has a reliable basis of information to believe that the individual is engaged in . . . prostitution activity, including, but not limited, information provided by another first responder, a professional, or a credible community member.

(B) The individual's prior involvement with . . . prostitution activity occurred within the LEAD pilot program area.

(C) The individual's prior involvement with . . . prostitution activity occurred within 24 months of the date of referral.

Under Cal. Penal Code § 1001.88(a), services made available to LEAD participants include “case management, housing, medical care, mental health care, treatment for alcohol or substance use disorders, nutritional counseling and treatment, psychological counseling, employment, employment training and education, civil legal services, and system navigation.”

<sup>91</sup> The text of Cal. Penal Code §§ 1001.85-88 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 843 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>92</sup> Cal. Penal Code § 1001.87(b)(2)(6) authorizes prostitution offenses pursuant to Cal. Penal Code § 647(b) to be offenses, “eligible for either prebooking diversion, social contact referral or both.”

For minor victims who voluntarily participate in LEAD, “criminal charges based on the conduct for which a person diverted to LEAD shall not be filed, provided that the person finishes the complete assessment intake interview within a period set by the local jurisdictional partners, but not to exceed 30 days after referral.” Cal. Penal Code § 1001.87(a)(1).

## Summary

Juvenile sex trafficking victims may receive specialized services through numerous points of entry, and California law mandates immunity for certain offenses committed as a result of the trafficking victimization.

### 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>93</sup>

Child sex trafficking is expressly identified as a type of abuse and neglect within California’s child protection laws and its laws relating to child abuse and neglect reporting. Cal. Welf. & Inst. Code § 300(b)(2) (Persons subject to jurisdiction of juvenile court) identifies “commercially sexually exploited children” as those who have been “sexually trafficked, as described in Section 236.1 of the Penal Code, or who receive[] food or shelter in exchange for, or who [are] paid to perform, sexual acts described in Section 236.1 or 11165.1 of the Penal Code, and whose parent[s] or guardian[s] failed to, or [were] unable to, protect the child . . . .” Additionally, Cal. Welf. & Inst. Code § 300(d) provides that “sexually abused” children, “as defined in Section 11165.1 [“Sexual abuse;” “sexual assault;” “sexual exploitation”] of the Penal Code,” are within the juvenile court’s jurisdiction as dependent children.

California’s Child Abuse and Neglect Reporting Act<sup>94</sup> expressly states that “child abuse or neglect” includes “sexual abuse as defined in Section 11165.1.” Cal. Penal Code § 11165.6. Cal. Penal Code § 11165.1 states,

“[S]exual abuse” means sexual assault or sexual exploitation as defined by the following:

- (a) “Sexual assault” means conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), Section 264.1 (rape in concert), Section 285 (incest), Section 286 (sodomy), subdivision (a) or (b), or paragraph (1) of subdivision (c) of Section 288 (lewd or lascivious acts upon a child), Section 288a (oral copulation), Section 289 (sexual penetration), or Section 647.6 (child molestation).
- (b) Conduct described as “sexual assault” includes, but is not limited to, all of the following:
  - (1) Penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.
  - (2) Sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.
  - (3) Intrusion by one person into the genitals or anal opening of another person, including the use of an object for this purpose, except that, it does not include acts performed for a valid medical purpose.
  - (4) The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.
  - (5) The intentional masturbation of the perpetrator’s genitals in the presence of a child.
- (c) “Sexual exploitation” refers to any of the following:

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<sup>93</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/slscstdefinitions>.

<sup>94</sup> Cal. Penal Code §§ 11164–11174.31.

- (1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).
- (2) A person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or a person responsible for a child’s welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct, or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, “person responsible for a child’s welfare” means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home, residential school, or other residential institution.
- (3) A person who depicts a child in, or who knowingly develops, duplicates, prints, downloads, streams, accesses through any electronic or digital media, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.
- (d) “Commercial sexual exploitation” refers to either of the following:
  - (1) The sexual trafficking of a child, as described in subdivision (c) of Section 236.1.
  - (2) The provision of food, shelter, or payment to a child in exchange for the performance of any sexual act described in this section or subdivision (c) of Section 236.1.

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.*

Based upon the definition of abused or neglected child under California state law, a child who has been subjected to commercial sexual exploitation by a third party, who is not a parent or caregiver, would unlikely to fall under the protective care and services of child welfare.

The term “caregiver” is used in several provisions under California’s child welfare statutes;<sup>95</sup> however, no definition is provided for that term under Division 2 (Children), Part 1 (Delinquents and wards of the juvenile court) of California’s Welfare and Institutions Code. Furthermore, Cal. Welf. & Inst. Code § 300(b)(2) (Persons subject to jurisdiction of juvenile court) does not include caregiver language, but instead refers to and requires the involvement of a child’s parent or guardian for a child to be identified as a commercially sexually exploited child. Cal. Welf. & Inst. Code § 300(b)(2) states in part,

a child who is sexually trafficked, as described in Section 236.1 of the Penal Code, or who receives food or shelter in exchange for, or who is paid to perform, sexual acts described in Section 236.1 or 11165.1 of the Penal Code, and whose parent or guardian failed to, or was unable to, protect the child, is within the description of this subdivision . . . . These children shall be known as commercially sexually exploited children

Finding that the definition of requires the involvement of a child’s parent or guardian for a sexually exploited child to be identified as such, and receive corresponding services, children trafficked or commercially sexually exploited by a non-familial offender would face difficulty in receiving child welfare services and care.

Furthermore, Cal. Welf. & Inst. Code § 300(d) provides that “sexually abused” children or children with a “substantial risk [of being] sexually abused,” “as defined in Section 11165.1 [“Sexual abuse;” “sexual assault;”

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<sup>95</sup> *E.g.*, Cal. Welf. & Inst. Code § 290.1(a)(5) (Duty to file petition and give notice), § 290.2(a)(5) (Issuance and service of notice), § 291(a)(5), (8) (Notice following initial petition hearing; service; waiver), and § 292(a)(5) (Notice of dependency status review hearing when child not removed from parent’s custody).

“sexual exploitation”] of the Penal Code,” are within the juvenile court’s jurisdiction as dependent children. However, Cal. Welf. & Inst. Code § 300(d) specifies that the abuse must have been directly committed by the child’s “parent, guardian, or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.” Thus, children who are sexually exploited, and therefore, sexually abused under Cal. Welf. & Inst. Code § 11165.1, by a non-familial person would not fall within the juvenile court’s jurisdiction and protection pursuant to Cal. Welf. & Inst. Code § 300(d).

Additionally, while Cal. Welf. & Inst. Code § 727(a)(4)(F) (Order for care and custody of minor adjudged ward of court) refers to the definition of “caregiver” found in “paragraph (1) of subdivision (a) of Section 362.04 [Use of short-term babysitters],”<sup>96</sup> this definition does not appear to be applicable to the term “caregiver” as used in other provisions of California’s Welfare and Institutions Code, Division 2 (Children), Part 1 (Delinquents and wards of the juvenile court). However, Cal Welf. & Inst. Code § 362.7 (Evaluation of home for placement with nonrelative extended family member; “nonrelative extended family member”) defines a “nonrelative extended family member” as,

an adult caregiver who has an established familial relationship with a relative<sup>97</sup> of the child, as defined in paragraph (2) of subdivision (c) of Section 361.3, or a familial or mentoring relationship with the child. The county welfare department shall verify the existence of a relationship through interviews with the parent and child or with one or more third parties. The parties may include relatives of the child, teachers, medical professionals, clergy, neighbors, and family friends.

Finding that Cal. Welf. & Inst. Code § 300(b)(2) (Persons subject to jurisdiction of juvenile court) and the definition of sexual abuse under Cal. Welf. & Inst. Code § 300(d) require parental or custodian involvement, children who are sexually exploited or trafficked by a non-familial offender would likely face numerous obstacles in receiving child welfare services and protective care.

5.6.1 Recommendation: Amend Cal. Welf. & Inst. Code §§ 300(b)(2) and § 300(d) to allow child welfare protection for juvenile sex trafficking victims irrespective of the perpetrator of the abuse or fault of the parent or guardian.<sup>98</sup>

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

To the extent that a commercially sexually exploited child suffers pecuniary loss and physical injury, emotional injury and a threat of physical injury, or only emotional injury from a specified crime, including human trafficking, the child may be eligible to receive crime victims’ compensation. Human trafficking victims are expressly exempted from certain, but not all ineligibility factors.

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<sup>96</sup> Cal. Welf. & Inst. Code § 362.04(a)(1) (Use of short-term babysitters) defines “caregiver” as “any licensed certified foster parent, approved 362.04 relative caregiver, or approved nonrelative extended family member, or approved resource family.”

<sup>97</sup> Cal. Welf. & Inst. Code § 319(f)(2) states,

“[R]elative” means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words “great,” “great-great,” or “grand,” or the spouse of any of these persons, even if the marriage was terminated by death or dissolution. However, only the following relatives shall be given preferential consideration for the placement of the child: an adult who is a grandparent, aunt, uncle, or sibling of the child.

<sup>98</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.



Cal. Gov't Code § 13953(a) (Time period for filing application) requires an application for victim compensation to be filed with the California Victim Compensation and Government Claims Board ("Board") within 3 years of the commission of the crime, within 3 years of the victim's 18th birthday or within 3 years of the time the victim knew or "could have discovered that an injury or death had been sustained as a direct result of crime, whichever is later." However, "[a]n application based on any crime eligible for prosecution under" Cal. Penal Code § 261, § 286, § 288, § 288.5, § 288a, § 289, or § 289.5 are allowed to be filed any time before the victim's 28th birthday. Cal. Gov't Code §§ 13953(a); Cal. Penal Code 801.1(a). If the Board finds good cause, however, it may grant an extension of time. Cal. Gov't Code § 13953(b) states that, in determining whether there is good cause to grant an extension, the Board will consider, among others, the following factors:

- (1) A recommendation from the prosecuting attorney regarding the victim's or derivative victim's cooperation with law enforcement and the prosecuting attorney in the apprehension and prosecution of the person charged with the crime.
- (2) Whether particular events occurring during the prosecution or in the punishment of the person convicted of the crime have resulted in the victim or derivative victim incurring pecuniary loss.
- (3) Whether the nature of the crime is such that a delayed reporting of the crime is reasonably excusable.

Under Cal. Gov't Code § 13956(a) (Non-eligible persons), "[a]n application may be denied, in whole or in part, if the board finds that denial is appropriate because of the nature of the victim's or other applicant's involvement in the events leading to the crime, or the involvement of the person whose injury or death gives rise to the application." Cal. Gov't Code § 13956(b)(1) also requires the Board to deny a victim's application if it finds that the victim "failed to cooperate"<sup>99</sup> reasonably with a law enforcement agency in the apprehension and conviction of a criminal committing the crime;" however, Cal. Gov't Code § 13956(b)(4) provides,

An application for a claim based on human trafficking as defined in Section 236.1 of the Penal Code shall not be denied solely because no police report was made by the victim. The board shall adopt guidelines that allow the board to consider and approve applications for assistance based on human trafficking relying upon evidence other than a police report to establish that a human trafficking crime as defined in Section 236.1 of the Penal Code has occurred. That evidence may include any reliable corroborating information approved by the board, including, but not limited to, the following:

- (A) A Law Enforcement Agency Endorsement issued pursuant to Section 236.2 [Duty of law enforcement agencies to use due diligence to identify victims of human trafficking; indicators] of the Penal Code.
- (B) A human trafficking caseworker, as identified in Section 1038.2 [Definitions] of the Evidence Code, has attested by affidavit that the individual was a victim of human trafficking.

Normally, for a victim to receive a victim compensation award, Cal. Gov't Code § 13955(g) additionally requires that the "injury or death has resulted or may result in pecuniary loss . . . ." Pecuniary loss is defined, in part, as an "economic loss or expense resulting from an injury."<sup>100</sup> Cal. Gov't Code §§ 13951(e), 13955(g). However, pursuant to Cal. Gov't Code § 13955(f)(3), if an injury is caused by a violation of Cal Penal Code §§ 236.1 (Human trafficking defined; punishment) or § 311.4(b) (Employment of minor in sale or distribution of obscene matter or production of pornography), the injury can be an emotional injury only. Compensation is

<sup>99</sup> See *infra* Component 5.8 for discussion of laws discussing protections for victim- witnesses.

<sup>100</sup> Cal. Gov't Code § 13951(e) (Definitions) defines "pecuniary loss" as "an economic loss or expense resulting from an injury or death to a victim of crime that has not been and will not be reimbursed from any other source." Pursuant to Cal Gov't Code § 13957(a)(2), reimbursements are potentially available for costs of "outpatient psychiatric, psychological, or other mental health counseling-related expenses incurred by the victim or derivative victim, including peer counseling services provided by a rape crisis center as defined by Section 13837 of the Penal Code, and including family psychiatric, psychological, or mental health counseling for the successful treatment of the victim provided to family members of the victim in the presence of the victim . . . ."

also available for an “[e]motional injury to a victim who is a minor incurred as a direct result of the nonconsensual distribution of pictures or video of sexual conduct in which the minor appears.” Cal. Gov’t Code § 13955(f)(5). Nonetheless, proving a pecuniary loss may be a barrier to receiving victim compensation.

Under Cal. Gov’t Code § 13959(a) (Hearing to contest denial of compensation), if a victim’s application for compensation is denied, the victim may request a hearing to contest the denial. Pursuant to Cal. Gov’t Code § 13960(a) (Filing petition for judicial review), if the Board again denies the application, the victim may seek judicial review.

5.7.1 Recommendation: Amend Cal. Gov’t Code § 13953(a) (Time period for filing application) to eliminate any limitation on when a victim of Cal. Penal Code § 236.1 (Human trafficking defined; punishment) may file an application for compensation, or amend Cal. Gov’t Code § 13953(b) to expressly require the Board to consider the special circumstances of a commercially sexually exploited child in determining whether good cause exists for the failure to file within the applicable filing deadlines.<sup>101</sup>

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

Some victim-friendly protections are provided to victims of Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 1347.1<sup>102</sup> (Testimony of minor in criminal proceeding charging human trafficking violation) permits certain child sex trafficking victims to give testimony by closed circuit television. This protection is limited, however, to use in human trafficking prosecutions where the minor is aged 15 or younger and “[t]he impact on the minor of one or more factors enumerated in clauses (i) to (v), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used.” Cal. Penal Code § 1347.1(a)(2)(A). These factors include whether the testimony would otherwise cause serious emotional distress to the victim, whether the defendant used a deadly weapon to commit the offense, whether the defendant threatened the victim or the victim’s family, whether the victim suffered great bodily injury, and whether the victim was unable to continue testimony due to the defendant’s or the defendant’s counsel’s actions. Cal. Penal Code § 1347.1(a)(2)(A)(i)–(v). Further, “the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged.” Cal. Penal Code § 1347.1(a)(2)(B). The court next determines whether the minor will testify by one-way or two-way closed circuit television. Cal. Penal Code § 1347.1(b).

Additionally, Cal. Penal Code § 236.13(a)<sup>103</sup> (Assistance to minors from the Victim Witness Assistance Center) states, “[i]n a case involving a charge of human trafficking under Section 236.1, a minor who is a victim of the human trafficking shall be provided with assistance from the local county Victim Witness Assistance Center if the minor so desires.”

Further, Cal. Evid. Code § 1038(a) (Right to prevent disclosure of confidential communication between victim and caseworker; who may claim privilege; notice to victim) provides that “[a] trafficking victim,<sup>104</sup> whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a

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<sup>101</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>102</sup> The text of Cal. Penal Code § 1347.1 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 1276 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>103</sup> The text of Cal. Penal Code § 236.13 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 2221 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>104</sup> Cal. Evid. Code § 1038.2(a) (Definitions) states that “[a]s used in this article, ‘victim’ means any person who is a ‘trafficking victim’ as defined in Section 236.1 [Human trafficking defined; Punishment] of the Penal Code.”

confidential communication between the victim and a human trafficking caseworker.” Under Cal. Evid. Code § 1038.1(a) (When court may compel disclosure; ruling on claim of privilege), however, the court may compel disclosure of a trafficking victim’s confidential communications.

Several statutes protect against the disclosure of a trafficking victim’s identifying information. Specifically, Cal. Penal Code § 293(e)<sup>105</sup> (Publication of information regarding victim of sex offense or human trafficking) states,

A law enforcement agency shall not disclose to a person . . . names, addresses, or images of a person who alleges to be the victim of human trafficking, as defined in Section 236.1, or of that alleged victim’s immediate family, other than a family member who is charged with a criminal offense arising from the same incident, and that information and those images shall be withheld and remain confidential . . . .

Similarly, Cal. Gov’t Code § 6254(f)(2)(B)<sup>106</sup> (Records exempt from disclosure requirements) provides,

Subject to the restrictions imposed by Section 841.5 of the Penal Code [Disclosure of victim or witness identification to arrested person or defendant in criminal action], the names and images of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, and of that victim’s immediate family, other than a family member who is charged with a criminal offense arising from the same incident, may be withheld at the victim’s request until the investigation and any subsequent prosecution is complete . . . .

Cal. Penal Code § 273.7(a) (Disclosure of trafficking or domestic violence shelter) helps ensure that the location of trafficking shelters is not disclosed, by providing that “[a]ny person who maliciously publishes, disseminates, or otherwise discloses the location of any trafficking shelter or domestic violence shelter or any place designated as a trafficking shelter or domestic violence shelter, without the authorization of that trafficking shelter or domestic violence shelter, is guilty of a misdemeanor.”

Cal. Evid. Code § 1161 (Admissibility of evidence relating to victim of human trafficking) protects testifying victims of human trafficking and establishes the following:

- (a) Evidence that a victim of human trafficking, as defined in Section 236.1 of the Penal Code, has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim’s criminal liability for the commercial sexual act.
- (b) Evidence of sexual history or history of any commercial sexual act of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, is inadmissible to attack the credibility or impeach the character of the victim in any civil or criminal proceeding.

Additionally, minors under the age of 13 who are victims of sexual offenses, but not those who are victims of Cal. Penal Code § 236.1 (Human trafficking defined; Punishment) or California’s CSEC laws, and minors under the age of 13 offering testimony regarding violent offenses may provide testimony via closed circuit television pursuant to Cal. Penal Code § 1347(b)(1) (Testimony of minor witness by closed circuit television). Where “a prosecuting witness in a case involving a violation or attempted violation of . . . subdivision (b) of Section 209 [Kidnapping for gain or to commit robbery or rape; punishment], Section . . . 236.1 [Human trafficking], 266 [Procurement], 266a [Procurement by force or fraud], . . . 266c [Inducing consent to sexual act by fraud or fear], . . . 266e [Acquiring prostitute], 266f [Selling prostitute], . . . 266h [Pimping], 266i [Pandering], 266j

<sup>105</sup> The text of Cal. Penal Code § 293 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 2498 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>106</sup> The text of Cal. Gov’t Code § 6254 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 2498 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

[Procurement of child], . . . 267 [Abduction of minor for prostitution], . . . 288.7 [Sexual acts with child 10 years old or younger; punishment as felony], . . . 311.3 [Sexual exploitation of a child], § 422 [Punishment for threats], § 646.9 [Stalking]” may bring up to two people for support while giving testimony for a preliminary hearing, trial, or juvenile court proceeding. Cal. Penal Code § 868.5(a).

Furthermore, in order to protect minors from “coercion, intimidation, or undue influence as a witness,” California allows the court in criminal proceedings to take special precautions to provide for their comfort and support when

the defendant is charged with a violation or attempted violation of subdivision (b) of Section 209 [Kidnapping for gain or to commit robbery or rape; punishment], Section 220 [Assault with intent to commit mayhem or specified sex offenses; assault of person under 18 years of age with intent to commit specified sex offenses; such assault in commission of first degree burglary], 236.1 [Admissibility of evidence relating to victim of human trafficking], 243.4 [Sexual battery; seriously disabled or medically incapacitated victims], 261 [Rape; “duress;” “menace”], 269 [Aggravated sexual assault of child], 273a [Endangering child or causing or permitting child to suffer physical pain, mental suffering, or injury; conditions of probation], 273d [Infliction of corporal punishment or injury on child resulting in traumatic condition; enhancement; conditions of probation], 285 [Incest], 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.5 [Continuous sexual abuse of child], 288.7 [Sexual acts with child 10 years old or younger; punishment as felony], or 289 [Penetration by foreign object], subdivision (1) of Section 314 [Indecent exposure], Section 422 [Punishment for threats], 646.9 [Stalking], 647.6 [Annoying or molesting children; punishment; probation], or former Section 647a [Transportation of person to shelter], or any crime that constitutes domestic violence defined in Section 13700, committed with or upon a person with a disability or a minor under 11 years of age.

Cal. Penal Code § 868.8 (Special precautions to provide for comfort and support of person with disability or minor). The special precautions pursuant to Cal Penal Code § 868.8 are as follows:

- (a) In the court's discretion, the witness may be allowed reasonable periods of relief from examination and cross-examination during which he or she may retire from the courtroom. The judge may also allow other witnesses in the proceeding to be examined when the person with a disability or child witness retires from the courtroom.
- (b) Notwithstanding Section 68110 of the Government Code, in his or her discretion, the judge may remove his or her robe if the judge believes that this formal attire intimidates the person with a disability or the minor.
- (c) In the court's discretion the judge, parties, witnesses, support persons, and court personnel may be relocated within the courtroom to facilitate a more comfortable and personal environment for the person with a disability or the child witness.
- (d) In the court's discretion, the taking of the testimony of the person with a disability or the minor may be limited to normal school hours if there is no good cause to take the testimony of the person with a disability or the minor during other hours.

Also, receiving services through family justice may not be preconditioned on cooperation with the criminal justice system. Cal. Penal Code § 13750(f) (Establishment of family justice center by city, county, city and county, or community-based nonprofit organization; Definitions; Staff members; Operations, policies, and procedures; Confidentiality; Disclosure of victim information) states, “[v]ictims of crime shall not be required to participate in the criminal justice system or cooperate with law enforcement in order to receive counseling, medical care, or other services at a family justice center.”

Additionally, state officials must assist human trafficking, sexual exploitation, and prostitution victims with an alien immigration status in obtaining temporary federal immigration benefit when the victim has been or is

likely to be helpful in the investigation or prosecution of a crime. Pursuant to Cal. Penal Code § 679.10(e) (Certification of victim helpfulness),

Upon the request of the victim or victim’s family member, a certifying official from a certifying entity shall certify victim helpfulness on Form I-918 Supplement B certification, when the victim was a victim of a qualifying criminal activity<sup>107</sup> and has been helpful, is being helpful, or is likely to be helpful to the detection or investigation or prosecution of that qualifying criminal activity.

The certifying entity must also complete the Form I-914 Supplement B declaration, which also relates to the cooperativeness of a human trafficking victim<sup>108</sup> in prosecutions related to their victimization. Cal. Penal Code § 679.11(e), (g) (Certification of victim cooperation of specified federal immigration declaration form for victim of human trafficking).

In determining venues for trials concerning multiple violations of Cal. Penal Code § 236.1, which have allegedly occurred in multiple counties, Cal. Penal Code § 784.7 provides that

[i]n determining whether all counts in the complaint should be joined in one county for prosecution, the court shall consider the location and complexity of the likely evidence, where the majority of the offenses occurred, the rights of the defendant and the people, and the convenience of, or hardship to, the victim or victims and witnesses.

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.*<sup>109</sup>

California law allows a child sex trafficking victim to vacate an adjudication for a nonviolent offense without mandating a waiting period, and related records are automatically sealed and destroyed. Specifically, Cal. Penal Code § 236.14<sup>110</sup> (Petition for vacatur relief of arrest for or conviction of nonviolent offense committed while victim of human trafficking) provides,

....  
(g) After considering the totality of the evidence presented, the court may vacate the conviction and expunge the arrests and issue an order if it finds all of the following:

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<sup>107</sup> Under Cal. Penal Code § 679.10(c), “qualifying criminal activity” includes, “(3) Human trafficking; . . . (7) Abusive sexual conduct; (8) Prostitution; (9) Sexual exploitation . . .”

<sup>108</sup> Pursuant to Cal. Penal Code § 679.11(c), (d) (Certification of victim cooperation of specified federal immigration declaration form for victim of human trafficking),

(c) “Human trafficking” means “severe forms of trafficking in persons” pursuant to Section 7102 of Title 22 of the United States Code and includes either of the following:

(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.

....  
(d) “Human trafficking” also includes criminal offenses for which the nature and elements of the offenses are substantially similar to the criminal activity described in subdivision (c), and the attempt, conspiracy, or solicitation to commit any of those offenses.

The text of Cal. Penal Code § 679.11 cited here and elsewhere in this report includes amendments made by enactment of Assembly Bill 2027 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>109</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>110</sup> The text of Cal. Penal Code § 236.14 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 823 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

- (1) That the petitioner was a victim of human trafficking at the time the nonviolent crime was committed.
- (2) The commission of the crime was a direct result of being a victim of human trafficking.
- (3) The victim is engaged in a good faith effort to distance himself or herself from the human trafficking scheme.
- (4) It is in the best interest of the petitioner and in the interests of justice.

....

(j) A person who was arrested as, or found to be, a person described in Section 602 of the Welfare and Institutions Code [Persons subject to jurisdiction of juvenile court and to adjudication as ward for violation of law or ordinance defining crime; Persons subject to prosecution in criminal court]<sup>111</sup> because he or she committed a nonviolent offense while he or she was a victim of human trafficking, including, but not limited to, prostitution, as described in subdivision (b) of Section 647, may petition the court for relief under this section. If the petitioner establishes that the arrest or adjudication was the direct result of being a victim of human trafficking the petitioner is entitled to a rebuttable presumption that the requirements for relief have been met.

....

(t) For the purposes of this section, the following terms apply:

....

(2) “Vacate” means that the arrest and any adjudications or convictions suffered by the petitioner are deemed not to have occurred and that all records in the case are sealed and destroyed pursuant to this section . . . .

Petitions “shall be made and heard within a reasonable time after the person has ceased to be a victim of human trafficking, or within a reasonable time after the petitioner has sought services for being a victim of human trafficking, whichever occurs later . . . .” Accordingly, relief is immediately available to child sex trafficking victims.<sup>112</sup>

<sup>111</sup> Pursuant to Cal. Welf. & Inst. Code § 602(a) (Persons subject to jurisdiction of juvenile court and to adjudication as ward for violation of law or ordinance defining crime; Persons subject to prosecution in criminal court), a minor who “violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age” may be adjudicated by the juvenile court to be “a ward of the court.”

<sup>112</sup> California law also provides a general avenue to seal and destroy juvenile records. A child who is adjudged a ward of the court for violating California law, being beyond the control of the child’s parents, guardians, or custodians, or being habitually truant may be able to have records related to their adjudication sealed pursuant to Cal. Welf. & Inst. Code § 781(a) (Sealing of records; admission of records in defamation actions; exception for DMV records; destruction of records; use of records to prove alleged enhancements) after the child turns 18 or after 5 years have passed. Cal. Welf. & Inst. Code § 781(d) further provides that 5 years after a ward’s records are sealed, “[u]nless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person’s juvenile court records that are sealed . . . .”

Further, Cal. Welf. & Inst. Code § 826(a) (Destruction of records) provides,

After five years from the date on which the jurisdiction of the juvenile court over a minor is terminated, the probation officer may destroy all records and papers in the proceedings concerning the minor.

The juvenile court record, which includes all records and papers, any minute book entries, dockets and judgment dockets, shall be destroyed by order of the court as follows: when the person who is the subject of the record reaches the age of 28 years, if the person was alleged or adjudged to be a person described by Section 300 [Persons subject to jurisdiction of juvenile court], when the person who is the subject of the record reaches the age of 21 years, if the person was alleged or adjudged to be a person described by Section 601 [Persons subject to jurisdiction of court as ward for refusal to obey orders of parents, violation of curfew, or truancy], or when the person reaches the age of 38 years if the person was alleged or adjudged to be a person described by Section 602 [Persons subject to jurisdiction of juvenile court and to adjudication as ward for violation of law or ordinance defining crime; persons subject to prosecution in

Records related to charges resulting from a minor’s trafficking victimization may also be sealed under a separate law, Cal. Penal Code § 236.23(e)(1)(A)<sup>113</sup> (Human trafficking; Affirmative defense; Burden and standard), but the minor must have successfully asserted an affirmative defense based on his or her trafficking victimization.

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.*

Cal. Civ. Code § 52.5(a), (f) (Action by victim of human trafficking) expressly states that victims of Cal. Penal Code § 236.1 (Human trafficking defined; punishment) “may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney’s fees and costs,” as well as “litigation costs including, but not limited to, expert witness fees and expenses . . . .” Additionally, “the plaintiff may be awarded up to three times his or her actual damages or ten thousand dollars (\$10,000), whichever is greater,” as well as “punitive damages . . . upon proof of the defendant’s malice, oppression, fraud, or duress in committing the act of human trafficking.” Cal. Civ. Code § 52.5(b).

Cal. Penal Code § 1202.4(q)<sup>114</sup> (Restitution; amount; hearing and court order; financial disclosure) expressly mandates payment of restitution directly<sup>115</sup> to a victim of Cal. Penal Code § 236.1 (Human trafficking defined; punishment). Cal. Penal Code § 1202.4(q) provides,

Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, order the defendant to pay restitution to the victim in a case in which a victim has suffered economic loss as a result of the defendant’s conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or another showing to the court. In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim’s labor as guaranteed under California law, or the actual income derived by the defendant from the victim’s labor or services or any other appropriate means to provide reparations to the victim.

Restitution is available directly to domestic minor sex trafficking victims whose offenders are guilty of other crimes under Cal. Penal Code § 1202.4(f).<sup>116</sup> Specifically, Cal. Penal Code § 1202.4(f)(3)<sup>117</sup> provides a non-exhaustive list stating that a victim may receive restitution for any of the following:

- (A) Full or partial payment for the value of stolen or damaged property . . . .
- (B) Medical expenses.
- (C) Mental health counseling expenses.

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criminal court], unless for good cause the court determines that the juvenile record shall be retained, or unless the juvenile court record is released to the person who is the subject of the record pursuant to this section . . . .

<sup>113</sup> See *supra* note 81.

<sup>114</sup> See *supra* Component 3.4 for the provisions of Cal. Penal Code § 1202.4(q).

<sup>115</sup> Cal. Penal Code § 1202.4(a)(3)(B) states, “The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . [r]estitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment.”

<sup>116</sup> See *supra* Component 2.8 for the provisions of Cal. Penal Code § 1202.4(f).

<sup>117</sup> The text of Cal. Penal Code § 1202.4 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 756 during the 2017-2018 Session of the California Legislature (effective January 1, 2018).

(D) Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor. Lost wages shall include any commission income as well as any base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

(E) Wages or profits lost by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution. Lost wages shall include any commission income as well as any base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

(F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288 [Lewd or lascivious acts involving children], 288.5 [Continuous sexual abuse of child], or 288.7 [Sexual acts with child 10 years old or younger; punishment as felony].

(G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court.

(H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim.

(I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items. Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.

(J) Expenses to install or increase residential security incurred related to a violent felony, as defined in subdivision (c) of Section 667.5 [Enhancement of prison terms for new offenses], including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

....

(L) Expenses for a period of time reasonably necessary to make the victim whole, for the costs to monitor the credit report of, and for the costs to repair the credit of, a victim of identity theft, as defined in Section 530.5.

*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.*

A civil action pursuant to Cal. Civ. Code § 52.5(c) (Action by victim of human trafficking) generally must commence "within seven years of the date on which the trafficking victim was freed from the trafficking situation or, if the victim was a minor when the act of human trafficking against the victim occurred, within 10 years after the date the plaintiff attains the age of majority." Pursuant to Cal. Civ. Code § 52.5(d), (e), however,

(d) If a person entitled to sue is under a disability at the time the cause of action accrues so that it is impossible or impracticable for him or her to bring an action, the time of the disability is not part of the time limited for the commencement of the action. Disability will toll the running of the statute of limitations for this action.

(1) Disability includes being a minor, lacking legal capacity to make decisions, imprisonment, or other incapacity or incompetence.

....

(3) A defendant is estopped from asserting a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action, or due to threats made by the defendant causing duress upon the plaintiff.

(4) The suspension of the statute of limitations due to disability, lack of knowledge, or estoppel applies to all other related claims arising out of the trafficking situation.



- (5) The running of the statute of limitations is postponed during the pendency of criminal proceedings against the victim.
- (e) The running of the statute of limitations may be suspended if a person entitled to sue could not have reasonably discovered the cause of action due to circumstances resulting from the trafficking situation, such as psychological trauma, cultural and linguistic isolation, and the inability to access services.

While Cal. Penal Code § 801 does not specifically extend the statute of limitations for human trafficking offenses, human trafficking falls within the crimes for which a longer statute of limitations is provided. Cal. Penal Code § 800 (Offenses punishable by imprisonment for eight years or more) establishes a 6-year statute of limitations for offenses “punishable by imprisonment in the state prison for eight years or more or by imprisonment pursuant to subdivision (h) of Section 1170 for eight years or more.” While Cal. Penal Code § 799(a) (Offenses punishable by death or life imprisonment without parole; embezzlement of public money) allows prosecution for an offense punishable by “death or by imprisonment in the state prison for life or for life without the possibility of parole,” to be “commenced at any time,” the elimination of the statute of limitation is applicable in child sex trafficking cases only when the means of, “force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person” are employed. Cal. Penal Code § 236.1(c) (False imprisonment is the unlawful violation of the personal liberty of another).

Additionally, Cal. Penal Code § 801.2 (Time limitation for prosecution of use of minor in production of pornography) establishes a 10-year statute of limitations for a “prosecution for a violation of subdivision (b) of Section 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography].”

However, under Cal. Penal Code § 803(f) (Tolling or extension of time period generally; tolling until discovery of certain offenses; tolling where defendant is out of state; time limits for certain crimes against children and certain other crimes) and § 801.1(a)<sup>118</sup> (Ten-year limitation for specified sex offenses; exception for minor victims), statutes of limitations related to specified sex offenses may be tolled where the victim was a minor at the time of the crime’s commission. Specifically, although a 10-year statute of limitation generally applies to prosecutions for violations of Cal. Penal Code § 261 (Rape; “duress;” “menace”), § 286 (Sodomy), § 288 (Lewd or lascivious acts involving children), § 288a (Oral copulation), § 288.5 (Continuous sexual abuse of child), § 289 (Penetration by foreign object), and § 289.5 (Sex offender fleeing state), Cal. Penal Code § 801.1(a)(1) allows a prosecution to commence “any time prior to the victim’s 40th birthday” in instances where the victim was under 18 at the time of the alleged offense. Cal. Penal Code § 803(f)(1), (2) further provides,

- (1) Notwithstanding any other limitation of time described in this chapter, . . . a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under 18 years of age, was the victim of a crime described in Section 261 [Rape; “duress;” “menace”], 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.5 [Continuous sexual abuse of child], or 289 [Penetration by foreign object], or Section 289.5 [Sex offender fleeing state], as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object.
- (2) This subdivision applies only if all of the following occur:
- (A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired.
- (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.
- (C) There is independent evidence that corroborate the victim’s allegation . . . .

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<sup>118</sup> Cal. Penal Code § 801.1(a)(1) applies only to those crimes committed on or after January 1, 2015, or those crimes for which the statute of limitations was in effect before January 1, 2015, but had not run as of January 1, 2015. For those crimes that were committed prior to January 1, 2015, and for which the statute of limitations has run, “prosecution for a felony offense described in subdivision (c) of Section 290 shall be commenced within 10 years after commission of the offense.” Cal. Penal Code § 801.1(b).

5.11.1 Recommendation: Eliminate the statute of limitation applicable to a civil cause of action provided under Cal. Civ. Code § 52.5(c) (Action by victim of human trafficking).<sup>119</sup>

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<sup>119</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

***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 posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
  - 6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
  - 6.6 *State law requires reporting of missing children and recovered missing children.*
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***Legal Analysis:***

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.<sup>120</sup>*

Cal. Penal Code § 13519.14 (Training and guidelines for handling human trafficking complaints) provides,

(a) The [Commission on Peace Officer Standards and Training (“commission”)] shall implement by January 1, 2007, a course or courses of instruction for the training of law enforcement officers in California in the handling of human trafficking complaints and also shall develop guidelines for law enforcement response to human trafficking. The course or courses of instruction and the guidelines shall stress the dynamics and manifestations of human trafficking, identifying and communicating with victims, providing documentation that satisfy the Law Enforcement Agency (LEA) endorsement required by federal law, collaboration with federal law enforcement officials, therapeutically appropriate investigative techniques, the availability of civil and immigration remedies<sup>121</sup> and community resources, and protection of the victim. Where appropriate, the training presenters shall include human trafficking experts with experience in the delivery of direct services to victims of human trafficking. Completion of the course may be satisfied by telecommunication, video training tape, or other instruction.

....

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<sup>120</sup> Cal Educ. Code § 44691 requires the State Department of Education “in consultation with the Office of Child Abuse Prevention in the State Department of Social Services” shall offer statewide guidance regarding the duties of mandated reporters “who are school personnel in accordance with the Child Abuse and Neglect Reporting Act,” which includes an online training module.

<sup>121</sup> Pursuant to Cal. Penal Code 679.10(e),

Upon the request of the victim or victim’s family member, a certifying official from a certifying entity shall certify victim helpfulness on the Form I-918 Supplement B certification, when the victim was a victim of a qualifying criminal activity and has been helpful, is being helpful, or is likely to be helpful to the detection or investigation or prosecution of that qualifying criminal activity.

Under Cal. Penal Code 679.10(c), “[q]ualifying criminal activity’ means qualifying criminal activity pursuant to Section 101(a)(15)(U)(iii) of the Immigration and Nationality Act” and includes rape, human trafficking, sexual assault, abusive sexual conduct, prostitution, sexual exploitation, and kidnaping.

(d) The commission, in consultation with these groups and individuals, shall review existing training programs to determine in what ways human trafficking training may be included as a part of ongoing programs.

(e) Every law enforcement officer who is assigned field or investigative duties shall complete a minimum of two hours of training in a course or courses of instruction pertaining to the handling of human trafficking complaints as described in subdivision (a) by July 1, 2014, or within six months of being assigned to that position, whichever is later.

Under Cal. Penal Code § 13516(a) (Procedures to be followed in sexual assault, exploitation, and abuse cases), however, the commission shall provide police agencies “guidelines establishing standard procedures” to be followed in investigating “sexual assault cases, and cases involving the sexual exploitation<sup>122</sup> or sexual abuse<sup>123</sup> of children, including, police response to, and treatment of, victims of these crimes.” Cal. Penal Code § 13510.5 (Minimum standards for training) further mandates that the commission establish minimum training standards for law enforcement officers.

Cal. Penal Code § 13516(b) states that “[t]he course of training leading to the basic certificate issued by the commission shall, on and after July 1, 1977, include adequate instruction in the procedures” regarding cases involving the sexual exploitation or sexual abuse of children. Law enforcement officers’ basic training courses<sup>124</sup> must also “include adequate instruction in the handling of missing person and runaway cases.” Cal. Penal Code § 13519.1(b), (c).

In addition, Cal. Penal Code § 236.2 requires a peace officer who comes into contact with a minor who has engaged in a commercial sex act to consider whether the following indicators of human trafficking are present:

- (a) Signs of trauma, fatigue, injury, or other evidence of poor care.
- (b) The person is withdrawn, afraid to talk, or his or her communication is censored by another person.
- (c) The person does not have freedom of movement.
- (d) The person lives and works in one place.
- (e) The person owes a debt to his or her employer.
- (f) Security measures are used to control who has contact with the person.
- (g) The person does not have control over his or her own government-issued identification or over his or her worker immigration documents. Cal. Penal Code § 236.2.

Under Cal. Penal Code § 13750(c), staffing at family justice centers may include law enforcement personnel, and pursuant to Cal. Penal Code § 13751, family justice centers must “maintain a formal training program with mandatory training for all staff members, volunteers, and agency professionals<sup>125</sup> of not less than eight hours per year on subjects, including, but not limited to, privileges and confidentiality, information sharing, risk assessment, safety planning, victim advocacy, and high-risk case response.”

Additionally, under Cal. Penal Code § 13898(a),

Each county may establish and implement an interagency sexual assault response team (SART) program for the purpose of providing a forum for interagency cooperation and coordination, to assess and make recommendations for the improvement in the local sexual assault intervention system, and to

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<sup>122</sup> See *supra* Component 5.5 for the definition of “sexual exploitation.”

<sup>123</sup> See *supra* Component 5.5 for the definition of “sexual abuse.”

<sup>124</sup> Pursuant to Cal. Code Regs. tit. 11, § 9070(f) (Professional certificates—peace officers), to receive the basic certificate award, law enforcement officers must satisfy basic training requirements and complete a probationary period of employment.

<sup>125</sup> See *supra* Component 5.4 for discussion of Family Justice Centers. “Staff members at a family justice center may” include law enforcement pursuant to Cal. Penal Code § 13750(c)(1).

facilitate improved communication and working relationships to effectively address the problem of sexual assault in California.

Pursuant to Cal. Welf. & Inst. Code § 16501.35(a),

On or before September 29, 2016, county child welfare agencies and probation departments shall implement policies and procedures that require social workers and probation officers to do all of the following:

- (1) Identify children receiving child welfare services, including dependents or wards in foster care, nonminor dependents, and youth receiving services pursuant to Section 677 of Title 42 of the United States Code, who are, or are at risk of becoming, victims of commercial sexual exploitation.
- (2) Document individuals identified pursuant to paragraph (1) in the Child Welfare Services/Case Management System and any other agency record as determined by the county.
- (3) Determine appropriate services for the child or youth identified pursuant to paragraph (1).
- (4) Receive relevant training in the identification, documentation, and determination of appropriate services for any child or youth identified in paragraph (1).

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

California allows single party consent for audiotaping during human trafficking investigations. Cal. Penal Code § 632(a)<sup>126</sup> (Eavesdropping on confidential communication; punishment) makes it a crime if a person

intentionally and without the consent of all parties to a confidential communication,<sup>127</sup> uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio . . . .

Cal. Penal Code § 632(d) further provides that “[e]xcept as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is inadmissible in any judicial, administrative, legislative, or other proceeding.”

However, Cal. Penal Code § 633.5<sup>128</sup> (Recording by party to communication) expressly authorizes single-party consent to audiotaping in human trafficking investigations. Specifically, Cal. Penal Code § 633.5 states,

Nothing in Section 631 [Unauthorized wiretaps; punishment], 632 [Eavesdropping on confidential communication; punishment], 632.5 [Interception of cellular radio telephone communications; punishment], 632.6 [Eavesdropping on confidential communication transmitted between cordless telephones; punishment], or 632.7 [Eavesdropping on and recording of communications transmitted

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<sup>126</sup> The text of Cal. Penal Code § 632 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 1671 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

<sup>127</sup> As used in Cal. Penal Code § 632(a), Cal. Penal Code § 632(c) defines a “confidential communication” as

any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

<sup>128</sup> The text of Cal. Penal Code § 633.5 cited here and elsewhere in this report includes amendments made by the enactment of Assembly Bill 1671 during the 2015-2016 Session of the California Legislature (effective January 1, 2017).

between cellular or cordless telephones; punishment] prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 231.6 [Human trafficking defined; punishment], or a violation of Section 653m [Obscene, threatening, harassing, or annoying telephone calls]. Sections 631, 632, 632.5, 632.6, and 632.7 do not render any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 231.6, a violation of Section 653m, or any crime in connection therewith.

Cal. Penal Code § 632.7 (Eavesdropping on and recording of communications transmitted between cellular or cordless telephones; punishment), § 632.6 (Eavesdropping on confidential communication transmitted between cordless telephones; punishment), and § 632.5 (Interception of cellular radio telephone communications; punishment) apply to specified forms of communication, including communications transmitted via cellular or cordless telephones.

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

Cal. Penal Code § 629.52 (Ex parte order for interception) allows a judge to enter an ex parte order authorizing the interception of electronic communications when “[t]here is probable cause to believe that an individual is committing, has committed, or is about to commit” offenses pursuant to Cal. Penal Code § 236.1 (Human trafficking defined; punishment).

Additionally, pursuant to Cal. Penal Code § 1546.1(a)<sup>129</sup> (Restrictions to compelling production of, or access to, electronic information; Warrants for electronic information; Voluntary disclosure by service providers; Emergency), barring the existence of an emergency,<sup>130</sup> a search warrant, or related authorization, law enforcement officers are prohibited from accessing electronic communications through the means of:

- (1) Compel[ling] the production of or access to electronic communication information from a service provider.
- (2) Compel[ling] the production of or access to electronic device information from any person or entity other than the authorized possessor of the device.
- (3) Access[ing] electronic device information by means of physical interaction or electronic communication with the electronic device. This section does not prohibit the intended recipient of an electronic communication from voluntarily disclosing electronic communication information concerning the communication to a government entity.

. . . .

6.3.1 Recommendation: Amend Cal. Penal Code § 629.52(a) (Ex part order for interception) to include California’s CSEC laws.

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<sup>129</sup> The text of Cal. Penal Code § 1546.1 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 178, Senate Bill 1121, and Assembly Bill 1924 during the 2015-2016 Session of the California Legislature (effective January 1, 2016, January 1, 2017, and September 23, 2016, respectively).

<sup>130</sup> Cal. Penal Code § 1546.1(c)(6) defines emergency as, “[I] involving danger or death or serious physical injury to any person . . .”

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

California’s laws do not expressly prohibit a defense to prosecution based on the use of a law enforcement decoy posing as a minor during prostitution, CSEC, or sex trafficking investigations. However, case law indicates that the use of police decoys in the investigation of prostitution is permissible and does not amount to entrapment.<sup>131</sup>

6.4.1 Recommendation: Enact a law specifically prohibiting a defense to prosecution based on the use of a law enforcement decoy posing as a minor to investigate violations of Cal. Penal Code § 647(m) (Disorderly conduct; restrictions on probation), other prostitution-related offenses involving minors under the age of 18, Cal. Penal Code § 236.1 (Human trafficking defined; punishment), and any other California CSEC law.<sup>132</sup>

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

California law permits law enforcement to use the Internet or electronic communications to investigate buyers and traffickers. Cal. Penal Code § 288.3(a) (Contact or communication with minor with knowledge and intent to commit specified offenses punishable by imprisonment; additional punishment for repeat violation) provides criminal liability for any person who,

contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 261 [Rape; “duress;” “menace”], 264.1 [Punishment for aiding or abetting rape], . . . 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], 288.2 [Sending harmful matter to minor by telephone messages, electronic mail, Internet, or commercial online service; Defenses; Exemption of carrier, broadcaster, or transmitter], 289 [Penetration by foreign object], 311.1 [Sale or distribution of obscene matter depicting person under age of 18 years engaging in sexual conduct], 311.2 [Production, distribution, or exhibition of obscene matter], 311.4 [Employment of minor in sale or distribution of obscene matter or production of pornography] or 311.11 [Possession or control of child pornography; persons previously convicted guilty of felony] involving the minor . . .

Cal. Penal Code § 288.3(b) defines “contacts or communicates with” as including “direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.”

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<sup>131</sup> See *People v. Barraza*, 591 P.2d 947, 955 (Cal. 1979) (“Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.”). See also *Reyes v. Municipal Court*, 173 Cal. Rptr. 48, 51 (Cal. Ct. App. 1981) (holding a defendant’s conviction under Cal. Penal Code § 647(b) (Disorderly conduct; restrictions on probation) when the defendant solicited an undercover police officer); *People v. Hsu*, 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000) (affirming a defendant’s conviction for an attempted violation of Cal. Penal Code § 288.2 where a defendant communicated on the Internet with a law enforcement officer, whom the defendant believed to be a 14 year old child, and offered to meet to engage in sexual acts); *People v. Federico*, 120 Cal. Rptr. 3d 349 (Cal. Ct. App. 2011) (affirming a defendant’s conviction for attempting to commit a lewd act with a child under the age of 14 and attempting to send harmful matter to a minor with the intent of seducing the minor for the defendant’s Internet interactions with a non-law enforcement individual posing as a 12-year-old girl).

<sup>132</sup> The recommendation in this section is predicated upon the recommendation in 2.1 being simultaneously or previously enacted.

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

Pursuant to Cal. Penal Code § 14211 (Missing person reports; persons under 21 or persons at risk),

- (a) All local police and sheriffs' departments shall accept any report, by any party, including any telephonic report, of a missing person, including runaways, without delay and shall give priority to the handling of these reports over the handling of reports relating to crimes involving property.
- (b) In cases where the person making a report of a missing person or runaway, contacts, including by telephone, the Department of the California Highway Patrol, the Department of the California Highway Patrol may take the report, and shall immediately advise the person making the report of the name and telephone number of the police or sheriff's department having jurisdiction of the residence address of the missing person and of the name and telephone number of the police or sheriff's department having jurisdiction of the place where the person was last seen.
- (c) In cases of reports involving missing persons, including, but not limited to, runaways, the local police or sheriff's department shall immediately take the report and make an assessment of reasonable steps to be taken to locate the person by using the report forms, checklists, and guidelines required under Section 13519.07.
- (d) If the missing person is under 21 years of age, or there is evidence that the person is at risk, the police department or sheriff's department shall broadcast a "Be On the Lookout" bulletin, without delay, within its jurisdiction.
- (e) If the person reported missing is under 21 years of age, or if there is evidence that the person is at risk, the law enforcement agency receiving the report shall, within two hours after the receipt of the report, electronically transmit the report to the Department of Justice via the California Law Enforcement Telecommunications System for inclusion in the Violent Crime Information Center and the National Crime Information Center databases.
- (f) Information not immediately available for electronic transmission to the department shall be obtained by the investigating agency and provided as a supplement to the original entry as soon as possible, but in no event later than 60 days after the original electronic entry. Supplemental information may include, but is not limited to, the following:
  - (1) Dental records and treatment notes.
  - (2) Fingerprints.
  - (3) Photographs.
  - (4) Description of physical characteristics.
  - (5) Description of clothing the person was wearing when last seen.
  - (6) Vehicle information.
  - (7) Other information describing any person or vehicle believed to be involved in taking, abducting, or retaining the missing person.
- (g) In cases where the report is taken by a department, other than that of the city or county of residence of the missing person or runaway, the department, or division of the Department of the California Highway Patrol taking the report shall, without delay, and, in the case of persons under 21 years of age or where there was evidence that the missing person was at risk, within no more than 24 hours, notify, and forward a copy of the report to the police or sheriff's department or departments having jurisdiction of the residence address of the missing person or runaway and of the place where the person was last seen. The report shall also be submitted by the department or division of the Department of the California Highway Patrol which took the report to the center. The initial California Law Enforcement Telecommunications System record may only be removed after the receiving agency has accepted the report.

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Cal. Penal Code § 14206(b) (Missing and exploited children's recovery network) provides for the creation of the Missing and Exploited Children's Recovery Network, which consists of



an automated computerized system that shall have the capability to electronically transmit to all state and local law enforcement agencies, and all cooperating news media services, either by facsimile or computer modem, a missing child poster that includes the name, personal description data, and picture of the missing child. The information contained in this poster shall include, but not be limited to, the child's date of birth, color of eyes and hair, sex, height, weight, race, the time and date he or she was reported missing, the reporting agency, including contact person at reporting agency if known, and any other data pertinent to the purpose of locating missing persons.

Additionally, pursuant to Cal. Penal Code § 14207(a)(2) (Internet information), the California Department of Justice must "maintain a publicly accessible computer Internet directory of information relating to . . . [a]t-risk missing persons." A director within the Department of Justice will "coordinat[e] California's response to missing persons," to "assist law enforcement agencies, at their request, with the timely search and recovery of missing children . . . [and] maintain up-to-date knowledge and expertise of those protocols, best practices, and technologies that are most effective for recovering missing children in a timely manner." Cal. Penal Code § 14208(a)(1), (2). Additionally, Cal. Penal Code § 14203(a) (Investigative support unit and automated violent crime method of operation system; files; contents; duties) requires the Attorney General to establish an "investigative support unit and an automated violent crime method of operation system . . . responsible for identifying perpetrators of violent felonies collected from the center and analyzing and comparing data on missing persons in order to determine possible leads which could assist local law enforcement agencies."

Pursuant to Cal. Penal Code § 14209 (Accessibility of information regarding missing or unidentified persons),

The [California Violent Crime Information Center ("center")] shall make accessible to the National Missing and Unidentified Persons System specific information authorized for dissemination and as determined appropriate by the center that is contained in law enforcement reports regarding missing or unidentified persons. The information shall be accessible in a manner and format approved by the center and shall be used to assist in the search for the missing person or persons. The center shall not permit the transmission or sharing of information, or portions of information, to the National Missing and Unidentified Persons System unless the reporting agency, as specified in Section 14211, or the reporting party, with respect to the information submitted to the center, submits authorization to the center to transmit or share that information.

Cal. Penal Code § 14213(a) (Report of finding missing person) requires the law enforcement agency that locates the missing person to "immediately report that information to the Attorney General's office." Cal. Penal Code § 14213(b), (c) further provides,

(b) When a missing person is found, the report indicating that the person is found shall be made not later than 24 hours after the person is found to the law enforcement agency that made the initial missing person report.

(c) In the event that a missing person is found alive or dead in less than 24 hours and the local police or sheriff's department has reason to believe that the person had been abducted, the department shall submit a report to the center in a format established by the Attorney General. In the event that a missing person has been found before he or she has been reported missing to the center, the information related to the incident shall be submitted to the center.

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