

## 2017 ANALYSIS AND RECOMMENDATIONS

### INDIANA

#### 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.*

Ind. Code Ann. § 35-42-3.5-1<sup>2</sup> (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) criminalizes sex trafficking of a minor under 18 years of age without requiring proof of force, fraud, or coercion under two subsections: “promotion of human trafficking of a minor” in subsection (b) and “sexual trafficking of a minor” in subsection (c).

Subsection (b) provides,

A person who knowingly or intentionally recruits, harbors, or transports a child less than:

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

<sup>2</sup> The text of Ind. Code Ann. § 35-42-3.5-1 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

- (1) eighteen (18) years of age with the intent of:
    - (A) engaging the child in:
      - (i) forced labor; or
      - (ii) involuntary servitude; or
    - (B) inducing or causing the child to:
      - (i) engage in prostitution or juvenile prostitution;<sup>3</sup> or
      - (ii) engaged in a performance or incident that includes sexual conduct in violation of IC 35-42-4-4(b) or IC 35-42-4-4(c) (child exploitation); or
  - (2) sixteen (16) years of age with the intent of inducing or causing the child to participate in sexual conduct (as defined by IC 35-42-4-4);
- commits promotion of human trafficking of a minor, a Level 3<sup>4</sup> felony. Except as provided in subsection (e),<sup>5</sup> it is not a defense to a prosecution under this subsection that the child consented to engage in prostitution or juvenile prostitution or to participate in sexual conduct.

Subsection (c) states, “A person who is at least eighteen (18) years of age who knowingly or intentionally sells or transfers custody of a child less than eighteen (18) years of age for the purpose of prostitution, juvenile

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<sup>3</sup> Ind. Code Ann. § 35-31.5-2-178.5 (“Juvenile prostitution” defined) defines “juvenile prostitution” as “an act by a person less than eighteen years of age that would be a crime described in IC 35-45-4-2(a) [Prostitution] if committed by an individual at least eighteen (18) years of age.”

The text of Ind. Code Ann. § 35-31.5-2-178.5 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>4</sup> A Level 3 felony is punishable with a term of imprisonment between 3-20 years, “with the advisory sentence being six (6),” and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-5(b).

<sup>5</sup> Pursuant to Ind. Code Ann. § 35-42-3.5-1(e),

It is a defense to a prosecution under subsection (b)(2) if:

- (1) the child is at least fourteen (14) years of age but less than sixteen (16) years of age and the person is less than eighteen (18) years of age; or
- (2) all the following apply:
  - (A) The person is not more than four (4) years older than the victim.
  - (B) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term "ongoing personal relationship" does not include a family relationship.
  - (C) The crime:
    - (i) was not committed by a person who is at least twenty-one (21) years of age;
    - (ii) was not committed by using or threatening the use of deadly force;
    - (iii) was not committed while armed with a deadly weapon;
    - (iv) did not result in serious bodily injury;
    - (v) was not facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge; and
    - (vi) was not committed by a person having a position of authority or substantial influence over the victim.
  - (D) The person has not committed another sex offense (as defined in IC 11-8-8-5.2), including a delinquent act that would be a sex offense if committed by an adult, against any other person.

prostitution, or participating in sexual conduct (as defined by IC 35-42-4-4) commits sexual trafficking of a minor, a Level 2<sup>6</sup> felony.”

Ind. Code Ann. § 35-42-3.5-1(d) is age neutral and provides,

A person who knowingly or intentionally pays, offers to pay, or agrees to pay money or other property to another person for an individual who the person knows has been forced into:

- (1) forced labor;
  - (2) involuntary servitude; or
  - (3) prostitution or juvenile prostitution;
- commits human trafficking, a Level 5<sup>7</sup> felony.

Subsection (a), which is also age-neutral, provides,

A person who, by force, threat of force, or fraud, knowingly or intentionally recruits, harbors, or transports another person: by force, threat of force, or fraud:

- (1) to engage the other person in:
  - (A) forced labor; or
  - (B) involuntary servitude; or
- (2) to force the other person into:
  - (A) marriage; or
  - (B) prostitution; or
  - (C) participating in sexual conduct (as defined by IC 35-42-4-4); commits promotion of human trafficking, a Level 4<sup>8</sup> felony.

Additionally, within Indiana’s Title 31 (Family and Juvenile Law), Ind. Code Ann. § 31-9-2-133.1<sup>9</sup> (Victim of human or sexual trafficking) states that a “victim of human or sexual trafficking” for purposes of Ind. Code Ann. § 31-34-1-3.5 (Victim of human sexual trafficking offense), which identifies certain child victims of human or sexual trafficking as a child in need of services,

[r]efers to a child who is recruited, harbored, transported, or engaged in:

- (1) forced labor;
- (2) involuntary servitude;
- (3) prostitution;
- (4) juvenile prostitution, as defined in IC 35-31.5-2-178.5;
- (5) child exploitation, as defined in Ind. Code Ann § 35-42-4-4(b);
- (6) marriage, unless authorized by a court under Ind. Code Ann. § 31-11-1-6; or
- (7) trafficking for the purpose of prostitution, juvenile prostitution, or participation in sexual conduct as defined in Ind. Code Ann. § 35-42-4-4(a)(4).

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<sup>6</sup>A Level 2 felony is punishable by an imprisonment term of 10–30 years, “with the advisory sentence being 17 1/2 years,” and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-4.5.

<sup>7</sup> A Level 5 felony is punishable by an imprisonment term of 1–6 years, “with the advisory sentence being four (4) years,” and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-6(c).

<sup>8</sup> A Level 4 felony is punishable by a term of imprisonment between 2-12 years, “with the advisory sentence being four (4) years” and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-5.5.

<sup>9</sup> The text of Ind. Code Ann. § 31-9-2-133.1 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

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

The following state law creates a separate and specific crime of commercial sexual exploitation of children:

1. Ind. Code Ann. § 35-45-4-4(b)<sup>10</sup> (Promoting prostitution) states,

A person who:

- (1) knowingly or intentionally entices or compels another person to become a prostitute or juvenile prostitution victim;<sup>11</sup>
  - (2) knowingly or intentionally procures, or offers or agrees to procure, a person for another person for the purpose of prostitution or juvenile prostitution;
  - (3) having control over the use of a place, knowingly or intentionally permits another person to use the place for prostitution or juvenile prostitution;
  - (4) receives money or other property from a prostitute or juvenile prostitution victim, without lawful consideration, knowing it was earned in whole or in part from prostitution or juvenile prostitution; or
  - (5) knowingly or intentionally conducts or directs another person to a place for the purpose of prostitution or juvenile prostitution.
- commits promoting prostitution, a Level 5<sup>12</sup> felony. However, the offense is a Level 4<sup>13</sup> felony under subdivision (1) if the person enticed or compelled is less than eighteen (18) years of age.

Certain non-commercial sexual offenses may be applicable in cases involving the commercial sexual exploitation of a child. These include the following:

1. Ind. Code Ann. § 35-42-4-6 (Child solicitation), which states,

....

- (b) A person eighteen (18) years of age or older who knowingly or intentionally solicits<sup>14</sup> a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in:
- (1) sexual intercourse;
  - (2) other sexual conduct (as defined in IC 35-31.5-2-221.5<sup>15</sup>); or
  - (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person;

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<sup>10</sup> The text of Ind. Code Ann. § 35-45-4-4 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>11</sup> Ind. Code Ann. § 35-45-4-4(a) defines “juvenile prostitution victim” as “a person less than eighteen (18) years of age who engages in juvenile prostitution.” In turn, Ind. Code Ann. § 35-31.5-2-178.5 (“Juvenile prostitution” defined) defines “juvenile prostitution” as “an act by a person less than eighteen years of age that would be a crime described in IC 35-45-4-2(a) [Prostitution] if committed by an individual at least eighteen (18) years of age.”

*See supra* note 3.

<sup>12</sup> *See supra* note 7.

<sup>13</sup> *See supra* note 8.

<sup>14</sup> Solicitation is defined as “to command, authorize, urge, incite, request, or advise an individual.” Ind. Code Ann. § 35-42-4-6(a).

commits child solicitation, a Level 5<sup>16</sup> felony.

(c) A person at least twenty-one (21) years of age who knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in:

(1) sexual intercourse;

(2) other sexual conduct (as defined in IC 35-31.5-2-221.5); or

(3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person;

commits child solicitation, a Level 5<sup>17</sup> felony.

2. Ind. Code Ann. § 35-42-4-9(a) (Sexual misconduct with a minor) states

A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) commits sexual misconduct with a minor, a Level 5<sup>18</sup> felony. However, the offense is:

(1) a Level 4<sup>19</sup> felony if it is committed by a person at least twenty-one (21) years of age . . . .

. . . .

3. Comparatively, Ind. Code Ann. § 35-42-4-9(b) (Sexual misconduct with a minor) states,

A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor, a Level 6<sup>20</sup> felony. However, the offense is:

(1) a Level 5<sup>21</sup> felony if it is committed by a person at least twenty-one (21) years of age . . . .

. . . .

4. Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child) makes it illegal if a person 18 or older, other than a parent, guardian, or custodian of the child, or a person acting with the child's parent, guardian's, or custodian's permission,

knowingly or intentionally communicates with an individual whom the person believes to be a child less than fourteen (14) years of age concerning sexual activity<sup>22</sup> with the intent to gratify the sexual desires of the person or the individual . . . .<sup>23</sup>

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<sup>15</sup> Other sexual conduct is defined as “an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code Ann. § 35-31.5-2-221.5.

<sup>16</sup> See *supra* note 7.

<sup>17</sup> See *supra* note 7.

<sup>18</sup> See *supra* note 7.

<sup>19</sup> See *supra* note 8.

<sup>20</sup> A Level 6 felony is punishable by an imprisonment term of six (6) months to two and one half (2 ½) years, with a 1-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-7(b).

<sup>21</sup> See *supra* note 7.

<sup>22</sup> “Sexual activity” is defined as “sexual intercourse, other sexual conduct (as defined in IC 35-31.5-2-221.5), or the fondling or touching of the buttocks, genitals, or female breasts.” Ind. Code Ann. § 35-42-4-13(b).

5. Ind. Code Ann. § 35-42-4-3(a) (Child molesting) makes it illegal if a person “knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct” if the child is under 14. Generally, a violation is a Level 3<sup>24</sup> felony.<sup>25</sup> Ind. Code Ann. §§ 35-42-4-3(a), 35-50-2-5.

Similarly, Ind. Code Ann. § 35-42-4-3(b) (Child molesting) makes it illegal if a person “performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person” if the child is under 14. Generally, a violation is a Level 4<sup>26</sup> felony. Ind. Code Ann. §§ 35-42-4-3(b), 35-50-2-6(a).<sup>27</sup>

6. Ind. Code Ann. § 35-42-4-4(b) (Child exploitation – Child pornography) states

A person who knowingly or intentionally:

- (1) manages, produces, sponsors, presents, exhibits, photographs, films, videotapes, or creates a digitized image of any performance or incident that includes sexual conduct by a child under eighteen (18) years of age;
  - (2) disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age; or
  - (3) makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age;
- commits child exploitation, a Level 5<sup>28</sup> felony.

However, under Ind. Code Ann. § 35-42-4-4(c), the offense of child exploitation is a Level 4<sup>29</sup> felony if:

- (1) the sexual conduct, matter, performance, or incident depicts or describes a child less than eighteen (18) years of age who:
  - (A) engages in bestiality (as described in IC 35-46-3-14);
  - (B) is mentally disabled or deficient;
  - (C) participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force;

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<sup>23</sup> Ind. Code Ann. § 35-42-4-13(c) states in part that violation of the statute is classified as “. . . a Class B misdemeanor. However, the offense is a Class A misdemeanor if the person commits the offense by using a computer network (as defined in IC 35-43-2-3(a)).” A Class B misdemeanor is punishable by a sentence of up to 180 days’ imprisonment and a possible fine up to \$1,000. If the buyer communicates with the victim via computer network, the offense increases to a Class A misdemeanor with up to one year imprisonment and a maximum fine of \$5,000. Ind. Code Ann. §§ 35-42-4-13(c), 35-50-3-2.

<sup>24</sup> See *supra* note 4.

<sup>25</sup> Pursuant to Ind. Code Ann. § 35-42-4-3(a), the penalty for this offense is enhanced to a Level 1 felony if “(1) it is committed by a person at least twenty-one (21) years of age; (2) it is committed by using or threatening the use of deadly force or while armed with a deadly weapon; (3) it results in serious bodily injury” or it involves drugs or a controlled substance being given to the victim without the victim’s knowledge.

<sup>26</sup> See *supra* note 8.

<sup>27</sup> Pursuant to Ind. Code Ann. § 35-42-4-3(b) the offense increases to a Level 2 felony when conditions of deadly force, a deadly weapon, or drugs given to the victim without his or her knowledge are present. Ind. Code Ann. § 35-42-4-3(b)(1). See *supra* note 6.

<sup>28</sup> See *supra* note 7.

<sup>29</sup> See *supra* note 8.

- (D) physically or verbally resists participating in the sexual conduct, matter, performance or incident;
- (E) received bodily injury while participating in the sexual conduct, matter, performance, or incident; or
- (F) is less than twelve (12) years of age; or
- (2) the child is less than eighteen (18) years of age:
  - (A) engages in bestiality (as described in IC 35-46-3-14);
  - (B) is mentally disabled or deficient;
  - (C) participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force;
  - (D) physically or verbally resists participating in the sexual conduct, matter, performance or incident;
  - (E) received bodily injury while participating in the sexual conduct, matter, performance, or incident; or
  - (F) is less than twelve (12) years of age.

7. Under Ind. Code Ann. § 35-42-4-5(a) (Vicarious sexual gratification),

[a] person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to touch or fondle himself or herself or another child under the age of sixteen (16) with intent to arouse or satisfy the sexual desires of a child or the older person commits vicarious sexual gratification . . . .

This crime is a Level 5<sup>30</sup> felony. Ind. Code Ann. §§ 35-42-4-5(a), 35-50-2-6(c).

8. Ind. Code Ann. § 35-42-4-5(b) (Vicarious sexual gratification) states,

A person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to:

- (1) engage in sexual intercourse with another child under sixteen (16) years of age;
  - (2) engage in sexual conduct with an animal other than a human being; or
  - (3) engage in other sexual conduct (as defined in IC 35-31.5-2-221.5) with another person;
- with intent to arouse or satisfy the sexual desires of a child or the older person commits vicarious sexual gratification, a Level 4<sup>31</sup> felony . . . .

It is also unlawful under Ind. Code Ann. § 35-42-4-5(c) when an adult “knowingly or intentionally: (1) engages in sexual intercourse; (2) engages in other sexual conduct (as defined in IC 35-31.5-2-221.5); or (3) touches or fondles the person’s own body; in the presence of a child less than fourteen (14) years of age with the intent to arouse or satisfy the sexual desires of the child or the older person . . . .” A violation of Ind. Code Ann. § 35-42-4-5(c) is classified as a Level 6<sup>32</sup> felony. Ind. Code Ann. § 35-50-2-7(b).

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<sup>30</sup> See *supra* note 7.

<sup>31</sup> See *supra* note 8. Pursuant to Ind. Code Ann. § 35-42-4-5(b), the offense is raised one degree if the victim is less than 14 and four degrees if it committed with deadly force, a deadly weapon, results in serious bodily injury, or if drugs or controlled substances were given to the victim without his or her knowledge.

<sup>32</sup> See *supra* note 20.

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

Indiana’s prostitution statute, Ind. Code Ann. § 35-45-4-2(b)<sup>33</sup> (Prostitution), refers to the human trafficking statute, stating,

It is a defense to a prosecution under this section that the person was a victim or an alleged victim of an offense under IC 35-42-3.5-1 [Promotion of human trafficking—sexual trafficking of a minor—human trafficking] at the time the person engaged in the prohibited conduct.

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.*

Ind. Code Ann. § 35-45-6-2 (Corrupt business influence) states,

A person:

- (1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in property or to establish or to operate an enterprise;
- (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of property or an enterprise; or
- (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Level 5<sup>34</sup> felony.

Pursuant to Ind. Code Ann. § 35-45-6-1(e)<sup>35</sup> (Definitions), “racketeering activity means to commit, to attempt to commit, to conspire to commit a violation of, or aiding and abetting in a violation of any of the following:

- ....
- (8) Human and sexual trafficking crimes (IC 35-42-3.5)
- (9) Child exploitation (IC 35-42-4-4)
- ....
- (24) Promoting prostitution (IC 35-45-4-4)
- ....

A “pattern of racketeering activity” is defined in Ind. Code Ann. § 35-45-6-1(d) as “engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents.” The definition also states, “[t]he incidents are a pattern of racketeering activity only if at least one (1) of the

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<sup>33</sup> The text of Ind. Code Ann. § 35-45-4-2 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>34</sup> See *supra* note 7.

<sup>35</sup> The text of Ind. Code Ann. § 35-45-6-1 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1406 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).



incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.”

Ind. Code Ann. § 35-45-6-2 (Corrupt business influence) makes it a Level 5<sup>36</sup> felony if a person, among other things, “knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and . . . uses or invests those proceeds or the proceeds derived from them to acquire an interest in property or to establish or to operate an enterprise.”

Where the alleged enterprise is a criminal organization<sup>37</sup> other statutes also apply. Ind. Code Ann. § 35-45-9-3(c) (Participation in criminal organization; offense) states,

A person who knowingly or intentionally commits an offense:

- (1) with the intent to benefit, promote, or further the interests of a criminal organization; or
- (2) for the purpose of increasing the person’s own standing or position within a criminal organization;

commits criminal organization activity, a Level 6<sup>38</sup> felony. However, the offense is a Level 5<sup>39</sup> felony if the offense involves, directly or indirectly, the unlawful use of a firearm (including assisting a criminal (IC 35-44.1-2-5) if the offense committed by the person assisted involves the unlawful use of a firearm).

Pursuant to Ind. Code Ann. § 35-45-9-1 (Criminal organization), “Criminal organization” is defined as

a formal or informal group with at least three (3) members that specifically:

- (1) either:
  - (A) promotes, sponsors, or assists in; or
  - (B) participates in or;
  - (C) has as one (1) of its goals; or
- (2) requires as condition of membership or continued membership; the commission of a felony, an act that would be a felony if committed by an adult . . .

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<sup>36</sup> See *supra* note 7.

<sup>37</sup> A person who “knowingly or intentionally solicits, recruits, entices, or intimidates another to join a criminal organization or remain in a criminal organization commits criminal organization recruitment, a Level 6 felony.” Ind. Code Ann. §§ 35-45-9-5, 35-50-2-7(a). The offense is a Level 5 felony if “the individual who is solicited, recruited, enticed, or intimidated is less than eighteen (18) years of age.” Ind. Code Ann. § 35-45-9-5(b)(2). See *supra* notes 7 and 20.

<sup>38</sup> See *supra* note 20.

<sup>39</sup> See *supra* note 7.

**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 of prostitution laws differentiate between 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.*
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**Legal Analysis:**

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

Ind. Code Ann. § 35-42-3.5-1(d)<sup>40</sup> (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) makes it a crime to purchase sex with a trafficking victim when force was used. That section states, “A person who knowingly or intentionally pays, offers to pay, or agrees to pay money or other property to another person for an individual who the person knows has been forced into: (1) forced labor; (2) involuntary servitude; or (3) prostitution or juvenile prostitution;<sup>41</sup> commits human trafficking, a Level 5<sup>42</sup> felony.”

However, Ind. Code Ann. § 35-42-3.5-1(d) does not distinguish between or provide heightened penalties for buyers of commercial sex with a minor as opposed to buyers of commercial sex with an adult. Moreover, subsection (d) of the human trafficking statute requires the buyer to have knowledge that the victim was forced into prostitution by restricting its application to a person who knowingly purchases sex with “an individual who the person knows has been forced into . . . prostitution or juvenile prostitution.”<sup>43</sup> Ind. Code Ann. § 35-42-3.5-1(d)(3). This crime is a Level 5<sup>44</sup> felony. Ind. Code Ann. § 35-42-3.5-1(d).

- 2.1.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(d) (Promotion of human trafficking—sexual trafficking—human trafficking) to eliminate the requirement that the buyer have knowledge that the victim was forced into prostitution when the victim is a minor and provide a heightened penalty for these offenses.

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<sup>40</sup> See *supra* note 2.

<sup>41</sup> See *supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

<sup>42</sup> See *supra* note 7.

<sup>43</sup> See *infra* Component 5.1 for impact on victim identification and services.

<sup>44</sup> See *supra* note 7.

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

Indiana’s CSEC offenses do not make it a crime to purchase commercial sex acts with a minor.

While not expressly commercial, however, Ind. Code Ann. § 35-42-4-6(b) (Child solicitation) makes it illegal to solicit children of certain ages for sex acts and could apply to buyer conduct.<sup>45</sup> Additionally, a buyer could be held liable under Ind. Code Ann. § 35-45-1-5(b)<sup>46</sup> (Common nuisance; defined; offense; felony), which states,

a person who knowingly or intentionally visits a common nuisance described in . . . (a)(4)<sup>47</sup> commits visiting a common nuisance. The offense is a . . . (2) Class A misdemeanor if: (A) the common nuisance is used as a location for a person to pay, offer to pay, or agree to pay for a person who has been forced into forced labor, involuntary servitude, prostitution, or juvenile prostitution<sup>48</sup> . . . .

A violation is punishable by a prison sentence up to 1 year and a possible fine not to exceed \$5,000. Ind. Code Ann. §§ 35-45-1-5, 35-50-3-2.

2.2.1 Recommendation: Enact a law that separately criminalizes buying sex with a minor.

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

Ind. Code Ann. § 35-45-4-3<sup>49</sup> (Making an unlawful proposition) does not differentiate between buying sex with an adult and the buying of sex with a minor. A Class A misdemeanor is committed when a person

knowingly or intentionally pays, or offers or agrees to pay, money or other property to another person:  
(1) For having engaged in, or on the understanding that the other person will engage in, sexual intercourse or other sexual conduct (as defined in IC-35-31.5-2-211.5) with the person or with any other person; or  
(2) For having fondled, or on the understanding that the other person will fondle, the genitals of the person or any other person . . . .

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<sup>45</sup> See *supra* Component 1.2 for discussion of non-commercial offenses that are potentially applicable to CSEC conduct.

<sup>46</sup> The text of Ind. Code Ann. § 35-45-1-5 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>47</sup> Ind. Code Ann. § 35-45-1-5(a)(4) includes as a “common nuisance,”

a building, structure, vehicle, or other place that is used . . . [t]o provide a location for a person to pay, offer to pay, or agree to pay money or other property to another person for an individual whom the person knows has been forced into:

- (A) forced labor;
- (B) involuntary servitude; or
- (C) prostitution or juvenile prostitution.

<sup>48</sup> See *supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

<sup>49</sup> The text of Ind. Code Ann. § 35-45-4-3 cited here and elsewhere in this report includes amendments made by the enactment of Senate Enrolled Act 100 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

A violation is punishable by a prison sentence up to 1 year and a possible fine not to exceed \$5,000. Ind. Code Ann. §§ 35-45-4-3, 35-50-3-2. Buyers with two prior convictions will be charged with a Level 6<sup>50</sup> felony. Ind. Code Ann. §§ 35-50-2-7(a),<sup>51</sup> 35-45-4-3. The same penalties apply regardless of the prostituted person's age.

2.3.1 Recommendation: Amend Ind. Code Ann. § 35-45-4-3 (Making an unlawful proposition) to refer cases of making an unlawful proposition where the victim is a minor to Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) to clarify that purchasing sex with a minor is trafficking.

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

A buyer of a commercial sex act from a child can be charged with a variety of offenses under Indiana law. For example, when applicable to buyers, a violation of Ind. Code Ann. § 35-42-3.5-1(d) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) is a Level 5<sup>52</sup> felony.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA),<sup>53</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>54</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>55</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>56</sup>

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<sup>50</sup> See *supra* note 20.

<sup>51</sup> See *supra* note 20.

<sup>52</sup> See *supra* note 7.

<sup>53</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>54</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>55</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>56</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both.); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

2.4.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(d) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) to increase the penalty to reflect the seriousness of the offense.

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

No Indiana law independently makes it a crime to use the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor. However, several laws include penalty enhancements for the buyers using the Internet to commit an offense.

Under Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with child), the penalty is raised from a Class B misdemeanor, which carries a sentence of no more than 180 days' imprisonment and a possible fine up to \$1,000, to a Class A misdemeanor, which carries a sentence of no more than 1 year imprisonment and a possible fine up to \$5,000, if "the person commits the offense by using a computer network (as defined in IC 35-43-2-3(a))."<sup>57</sup>

Similarly, although not specifically commercial, Ind. Code Ann. § 35-42-4-6 (Child solicitation), imposes a penalty enhancement for a buyer who uses a computer network to solicit a minor or "individual believed to be a child at least fourteen (14) but less than sixteen (16) years of age to engage in sexual intercourse," making the crime a Level 5<sup>58</sup> felony. A buyer who did not use a computer network to solicit the child would only be guilty of a Level 6<sup>59</sup> felony. Ind. Code Ann. § 35-42-4-6(b).

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

Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) is silent on the availability of a mistake of age defense for a person prosecuted under these statutes for sex trafficking a minor under 18.

Further, Ind. Code Ann. § 35-41-3-7 (Mistake of fact) states, "It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense."

2.6.1 Recommendation: Enact a law expressly prohibiting the defense of mistake of age in any prosecution for purchasing commercial sex acts with a minor.

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

Indiana's trafficking law does not stagger penalties based on a minor's age, but penalties are not sufficiently high. A conviction under Ind. Code Ann. § 35-42-3.5-1(d)<sup>60</sup> (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) is punishable as a Level 5 felony regardless of whether the victim is a minor or an adult. Ind. Code Ann. § 35-42-3.5-1(d). A Level 5 felony is punishable by an imprisonment term of 1–6 years. Ind. Code Ann. § 35-50-2-6(c).

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<sup>57</sup> See *supra* note 23.

<sup>58</sup> See *supra* note 7.

<sup>59</sup> See *supra* note 20.

<sup>60</sup> See *supra* note 2.

None of Indiana’s CSEC laws make it a crime to purchase commercial sex acts with a minor.<sup>61</sup>

2.7.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(d) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) to increase penalties when the victim is a minor to reflect the seriousness of the offense.

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

Buyers of sex with minors convicted of Level 1, 3, 5, or 6, felonies (i.e. human trafficking, third violations of making an unlawful proposition, child solicitation, sexual misconduct with a minor, child molesting, vicarious sexual gratification, and child exploitation) may be ordered to pay a possible fine not exceeding \$10,000. Ind. Code Ann. §§ 35-50-2-4 to -7. Those convicted of Class A misdemeanors (making an unlawful proposition for a first or second time and inappropriate communication with a child using a computer network) or Ind. Code Ann. § 35-45-1-5(b)<sup>62</sup> (Common nuisance; defined; offense; felony) can be ordered to pay a possible fine up to \$5,000, while those convicted of Class B misdemeanors (inappropriate communication with a child without use of a computer network) can be required to pay a possible fine up to \$1,000. Ind. Code Ann. §§ 35-50-3-2, 35-50-3-3.

A court shall order a buyer convicted of violating Indiana’s human trafficking law to make restitution to the victim; Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under Section 1 [IC 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking)] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3.” Ind. Code Ann. § 35-50-5-3(k) (Restitution orders) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim’s labor or services.
- (2) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage); whichever is greater.

Restitution may be ordered, at the discretion of the court, for violations of CSEC and sexual offense laws under Ind. Code Ann. § 35-50-5-3(a), which permits the court to order a defendant convicted of a felony or misdemeanor to make restitution to the victim. In determining the amount of restitution a defendant must pay, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;

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<sup>61</sup> See *supra* Component 2.2.

<sup>62</sup> See *supra* note 46.

- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Buyers are also subject to some limited seizure provisions, which are civil and discretionary in nature. Vehicles used by buyers to “(A) commit, attempt to commit, or conspire to commit; (B) facilitate the commission of; or (C) escape from the commission of . . . child molesting (IC 35-42-4-3), or child exploitation (IC 35-42-4-4) [including possession of child pornography]” may be seized pursuant to Ind. Code Ann. § 34-24-1-1(a)(4) (Property which may be seized). Ind. Code Ann. § 34-24-1-1(18) also provides for forfeiture of “[r]eal or personal property, including a vehicle, that is used by a person to: (A) commit, attempt to commit, or conspire to commit; (B) facilitate the commission of; or (C) escape from the commission of; a violation of IC 35-42-3.5-1 (human trafficking) or IC 35-45-4-4 (promoting prostitution).” Ind. Code Ann. § 34-24-1-9(b) (Transfer to federal authority – Disposition and use of money) states in part, “The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or forfeiture for purposes consistent with federal laws and regulations.” Seizure of forfeitable property is governed by Ind. Code Ann. § 34-24-1-9.

Buyers may also face forfeiture under nuisance laws.<sup>63</sup> Ind. Code Ann. § 32-30-7-1 (“Indecent nuisance” defined) provides,

As used in this chapter, “indecent nuisance” means a:

- (1) place in or upon which prostitution (as described in IC 35-45-4);  
. . . .
- (4) public place in or upon which human trafficking (as described in IC 35-42-3.5-1);  
is conducted, permitted, continued, or exists, and the personal property and contents used in conducting and maintaining the place for such a purpose.

Ind. Code Ann. § 32-30-7-24.5 (Distribution of money) provides,

Money collected under this chapter concerning a public place in or upon which human trafficking (as described in IC 35-42-3.5-1) is conducted, permitted, continued, or exists, and the personal property and contents used in conducting and maintaining the place for such a purpose shall be distributed as follows:

- (1) Eighty percent (80%) of the money collected shall be deposited in the human trafficking prevention and victim assistance fund established by IC 5-2-6-25, to be used for the purposes of the fund.
- (2) Twenty percent (20%) of the money collected shall be transferred to the county auditor for deposit in the county general fund. Money deposited in the county general fund under this subdivision may only be appropriated to the prosecuting attorney to defray expenses incurred in the:

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<sup>63</sup> Ind. Code Ann. § 32-30-7-1 (“Indecent nuisance” defined) provides in part,

(a) If the existence of an indecent nuisance is admitted or established as provided in section 21 of this chapter, the court shall enter an order of abatement as a part of the judgment in the case. The order of abatement must:

- (1) direct the removal of all personal property and contents that:
  - (A) are located at the place described in the complaint;
  - (B) are used in conducting the indecent nuisance . . . .

- (A) collection of the funds; and
- (B) investigation or prosecution of human trafficking.

Additionally, buyers convicted of Ind. Code Ann. § 35-42-3.5-1(d) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) are liable for a sexual assault victims assistance fee pursuant to Ind. Code Ann. § 33-37-5-23(14) (Sexual assault victims assistance fee), which states, “The court shall assess a sexual assault victims assistance fee of at least five hundred dollars (\$500) and not more than five thousand dollars (\$5,000) . . . .”

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

Possessing images of child sexual exploitation (ICSE) is prohibited under Ind. Code Ann. § 35-42-4-4(d)<sup>64</sup> (Child exploitation – Child pornography), which criminalizes knowingly or intentionally possessing, or accessing with the intent to view, “child pornography”<sup>65</sup> “that depicts or describes sexual conduct by a child who the person knows is less than eighteen (18) years of age or who appears to be less than eighteen (18) years of age, and that lacks serious literary, artistic, political, or scientific value.” A conviction under this statute is a Level 6<sup>66</sup> felony punishable by six (6) months to two and one half (2 ½) years imprisonment, with a 1-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-42-4-4 (c), (d), 35-50-2-7(b).

Pursuant to Ind. Code Ann. § 35-42-4-4(e), however,

the offense of possession of child pornography described in subsection (d) is a Level 5 felony if:

- (1) the item described in subsection (d)(1) through (d)(9) depicts or describes sexual conduct by a child who the person knows is less than eighteen (18) years of age, or who appears to be less than eighteen (18) years of age, who:
  - (A) engages in bestiality (as described in IC 25-46-3-14);
  - (B) is mentally disabled or deficient;
  - (C) participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force;
  - (D) physically or verbally resists participating in the sexual conduct, matter, performance, or incident; or
  - (E) receives a bodily injury while participating in the sexual conduct, matter, performance, or incident; or
  - (F) is less than twelve (12) years of age;
- (2) the child whose sexual conduct is depicted or describes in an item described in subsection (d)(1) through (d)(9):
  - (A) engages in bestiality (as described in IC 25-46-3-14);
  - (B) is mentally disabled or deficient;
  - (C) participates in the sexual conduct, matter, performance, or incident by use of force or the threat of force;
  - (D) physically or verbally resists participating in the sexual conduct, matter, performance, or incident; or

<sup>64</sup> The text of Ind. Code Ann. § 35-42-4-4 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1091 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>65</sup> Ind. Code Ann. § 35-42-4-4(d) (Child exploitation – Child pornography) defines “child pornography” as “(1) a picture; (2) a drawing; (3) a photograph; (4) a negative image; (5) undeveloped film; (6) a motion picture; (7) a videotape; (8) a digitized image; or (9) any pictorial representation . . . .”

<sup>66</sup> See *supra* note 20.



- (E) receives a bodily injury while participating in the sexual conduct, matter, performance, or incident; or
- (F) is less than twelve (12) years of age.

A Level 5 felony is punishable by an imprisonment term of 1–6 years, “with the advisory sentence being four (3) years,” and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-6(b) (Class C felony; Level 5 felony; commission of nonsupport of child as Class D felony).

In comparison, a federal conviction for possession of ICSE<sup>67</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>68</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>69</sup>

- 2.9.1 Recommendation: Amend Ind. Code Ann. § 35-42-4-4 (Child exploitation – Child pornography) to increase penalties to reflect the seriousness of the offense.

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

Pursuant to Ind. Code Ann. § 11-8-8-7(a) (Persons who must register), “A sex or violent offender who resides in Indiana,” who is or intends to be employed for a certain time period in Indiana, or “who is enrolled or intends to be enrolled” as a student must register under the sex offender chapter.

A “sex or violent offender” is defined to include, among others, persons convicted under Ind. Code Ann. § 35-42-4-3 (Child molesting), § 35-42-4-4(b),(c) (Child exploitation – Child pornography), § 35-42-4-5 (Vicarious sexual gratification), § 35-42-4-6 (Child solicitation), § 35-42-4-9 (Sexual misconduct with a minor) as a Level 1, Level 2, Level 4, or Level 5 felony, except for under some circumstances where the person convicted is not more than 5 years older than the victim), § 35-42-4-4(d), (e) (Child exploitation – Child pornography), § 35-42-3.5-1(b)(1)(B), (b)(2), (c), (d)(3) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking), and § 35-44.1-3-10(c) (Sexual misconduct by a service provider with a detained child). Ind. Code Ann. § 11-8-8-5(a)(3), (4), (5), (6), (8), (13), (16), (17), (18), (21). A buyer convicted of these offenses will also be deemed a “sex offender” under Ind. Code Ann. § 11-8-8-4.5(a)(3), (4), (5), (6), (8), (13), (16), (17), (18),

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<sup>67</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>68</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), and 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), and 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>69</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), and 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), and 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

(19). Additionally, Ind. Code Ann. § 11-8-8-5(22) and § 11-8-8-4.5(20) require registering as a sex offender if convicted of attempt or conspiracy to commit any of the crimes listed.

**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 *Use of the Internet or electronic communications to lure, entice, recruit or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers are sufficiently high to expose the crime and reach assets for forfeiture and vehicles for impound.*
- 3.5 *Sex offender registry laws include domestic minor sex trafficking as an offense for which the perpetrator must register.*
- 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.*

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**Legal Analysis:**

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

A trafficker can be prosecuted under Ind. Code Ann. § 35-42-3.5-1(a)(2)(B), (C) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) if one “by force, threat of force, or fraud, knowingly or intentionally recruits, harbors, or transports another person. . . to force the other person into . . . prostitution; or . . . participating in sexual conduct (as defined by IC 35-42-4-4 [Child exploitation – Child pornography]).” Promotion of human trafficking is a Level 4<sup>70</sup> felony. Ind. Code Ann. §§ 35-42-3.5-1(a), 35-50-2-55.

In addition, if a trafficker is “at least eighteen (18) years of age” and “knowingly or intentionally sells or transfers custody of a child less than eighteen (18) years of age for the purpose of prostitution, juvenile prostitution,<sup>71</sup> or participating in sexual conduct,” the trafficker could be convicted of “sexual trafficking of a minor, a Level 2<sup>72</sup> felony.” Ind. Code Ann. §§ 35-42-3.5-1(c),<sup>73</sup> 35-50-2-4.5. Lastly, a trafficker could be convicted of promotion of human trafficking of a minor under § 35-42-3.5-1(b) for recruiting, harboring, or transporting a minor under

- (1) eighteen (18) years of age with the intent of:
  - (A) engaging the child in:
    - (i) forced labor; or
    - (ii) involuntary servitude; or
  - (B) inducing or causing the child to:
    - (i) engage in prostitution or juvenile prostitution; or
    - (ii) engaging in a performance or incident that includes sexual conduct in violation of IC 35-42-4-4(b) or IC 35-42-4-4(c) (child exploitation); or

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<sup>70</sup> See *supra* note 8.

<sup>71</sup> See *supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

<sup>72</sup> See *supra* note 6.

<sup>73</sup> See *supra* note 2.

(2) sixteen (16) years of age with the intent of inducing or causing the child to participate in sexual conduct (as defined by IC 35-42-4-4) . . . .

Promotion of human trafficking of a minor under § 35-42-3.5-1(b) is a Level 3<sup>74</sup> felony. Ind. Code Ann. §§ 35-42-3.5-1(b), 35-50-2-5.

Traffickers may also face prosecution under a number of other laws. A trafficker convicted under Ind. Code Ann. § 35-45-4-4(b)<sup>75</sup> (Promoting prostitution) ordinarily faces punishment for a Level 5<sup>76</sup> felony; if, however, the trafficker “entices or compels” a person under 18 “to become a . . . juvenile prostitution victim,” the trafficker will be guilty of a Level 4<sup>77</sup> felony. Ind. Code Ann. §§ 35-45-4-4(b), 35-50-2-5.

In addition, because Ind. Code Ann. § 35-42-4-6(a) (Child solicitation) defines “solicit” broadly,<sup>78</sup> subsections (b) and (c) also could apply to traffickers. A trafficker 18 or older who solicits a child under 14, or a trafficker 21 or older who solicits a child between 14-15 years old, is guilty of a Level 5<sup>79</sup> felony. Ind. Code Ann. §§ 35-42-4-6(b)-(c), 35-50-2-6(c).

In addition, under Ind. Code Ann. § 35-45-15-5(a) (Money laundering), a person commits money laundering if, “knowingly or intentionally,” he does any of the following:

- (1) acquires or maintains an interest in, receives, conceals, possesses, transfers, or transports the proceeds of criminal activity;
- (2) conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity; or
- (3) invests, expends, receives, or offers to invest, expend, or receive, the proceeds of criminal activity or funds that are the proceeds of criminal activity, and the person knows that the proceeds or funds are the result of criminal activity;

. . . .

“Criminal activity” is defined as including “any offense . . . classified as a felony under Indiana or United States law,” while “proceeds” is defined as “funds acquired or derived directly or indirectly from, produced through, or realized through an act.” Ind. Code Ann. §§ 35-45-15-1, 35-45-15-4. Based on those definitions, a trafficker who receives money from domestic minor human sex trafficking could be convicted of money laundering, generally a Level 6<sup>80</sup> felony. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-7(a). The offense is also subject to penalty enhancements, including where the proceeds are at least \$50,000, which increases the offense to a Level 5<sup>81</sup> felony. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-6(c).

Additionally, under Ind. Code Ann. § 35-45-1-5(b)(2)<sup>82</sup> (Common nuisance; defined; offense; felony), a trafficker could be held liable for a Class A misdemeanor for “knowingly or intentionally visit[ing] a common nuisance”<sup>83</sup> if “the common nuisance is used as a location for a person to pay, offer to pay, or agree to pay for a

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<sup>74</sup> See *supra* note 4.

<sup>75</sup> See *supra* note 10.

<sup>76</sup> See *supra* note 7.

<sup>77</sup> See *supra* note 8.

<sup>78</sup> See *supra* note 14.

<sup>79</sup> See *supra* note 7.

<sup>80</sup> See *supra* note 20.

<sup>81</sup> See *supra* note 7.

<sup>82</sup> See *supra* note 46.

<sup>83</sup> Ind. Code Ann. § 35-45-1-5 (a)(4) includes as a “common nuisance,”

person who has been forced into forced labor, involuntary servitude, prostitution, or juvenile prostitution . . . .” Further, pursuant to Ind. Code Ann. § 35-45-1-5(c), “[a] person who knowingly or intentionally maintains a common nuisance commits maintaining a common nuisance, a Level 6 felony.” A Class A misdemeanor is punishable by a prison sentence up to 1 year and a possible fine not to exceed \$5,000, and a Level 6 felony is punishable by an imprisonment term of six (6) months to two and one half (2 ½) years, with a 1-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-1-5, 35-50-3-2, 35-50-2-7(b).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>84</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>85</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.*

Traffickers who create or distribute images of child sexual exploitation (ICSE) in violation of Ind. Code Ann. § 35-42-4-4(b) or (c)<sup>86</sup> (Child exploitation – Child pornography) can be subject to a Level 5<sup>87</sup> felony or Level 4<sup>88</sup> felony, respectively. A Level 5 felony is punishable by an imprisonment term of 1–6 years, “with the advisory sentence being four (4) years,” and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-6(c) (Level 5 or Class C felony). A Level 4 felony is punishable by a term of imprisonment between 2-12 years, “with the advisory sentence being four (4) years” and a possible fine up to \$10,000. Ind. Code Ann. § 35-50-2-5.5 (Level 4 felony).

Also, Ind. Code Ann. § 35-49-3-2 (Obscene performance) states, “A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance<sup>89</sup> commits a Class A misdemeanor. However, the offense is a Level 6<sup>90</sup> felony if the

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a building, structure, vehicle, or other place that is used . . . [t]o provide a location for a person to pay, offer to pay, or agree to pay money or other property to another person for an individual whom the person knows has been forced into:

- (A) forced labor;
- (B) involuntary servitude; or
- (C) prostitution or juvenile prostitution.

<sup>84</sup> See *supra* note 53.

<sup>85</sup> See *supra* note 54.

<sup>86</sup> See *supra* Component 1.2 for full discussion of Ind. Code Ann. § 35-42-4-4(b) or (c) (Child exploitation – Child pornography).

<sup>87</sup> See *supra* note 7.

<sup>88</sup> See *supra* note 8.

<sup>89</sup> “‘Performance’ means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.” Ind. Code Ann. § 35-49-1-7. Additionally, pursuant to Ind. Code Ann. § 35-49-2-1 (Obscene matter or performance),

A matter or performance is obscene for purposes of this article if:

- (1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
- (2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen (18) years of age.”

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>91</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of ICSE<sup>92</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed 250,000.<sup>93</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>94</sup>

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

No Indiana law independently criminalizes the use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor; however, two laws include penalty enhancements when the Internet is used to commit the offense for offenses that are not specifically commercial.

Ind. Code Ann. § 35-42-4-6 (Child solicitation), imposes a penalty enhancement for a trafficker who uses a computer network to solicit a minor or individual that is believed to be a child under 16 to engage in sexual intercourse, making the crime a Level 5<sup>95</sup> felony. Ind. Code Ann. §§ 35-42-4-9(b), (c), 35-50-2-6(a). A trafficker who did not use a computer network to solicit the child would only be guilty of a Level 6<sup>96</sup> felony. Ind. Code Ann. §§ 35-42-4-9(b), (c), 35-50-2-7(b).

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(3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

<sup>90</sup> See *supra* note 20.

<sup>91</sup> See *supra* note 54.

<sup>92</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)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>93</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), and 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) and 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>94</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), and 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) and 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>95</sup> See *supra* note 7.

<sup>96</sup> See *supra* note 20.

Ind. Code Ann. § 35-42-4-13 (c) (Inappropriate communication with child) imposes a penalty enhancement where a defendant uses a computer network. The use of a computer network enhances the crime from a Class B misdemeanor to a Class A misdemeanor, punishable by imprisonment up to 1 year and a possible fine not to exceed \$5,000. Ind. Code Ann. §§ 35-42-4-13(c), 35-50-3-2.

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

Traffickers convicted of crimes related to domestic minor sex trafficking under Indiana law may be ordered to pay fines, make restitution to the victim, and forfeit proceeds of the crime or property used in connection with the crime. Traffickers convicted under Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking), § 35-45-4-4 (Promoting prostitution), § 35-52-4-6 (Child solicitation), § 35-42-4-4(b), (c) (Child exploitation – Child pornography), or § 35-45-15-5 (Money laundering), all felonies, can be ordered to pay a possible fine up to \$10,000. Ind. Code Ann. §§ 35-50-2-4 to -7. Also, under Ind. Code Ann. § 34-45-1-5 (Common nuisance; defined; offense; felony) a trafficker is liable for a possible fine up to \$5,000, as a Class A misdemeanor. Ind. Code Ann. §§ 34-45-1-5, 35-50-3-2. Additionally, under Ind. Code Ann. § 35-50-5-2 (Fines as alternative penalty for felony or misdemeanor), “In the alternative to the provisions concerning fines in this article, a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by victims of the offense he committed.”

A court shall order a trafficker convicted of violating Indiana’s human trafficking law to make restitution to the victim of the crime. Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under section 1 [IC 35-42-3.5-1] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3 [Restitution orders].” Ind. Code Ann. § 35-50-5-3(k) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim’s labor or services.
- (2) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage); whichever is greater.

Restitution may be ordered, at the court’s discretion, for violations of CSEC, sexual offense laws, or criminal gang recruitment under Ind. Code Ann. § 35-50-5-3(a), which permits the court to order a defendant convicted of a felony or misdemeanor to make restitution to the victim. In determining the amount of restitution a defendant must pay, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Moreover, restitution is mandatory for criminal gang members. Pursuant to Ind. Code Ann. § 35-45-9-6 (Restitution), “In addition to any sentence or fine imposed on a criminal organization member for committing a felony or misdemeanor, the court shall order a criminal organization member convicted of a felony or misdemeanor to make restitution to the victim of the crime under IC 35-50-5-3.”

Several forfeiture provisions, which are civil and discretionary in nature, apply to traffickers. Ind. Code Ann. § 34-24-1-1(a)(3) (Property which may be seized) permits seizure of “[a]ny portion of real or personal property purchased with money that is traceable as a proceed of a violation of a criminal statute.” Furthermore, vehicles used by traffickers to “(A) commit, attempt to commit, or conspire to commit; (B) facilitate the commission of; or (C) escape from the commission of; . . . kidnapping (IC 35-42-3-2) . . . child molesting (IC 35-42-4-3), or child exploitation (IC 35-42-4-4)” may also be seized. Ind. Code Ann. § 34-24-1-1(a)(4). In addition, “[a]ny equipment, including computer equipment and cellular telephones, used for or intended for use in preparing, photographing, recording, videotaping, digitizing, printing, copying, or disseminating matter in violation of IC 35-42-4 [Sex crimes]” may be seized, but only if it is proven “by a preponderance of the evidence that the owner of the equipment knowingly permitted the equipment to be used to engage in conduct that subjects it to seizure under subsection (a)(10).” Ind. Code Ann. § 34-24-1-1(a)(10), (c). Ind. Code Ann. § 34-24-1-1(18) also provides for forfeiture of “[r]eal or personal property, including a vehicle, that is used by a person to: (A) commit, attempt to commit, or conspire to commit; (B) facilitate the commission of; or (C) escape from the commission of; a violation of IC 35-42-3.5-1 (human trafficking) or IC 35-45-4-4 (promoting prostitution).” Pursuant to Ind. Code Ann. § 34-24-1-9, “The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or forfeiture for purposes consistent with federal laws and regulations.” Seizure of such forfeitable property is governed by Ind. Code Ann. § 34-24-1-9.

Traffickers may also face forfeiture under nuisance laws.<sup>97</sup> Ind. Code Ann. § 32-30-7-1 (“Indecent nuisance” defined) provides,

As used in this chapter, “indecent nuisance” means a:

(1) place in or upon which prostitution (as described in IC 35-45-4);

. . . .

(4) public place in or upon which human trafficking (as described in IC 35-42-3.5-1); is conducted, permitted, continued, or exists, and the personal property and contents used in conducting and maintaining the place for such a purpose.

Ind. Code Ann. § 32-30-7-24.5 (Distribution of money) provides,

Money collected under this chapter concerning a public place in or upon which human trafficking (as described in IC 35-42-3.5-1) is conducted, permitted, continued, or exists, and the personal property and contents used in conducting and maintaining the place for such a purpose shall be distributed as follows:

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<sup>97</sup> Ind. Code Ann. § 32-30-7-1 (“Indecent nuisance” defined) provides in part,

(a) If the existence of an indecent nuisance is admitted or established as provided in section 21 of this chapter, the court shall enter an order of abatement as a part of the judgment in the case. The order of abatement must:

(1) direct the removal of all personal property and contents that:

(A) are located at the place described in the complaint;

(B) are used in conducting the indecent nuisance . . . .



(1) Eighty percent (80%) of the money collected shall be deposited in the human trafficking prevention and victim assistance fund established by IC 5-2-6-25, to be used for the purposes of the fund.

(2) Twenty percent (20%) of the money collected shall be transferred to the county auditor for deposit in the county general fund. Money deposited in the county general fund under this subdivision may only be appropriated to the prosecuting attorney to defray expenses incurred in the:

(A) collection of the funds; and

(B) investigation or prosecution of human trafficking.

Additionally, individuals convicted of Ind. Code Ann. § 35-42-3.5-1(a)–(d) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) are liable for a sexual assault victims assistance fee pursuant to Ind. Code Ann. § 33-37-5-23(11)–(14) (Sexual assault victims assistance fee), which states, “The court shall assess a sexual assault victims assistance fee of at least five hundred dollars (\$500) and not more than five thousand dollars (\$5,000) . . . .”

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

Pursuant to Ind. Code Ann. § 11-8-8-7(a) (Persons who must register), “A sex or violent offender who resides in Indiana,” who is or intends to be employed for a certain time period in Indiana, or “who is enrolled or intends to be enrolled” as a student must register under the sex offender chapter. A “sex or violent offender” is defined to include, among others, persons convicted under Ind. Code Ann. § 35-42-4-4(b),(c) (Child exploitation – Child pornography), § 35-42-4-6 (Child solicitation), § 35-45-4-4 (Promoting prostitution when the prostituted person is a minor), § 35-42-3.5-1(a)(2), (b)(1)(B), (b)(2), (c), (d)(3) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking, and § 35-44.1-3-10(c) (Sexual misconduct by a service provider with a detained child). Ind. Code Ann. § 11-8-8-5(a)(4), (6), (14), (15), (16), (17), (18), (21). A trafficker convicted of these offenses will also be deemed a “sex offender” under Ind. Code Ann. § 11-8-8-4.5(a) (4), (6), (14), (15), (16), (17), (18), (19). Additionally, Ind. Code Ann. §§ 11-8-8-5(22) and 11-8-8-4.5(20) require registering as a sex offender if convicted of attempt or conspiracy to commit any of the crimes listed.

### 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.*

Ind. Code Ann. § 31-35-3-1 (Applicability of chapter) states, “This chapter applies the termination of the parent-child relationship between an individual convicted of an offense listed in section 4(1) [IC 31-35-3-4(1)] of this chapter and a child described in section 4(2) [IC 31-35-3-4(2)] of this chapter.” The list of offenses in Ind. Code Ann. § 31-35-3-4(1) (Filing of a petition) does not include violations of Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking), § 35-42-4-6 (Child solicitation) or § 35-45-4-4 (Promoting prostitution). However, the list does include Ind. Code Ann. § 35-42-4-4 (Child exploitation – Child pornography), § 35-42-4-3 (Child molesting), and § 35-42-4-9 (Sexual misconduct with a minor).<sup>98</sup> Under Ind. Code Ann. § 31-35-3-4(2), the victim must be under 16 and the offender’s child or the offender’s spouse’s child. If the requirements of Ind. Code Ann. § 31-35-3-4 are met, “the attorney for the department, the child’s guardian ad litem, or the court appointed special advocate may file a petition with the juvenile or probate court to terminate the parent-child relationship of the individual who has committed the

<sup>98</sup> Other crimes constituting grounds for a petition for terminating parental rights include Ind. Code Ann. § 35-42-1-1 (Murder), § 35-42-1-1 (Causing suicide), § 35-42-1-3 (Voluntary manslaughter), § 35-42-1-4 (Involuntary manslaughter), § 35-42-4-1 (Rape), and § 35-46-1-3 (Incest). Ind. Code Ann. § 31-35-3-4.

offense with the victim of the offense, the victim’s siblings, or any biological or adoptive child of that individual.” Ind. Code Ann. § 31-35-3-4. “If the court finds that the allegations in a petition described in section 4 [IC 31-35-3-4] of this chapter are true, the court shall terminate the parent-child relationship.” Ind. Code Ann. § 31-35-3-9(a).

In addition, chapter 2, pursuant to Ind. Code Ann. § 31-35-2-1 (Applicability of chapter), “applies to the termination of the parent-child relationship involving: (1) a delinquent child; or (2) a child in need of services.” Ind. Code Ann. § 31-34-1-3.5(a) (Victim of human sexual trafficking offense) specifically provides that a child victim of “human or sexual trafficking (as defined in IC 31-9-2-133.1) or equivalent offenses in other jurisdictions” is a child in need of services if the child “needs care, treatment, or rehabilitation that: (A) the child is not receiving; and (B) is unlikely to be provided or accepted without the coercive intervention of the court.”

Additionally, Ind. Code Ann. § 31-34-1-3(a)(1) (Victim of sex offenses) defines a “child in need of services” as a child who, before the age of 18, is the victim of a specified offense, including victims of Ind. Code Ann. § 35-42-4-3 (Child molesting), § 35-42-4-4 (Child exploitation – Child pornography), § 35-42-4-5 (Vicarious sexual gratification; sexual conduct in presence of a minor), § 35-42-4-9 (Sexual misconduct with a minor), § 35-45-4-2 (Prostitution), § 35-45-4-3<sup>99</sup> (Making an unlawful proposition), § 35-45-4-4 (Promoting prostitution), or “the law of another jurisdiction . . . that is substantially equivalent to any of the offenses listed . . . [,]” and who “needs care, treatment, or rehabilitation that: (A) the child is not receiving; and (B) is unlikely to be provided or accepted without the coercive intervention of the court.”<sup>100</sup> A petition may be filed to terminate parental rights to a delinquent child or a child in need of services, by the department’s attorney or the child’s guardian ad litem or court appointed special advocate. Ind. Code Ann. § 31-35-2-4(a). Pursuant to Ind. Code Ann. § 31-35-2-4(b)(2) (Petition; contents), among other things,

The petition [filed for in the case of a delinquent child or a child in need of services] must allege:

- (A) that one (1) of the following is true:
  - (i) The child has been removed from the parent for at least six (6) months under a dispositional decree.
  - (ii) A court has entered a finding under IC 31-34-21-5.6 [When efforts to reunify or preserve family not required] that reasonable efforts for family preservation or reunification are not required, including a description of the court’s finding, the date of the finding, and the manner in which the finding was made.
  - (iii) The child has been removed from the parent and has been under the supervision of a county office of family and children or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;
- (B) that one (1) of the following is true:
  - (i) There is a reasonable probability that the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied.
  - (ii) There is a reasonable probability that the continuation of the parent-child relationship poses

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<sup>99</sup> See *supra* note 49.

<sup>100</sup> A child may also be identified as a “child in need of services” if “the child lives in the same household as an adult who committed an offense described in subsection (a)(1) against a child and the offense resulted in a conviction . . .” or “the child lives in the same household as another child who is the victim of an offense described in subsection (a)(1)” provided that certain other criteria are met. Ind. Code Ann. § 31-34-1-3(b), (c).

The text of Ind. Code Ann. § 31-34-1-3 cited here and elsewhere in this report includes amendments made by the enactment of Senate Enrolled Act 447 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

- a threat to the well-being of the child.
- (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
- (C) that termination is in the best interests of the child; and
- (D) that there is a satisfactory plan for the care and treatment of the child.

Where the court determines that the allegations in the petition, as provided under Ind. Code Ann. § 31-35-2-4, are true, and no exceptions under Ind. Code Ann. § 31-35-2-4.5(d) exist, the court will terminate parental rights to a delinquent child or a child in need of services. Ind. Code Ann. § 31-35-2-8(a).

Under Ind. Code Ann. § 31-34-21-5.6, (Exceptions to requirement to make reasonable efforts to preserve and reunify families) a reasonable effort to reunify a parent, guardian, or custodian with a child or preserve a child's family is not required if the court finds that the "parent, guardian or custodian of a child who is a child in need of services is convicted of . . . promotion of human trafficking, promotion of human trafficking of a minor, sexual trafficking of a minor, or human trafficking (IC 35-42-3.5-1) as a felony . . . ." Ind. Code Ann. § 31-34-21-5.6 (3)(G).

***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.*

Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) may apply to some facilitators, such as those who harbor or transport victims, but it does not include language aimed at those who knowingly benefit from trafficking. Other laws might apply to facilitators of domestic minor sex trafficking. Ind. Code Ann. § 35-45-4-4(b)<sup>101</sup> (Promoting prostitution), which is a Level 5<sup>102</sup> felony, could apply to a facilitator who “[h]aving control over the use of a place, knowingly or intentionally permits another person to use the place for prostitution or juvenile prostitution”<sup>103</sup> or “[k]nowingly or intentionally conducts or directs another person to a place for the purpose of prostitution or juvenile prostitution.” Ind. Code Ann. §§ 35-45-4-4(b)(3), (5); 35-50-2-6(c). A facilitator “[k]nowingly or intentionally entices or compels another person [under the age of 18] to become a . . . juvenile prostitution victim,” faces a Level 4<sup>104</sup> felony. Ind. Code Ann. §§ 35-45-4-4(b)(1), (5); 35-50-2-5.5.<sup>105</sup>

Facilitators could be held liable for maintaining a “common nuisance” under Ind. Code Ann. § 35-45-1-5(c), which provides that it is a Level 6<sup>106</sup> felony for any person who “knowingly or intentionally maintains a common nuisance.” Ind. Code Ann. § 35-45-1-5(a)(4), (5)<sup>107</sup> (Common nuisance; defined; offense; felony) defines a “common nuisance” as

a building, structure, vehicle, or other place that is used for [one] or more of the following purposes:

. . . .

(4) to provide a location for a person to pay, offer to pay, or agree to pay money or other property to another person for an individual whom the person knows has been forced into:

- (A) forced labor;
- (B) involuntary servitude; or
- (C) prostitution or juvenile prostitution.

<sup>101</sup> See *supra* note 10.

<sup>102</sup> See *supra* note 7.

<sup>103</sup> See *supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

<sup>104</sup> See *supra* note 8.

<sup>105</sup> See *supra* note 8.

<sup>106</sup> See *supra* note 20.

<sup>107</sup> See *supra* note 46.

(5) To provide a location for a person to commit a violation of IC 35-42-3.5-1(a) through IC 35-42-3.5-1(d) (human trafficking).

A Level 6 felony is punishable by an imprisonment term of six (6) months to two and one half (2 ½) years, with a 1-year advisory sentence, and a possible fine up to \$10,000. Ind. Code Ann. §§ 35-45-1-5, 35-50-2-7(b).<sup>108</sup>

In addition, under Ind. Code Ann. § 35-45-15-5(a) (Money laundering), a facilitator commits money laundering if, “knowingly or intentionally,” he does any of the following:

- (1) acquires or maintains an interest in, receives, conceals, possesses, transfers, or transports the proceeds of criminal activity;
- (2) conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity; or
- (3) invests, expends, receives, or offers to invest, expend, or receive, the proceeds of criminal activity or funds that are the proceeds of criminal activity, and the person knows that the proceeds or funds are the result of criminal activity;

....

“Criminal activity” is defined as including “any offense . . . classified as a felony under Indiana or United States law,” while “proceeds” is defined as “funds acquired or derived directly or indirectly from, produced through, or realized through an act.” Ind. Code Ann. §§ 35-45-15-1, 35-45-15-4. Based on those definitions, a facilitator who receives money from promoting prostitution, sponsoring or distributing images of child sexual exploitation (ICSE), or criminal gang activity could be convicted of money laundering, a Level 6<sup>109</sup> felony. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-7(b). The offense is also subject to penalty enhancements, including where the proceeds are at least \$50,000, which increases the offense to a Level 5<sup>110</sup> felony. Ind. Code Ann. §§ 35-45-15-5(a), 35-50-2-6(c).

- 4.1.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(a) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) to include those who “knowingly benefit” from trafficking to include more facilitators within the trafficking crime.

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 convicted of Ind. Code Ann. § 35-45-4-4 (Promoting prostitution), § 35-42-4-4(b), (c) (Child exploitation – Child pornography), § 35-45-1-5 (Common nuisance; defined; offense; felony), § 35-45-9-3 (Participation in criminal organization; offense), § 35-45-6-2(1) (Corrupt business influence), or § 35-45-15-5 (Money laundering), all felonies, may be ordered to pay fines up to \$10,000. Ind. Code Ann. §§ 35-50-2-4 to -7. Additionally, under Ind. Code Ann. § 35-50-5-2 (Fine as alternative penalty for felony or misdemeanor), “In the alternative to the provisions concerning fines in this article, a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by victims of the offense he committed.” Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) applies to some facilitators, subjecting those facilitators to a possible fine not to exceed \$10,000 and the trafficking law’s

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<sup>108</sup> Under Ind. Code Ann. § 35-45-1-5(b)(2) a facilitator could be held liable for a Class A misdemeanor for “knowingly or intentionally visit[ing] a common nuisance” if “the common nuisance is used as a location for a person to pay, offer to pay, or agree to pay for a person who has been forced into forced labor, involuntary servitude, prostitution, or juvenile prostitution . . . .” A Class A misdemeanor is punishable by a prison sentence up to 1 year and a possible fine not to exceed \$5,000. Ind. Code Ann. §§ 35-45-1-5, 35-50-3-2.

<sup>109</sup> See *supra* note 20.

<sup>110</sup> See *supra* note 7.

mandatory restitution orders. Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under section 1 [IC 35-42-3.5-1] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3 [Restitution orders].” Ind. Code Ann. § 35-50-5-3(k) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim’s labor or services.
- (2) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage);whichever is greater.

Restitution may be ordered, at the court’s discretion, for violations of CSEC and sexual offense laws under Ind. Code Ann. § 35-50-5-3(a), which permits the court to order a defendant convicted of a felony or misdemeanor to make restitution to the victim. In determining the amount of restitution a defendant must pay, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Moreover, restitution is mandatory for criminal gang members. Pursuant to Ind. Code Ann. § 35-45-9-6 (Restitution), “In addition to any sentence or fine imposed on a criminal gang member for committing a felony or misdemeanor, the court shall order a criminal gang member convicted of a felony or misdemeanor to make restitution to the victim of the crime under IC 35-50-5-3.” Also, under Ind. Code Ann. § 34-24-3-1 (Damages in civil action),

[i]f a person . . . suffers a pecuniary loss as a result of a violation of . . . IC 35-45-9 [Criminal gang control], the person may bring a civil action against the person who caused the loss for the following:

- (1) An amount not to exceed three (3) times:
  - (A) the actual damages of the person suffering the loss, in the case of a liability that is not covered by IC 24-4.6-5, and other listed expenses.

Additional financial penalties apply to facilitators convicted of racketeering. Ind. Code Ann. § 35-45-6-2 (Corrupt business influence) is a Level 5<sup>111</sup> felony. Ind. Code Ann. §§ 35-45-6-2, 35-50-2-6(c).

Ind. Code Ann. § 34-24-1-1(a)(3) (Property which may be seized) permits civil asset forfeiture at the discretion of the court. Ind. Code Ann. § 34-24-1-1 permits the seizure of “[a]ny portion of real or personal property

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<sup>111</sup> See *supra* note 7.

purchased with money that is traceable as a proceed of a violation of a criminal statute. In addition, “[a]ny equipment, including computer equipment and cellular telephones, used for or intended for use in preparing, photographing, recording, videotaping, digitizing, printing, copying, or disseminating matter in violation of IC 35-42-4 [Sex crimes]” may be seized, but only if it is proven “by a preponderance of the evidence that the owner of the equipment knowingly permitted the equipment to be used to engage in conduct that subjects it to seizure under subsection (a)(10).” Ind. Code Ann. § 34-24-1-1(a)(10), (c). Ind. Code Ann. § 34-24-1-1(18) also provides for forfeiture of “[r]eal or personal property, including a vehicle, that is used by a person to: (A) commit, attempt to commit, or conspire to commit; (B) facilitate the commission of; or (C) escape from the commission of; a violation of IC 35-42-3.5-1 (human trafficking) or IC 35-45-4-4 (promoting prostitution).” Pursuant to Ind. Code Ann. § 34-24-1-9, “The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or forfeiture for purposes consistent with federal laws and regulations.” Seizure of such forfeitable property is governed by Ind. Code Ann. § 34-24-1-9.

Facilitators may also face forfeiture under nuisance laws.<sup>112</sup> Ind. Code Ann. § 32-30-7-1 (“Indecent nuisance” defined) provides,

As used in this chapter, “indecent nuisance” means a:

- (1) place in or upon which prostitution (as described in IC 35-45-4);
- . . . .
- (4) public place in or upon which human trafficking (as described in IC 35-42-3.5-1); is conducted, permitted, continued, or exists, and the personal property and contents used in conducting and maintaining the place for such a purpose.

Ind. Code Ann. § 32-30-7-24.5 (Distribution of money) provides,

Money collected under this chapter concerning a public place in or upon which human trafficking (as described in IC 35-42-3.5-1) is conducted, permitted, continued, or exists, and the personal property and contents used in conducting and maintaining the place for such a purpose shall be distributed as follows:

- (1) Eighty percent (80%) of the money collected shall be deposited in the human trafficking prevention and victim assistance fund established by IC 5-2-6-25, to be used for the purposes of the fund.
- (2) Twenty percent (20%) of the money collected shall be transferred to the county auditor for deposit in the county general fund. Money deposited in the county general fund under this subdivision may only be appropriated to the prosecuting attorney to defray expenses incurred in the:
  - (A) collection of the funds; and
  - (B) investigation or prosecution of human trafficking.

Additionally, individuals convicted of Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) are liable for a sexual assault victims assistance fee pursuant to Ind.

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<sup>112</sup> Ind. Code Ann. § 32-30-7-1 (“Indecent nuisance” defined) provides in part,

- (a) If the existence of an indecent nuisance is admitted or established as provided in section 21 of this chapter, the court shall enter an order of abatement as a part of the judgment in the case. The order of abatement must:
  - (1) direct the removal of all personal property and contents that:
    - (A) are located at the place described in the complaint;
    - (B) are used in conducting the indecent nuisance . . . .

Code Ann. § 33-37-5-23(11)–(14) (Sexual assault victims assistance fee), which states, “The court shall assess a sexual assault victims assistance fee of at least five hundred dollars (\$500) and not more than five thousand dollars (\$5,000) . . . .”

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

There is no specific provision under Indiana’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 of a minor or prostitution of a minor, if the travel is occurring in Indiana.

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

Sponsoring, producing, and selling images of child sexual exploitation (ICSE) is prohibited under Ind. Code Ann. § 35-42-4-4(b), (c) (Child exploitation – Child pornography). Ind. Code Ann. § 35-42-4-4(b) states that it is illegal when a person does any of the following:

- (1) manages, produces, sponsors, presents, exhibits, photographs, films, videotapes, or creates a digitized image of any performance or incident that includes sexual conduct by a child under eighteen (18) years of age;
  - (2) disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age; or
  - (3) makes available to another person a computer, knowing that the computer’s fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age;
- . . . .

Child exploitation in violation of Ind. Code Ann. § 35-42-4-4(b) is a Level 5<sup>113</sup> felony. Ind. Code Ann. §§ 35-42-4-4(b), 35-50-2-6(c). However, violations of Ind. Code Ann. § 35-42-4-4(c)<sup>114</sup> include instances, among others, in which the depicted child is forced or under twelve years old, and is a Level 4<sup>115</sup> felony.

Ind. Code Ann. § 35-49-3-2 (Activities related to obscene performance) states, “A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance<sup>116</sup> commits a Class A misdemeanor. However, the offense is a Level 6<sup>117</sup> felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen (18) years of age.” Ind. Code Ann. § 35-49-3-1 (Importation or distribution of obscene matter) states,

A person who knowingly or intentionally:

- (1) Sends or brings into Indiana obscene matter for sale or distribution; or
- (2) Offers to distribute, distributes, or exhibits to another person obscene matter;

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<sup>113</sup> See *supra* note 7.

<sup>114</sup> See *supra* Component 1.2 for full discussion of Ind. Code Ann. § 35-42-4-4(c) (Child exploitation).

<sup>115</sup> See *supra* note 8.

<sup>116</sup> See *supra* note 89.

<sup>117</sup> See *supra* note 20.



commits a Class A misdemeanor. However, the offense is a Level 6<sup>118</sup> felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen (18) years of age.

- 4.4.1 Recommendation: Increase the penalties under Ind. Code Ann. § 35-42-4-4(b) (Child exploitation – Child pornography) and Ind. Code Ann. § 35-49-3-2 (Activities related to obscene performance) when a minor victim is involved to reflect the seriousness of the offense.

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<sup>118</sup> *See supra* note 20.

***Legal Components:***

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

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***Legal Analysis:***

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children*<sup>119</sup>

Third party control is required in establishing the crime of sex trafficking, and buyers are required to know force was employed, excluding some commercially sexually exploited children from identification and eligibility for services as sex trafficking victims. Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) criminalizes sex trafficking of a minor under 18 years of age without requiring proof of force, fraud, or coercion. However, this offense only applies to the acts of a trafficker or controlling third party, as only “recruit[ing], harbor[ing], or transport[ing] a child” are prohibited under the core sex trafficking offense in Ind. Code Ann. § 35-42-3.5-1.

Although, buyers are liable under Ind. Code Ann. § 35-42-3.5-1(d),<sup>120</sup> which specifically criminalizes “pay[ing], offer[ing] to pay, or agree[ing] to pay money or other property to another person for an individual who the person knows has been forced into . . . juvenile prostitution<sup>121</sup> . . .,” Ind. Code Ann. § 35-42-3.5-1(d) requires that the buyer know that a minor victim was “forced,” and the offense does not differentiate between minors and

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<sup>119</sup> See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

<sup>120</sup> See *supra* note 2.

<sup>121</sup> See *supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

adults. Thus, children who are commercially sexually exploited would not be identified as sex trafficking victims under Ind. Code Ann. § 35-42-3.5-1 where no trafficker is identified or where force is not proven.

Within Title 31 (Family and Juvenile Law), for purposes of Ind. Code Ann. § 31-34-1-3.5 (Victim of human sexual trafficking offense), which identifies certain child victims of human or sexual trafficking as a child in need of services, Ind. Code Ann. § 31-9-2-133.1<sup>122</sup> (Victim of human or sexual trafficking) provides that a “victim of human or sexual trafficking” means

. . . a child who is recruited, harbored, transported, or engaged in:

- (1) forced labor;
- (2) involuntary servitude;
- (3) prostitution;
- (4) juvenile prostitution, as defined in IC 35-31.5-2-178.5;
- (5) child exploitation, as defined in [Ind. Code Ann §] 35-42-4-4(b);
- (6) marriage, unless authorized by a court under [Ind. Code Ann. §] 31-11-1-6; or
- (7) trafficking for the purpose of prostitution, juvenile prostitution, or participation in sexual conduct as defined in [Ind. Code Ann. §] 35-42-4-4(a)(4).

This definition of child sex trafficking victim includes commercially sexually exploited children who are not subjected to force or controlled by a third party; thus, the definition of human or sex trafficking victim within the Family and Juvenile Law Title includes children who would not be identified as victims under the criminal sex trafficking offense, Ind. Code Ann. § 35-42-3.5-1. However, any victim protection defined by the criminal offense, meaning those available only to victims of Ind. Code Ann. § 35-42-3.5-1, would be unavailable to all commercially sexually exploited children.

5.1.1. Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) so that all commercially sexually exploited children are identifiable as victims and eligible for protections pursuant to their victim status.<sup>123</sup>

5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*<sup>124</sup>

Ind. Code Ann. § 35-42-3.5-1(b)<sup>125</sup> (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) prohibits a defense to prosecution for promotion of human trafficking of a minor based on the child’s willingness to engage in the commercial sex act. Ind. Code Ann. § 35-42-3.5-1(b) states in part, “Except as provided in subsection (e), it is not a defense to prosecution under this subsection that the child consented to engage in prostitution or juvenile prostitution<sup>126</sup> or to participate in sexual conduct.”

The exception in subsection (e)<sup>127</sup> applies only to conduct criminalized under Ind. Code Ann. § 35-42-4-4 (Child exploitation – Child pornography), a non-CSEC offense. Accordingly, a defendant charged with

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<sup>122</sup> See *supra* note 9.

<sup>123</sup> Subsequent recommendations that discuss referring certain crimes to the human trafficking statute are predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>124</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>125</sup> See *supra* note 2.

<sup>126</sup> See *supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

<sup>127</sup> Pursuant to Ind. Code Ann. § 35-42-3.5-1(e),

promoting human trafficking under Ind. Code Ann. § 35-42-3.5-1(b)(1), for “recruit[ing], harbor[ing], or transport[ing] a [minor] . . . with the intent of (B) inducing or causing the child to: (i) engage in prostitution or juvenile prostitution; or (ii) engage in a performance or incident that includes sexual conduct in violation of IC 35-42-4-4(b) or IC 35-42-4-4(c) (child exploitation) . . .” may not assert such a defense. However, a defense based on a minor’s willingness to engage in the commercial sex act is not expressly prohibited for prosecutions under subsections (c) or (d), suggesting availability of this defense in prosecutions of buyers.

For purposes of qualification as a child in need of services, however, Ind. Code Ann. § 31-34-1-3.5(b) (Victim of human sexual trafficking offense) states that a “child is considered a victim of human or sexual trafficking regardless of whether the child consented to the conduct described in subsection (a)(1),” which includes minors engaged in juvenile prostitution. Ind. Code Ann. § 31-9-2-133.1<sup>128</sup> (Victim of human or sexual trafficking).

### 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>129</sup>

Ind. Code Ann. § 35-45-4-2(a)<sup>130</sup> (Prostitution) specifically excludes minors from prosecution for prostitution offenses. Pursuant to Ind. Code Ann. § 35-45-4-2,

A person at least eighteen (18) years of age who knowingly or intentionally:

- (1) performs, or offers or agrees to perform, sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5); or
- (2) fondles, or offers or agrees to fondle, the genitals of another person; for money or other property commits prostitution, a Class A misdemeanor . . .

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It is a defense to prosecution under subsection (b)(2) if:

(1) the child is at least fourteen (14) years of age but less than sixteen (16) years of age and the person is less than eighteen (18) years of age; or

(2) all the following apply:

(A) The person is not more than four (4) years older than the victim.

(B) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term “ongoing personal relationship” does not include a family relationship.

(C) The crime:

(i) was not committed by a person who is at least twenty-one (21) years of age;

(ii) was not committed by using or threatening the use of deadly force;

(iii) was not committed while armed with a deadly weapon;

(iv) did not result in serious bodily injury;

(v) was not facilitated by furnishing the victim, without the victim’s knowledge, with a drug . . . or a controlled substance . . . or knowing that the victim was furnished with the drug or controlled substance without the victim’s knowledge; and

(vi) was not committed by a person having a position of authority or substantial influence over the victim.

(D) The person has not committed another sex offense (as defined in IC 11-8-8-5.2), including a delinquent act that would be a sex offense if committed by an adult, against any other person.

<sup>128</sup> See *supra* note 9.

<sup>129</sup> For more information regarding recent federal legislation impacting this component see:

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

<sup>130</sup> See *supra* note 33.

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

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

Juvenile sex trafficking victims may receive services through numerous points of entry and may avoid delinquency adjudications for offenses committed as a result of the trafficking victimization, but specialized services are not mandated.

*I. Services through child welfare*

Upon detaining<sup>131</sup> a juvenile sex trafficking victim, law enforcement must notify the department of child services. Ind. Code Ann. § 35-42-3.5-4(c) (Rights of alleged victims) states,

If a law enforcement agency detains an alleged victim of an offense under section 1 of this chapter [Promotion of human trafficking; sexual trafficking of a minor; human trafficking] who is less than eighteen (18) years of age, the law enforcement agency shall immediately notify the department of child services that the alleged victim (1) has been detained; and (2) may be a victim of child abuse or neglect.

Additionally, Ind. Code Ann. § 31-33-7-7(a) (Law enforcement agency investigation and communication of information) requires law enforcement to “immediately communicate [reports of suspected child abuse or neglect] to the department, whether or not the law enforcement agency has reason to believe there exists an imminent danger to the child’s health or welfare; and . . . conduct an immediate, onsite assessment of the report along with the department whenever the law enforcement agency has reason to believe that an offense has been committed.”

Further, a juvenile sex trafficking victim will be identified as a child in need of services.<sup>132</sup>

Based on a mandated referral or through identification as a child in need of services, child welfare may respond and provide services to juvenile sex trafficking victims. These services, however, are not required to be specialized to their needs.

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<sup>131</sup> Ind. Code Ann. § 35-42-3.5-4(a) states that “an alleged victim of an offense” under the human trafficking law,

- (1) may not be detained in a facility that is inappropriate to the victim’s status as a crime victim;
- (2) may not be jailed, fined, or otherwise penalized due to having been the victim of the offense; and
- (3) shall be provided protection if the victim’s safety is at risk or if there is danger of additional harm by recapture of the victim by the person who allegedly committed the offense, including:

- (A) taking measures to protect the alleged victim and the victim’s family members from intimidation and threats of reprisals and reprisals from the person who allegedly committed the offense or the person’s agent; and

- (B) ensuring that the names and identifying information of the alleged victim and the victim’s family members are not disclosed to the public.

This subsection shall be administered by law enforcement agencies and the Indiana criminal justice institute as appropriate.

<sup>132</sup> *See infra* Component 5.5 for full CHINS discussion.

## II. Services through juvenile justice

Although Ind. Code Ann. § 35-45-4-2(a) (Prostitution) specifically excludes minors from prosecution for prostitution offenses, a minor may be subject to prosecution for other delinquent acts arising from their trafficking victimization. Pursuant to Ind. Code Ann. § 31-37-1-2, “[a] child commits a delinquent act if, before becoming eighteen (18) years of age, the child commits an act that would be an offense if committed by an adult, except an act committed by a person over which the juvenile court lacks jurisdiction under IC 31-30-1.”

During a dispositional hearing concerning a child found to be delinquent, the court must consider, among other things, “[a]lternatives for the care, treatment, rehabilitation, or placement of the child.” Ind. Code Ann. § 31-37-18-1 (Issues for consideration). Ind. Code Ann. § 31-37-13-2(a)(4) (Judgment order of predisposition report; scheduling of dispositional hearing; dual status screening; dual status determination) also requires the court to “[c]omplete a dual status screening tool on the child, as described in IC 31-41-1-3,<sup>133</sup> and determine whether the child is a dual status child as described in IC 31-41-1-2.”

“If a child is determined to be a dual status child, the court may refer the child for an assessment by a dual status assessment team as described in IC 31-41.” This dual status assessment includes “a review by a dual status assessment team to assess a dual status child’s: (1) status; (2) best interests; (3) need for services; and (4) level

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<sup>133</sup> Ind. Code Ann. § 31-41-1-3 (“Dual status screening tool”) defines “dual status screening tool” as “a factual review of a child’s status and history conducted by the case manager under IC 31-34 or the probation officer under IC 31-37 to determine whether a child meets the criteria for being a dual status child as defined by section 2 of this chapter.”

Further, Ind. Code Ann. § 31-41-1-2 (“Dual status child”) defines “dual status child” as

- (1) a child who is alleged to be or is presently adjudicated to be a child in need of services under IC 31-34-10 or IC 31-34-11 and is alleged to be or is presently adjudicated to be a delinquent child under IC 31-37-12 or IC 31-37-13;
- (2) a child who is presently named in an informal adjustment under IC 31-34-8 and who is adjudicated a delinquent child under IC 31-37-12 or IC 31-37-13;
- (3) a child who is presently named in an informal adjustment under IC 31-37-9 and who is adjudicated to be a child in need of services under IC 31-34-10 or IC 31-34-11;
- (4) a child who:
  - (A) has been previously adjudicated to be a child in need of services under IC 31-34-10 or IC 31-34-11; or
  - (B) was a participant in a program of informal adjustment under IC 31-34-8; and who was under a wardship that had been terminated or was in a program of informal adjustment that had concluded before the current delinquency petition;
- (5) a child who was:
  - (A) previously adjudicated to be a delinquent child under IC 31-37-12 or IC 31-37-13 that was closed; and
  - (B) a participant in a program of informal adjustment under IC 31-37-9 which was concluded prior to a child in need of services proceeding; and
- (6) a child:
  - (A) who is eligible for release from commitment of the department of correction;
  - (B) whose parent, guardian, or custodian:
    - (i) cannot be located; or
    - (ii) is unwilling to take custody of the child; and
  - (C) for whom the department of correction is requesting a modification of the dispositional decree under IC 31-30-2-4.

of needs, strengths, and risks of the child.” Ind. Code Ann. § 31-41-1-4 (“Dual status assessment”). Accordingly, a juvenile sex trafficking victim may receive services even if routed through the juvenile justice system.

## Summary

A juvenile sex trafficking victim may access services through child welfare or the juvenile justice system and may avoid a delinquency adjudication based on non-criminalization for prostitution offenses. However, services are not required to be specialized regardless of the route.

5.4.1 Recommendation: Amend Indiana’s protective response for juvenile sex trafficking victims to require that services be specialized.<sup>134</sup>

5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>135</sup>

Child sex trafficking is identified as a type of abuse and neglect within Indiana’s child protection statutes. Specifically, Ind. Code Ann. § 31-34-1-3.5(a) (Victim of human sexual trafficking offense) includes child sex trafficking as children in need of services.<sup>136</sup> Ind. Code Ann. § 31-34-1-3.5(a) states,

A child is a child in need of services if, before the child becomes eighteen (18) years of age:

- (1) the child is the victim of:
  - (A) human or sexual trafficking (as defined in IC 31-9-2-133.1); or
  - (B) a human or sexual trafficking offense under the law of another jurisdiction . . . the is substantially equivalent to the act described in clause (A); and
- (2) the child needs care, treatment, or rehabilitation that:
  - (A) the child is not receiving; and
  - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

Ind. Code Ann. § 31-34-1-3.5(b) adds that “a child is considered a victim of human or sexual trafficking regardless of whether the child consented to the conduct described in subsection (a)(1).” As used within Ind. Code Ann. § 31-34-1-3.5, Ind. Code Ann. § 31-9-2-133.1<sup>137</sup> (Victim of human or sexual trafficking) clarifies that a “victim of human or sexual trafficking” includes,

. . . a child who is recruited, harbored, transported, or engaged in:

- (1) forced labor;
- (2) involuntary servitude;
- (3) prostitution;
- (4) juvenile prostitution, as defined in IC 35-31.5-2-178.5;<sup>138</sup>
- (5) child exploitation, as defined in Ind. Code Ann § 35-42-4-4(b);
- (6) marriage, unless authorized by a court under Ind. Code Ann. § 31-11-1-6; or

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<sup>134</sup> The analysis and recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>135</sup> For more information regarding recent federal legislation impacting this component *see*:

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

<sup>136</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>137</sup> *See supra* note 9.

<sup>138</sup> *See supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

7) trafficking for the purpose of prostitution, juvenile prostitution, or participation in sexual conduct as defined in Ind. Code Ann. § 35-42-4-4(a)(4).

Additionally, Ind. Code Ann. § 31-34-1-3(a)(1) (Victim of specified offenses; living in household with adult who committed or has been charged with a specified offense) defines a “child in need of services” as a child who, before reaching the age of 18, is the victim of a specified offense, including a victim of Ind. Code Ann. § 35-42-4-3 (Child molesting), § 35-42-4-4 (Child exploitation – Child pornography), § 35-42-4-5 (Vicarious sexual gratification), § 35-42-4-6 (Child solicitation), § 35-42-4-9 (Sexual misconduct with a minor), § 35-45-4-2 (Prostitution), § 35-45-4-3<sup>139</sup> (Making an unlawful proposition), § 35-45-4-4 (Promoting prostitution), or “the law of another jurisdiction . . . that is substantially equivalent to any of the offenses listed,” and “the child needs care, treatment, or rehabilitation that: (A) the child is not receiving; and (B) is unlikely to be provided or accepted without the coercive intervention of the court.”

For purposes of investigating possible instances of child abuse and neglect within family law, under Ind. Code Ann. § 31-32-11-1 (Privileged communications), § 31-33 (Juvenile law: reporting and investigation of child abuse and neglect), § 31-34-7-4 (Persons accused of child abuse or neglect entitled to access to report), and § 31-39-8-4 (Probative value of information—Unsubstantiated information), “child abuse and neglect . . . refers to a child described in IC 31-34-1-1 through IC 31-34-1-5<sup>140</sup> and § 31-34-1-8 and § 31-34-1-11,<sup>141</sup> regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.” Ind. Code Ann. § 31-9-2-14. However, subsection (b) specifies that “child abuse and neglect” does not apply to a child who is alleged to be “a victim of a sexual offense under IC 35-42-4-3 [Child molesting] unless the alleged offense under IC 35-42-4-3 involves the fondling or touching of the buttocks, genitals, or female breasts, regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.” Under subsection (c), “‘Child abuse or neglect’, for purposes of IC 31-34-2.3 [Child protective orders for removal of alleged perpetrators], refers to acts or omissions by a person against a child as described in IC 31-34-1-1 through IC 31-34-1-11, regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.”

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.*

Since Ind. Code Ann. § 31-34-1-3.5(a) (Victim of human sexual trafficking offense) provides that minor victims of sex trafficking<sup>142</sup> are defined as children in need of services regardless of fault of a parent or custodian, the definition of “custodian” is not a limitation on the ability of a victim of “sexual trafficking” and other specified offenses to be classified as a child in need of services entitled to protective services through child welfare.<sup>143</sup> Ind. Code Ann. §§ 31-34-1-3(a)(1), 31-34-1-3.5(a).

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<sup>139</sup> See *supra* note 49.

<sup>140</sup> Ind. Code Ann. § 31-34-1-1 (Impairment or serious endangerment of physical or mental condition); § 31-34-1-2 (Endangerment of physical or mental health); § 31-34-1-3 (Victims of sex offenses); § 31-34-1-3.5 (a) (Victim of human sexual trafficking offense); § 31-34-1-4 (Participation in obscene performances); § 31-34-1-5 (Sex offenses committed by child).

<sup>141</sup> Ind. Code Ann. § 31-34-1-8 (Missing child), § 31-34-1-9 (Disabled child deprived of necessary nutrition or medical or surgical intervention), § 34-34-1-10 (Child born with fetal alcohol syndrome or with controlled substance or legend drug in child's body), and § 31-34-1-11 (Risks or injuries arising from use of alcohol, controlled substance, or legend drug by child's mother during pregnancy).

<sup>142</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>143</sup> See *supra* Component 5.5. for full definition of child in need of services and children considered to be abused or neglected.



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

Pursuant to Ind. Code Ann. § 5-2-6.1-12(1) (Eligibility for assistance), a victim of a violent crime is eligible to receive compensation under Title 5, Article 2, Chapter 6.1 (Compensation for victims of violent crime). A “victim” is defined as “an individual who suffers bodily injury or death as a result of a violent crime.” Ind. Code Ann. § 5-2-6.1-7 (“Victim” defined). Violent crimes include, with some exceptions, those felonies or Class A misdemeanors that result in bodily injury or death to the victim but do not include Ind. Code Ann. § 35-42-4-3 (Child molesting) and § 35-42-4-7 (Child seduction). Ind. Code Ann. § 5-2-6.1-8(1) (“Violent crime” defined). “Bodily injury” is defined as: “(1) an impairment of a physical condition; (2) a visible injury; (3) physical pain; or (4) emotional trauma that stems directly from the impairment of a physical condition, a visible injury, or physical pain.” Ind. Code Ann. § 5-2-6.1-0.5 (“Bodily injury” defined).

After proving “bodily injury,” other requirements and ineligibility factors present special difficulties for domestic minor sex trafficking victims. A victim who “sustained the injury as a result of participating in or assisting in . . . a criminal act,” or “profited or would have profited from the criminal act” may not receive victim’s compensation benefits. Ind. Code Ann. § 5-2-6.1-13(a)(1), (3) (Limitations on award of benefits).<sup>144</sup> However, an exception to the reporting requirement exists for alleged victims of child sex crimes and may apply to CSEC victims. Ind. Code Ann. § 5-2-6.1-17(a) (Crime report within 72 hours) states, “(a) Except for an alleged victim of a child sex crime,<sup>145</sup> the division may not award compensation under this chapter unless the violent crime was reported to a law enforcement officer not more than seventy-two (72) hours after the occurrence of the crime.” In addition, if an eligible victim’s application for compensation is not received within 180 days after the date of the crime, or within 2 years given a showing of good cause, compensation will not be granted to the victim. Ind. Code Ann. § 5-2-6.1-16(b) (Application for assistance). Nothing in Ind. Code Ann. § 5-2-6.1 (Compensation for victims of violent crime), however, explains what constitutes “good cause” for purposes of Ind. Code Ann. § 5-2-6.1-16(b). An exception to this requirement may also apply to CSEC victims in some cases since “an alleged victim of a child sex crime may submit an application to the division until the victim becomes thirty-one (31) years of age.” Ind. Code Ann. § 5-2-6.1-16(e). Finally, if “the claimant fails to fully cooperate with law enforcement personnel in the investigation, apprehension, and prosecution of the offender,” compensation may be denied. Ind. Code Ann. § 5-2-6.1-18 (Failure to cooperate).

5.7.1 Recommendation: Amend Ind. Code Ann. § 5-2-6.1-13(a) (Limitations on award of benefits) to specifically extend the exceptions to the reporting requirement and ineligibility criteria to victims of domestic minor sex trafficking.<sup>146</sup>

<sup>144</sup> Pursuant to Ind. Code Ann. § 5-2-6.1-13(b), “If the victim is a dependent child or dependent parent of the person who commits a violent crime, compensation may be awarded where justice requires.”

<sup>145</sup> Ind. Code Ann. § 5-2-6.1-7.5 provides,

As used in this chapter, “victim of a child sex crime” means an individual who was the victim of:

- (1) child molesting (IC 35-42-4-3(a));
- (2) vicarious sexual gratification (IC 35-42-4-5);
- (3) child solicitation (IC 35-42-4-6);
- (4) child seduction (IC 35-42-4-7); or
- (5) incest (IC 35-46-1-3);

and was less than eighteen (18) years of age at the time the crime occurred.

<sup>146</sup> The recommendations in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

5.7.2 Recommendation: Amend Ind. Code Ann. § 5-2-6.1-8(1) (Violent crime) to include Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking), Ind. Code Ann. § 35-45-4-4 (Promoting prostitution), and Ind. Code Ann. § 35-42-4-4(b) (Child exploitation – Child pornography) within the definition of a violent crime, regardless of whether the victim suffers bodily injury or death as a result of the offense.

5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*<sup>147</sup>

Ind. Code Ann. § 35-42-3.5-4(a)(3) (Additional rights of victim) provides that human trafficking victims shall be provided protection if their “safety is at risk or if there is danger of additional harm by recapture of the victim by the person who allegedly committed the offense . . . .” Protections include “ensuring that the names and identifying information of the alleged victim and the victim’s family members are not disclosed to the public.” Ind. Code Ann. § 35-42-3.5-4(a)(3)(B).

In addition, victims of trafficking and sexual offenses who are under 14 are entitled to certain victim-friendly protections throughout the criminal justice process, as listed in Ind. Code Ann. Title 35, Article 37, Chapter 4 (Evidence). Pursuant to Ind. Code Ann. § 35-37-4-8(c) (Taking of child’s testimony – Closed circuit television – Videotape – Conditions), in prosecutions for certain listed crimes, including Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) and § 35-42-4 (Sex crimes),

On the motion of the prosecuting attorney, the court may order that the testimony of a protected person be taken in a room other than the courtroom, and that the questioning of the protected person by the prosecution and the defense be transmitted using a two-way closed circuit television arrangement that:

- (1) allows the protected person<sup>148</sup> to see the accused and the trier of fact; and
- (2) allows the accused and the trier of fact to see and hear the protected person.

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<sup>147</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>148</sup> Pursuant to Ind. Code Ann. § 35-37-4-8(b), “protected person” is defined by referring to Ind. Code Ann. § 35-37-4-6. Ind. Code Ann. § 35-37-4-6(c) states,

As used in this section, “protected person” means:

- (1) a child who is less than fourteen (14) years of age;
- (2) an individual with a mental disability who has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:
  - (A) is manifested before the individual is eighteen (18) years of age;
  - (B) is likely to continue indefinitely;
  - (C) constitutes a substantial impairment of the individual's ability to function normally in society; and
  - (D) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated; or
- (3) an individual who is:
  - (A) at least eighteen (18) years of age; and
  - (B) incapable by reason of mental illness, intellectual disability, dementia, or other physical or mental incapacity of:
    - (i) managing or directing the management of the individual's property; or
    - (ii) providing or directing the provision of self-care.

Videotaped testimony of a “protected person” may also be ordered by the court upon motion of the prosecuting attorney or the defendant under the same requirements of Ind. Code Ann. § 35-37-4-8(c). Ind. Code Ann. § 35-37-4-8(d). Pursuant to Ind. Code Ann. § 35-37-4-8(e), the court may not allow closed-circuit or videotaped testimony unless certain conditions are met, including the conditions outlined in subsection (e)(1)(B) that the court find that the protected person should testify outside of court because

- (i) the court finds from the testimony of a psychiatrist, physician, or psychologist and any other evidence that the protected person’s testifying in the physical presence of the defendant would cause the protected person to suffer serious emotional harm and the court finds that the protected person could not reasonably communicate in the physical presence of the defendant to the trier of fact;
- (ii) a physician has certified that the protected person cannot be present in the courtroom for medical reasons; or
- (iii) evidence has been introduced concerning the effect of the protected person’s testifying in the physical presence of the defendant, and the court finds that it is more likely than not that the protected person’s testifying in the physical presence of the defendant creates a substantial likelihood of emotional or mental harm to the protected person.

Ind. Code Ann. § 35-37-4-8 does not permit the defendant to be present in the room while the witness gives testimony via closed-circuit television. Ind. Code Ann. § 35-37-4-8(f). If the court allows testimony to be given via videotape, Ind. Code Ann. § 35-37-4-8(g) provides that only certain persons may be present in the room during the witness’s testimony, including the defendant if he is not represented by an attorney. Ind. Code Ann. § 35-37-4-8(g)(3). Also, “if the defendant is not represented by an attorney, the defendant may question the protected person.” Ind. Code Ann. § 35-37-4-8(g)(7).

The court also must provide safeguards all sex trafficking victims, such as separate waiting rooms, “to minimize the contact of the victim of an offense” with the defendant and the defendant’s friends and relatives during criminal proceedings. Ind. Code Ann. § 35-37-4-11(a), (b) (Contact of victim with accused person or relatives and friends of accused person during court proceedings).

Furthermore, in prosecutions under Ind. Code Ann. § 35-42-4 (Sex crimes), evidence of the victim’s past sexual conduct, including both opinion and reputation evidence, may not be admitted or referred to in the presence of the jury. Ind. Code Ann. § 35-37-4-4(a) (Prosecutions for sexual offenses – Evidence). However, pursuant to Ind. Code Ann. § 35-37-4-4(b), evidence

- (1) Of the victim’s or a witness’s past sexual conduct with the defendant;
- (2) Which in a specific instance of sexual activities shows that some person other than the defendant committed the act upon which the prosecution is founded; or
- (3) That the victim’s pregnancy at the time of the trial was not caused by the defendant; may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and its inflammatory or prejudicial nature does not outweigh its probative value.

Furthermore, prosecutions under Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) and § 35-45-4-4 (Promoting prostitution) do not include this protection, as these offenses are not “sex crimes” under Ind. Code Ann. § 35-42-4. Certain additional protections are afforded to children who are the victims of sex crimes. Under Ind. Code Ann. § 35-40-5-11 (Interview by defense counsel of child less than sixteen who is alleged victim of sex offense), defense counsel who wish to interview victims of sexual offenses under 16 after charges are filed must “contact the prosecuting attorney” rather than the child, and “[t]he child has the right . . . to confer with the prosecuting attorney before

the interview occurs.” Ind. Code Ann. § 35-40-5-11(c). “If the parties are unable to agree to the terms of the interview, the parties may petition the court for a hearing on the terms of the interview prior to the interview taking place. The court shall review the terms suggested by the parties and consider the age of the child, any special considerations, and the rights of victims provided by IC 35-40-5-1 [Right to be treated with fairness, dignity, and respect] in setting reasonable terms for the interview.” Ind. Code Ann. § 35-40-5-11(d).

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>149</sup>

Indiana law allows child sex trafficking victims to vacate delinquency adjudications for non-violent offenses related to trafficking victimization, but the child must have been coerced or controlled by another person. Although record expungement is not automatic upon granting vacatur, juvenile records may be expunged without a waiting period under Indiana’s general expungement statute.

Pursuant to Ind. Code Ann. § 31-37-22-11(b)<sup>150</sup> (Jurisdiction over petitions to expunge records of child alleged to be a delinquent child or child in need of services),

Upon the written motion of a trafficked child,<sup>151</sup> or any person acting on behalf of a trafficked child, the court that adjudicated the trafficked child a delinquent child shall vacate the adjudication issued with respect to the trafficked child, if the movant proves by a preponderance of the evidence that:

- (1) the child was a trafficked child at the time the child performed the delinquent act that resulted in the adjudication;
- (2) the delinquent act did not result in bodily injury to another person; and
- (3) at the time the child committed the delinquent act, the child was:
  - (A) coerced by; or
  - (B) under the control of;  
another person.

Because a minor must prove he or she acted under the coercion or control of a third party, however, Ind. Code Ann. § 31-37-22-11(b) excludes victims who are unable to identify their traffickers, leaving these victims to face the collateral consequences associated with having delinquency adjudications. Further, Ind. Code Ann. § 31-37-22-11 does not make record expungement automatic upon granting vacatur, making separate proceedings necessary to obtain both forms of relief.

Records related to trafficking victimization may be expunged without a waiting period under Ind. Code Ann. § 31-39-8-2<sup>152</sup> (Petition to juvenile court for removal of records), which states,

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<sup>149</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>150</sup> The text of Ind. Code Ann. § 31-37-22-11 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>151</sup> Pursuant to 31-37-22-11(a),

As used in this section, “trafficked child” means a child who was the victim of human trafficking (IC 35-42-3.5) or a substantially similar human trafficking offense committed in another jurisdiction, regardless of whether the person who committed the human trafficking offense was charged, tried, or convicted. The term includes a person who is now an adult.

- (a) Any person may petition a juvenile court at any time to remove from:
  - (1) the court's files;
  - (2) the files of law enforcement agencies; and
  - (3) the files of any other person who has provided services to a child under a court order; those records pertaining to the person's involvement in juvenile court proceedings.
- (b) Under this section, electronic records shall be removed to a secure data base to which the public or another person not having legal or statutory authority to access the records is not granted access to the data base.

In determining whether to grant such a petition, Ind. Code Ann. § 31-39-8-3(e)<sup>153</sup> (Factors considered) states the court may consider the following:

- (1) the best interests of the child;
- (2) the age of the person during the person's contact with the juvenile court or law enforcement agency;
- (3) the nature of any allegations;
- (4) whether there was an informal adjustment or an adjudication;
- (5) the disposition of the case;
- (6) the manner in which the person participated in any court ordered or supervised services;
- (7) the time during which the person has been without contact with the juvenile court or with any law enforcement agency;
- (8) whether the person acquired a criminal record; and
- (9) the person's current status.

Upon grant of an expungement petition, Ind. Code Ann. § 31-39-8-6<sup>154</sup> (Method of expungement) states,

- (a) Subject to subsections (b) and (c), the records shall be destroyed . . . .
- (b) Data from the records in subsection (a) shall be maintained by the court on a secure data base that does not enable identification of the offender to the public or another person not having legal or statutory authority to access the records.
- (c) The records maintained in the data base under subsection (b) may be used only for statistical analysis, research, and financial auditing purposes.

5.9.1 Recommendation: Amend Ind. Code Ann. § 31-37-22-11(b) (Jurisdiction over petitions to expunge records of child alleged to be a delinquent child or child in need of services) to remove the requirement of coercion or control.

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<sup>152</sup> The text of Ind. Code Ann. § 31-39-8-2 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>153</sup> The text of Ind. Code Ann. § 31-39-8-3 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>154</sup> The text of Ind. Code Ann. § 31-39-8-6 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1218 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

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.*

Victim restitution for victims of human trafficking<sup>155</sup> offenses is mandatory. Ind. Code Ann. § 35-42-3.5-2 (Restitution to victim) states, “In addition to any sentence or fine imposed for a conviction of an offense under section 1 [Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking)] of this chapter, the court shall order the person convicted to make restitution to the victim of the crime under IC 35-50-5-3.” Ind. Code Ann. § 35-50-5-3(k) states,

The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim’s labor or services.
- (2) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of:
  - (A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
  - (B) IC 22-2-2 (Minimum Wage);whichever is greater.

In addition, persons convicted of Ind. Code Ann. § 35-42-3.5-1 may also be liable to the victim for civil damages, including actual and punitive damages, reasonable attorney’s fees, and court costs. Ind. Code Ann. § 35-42-3.5-3(a) (Victim has civil cause of action against person convicted of offense – Damages recoverable – Statute of limitations).

Victims are entitled to restitution more broadly under Ind. Code Ann. § 35-50-5-3(a) (Restitution orders), which permits the court to order a defendant convicted of any felony or misdemeanor to make restitution to the victim. This restitution provision is subject to the discretion of the court. In determining the amount of restitution a victim is entitled to, pursuant to Ind. Code Ann. § 35-50-5-3(a), the court will consider the following:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Victims may also be entitled to receive “[a]n amount not to exceed three (3) times . . . the actual damages” they suffered as a result of a violation of Ind. Code Ann. § 35-45-9-3 (Participation in criminal organization; offense). Ind. Code Ann. § 34-24-3-1 (Damages in civil action).

Lastly, victims whose offenders are convicted of racketeering may pursue additional remedies. A victim who has suffered damages as a result of a violation of Ind. Code Ann. § 35-45-6-2 (Corrupt business influence) may bring a civil suit to recover three times the amount of damages incurred, attorney’s fees, court costs, and any

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<sup>155</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

punitive damages the court may award. Ind. Code Ann. § 34-24-2-6(b) (Action for injunctive relief from corrupt business influence). The trafficker or facilitator can also be ordered to forfeit “any property: (1) used in the course of; (2) intended for use in the course of; (3) derived from; or (4) realized through; conduct in violation of IC 35-45-6-2 [Corrupt business influence].” Ind. Code Ann. § 34-24-2-2(a) (Action for forfeiture). Pursuant to Ind. Code Ann. § 34-24-2-6(d), “an aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.”

However, victims may be required to subrogate some of these civil claims to the state for services provided to cover the cost of the services. Ind. Code Ann. § 5-2-6-25 (Human trafficking prevention and victim assistance fund)<sup>156</sup> provides,

....

(g) The state is subrogated to the rights of a victim to whom services are provided, to the extent of the services. The subrogation rights are against the perpetrator of the crime or a person otherwise liable for the loss. If the victim brings a civil action against the perpetrator of the crime or against the person otherwise liable for the loss, the victim shall promptly notify the institute of the filing of the civil action.

(h) In addition to the subrogation rights under subsection (g), the state is entitled to a lien in the amount of the services provided on a recovery made by or on behalf of the victim. The state may:

- (1) recover the amount of services in a separate action; or
- (2) intervene in an action brought by or on behalf of the victim.

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

Pursuant to Ind. Code Ann. § 35-41-4-2(c) (Periods of limitation), no statute of limitations applies to criminal prosecutions of Class A felonies (for a crime committed before July 1, 2014), or a Level 1 or 2 felony (for a crime committed after June 30, 2014), such as violations of Ind. Code Ann. § 35-42-3.5-1(b) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) and, when aggravating factors are present, Ind. Code Ann. § 35-42-4-9(a) (Sexual misconduct with a minor).

Pursuant to Ind. Code Ann. § 35-41-4-2(m), a statute of limitations applies to sex offenses listed within IC 11-8-8-4.5 (sex offender defined) if the offense is committed against a child. The case must be brought within 10 years of the offense, or within 4 years of when the victim gains their dependence from the alleged offender, “whichever occurs later.” There are two exceptions to this rule. The first is for sex offenses that are Class A felonies (if committed prior to July 1, 2014), Level 1 or Level 2 felonies (if committed after June 30, 2014); actions for these offenses may be brought at any time. The second exception is for actions brought under Ind. Code Ann. §§ 35-42-4-3(a) (Child molesting), 35-42-4-5 (Vicarious sexual gratification), 35-42-4-6 (Child solicitation), 35-42-4-7 (Child seduction), and 35-46-1-3 (Incest). These cases may be brought until the victim reaches 31 years of age. Ind. Code Ann. § 35-41-4-2(e).

Pursuant to Ind. Code Ann. § 35-41-4-2(a)(1), a statute of limitations of 5 years applies to criminal prosecutions of Level 4, Level 5, or Level 6 felonies, such as violations of Ind. Code Ann. § 35-45-9-3 (Participation in

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<sup>156</sup> Ind. Code Ann § 5-2-6-25(a) establishes the human trafficking prevention and victim assistance fund “for the purpose of providing funds for: 1) human trafficking victim services; and 2) human trafficking prevention programs provided by community based organizations. Money in the fund can only be used to carry out the purpose of the fund.”

criminal organization; offense), § 35-45-9-5 (Criminal organization recruitment), § 35-45-6-2(1) (Corrupt business influence), and § 35-45-15-5 (Money laundering). Pursuant to Ind. Code Ann. § 35-41-4-2(a)(2), a statute of limitations of 2 years applies to criminal prosecutions for any misdemeanor, such as Ind. Code Ann. § 35-42-4-13(c) (Inappropriate communication with a child) and § 35-45-4-3<sup>157</sup> (Making an unlawful proposition).

For civil claims, a 2-year statute of limitations, running from the date of the offender's conviction, applies to domestic minor sex trafficking victim's civil claims for damages under Ind. Code Ann. § 35-42-3.5-3(a) (Civil cause of action). Ind. Code Ann. § 35-42-3.5-3(b).

- 5.11.1 Recommendation: Amend Ind. Code Ann. § 35-41-4-2(e) (Periods of limitation) to include Ind. Code Ann. § 35-42-3.5-1(a) and (d) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) as an offense for which prosecution is not barred until the victim of the offense reaches the age of 31.<sup>158</sup>
- 5.11.2 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-3 (Civil cause of action) to extend the statute of limitations for civil claims for domestic minor sex trafficking victims.

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<sup>157</sup> See *supra* note 49.

<sup>158</sup> The recommendations 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.*

Pursuant to Ind. Code Ann. § 5-2-1-9(a)(10) (Implementation of chapter – Town marshal basic training program – Police chief executive training), which discusses mandatory training for law enforcement officers, the Indiana Law Enforcement Training Board is required to provide the following:

Minimum standards for a course of study on human and sexual trafficking that must be required for each person accepted for training at a law enforcement training school or academy and for in service training programs for law enforcement officers. The course must cover the following topics:

- (A) Examination of the human and sexual trafficking laws (IC 35-42-3.5).
- (B) Identification of human and sexual trafficking.
- (C) Communicating with traumatized persons.
- (D) Therapeutically appropriate investigative techniques.
- (E) Collaboration with federal law enforcement officials.
- (F) Rights of and protections afforded to victims.
- (G) Providing documentation that satisfies the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons (Form I-914, Supplement B) requirements established under federal law.
- (H) The availability of community resources to assist human and sexual trafficking victims.

A law enforcement officer appointed after June 30, 1993 may not “(1) make an arrest; (2) conduct a search or a seizure of a person or property; or (3) carry a firearm” unless they complete basic training requirements. Ind. Code Ann. § 5-2-1-9(d).<sup>159</sup>

Police reserve officers must also receive training on human trafficking. Ind. Code Ann. § 36-8-3-20(k)<sup>160</sup> (Police reserve officers) states,

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<sup>159</sup> The text of Ind. Code Ann. § 5-2-1-9 cited here and elsewhere in this report includes amendments made by the enactment of Senate Enrolled Act 185 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

After June 30, 2015, a police reserve officer who has satisfactorily completed pre-basic training and has been appointed to a law enforcement department or agency on either a full-time or part-time basis is not eligible for continued employment unless the police reserve officer satisfactorily completes the mandatory inservice training requirements established by rules adopted by the law enforcement training board (created by IC 5-2-1-3). Inservice training must include training in interacting with persons with mental illness, addictive disorders, intellectual disabilities, autism, developmental disabilities, and Alzheimer's disease or related senile dementia, to be provided by persons approved by the secretary of family and social services and the board. The inservice training must also concern human and sexual trafficking and high risk missing persons (as defined in IC 5-2-17-1) . . . .

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

Single party consent to audiotaping is permitted. Pursuant to Ind. Code Ann. § 35-33.5-5-4(a)(1) (Civil remedies), “[a] person whose communications are intercepted, disclosed, or used in violation of this article: (1) has a civil cause of action against a person who intercepts, discloses, uses, or procures another person to intercept, disclose, or use a communication in violation of this article.” However, pursuant to Ind. Code Ann. § 35-31.5-2-176 (Definitions), “[i]nterception,” for purposes of IC 35-33.5, means the intentional recording or acquisition of the contents of an electronic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article.”

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

In general, an application for a warrant for intercepting electronic communications must be in writing and include, among other things, pursuant to Ind. Code Ann. § 35-33.5-2-2(a)(2)(A) (Contents of application), “(2) An affidavit setting forth the facts relied upon by an applicant to show why a warrant should be issued or an extension granted, including the following: (A) Facts establishing probable cause for the belief that a designated offense allegedly has been, is being, or may be committed.”

“Designated offense” is defined in Ind. Code Ann. § 35-31.5-2-91 (Designated offense) “for purposes of IC 35-33.5” as including “human and sexual trafficking crimes under IC 35-42-3.5,” as well as Ind. Code Ann. § 35-42-4-6 (Child solicitation). Notably, Ind. Code Ann. § 35-44-4-2 (Prostitution), § 35-45-4-3<sup>161</sup> (Making an unlawful proposition), and § 35-45-4-4 (Promoting prostitution) are not included as designated offenses.

Because human and sexual trafficking crimes under Ind. Code Ann. § 35-42-3.5-1 (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) are considered “designated offenses,” wiretapping may be used in domestic minor sex trafficking investigations. Furthermore, the contents and evidence received from the interception may be received into evidence, but only if “each party, not less than fourteen (14) days before the proceeding, has been furnished with a copy of the application, warrant, and any orders for an extension under which the interception was authorized.” Ind. Code Ann. § 35-33.5-5-1 (Disclosure to parties of interception evidence). However, “[t]he fourteen (14) day period may be waived by the court if” certain findings are made by the court. Ind. Code Ann. § 35-33.5-5-1.

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<sup>160</sup> The text of Ind. Code Ann. § 36-8-3-20 cited here and elsewhere in this report includes amendments made by the enactment of House Enrolled Act 1555 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

<sup>161</sup> See *supra* note 49.

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.*

Both Ind. Code Ann. § 35-42-4-6(b), (c) (Child solicitation) and § 35-42-4-13(c) (Inappropriate communication with a child) implicitly prohibit a defense to prosecution based on the use of a law enforcement decoy posing as a minor to investigate these crimes. Ind. Code Ann. § 35-42-4-6(b) uses the phrase “a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age.” Similarly, Ind. Code Ann. § 35-42-4-6(c) uses the phrase “a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age.” Ind. Code Ann. § 35-42-4-13(c) uses the phrase “an individual whom the person believes to be a child less than fourteen (14) years of age.” These phrases indicate that the victim does not have to be a minor.

Additionally, Ind. Code Ann. § 35-41-5-1 (Attempt) prohibits a defense based on the fact that the victim was a law enforcement decoy. It states:

- (a) A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he the person engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted . . . .
- (b) It is no defense that, because of a misapprehension of the circumstances, including the age of the intended victim in a prosecution for attempted child molesting (IC 35-42-4-3), it would have been impossible for the accused person to commit the crime attempted.
- (c) For purposes of subsection (a), a person engages in conduct that constitutes a substantial step if the person, with the intent to commit a sex crime against a child or an individual the person believes to be a child:
  - (1) communicates with the child or individual the person believes to be a child concerning the sex crime; and
  - (2) travels to another location to meet the child or individual the person believes to be a child.

However, a defendant may still be able to assert a defense based on the use of a law enforcement decoy posing as a minor to investigate other buyer-applicable offenses through reverse sting operations, which are the most likely situations in which a defendant would try to use such a defense. Under Ind. Code Ann. § 35-42-3.5-1(d)<sup>162</sup> (Promotion of human trafficking; sexual trafficking of a minor), buyers may be able to successfully raise a defense that a forced minor was not involved, because a violation of this statute only occurs when a person offers to pay money for an individual that the person “knows has been forced into . . . juvenile prostitution.”<sup>163</sup>

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<sup>162</sup> See *supra* note 2.

<sup>163</sup> Ind. Code Ann. § 35-42-3.5-1(d) states,

A person who knowingly or intentionally pays, offers to pay, or agrees to pay money or other property to another person for an individual who the person knows has been forced into:

- (1) forced labor;
  - (2) involuntary servitude; or
  - (3) prostitution or juvenile prostitution;
- commits human trafficking, a Level 5 felony.

See *supra* note 11 for definitions of “juvenile prostitution” and “juvenile prostitution victim.”

Thus, it is unlikely that Ind. Code Ann. § 35-42-3.5-1(d) includes the crime of offering or attempting to buy sex with an individual presumed to be a minor but who is actually an undercover law enforcement officer.

- 6.4.1 Recommendation: Amend Ind. Code Ann. § 35-42-3.5-1(d) (Promotion of human trafficking—sexual trafficking of a minor—human trafficking) to prohibit a defense to prosecution based on the use of a law enforcement decoy posing as a minor.<sup>164</sup>

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

Law enforcement can likely use the Internet to investigate offenses under Ind. Code Ann. § 35-42-4-6(b), (c) (Child solicitation). Ind. Code Ann. § 35-42-4-6(b) makes it illegal if a person 18 or older to “knowingly or intentionally solicits a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in” certain sexual acts.<sup>165</sup> Similarly, Ind. Code Ann. § 35-42-4-6(c) makes it illegal if a person 21 years of age or older to “knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in” certain sexual acts. Ind. Code Ann. § 35-42-4-6(c). Ind. Code Ann. § 35-42-4-6(a) defines “solicit” as, “to command, authorize, urge, incite, request, or advise an individual: . . . (4) by using a computer network (as defined in IC 35-43-2-3(a)); . . . to perform an act described in [Ind. Code Ann. § 35-42-4-6(b) or (c)].”

Both of the above offenses provide enhanced crime classifications in the event the offense is committed through use of a computer network. Ind. Code Ann. § 35-42-4-6(b), (c).

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

Pursuant to Ind. Code Ann. § 10-13-5-5 (Indiana clearing house for information on missing children and missing endangered adults established), Indiana has established the Indiana Clearinghouse for Information on Missing Children and Missing Endangered Adults (Clearinghouse). The Clearinghouse staff’s duties include operating a “central data storage, retrieval, and information distribution system designed for the exchange of information on missing children,”<sup>166</sup> publishing a quarterly directory of missing children, and compiling statistics on missing children cases handled by the Clearinghouse each year. Ind. Code Ann. § 10-13-5-6(b)(2), (7), (8) (Staff appointment – Duties – Indiana data system under IC 10-13-3-35 – Coordination with other agencies – Toll free telephone line – Directory – Statistics).

Law enforcement agencies that receive notification of a missing child are required to prepare a report on the missing child within 5 hours. Ind. Code Ann. §§ 31-36-1-1 (Report by law enforcement agency – Contents), 31-36-1-2 (Time of report).<sup>167</sup> After completing the report, the law enforcement agency must immediately

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<sup>164</sup> The recommendation in this component is predicated upon the recommendation in 2.1 being simultaneously or previously enacted.

<sup>165</sup> See *supra* Component 1.2 for discussion of relevant provisions.

<sup>166</sup> A “missing child” is defined as “a person less than eighteen (18) years of age who: (1) is, or is believed to be: (A) a temporary or permanent resident of Indiana; (B) at a location that cannot be determined by the person’s parent or legal custodian; and (C) reported missing to a law enforcement agency; or (2) is, or is believed to be: (A) a temporary or permanent resident of Indiana; and (B) a victim of the offense of criminal confinement (IC 35-42-3-3) or interference with custody (IC 35-42-3-4).” Ind. Code Ann. § 10-13-5-4.

<sup>167</sup> An exception to the 5 hour reporting requirement applies where the law enforcement agency has received a prior, unrelated notification that the child was missing and the “agency has reason to believe that the child is missing because the child has committed a delinquent act.” Ind. Code Ann. § 31-36-1-2.

forward its contents to, among others, all law enforcement agencies having jurisdiction in areas where the child lives and last was seen, as well as to the Clearinghouse and the National Crime Information Center’s Missing Person File.<sup>168</sup> Ind. Code Ann. § 31-36-1-3<sup>169</sup> (Forwarding of report to law enforcement agencies and other entities). Within 24 hours of receiving notification that a child is missing, the law enforcement agency must begin an investigation. Ind. Code Ann. § 31-36-2-1. When a law enforcement agency is notified that a child previously reported missing has been found, it must promptly notify all those to whom the report was filed pursuant to Ind. Code Ann. § 31-36-1-3 and § 31-36-1-4 (Forwarding of report to child care center, child care home, or school). Ind. Code Ann. § 31-36-2-6 (Duties upon finding child).

Pursuant to Ind. Code Ann. § 5-2-17-7(a) (Information to be provided to person making the missing person report), “A law enforcement agency shall provide a copy of the written informational pamphlet described in IC 10-11-2-34 [“Law enforcement agency” defined] to a person making a report of a missing child less than eighteen (18) years of age at the time the person makes the report.” According to Ind. Code Ann. § 10-11-2-34(b), the written informational pamphlet must contain the following information:

- (1) The twenty-four (24) hour toll free numbers for the following:
  - (A) The National Center for Missing and Exploited Children.
  - (B) The National Runaway Safeline.
- (2) A description of the services that the National Center for Missing and Exploited Children and the National Runaway Safeline provide to families of missing children.

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<sup>168</sup> Pursuant to Ind. Code Ann. § 31-33-18-2 (Disclosure of unredacted material to certain persons), reports of known or suspected child abuse from the Department of child services may be shared with The National Center for Missing and Exploited Children as an exception to general confidentiality requirements.

<sup>169</sup> The text of Ind. Code Ann. § 31-36-1-3 cited here and elsewhere in this report includes amendments made by the enactment of Senate Enrolled Act 447 during the 2017 1st Regular Session 120th General Assembly of the Indiana Legislature (effective July 1, 2017).

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