

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2016 ANALYSIS AND RECOMMENDATIONS UTAH

### 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 and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute 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.*

Utah Code Ann. § 76-5-308.5<sup>2</sup> (Human trafficking of a child—Penalties) establishes a separate criminal offense when minors are victims of human trafficking for sexual exploitation without regard to the use of force, fraud or coercion. Utah Code Ann. § 76-5-308.5 states,

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<sup>1</sup> This report includes legislation enacted as of August 1, 2016.

<sup>2</sup> The text of Utah Code Ann. § 76-5-308.5 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 82 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

- (1) “Commercial sexual activity with a child”<sup>3</sup> means any sexual act with a child, on account of which anything of value is given to or received by any person
- (2) An actor commits human trafficking of a child if the actor recruits, harbors, transports, obtains, patronizes, or solicits a child for sexual exploitation or forced labor.
- (3) (a) . . . .  
(b) Human trafficking of a child for sexual exploitation includes all forms of commercial sexual activity with a child, including sexually explicit performance, prostitution, participation in the production of pornography, performance in a strip club, and exotic dancing or display.
- (4) Human trafficking of a child in violation of this section is a first degree felony.

The penalty for a first degree felony is 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-3-203(1), 76-3-301(1)(a).

Utah’s general human trafficking statute, Utah Code Ann. § 76-5-308(1)<sup>4</sup> (Human trafficking), makes human trafficking for forced sexual exploitation a crime but requires the offender to use “force, fraud, or coercion” in the commission of the crime. Utah Code Ann. § 76-5-308(1) states,

An actor commits human trafficking for forced labor or forced sexual exploitation if the actor recruits, harbors, transports, obtains, patronizes, or solicits a person through the use of force, fraud, or coercion by means of:

- (a) threatening serious harm to, or physical restraint against, that person or a third person;
- (b) destroying, concealing, removing, confiscating, or possessing any passport, immigration document, or other government identification document;
- (c) abusing or threatening abuse of the law or legal process against the person or a third person;
- (d) using a condition of a person being a debtor due to a pledge of the debtor’s personal services or the personal services of a person under the control of the debtor as a security for debt where the reasonable value of the services is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined; or
- (e) using a condition of servitude by means of any scheme, plan, or pattern intended to cause a person to believe that if the person did not enter into or continue in a condition of servitude, that person or a third person would suffer serious harm or physical restraint, or would be threatened with abuse of legal process.

Utah Code Ann. § 76-5-308(2)(b) further expounds by stating that “[h]uman trafficking for forced sexual exploitation includes all forms of forced commercial sexual activity, including forced sexually explicit performance, forced prostitution, forced participation in the production of pornography, forced performance in strip clubs, and forced exotic dancing or display.”

Pursuant to Utah Code Ann. § 76-5-309(1) (Human trafficking and human smuggling—Penalties), “Human trafficking for forced labor and human trafficking for forced sexual exploitation are each a second degree felony, except under Section 76-5-310.” As such, a conviction under Utah Code Ann. § 76-5-308 (Human trafficking), applicable when the victim trafficked for forced sexual exploitation is an adult, is punishable as a

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<sup>3</sup> Pursuant to Utah Code Ann. § 76-10-1301(1), “child” is defined as, “a person younger than 18 years of age.”

<sup>4</sup> The text of Utah Code Ann. § 76-5-308 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 82 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

second degree felony by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5-309(1), 76-3-203(2), 76-3-301(1)(a).

Utah Code Ann. § 76-5-310(1) establishes the crime of aggravated human trafficking for forced sexual exploitation and enhances the penalty for trafficking under certain circumstances, states,

An actor commits aggravated human trafficking for forced labor or forced sexual exploitation or aggravated human smuggling if, in the course of committing a human trafficking for forced labor or for forced sexual exploitation, a violation of Section 76-5-308, or human smuggling offense under Section 76-5-308, the offense:

- (a) results in the death of the trafficked or smuggled person;
- (b) results in serious bodily injury of the trafficked or smuggled person;
- (c) involves:
  - (i) rape under Section 76-5-402;
  - (ii) rape of a child under Section 76-5-402.1;
  - (iii) object rape under Section 76-5-402.2;
  - (iv) object rape of a child under Section 76-5-402.3;
  - (v) forcible sodomy under Section 76-5-403;
  - (vi) sodomy on a child under Section 76-5-403.1;
  - (vii) aggravated sexual abuse of a child under Section 76-5-404.1; or
  - (viii) aggravated sexual assault under 76-5-405;
- (d) involves ten or more victims in a single episode of human trafficking or human smuggling; or
- (e) involves a victim who is held against the victim's will for longer than 30 consecutive days.

A conviction under § 76-5-310 is punishable as a first degree felony by 5 years to life imprisonment and a possible fine not to exceed \$10,000.<sup>5</sup> Utah Code Ann. §§ 76-5-310(4)(a), 76-3-203(1), 76-3-301(1)(a).

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.*

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

1. Under Utah Code Ann. § 76-10-1306(1)(b) (Aggravated exploitation of prostitution), a person who commits the act of exploiting prostitution<sup>6</sup> will be guilty of aggravated exploitation if “the person procured,

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<sup>5</sup> Utah Code Ann. § 76-3-301(2) (Fines of persons) provides, “This section does not apply to a corporation, association, partnership, government, or governmental instrumentality.” Utah Code Ann. § 76-3-302 (Fines of corporations, associations, partnerships, or government instrumentalities) provides,

A corporation, association, partnership, or governmental instrumentality shall pay a fine for an offense defined in this code for which no special corporate fine is specified. The fine shall not exceed:

- (1) \$20,000 for a felony conviction;
- (2) \$10,000 for a class A misdemeanor conviction;
- (3) \$5,000 for a class B misdemeanor conviction; and
- (4) \$1,000 for a class C misdemeanor conviction or for an infraction conviction.

<sup>6</sup> Utah Code Ann. § 76-10-1305(1) (Exploiting Prostitution) states,

- (1) A person is guilty of exploiting prostitution if he:

transported, or persuaded or with whom he shares the proceeds of prostitution is under eighteen years of age.” A conviction under Utah Code Ann. § 76-10-1306(1)(b) is punishable as a second degree felony by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-10-1306(2), 76-3-203(2), 76-3-301(1)(a).

2. Utah Code Ann. § 76-5-404.1(4)(i) (Sexual abuse of a child—Aggravated sexual abuse of a child) states the following:

A person commits aggravated sexual abuse of a child when in conjunction with the offense [of sexual abuse under Utah Code Ann. § 76-5-404.1(2)<sup>7</sup>] any of the following circumstances have been charged and admitted or found true in the action for the offense:

- (i) the accused encouraged, aided, allowed, or benefited from acts of prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person.

Utah Code Ann. § 76-5-404.1(4) applies only where the victim is under the age of 14.<sup>8</sup> Utah Code Ann. § 76-5-404.1(1). A conviction under Utah Code Ann. § 76-5-404.1(4) is punishable as a first degree felony by 15 years to life imprisonment, unless the defendant “caused serious bodily injury” during the commission of the crime or has a prior conviction for a “grievous sexual offense,” in which case a conviction is punishable by life imprisonment without the possibility of parole. Utah Code Ann. § 76-5-404.1(5). However, offenders who have not been previously convicted of a “grievous sexual offense,” even those who have “caused serious bodily injury” during the commission of aggravated sexual abuse of a child, are eligible to receive lesser sentences<sup>9</sup> if the court determines that it “is in the interests of justice” and states

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- (a) procures an inmate for a house of prostitution or place in a house of prostitution for one who would be an inmate;
  - (b) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;
  - (c) transports a person into or within this state with a purpose to promote that person’s engaging in prostitution or procuring or paying for transportation with that purpose;
  - (d) not being a child or legal dependent of a prostitute, shares the proceeds of prostitution with a prostitute pursuant to their understanding that he is to share therein; or
  - (e) owns, controls, manages, supervises, or otherwise keeps, alone or in association with another, a house of prostitution or a prostitution business.

<sup>7</sup> Utah Code Ann. § 76-5-404.1(2) provides,

A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

<sup>8</sup> Pursuant to Utah Code Ann. § 76-5-404.1(1)(b), “‘Child’ means an individual under the age of 14.”

<sup>9</sup> Utah Code Ann. § 76-5-404.1(6) specifically provides,

If, when imposing a sentence under Subsection (5)(a) [aggravated sexual abuse of a child] or (b) [aggravated sexual abuse of a child causing serious bodily injury], a court finds that a lesser term than the term described in Subsection (5)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

- (a) for purposes of Subsection (5)(b), 15 years and which may be for life;
- (b) for purposes of Subsection (5)(a) or (b);
  - (i) ten years and which may be for life; or

those reasons on the record. Utah Code Ann. § 76-5-404.1(6). The defendant is also subject to a possible fine not to exceed \$10,000. Utah Code Ann. § 76-3-301(1)(a).

3. Utah Code Ann. § 76-5b-201 (Sexual exploitation of a minor—Offenses) criminalizes a variety of conduct related to the sexual exploitation of a minor through child pornography. Specifically, Utah Code Ann. § 76-5b-201(1) provides the following:

A person is guilty of sexual exploitation of a minor:

(a) when the person:

- (i) knowingly produces, possesses, or possesses with intent to distribute child pornography;<sup>10</sup> or
  - (ii) intentionally distributes or views child pornography; or
- (b) if the person is a minor's parent or legal guardian and knowingly consents to or permits the minor to be sexually exploited as described in Subsection (1)(a).

A conviction under this statute is punishable as a second degree felony by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5b-201(2), 76-3-203(2), 76-3-301(1)(a).

4. Utah Code Ann. § 76-10-1303 (Patronizing a prostitute) states,

(1) A person is guilty of patronizing a prostitute when the person:

- (a) pays or offers or agrees to pay another person a fee, or the functional equivalent of a fee, for the purpose of engaging in an act of sexual activity; or
- (b) enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

(2) Patronizing a prostitute is a class B misdemeanor, except as provided in Subsection (3) or (4) and in Section 76-10-1309.

(3) A violation of this section that is preceded by a conviction under this section or a conviction under local ordinance adopted under Section 76-10-1307 is a class A misdemeanor.

(4) If the patronizing of a prostitute under Subsection (1)(a) involves a child as the other person, a violation of Subsection (1)(a) is a third degree felony.

A third degree felony is punishable by up to 5 years' imprisonment and a possible fine not exceeding \$5,000. Utah Code Ann. §§ 76-3-203(3), 76-3-301(1)(b).

5. Utah Code Ann. § 76-10-1313 (Sexual solicitation—Penalty) makes it a crime when a person,

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(ii) six years and which may be for life.

<sup>10</sup> Utah Code Ann. § 76-5b-103(1) (Definitions) defines “child pornography” as

any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

- (a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (b) the visual depiction is of a minor engaging in sexually explicit conduct; or
- (c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

- (1) (a) offers or agrees to commit any sexual activity with another person for a fee, or fee the functional equivalent of a fee;
- (b) pays or offers or agrees to pay a fee to another person to commit any sexual activity; or
- (c) with intent to engage in sexual activity for a fee or to pay another person to commit any sexual activity for a fee engages in, offers or agrees to engage in, or requests or directs another to engage in any of the following acts:
  - (i) exposure of a person's genitals, the buttocks, the anus, the pubic area, or the female breast below the top of the areola;
  - (ii) masturbation;
  - (iii) touching of a person's genitals, the buttocks, the anus, the pubic area, or the female breast; or
  - (iv) any act of lewdness.

....

(4) If a person commits an act of sexual solicitation and the person solicited is a child, the offense is a third degree felony if the solicitation does not amount to human trafficking or human smuggling, a violation of Section 76-5-308, or aggravated human trafficking or aggravated human smuggling, a violation of Section 76-5-310.

A third degree felony is punishable by up to 5 years' imprisonment and a possible fine not exceeding \$5,000. Utah Code Ann. §§ 76-3-203(3), 76-3-301(1)(b).

Several other laws, while non-commercial in nature, may also apply in cases of commercial sexual exploitation of a child.<sup>11</sup>

1. Utah Code Ann. § 76-5-401.1(2)<sup>12</sup> (Sexual abuse of a minor) states,

A person commits sexual abuse of a minor if the person is four years or more older than the minor and, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, aggravated sexual assault, in violation of Section 76-5-405, unlawful sexual activity with a minor, in violation of Section 76-5-401, or an attempt to commit any of those offenses, the person touches the anus, buttocks, or any part of the genitals of the minor, or touches the breast of a female minor, or otherwise takes indecent liberties with the minor, or causes a minor to take indecent liberties with the actor or another person, with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

Pursuant to subsection (1), "minor" means "a person who is 14 years of age or older, but younger than 16 years of age, at the time the sexual activity described in this section occurred." A conviction under this statute is punishable as a Class A misdemeanor by imprisonment up to 1 year, a possible fine not to exceed \$2,500 unless it is a violation of subsection (3)(b), and is not subject to registration under Subsection 77-41-102(17)(a)(iv) on a first offense if the offender was younger than 21 years of age at the time of the offense. Utah Code Ann. §§ 76-5-401.1(3), 76-3-204(1), 76-3-301(1)(c).

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<sup>11</sup> Utah Code Ann. § 76-5-415 (Educator's license subject to action for violation of this part) states, "Commission of any offense under this Title 76, Chapter 5, Part 4, Sexual Offenses, by an educator as defined in Section 53A-6-103, is grounds under Section 53A-6-501 for disciplinary action against the educator, including revocation of the educator's license."

<sup>12</sup> The text of Utah Code Ann. § 76-5-401.1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 179 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

A violation of subsection 3(b) is a third degree felony, which applies if “the actor at the time of the commission of the offense: (i) is 18 years of age or older; (ii) held a position of special trust as a teacher or a volunteer at a school, as that position is defined in Subsection 76-5-404.1(1)(c)(xix);<sup>13</sup> and (iii) committed the offense against an individual who at the time of the offense was enrolled as a student at the school where the actor was employed or was acting as a volunteer.”

2. Utah Code Ann. § 76-5-404.1(4) (Sexual abuse of a child—Aggravated sexual abuse of a child) states the following:

A person commits aggravated sexual abuse of a child when in conjunction with the offense [of sexual abuse under Utah Code Ann. § 76-5-404.1(2)<sup>14</sup>] any of the following circumstances have been charged and admitted or found true in the action for the offense:

(a) the offense was committed by the use of a dangerous weapon as defined in Section 76-1-601, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnaping;

....

(d) the accused used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition during the course of the offense;

(e) the accused, prior to sentencing for this offense, was previously convicted of any felony, or of a misdemeanor involving a sexual offense;

(f) the accused committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct;

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<sup>13</sup> Utah Code Ann. §§ 76-5-404.1(1)(c) defines a “position of special trust” as:

- (i) an adoptive parent;
- (ii) an athletic manager who is an adult;
- (iii) an aunt;
- (iv) a babysitter;
- (v) a coach;
- (vi) a cohabitant of a parent if the cohabitant is an adult;
- (vii) a counselor;
- (viii) a doctor or physician;
- (ix) an employer;
- (x) a foster parent;
- (xi) a grandparent;
- (xii) a legal guardian;
- (xiii) a natural parent;
- (xiv) a recreational leader who is an adult;
- (xv) a religious leader;
- (xvi) a sibling or a step-sibling who is an adult;
- (xvii) a scout leader who is an adult;
- (xviii) a stepparent;
- (xix) a teacher or any other person employed by or volunteering at a public or private elementary school or secondary school, and who is 18 years of age or older;
- (xx) an uncle;
- (xxi) a youth leader who is an adult; or any person in a position of authority, other than those persons listed in Subsections (1)(c)(i) through (xxi), which enables the person to exercise undue influence over the child.

<sup>14</sup> See *supra* note 7.

(g) the accused committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense;

....

Utah Code Ann. § 76-5-404.1(4) applies only where the victim is under the age of 14.<sup>15</sup> Utah Code Ann. § 76-5-404.1(1). A conviction under Utah Code Ann. § 76-5-404.1(4) is punishable as a first degree felony<sup>16</sup> by 15 years to life imprisonment, unless the defendant “caused serious bodily injury” during the commission of the crime or has a prior conviction for a “grievous sexual offense,” in which case a conviction is punishable by life imprisonment without the possibility of parole. Utah Code Ann. § 76-5-404.1(5). However, offenders who have not been previously convicted of a “grievous sexual offense,” even those who have “caused serious bodily injury” during the commission of aggravated sexual abuse of a child, are eligible to receive lesser sentences<sup>17</sup> if the court determines that it “is in the interests of justice.” Utah Code Ann. § 76-5-404.1(6). Additionally, the court may order the defendant to pay a fine not to exceed \$10,000. Utah Code Ann. § 76-3-301(1)(a).

3. Utah Code Ann. § 76-5-401.2(2) (Unlawful sexual conduct with a 16 or 17 year old) states,
  - (a) A person commits unlawful sexual conduct with a minor [who is 16 or 17 years old] if, under circumstances not amounting to [rape, object rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, or any attempt to commit one of these offenses], a person who is:
    - (i) seven or more years older but less than 10 years older than the minor at the time of the sexual conduct engages in any conduct listed in Subsection (2)(b), and the person knew or reasonably should have known the age of the minor; or
    - (ii) 10 or more years older than the minor at the time of the sexual conduct and engages in any conduct listed in Subsection (2)(b).
  - (b) As used in Subsection (2)(a), "sexual conduct" refers to when the person:
    - (i) has sexual intercourse with the minor;
    - (ii) engages in any sexual act with the minor involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant;

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<sup>15</sup> See *supra* note 8.

<sup>16</sup> Pursuant to Utah Code Ann. § 76-3-406 (Crimes for which probation, suspension of sentence, lower category of offense, or hospitalization may not be granted),

Notwithstanding Sections 76-3-201 and 77-18-1 and Title 77, Chapter 16a, Commitment and Treatment of Mentally Ill Persons, except as provided in Section 76-5-406.5, probation shall not be granted, the execution or imposition of sentence shall not be suspended, the court shall not enter a judgment for a lower category of offense, and hospitalization shall not be ordered, the effect of which would in any way shorten the prison sentence for any person who commits a capital felony or a first degree felony involving:

....

(6) Section 76-5-402.1, rape of a child;

....

(8) Section 76-5-402.3, object rape of a child;

....

(10) Section 76-5-403.1, sodomy on a child;

....

(12) Subsections 76-5-404.1(4) and (5), aggravated sexual abuse of a child;

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<sup>17</sup> See *supra* note 9.



(iii) causes the penetration, however slight, of the genital or anal opening of the minor by any foreign object, substance, instrument, or device, including a part of the human body, with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant; or

....

A conviction under Utah Code Ann. § 76-5-401.2(2)(b)(i)–(iii) is punishable as a third degree felony by imprisonment up to 5 years and a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-5-401.2(4), 76-3-203(3), 76-3-301(1)(b), (c), 76-3-204(1).

4. Pursuant to Utah Code Ann. § 76-5-402.1(1), (2) (Rape of a child), any person who engages in “sexual intercourse with a child under the age of 14” is guilty of a first degree felony.<sup>18</sup> A conviction under this statute is punishable by 25 years to life imprisonment. Utah Code Ann. § 76-5-402.1(2)(a). However, if the “trier of fact finds that . . . during the commission of the rape of a child, the defendant caused serious bodily injury to another or . . . was previously convicted of a grievous sexual offense,” the punishment is enhanced to life imprisonment without the possibility of parole. Utah Code Ann. § 76-5-402.1(2)(b). The defendant is also subject to a possible fine not to exceed \$10,000. Utah Code Ann. § 76-3-301(1)(a).

5. Utah Code Ann. § 76-5-402.3(1) (Object rape of a child—Penalty) states,

A person commits object rape of a child when the person causes the penetration or touching, however slight, of the genital or anal opening of a child who is under the age of 14 by any foreign object, substance, instrument, or device, not including a part of the human body, with intent to cause substantial emotional or bodily pain to the child or with the intent to arouse or gratify the sexual desire of any person.

A conviction under this statute is punishable as a first degree felony by imprisonment for 25 years to life imprisonment.<sup>19</sup> Utah Code Ann. § 76-5-402.3(2). However, if the “trier of fact finds that . . . during the commission of the object rape of a child, the defendant caused serious bodily injury to another or . . . was previously convicted of a grievous sexual offense,” the punishment is enhanced to life imprisonment without the possibility of parole. Utah Code Ann. § 76-5-402.3(2). The defendant is also subject to a possible fine not to exceed \$10,000. Utah Code Ann. § 76-3-301(1)(a).

6. Utah Code Ann. § 76-9-702.5(1) (Lewdness involving a child) states,

A person is guilty of lewdness involving a child if the person under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, sexual abuse of a child, aggravated sexual abuse of a child, or an attempt to commit any of those offenses, intentionally or knowingly does any of the following to, or in the presence of, a child who under 14 years of age:

(a) performs an act of sexual intercourse or sodomy;

....

(d) under circumstances not amounting to sexual exploitation of a child under Section 76-5b-201 causes a child under the age of 14 to expose his or her genitals, anus, or breast, if female, to the actor, with the intent to arouse or gratify the sexual desire of the actor or the child; or

(e) performs any other act of lewdness.

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<sup>18</sup> See *supra* note 16.

<sup>19</sup> See *supra* note 16.

A conviction under this statute is punishable as a Class A misdemeanor by 1 year imprisonment and a possible fine not to exceed \$2,500. Utah Code Ann. §§ 76-9-702.5(2), 76-3-204(1), 76-3-301(1)(c). However, if the defendant is a “a sex offender as defined in [Utah Code Ann. § 77-27-21.<sup>20</sup> (Sex offender restrictions)]; or has been previously convicted of a violation of this section [Utah Code Ann. § 76-9-702.5(1)],” it is a third degree felony punishable by imprisonment up to 5 years and a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-9-702.5(2), 76-3-203(3), 76-3-301(1)(b).

7. Utah Code Ann. § 76-5-401(1), (2) (Unlawful sexual activity with a minor—Elements—Penalties—Evidence of age raised by defendant) makes it unlawful for a defendant to engage in any “unlawful sexual activity with a minor,” who is 14–15 years of age

if under circumstances not amounting to [rape, object rape, forcible sodomy, or aggravated sexual assault], the actor:

- (a) has sexual intercourse with the minor;
- (b) engages in any sexual act with the minor involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant; or
- (c) causes the penetration, however slight, of the genital or anal opening of the minor by any foreign object, substance, instrument, or device, including a part of the human body, with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant.

A conviction under this statute is punishable as a third degree felony by imprisonment up to 5 years and a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-5-401(3), 76-3-203(3), 76-3-301(1)(b). However, if “the defendant establishes by a preponderance of the evidence the mitigating factor that the defendant is less than four years older than the minor at the time the sexual activity occurred,” the offense is punishable as a Class B misdemeanor punishable by imprisonment up to 6 months, a possible fine not to exceed \$1,000, and not subject to registration under Subsection 77-41-102(17)(a)(iii)<sup>21</sup>. Utah Code Ann. §§ 76-5-401(3), 76-3-204(2), 76-3-301(1)(d).

8. Utah Code Ann. § 76-4-401(2) (Enticing a minor—Elements—Penalties) states,

- (a) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to solicit, seduce, or entice a minor, or to attempt to solicit, seduce, lure, or entice a minor, or other person that the actor believes to be a minor to engage in sexual activity which is a violation of state criminal law.
- (b) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to:
  - (i) initiate contact with a minor or a person the actor believes to be a minor; and
  - (ii) subsequently [initiates contact with a minor or a person the actor believes to be a minor], by any electronic or written means, solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice the minor or a person the actor believes to be the minor to engage in any sexual activity which is a violation of state criminal law.

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<sup>20</sup> See *infra* Component 2.10.

<sup>21</sup> The text of Utah Code Ann. § 76-5-401 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 179 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

Penalties for convictions under Utah Code Ann. § 76-4-401(2) are staggered according to the crime the defendant intended to commit. Utah Code Ann. § 76-4-401(4). Generally, a conviction is a felony one degree lower than the felony intended to be committed (e.g., a defendant who enticed a minor with the intent to commit a second degree felony will be convicted of a third degree felony, etc.). Utah Code Ann. § 76-4-401(4). However, in instances of enticement of a first degree felony and where the defendant also has a prior conviction under this statute, the defendant will be guilty of a first degree felony punishable by 3 years to life imprisonment. Utah Code Ann. § 76-4-401(4)(a)(ii).

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

Utah Code Ann. § 76-10-1302(1) (Prostitution) does not refer to § 76-5-308.5<sup>22</sup> (Human trafficking of a child—Penalties) or other provisions of the human trafficking law when the person charged is a minor.

Utah Code Ann. § 76-10-1302(3)(b)–(c)<sup>23</sup> does, however, identify children involved in prostitution-related activities as children qualified to be referred to and receive services through the Division of Child and Family Services.

- 1.3.1 Recommendation: Amend § 76-10-1302 (Prostitution) to refer to § 76-5-308.5 (Human trafficking of a child—Penalties) to clarify that commercially sexually exploited minors are victims of sex trafficking

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

Utah's Pattern of Unlawful Activity Act, is codified at Utah Code Ann. § 76-10-1601 et. seq. Pursuant to Utah Code Ann. § 76-10-1603 (Unlawful acts),

(1) It is unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of unlawful activity in which the person has participated as a principal, to use or invest, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or the establishment or operation of, any enterprise.

(2) It is unlawful for any person through a pattern of unlawful activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) It is unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.

(4) It is unlawful for any person to conspire to violate any provision of Subsection (1), (2), or (3).

For purposes of the Pattern of Unlawful Activity Act, Utah Code Ann. § 76-10-1602(2) (Definitions) defines a “pattern of unlawful activity” as

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<sup>22</sup> See *supra* note 2.

<sup>23</sup> The text of Utah Code Ann. § 76-10-1302 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 206 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

[E]ngaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise. At least one of the episodes comprising a pattern of unlawful activity shall have occurred after July 31, 1981. The most recent act constituting part of a pattern of unlawful activity as defined by this part shall have occurred within five years of the commission of the next preceding act alleged as part of the pattern.

The state's racketeering provisions include Utah's general human trafficking and CSEC offenses as predicate offenses for forfeiture, but the specific offense of Utah Code Ann. § 76-5-308.5<sup>24</sup> (Human trafficking of a child—Penalties) is not included. Utah Code Ann. § 76-10-1602(4). Here, "unlawful activity," is defined in Utah Code Ann. § 76-10-1602(4) as "to directly engage in conduct or to solicit, request, command, encourage, or intentionally aid another person to engage in conduct which would constitute any offense described by" certain listed crimes, "or to attempt or conspire to engage in an act which would constitute any of those offenses, regardless of whether the act is in fact charged or indicted by any authority or is classified as a misdemeanor or a felony." The listed crimes include violations of Utah Code Ann. § 76-5b-201 (Sexual exploitation of a minor—Offenses), § 76-5-308<sup>25</sup> (Human trafficking), § 76-5-309 (Human smuggling), § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties), § 76-10-1302 (Prostitution), § 76-10-1304 (Aiding prostitution), § 76-10-1305 (Exploiting prostitution), and § 76-10-1306 (Aggravated exploitation of prostitution). Utah Code Ann. § 76-10-1602(4)(n), (o), (dddd)–(ffff).

Based on this definition of unlawful activity, some acts of commercial sexual exploitation constitute predicate crimes under the racketeering law, making it available for combatting criminal enterprises that engage in domestic minor sex trafficking. A conviction under Utah Code Ann. § 76-10-1603 is a second degree felony punishable by imprisonment for 1–15 years and a possible fine not to exceed \$10,000 or any other amount not exceeding twice the proceeds the trafficker obtained from the commission of the crime. Additionally, a conviction subjects the offender to asset forfeiture. Pursuant to Utah Code Ann. § 76-10-1603.5(1), traffickers convicted under Utah Code Ann. § 76-10-1603, a section of Utah's Pattern of Unlawful Activity Act, may potentially forfeit real property, tangible and intangible property, property used to facilitate a violation of Sections 76-10-1204, 76-10-1205, 76-10-1206, or 76-10-1222. Utah Code Ann. § 24-4-102.

The court may order all the criminally related assets in the "unlawful activity" to be forfeited under Utah Code Ann. § 76-10-1603. Under Utah Code Ann. § 76-10-1603.5(3)(a), the court may order restitution for "any victim or rightful owner of property obtained, directly or indirectly, from: (i) the conduct constituting the pattern of unlawful activity; or (ii) any act or conduct constituting the pattern of unlawful activity that is proven as part of the violation of any provision of Section 76-10-1603."

Through a violation of the Unlawful Acts Act (Utah Code Ann. § 76-10-1603) "the court may order the person found guilty of the felony to pay to the state, if the attorney general brought the action, or to the county, if the county attorney or district attorney brought the action, the costs of investigating and prosecuting the offense and the costs of securing the forfeitures provided for in this section." Utah Code Ann. § 76-10-1603.5(1). Additionally, under the general forfeiture law, Utah Code Ann. § 24-1-101 through § 24-4-118, "property may be seized" by the court. Utah Code Ann. § 24-4-102.

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<sup>24</sup> See *supra* note 2

<sup>25</sup> See *supra* note 4.

Finally, where the alleged enterprise is also a criminal street gang, additional penalties may apply. Utah Code Ann. § 76-3-203.1 (Offenses committed in concert with two or more persons or in relation to a criminal street gang—Notice—Enhanced penalties), which provides for enhanced penalties in the commission of certain offenses outlined in Utah Code Ann. § 76-3-203.1(5),<sup>26</sup> includes the following:

- ....
- (d) kidnapping and related offenses under Title 76, Chapter 5, Part 3, Kidnapping, Trafficking, and Smuggling;
- (e) any felony sexual offense under Title 76, Chapter 5, Part 4, Sexual Offenses;
- (f) sexual exploitation of a minor as defined in Section 76-5b-201;
- ....
- (r) pornographic and harmful materials and performance offenses under Title 76, Chapter 10, Part 12, Pornographic and Harmful Materials and Performances;
- (s) prostitution and related offenses under Title 76, Chapter 10, Part 13, Prostitution;
- ....
- (u) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;
- ....
- (w) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act;
- ....

Utah Code Ann. § 76-3-203.1 provides in part,

- ....
- (2) A person who commits any offense listed in Subsection (5) is subject to an enhanced penalty for the offense as provided in Subsection (4) if the trier of fact finds beyond a reasonable doubt that the person acted:
  - (a) in concert with two or more persons;<sup>27</sup>
  - (b) for the benefit of, at the direction of, or in association with any criminal street gang<sup>28</sup> as defined in Section 76-9-802; or

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<sup>26</sup> The text of Utah Code Ann. § 76-3-203.1(5) cited here and elsewhere in this report includes amendments made by Senate Bill 124 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>27</sup> Utah Code Ann. § 76-3-203.1(1)(b), (c) (Offenses committed in concert with two or more persons or in relation to a criminal street gang—Notice—Enhanced penalties) states,

- (b) “In concert with two or more persons” means:
  - (i) the defendant was aided or encouraged by at least two other persons in committing the offense and was aware of this aid or encouragement; and
  - (ii) each of the other persons:
    - (A) was physically present; or
    - (B) participated as a party to any offense listed in Subsection (5).
- (c) “In concert with two or more persons” means, regarding intent:
  - (i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and
  - (ii) a minor is a party if the minor’s actions would cause the minor to be a party if the minor were an adult.

<sup>28</sup> Utah Code Ann. § 76-9-802(1) (Definitions) defines “criminal street gang” as

(c) to gain recognition, acceptance, membership, or increased status with a criminal street gang as defined in Section 76-9-802.

. . . .

(6) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

Pursuant to Utah Code Ann. § 76-3-203.1(4) enhanced penalties will be classified one level higher than the original penalty, unless the original penalty was classified as a first degree felony.

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an organization, association in fact, or group of three or more persons, whether operated formally or informally:

- (a) that is currently in operation;
- (b) that has as one of its primary activities the commission of one or more predicate gang crimes;
- (c) that has, as a group, an identifying name or identifying sign or symbol, or both; and
- (d) whose members, acting individually or in concert with other members, engage in or have engaged in a pattern of criminal gang activity.

### ***Legal Components:***

- 2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts with a minor.*
  - 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
  - 2.3 *Solicitation laws differentiate buying sex acts with an adult and buying sex acts with a minor under 18.*
  - 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
  - 2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
  - 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
  - 2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*
  - 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
  - 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*
  - 2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*
- 

### ***Legal Analysis:***

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

Utah Code Ann. § 76-5-308.5(2)<sup>29</sup> (Human trafficking of a child—Penalties), Utah Code Ann. § 76-5-308<sup>30</sup> (Human trafficking), and Utah Code Ann. § 76-5-310(2) (Aggravated human trafficking and aggravated human smuggling—Penalties) apply to buyers of sex with minors, as the statutes expressly criminalize the act of patronizing or soliciting a minor for sexual acts. Additionally, buyers may also be offenders under Utah Code Ann. § 76-5-308.5(2) following federal precedent through the term “obtain.”<sup>31</sup> Specifically, Utah Code Ann. §

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<sup>29</sup> See *supra* note 2.

<sup>30</sup> See *supra* Component 1.1 for a discussion of relevant provisions. See *supra* note 4.

<sup>31</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers (*United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F. 3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.” *Id.* at Sec. 109. The Eighth Circuit decision in *United States v. Jungers* and the federal sex trafficking law as amended by the Justice for Victims of Trafficking Act establish persuasive authority when state courts interpret the string of verbs constituting prohibited conduct in state sex

76-5-308.5(2) states, “An actor commits human trafficking of a child if the actor . . . obtains, patronizes, or solicits a child for sexual exploitation . . . .”

A violation of Utah Code Ann. § 76-5-308.5(2) is a first degree felony, punishable by 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-3-203(1), 76-3-301(1)(a). A conviction under Utah Code Ann. § 76-5-308 (Human trafficking), applicable when the victim trafficked for forced sexual exploitation is an adult, is punishable as a second degree felony by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5-309(1), 76-3-203(2), 76-3-301(1)(a). A violation of § 76-5-310 is punishable as a first degree felony by 5 years to life imprisonment and a possible fine not to exceed \$10,000.<sup>32</sup> Utah Code Ann. §§ 76-5-310(4)(a), 76-3-203(1), 76-3-301(1)(a).

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

Buyers face prosecution for buying or soliciting sex acts with a minor under two laws. Buying sex with a minor is criminalized under Utah Code Ann. § 76-10-1303 (Patronizing a prostitute), which states,

- (1) A person is guilty of patronizing a prostitute when the person:
  - (a) pays or offers or agrees to pay another person a fee, or the functional equivalent of a fee for the purpose of engaging in an act of sexual activity; or
  - (b) enters or remains in a house of prostitution for the purpose of engaging in sexual activity.
- (2) Patronizing a prostitute is a class B misdemeanor, except as provided in Subsection (3) or (4) and in Section 76-10-1309 [Enhanced penalties—HIV positive offender].
- ....
- (4) If the patronizing of a prostitute under Subsection (1)(a) involves a child as the other person, a violation of Subsection (1)(a) is a third degree felony.

Soliciting sex acts with a minor is criminalized under Utah Code Ann. § 76-10-1313 (Sexual solicitation—Penalty), which makes it a crime when a person,

- (1) (a) offers or agrees to commit any sexual activity with another person for a fee, or the functional equivalent of a fee(b) pays or offers or agrees to pay a fee to another person to commit any sexual activity; or
- ....

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trafficking laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.

<sup>32</sup> Utah Code Ann. § 76-3-301(2) (Fines of persons) provides, “This section does not apply to a corporation, association, partnership, government, or governmental instrumentality.” Utah Code Ann. § 76-3-302 (Fines of corporations, associations, partnerships, or government instrumentalities) provides,

A corporation, association, partnership, or governmental instrumentality shall pay a fine for an offense defined in this code for which no special corporate fine is specified. The fine shall not exceed:

- (1) \$20,000 for a felony conviction;
- (2) \$10,000 for a class A misdemeanor conviction;
- (3) \$5,000 for a class B misdemeanor conviction; and
- (4) \$1,000 for a class C misdemeanor conviction or for an infraction conviction.



(c) with intent to engage in sexual activity for a fee or to pay another person to commit any sexual activity for a fee engages in, offers or agrees to engage in, or requests or directs another to engage in any of the following acts:

- (i) exposure of a person's genitals, the buttocks, the anus, the pubic area, or the female breast below the top of the areola;
- (ii) masturbation;
- (iii) touching of a person's genitals, the buttocks, the anus, the pubic area, or the female breast; or
- (iv) any act of lewdness.

....

(4) If a person commits an act of sexual solicitation and the person solicited is a child, the offense is a third degree felony if the solicitation does not amount to human trafficking or human smuggling, a violation of Section 76-5-308, or aggravated human trafficking or aggravated human smuggling, a violation of Section 76-5-310.

As third degree felonies, Utah Code Ann. § 76-10-1303 (Patronizing a prostitute) and § 76-10-1313 (Sexual solicitation—Penalty) are punishable by imprisonment up to 5 years and a possible fine not to exceed \$5,000.

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

Under Utah Code Ann. § 76-10-1303(4) (Patronizing a prostitute), patronizing a prostitute for the purchase of commercial sex acts involving a child is a third degree felony. Otherwise, a violation of Utah Code Ann. § 76-10-1303(1)(a) involving paying or offering to pay an adult to engage in sexual activity, or a violation of subsection (b), which makes it a crime when a person “enters or remains in a house of prostitution for the purpose of engaging in sexual activity,” is punishable as a class B misdemeanor. Utah Code Ann. § 76-10-1303(1), (2), (4).

Additionally, Utah Code Ann. § 76-10-1313(4) (Sexual solicitation—Penalty) distinguishes between soliciting sex acts with a minor versus an adult by providing a heightened penalty when the person solicited is a minor. A violation of Utah Code Ann. § 76-10-1313(1) is a third degree felony punishable by imprisonment up to 5 years and a possible fine not to exceed \$5,000.

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

Buyers prosecuted under Utah Code Ann. § 76-5-308.<sup>33</sup> (Human trafficking of a child—Penalties) and Utah Code Ann. § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties) face a first degree felony punishable by 5 years to life imprisonment and a possible fine up to \$10,000. Buyers prosecuted under Utah Code Ann. § 76-10-1303(4) (Patronizing a prostitute) or § 76-10-1313(1) (Sexual solicitation) face third degree felonies punishable by imprisonment up to 5 years and a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-10-1313(4), 76-3-203(3), 76-3-301(1)(b).<sup>34</sup>

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<sup>33</sup> See *supra* note 2.

<sup>34</sup> See *supra* Component 1.2 for a full description of sexual offense laws that may be used to prosecute certain buyers.

Buyers may also be subject to enhanced penalties under certain circumstances. According to Utah’s habitual violent offender<sup>35</sup> statute, buyers who have two prior violent felony convictions are subject to an enhanced penalty if convicted of a third violent felony. Utah Code Ann. § 76-3-203.5(2) (Habitual violent offender—Definition—Procedure—Penalty) states,

If a person is convicted in this state of a violent felony by plea or by verdict and the trier of fact determines beyond a reasonable doubt that the person is a habitual violent offender under this section, the penalty for a:

- (a) third degree felony is as if the conviction were for a first degree felony;
- (b) second degree felony is as if the conviction were for a first degree felony; or
- (c) first degree felony remains the penalty for a first degree penalty except:
  - (i) the convicted person is not eligible for probation; and
  - (ii) the Board of Pardons and Parole shall consider that the convicted person is a habitual violent offender as an aggravating factor in determining the length of incarceration.

Pursuant to Utah Code Ann. § 76-3-203.5(1)(c)(i), a “violent felony” is defined as

any of the following offenses, or any attempt, solicitation, or conspiracy to commit any of the following offenses punishable as a felony:

- ....
- (Q) rape of a child, Section 76-5-402.1;
- (R) object rape, Section 76-5-402.2;
- (S) object rape of a child, Section 76-5-402.3;
- ....
- (W) aggravated sexual abuse of a child or sexual abuse of a child, Section 76-5-404.1;
- ....
- (Y) sexual exploitation of a minor, Section 76-5b-201;
- ....

Furthermore, Utah Code Ann. § 76-3-407(2) (Repeat and habitual sex offenders—Additional prison term for prior felony convictions) states that defendants who are being charged with a sexual offense<sup>36</sup> and have a previous conviction for a sexual offense<sup>37</sup> may be subject to the maximum penalty plus an additional 5 year

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<sup>35</sup> “Habitual violent offender” is defined as “a person convicted within the state of any violent felony and who on at least two previous occasions has been convicted of a violent felony and committed to either prison in Utah or an equivalent correctional institution of another state or of the United States either at initial sentencing or after revocation of probation.” Utah Code Ann. § 76-3-203.5(b).

<sup>36</sup> Utah Code Ann. § 76-3-407(1)(b) defines “sexual offense” as

- (i) an offense that is a felony of the second or third degree, or an attempted offense, which attempt is a felony of the second or third degree, described in Title 76, Chapter 5, Part 4, Sexual Offenses;
- (ii) sexual exploitation of a minor, Section 76-5b-201;
- (iii) a felony offense of enticing a minor over the Internet, Section 76-4-401;
- (iv) a felony attempt to commit an offense described in Subsection (1)(b)(ii) or (iii); or
- (v) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (1)(b)(i) through (iv).

<sup>37</sup> Utah Code Ann. § 76-3-407(1)(a) defines “prior sexual offense” as

- (i) a felony offense described in Title 76, Chapter 5, Part 4, Sexual Offenses;
- (ii) sexual exploitation of a minor, Section 76-5b-201;

penalty for “each conviction of the defendant for a prior sexual offense that arose from a separate criminal episode.” This supplementary term is “in addition to, and consecutive to, any other prison term served by the defendant.” Utah Code Ann. § 76-3-407(3).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C.

§§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>38</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>39</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment with a fine not to exceed \$250,000.<sup>40</sup>

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

Although Utah Code Ann. § 76-4-401(2) (Enticing a minor—Elements—Penalties) is not explicitly commercial in nature, it states,

(a) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to solicit, seduce, lure, or entice a minor, to attempt to solicit, seduce, lure, or entice a minor, or another person that the actor believes to be a minor to engage in any sexual activity which is a violation of state criminal law.

(b) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to:

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(iii) a felony offense of enticing a minor over the Internet, Section 76-4-401;

(iv) a felony attempt to commit an offense described in Subsections (1)(a)(i) through (iii); or

(v) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (1)(a)(i) through (iv).

<sup>38</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>39</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>40</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).

- (i) initiate contact with a minor or a person the actor believes to be a minor; and
- (ii) subsequently to the action under Subsection (2)(b)(i), by any electronic or written means, solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice the minor or a person the actor believes to be the minor to engage in any sexual activity which is a violation of state criminal law.

Penalties for convictions under Utah Code Ann. § 76-4-401(2) are staggered according to the crime the defendant intended to commit. Utah Code Ann. § 76-4-401(4). Generally, a conviction is punishable as a felony one degree lower than the felony enticed. Utah Code Ann. § 76-4-401(4). However, in instances where the defendant with a prior conviction under this statute, enticed a minor to engage in sexual activity, which is a first degree felony, the defendant will be guilty of a first degree felony punishable by 3 years to life imprisonment. Utah Code Ann. § 76-4-401(4)(a)(ii).

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

A mistake of age defense is prohibited under Utah Code Ann. § 76-2-304.5(3)<sup>41</sup> (Mistake as to victim's age is not a defense), which states,

It is not a defense to the crime of aggravated human trafficking or aggravated human smuggling, a violation of Section 76-5-310, or human trafficking of a child, a violation of Section 76-5-308.5,<sup>42</sup> that the actor mistakenly believed the victim to be 18 years of age or older at the time of the alleged offense or was unaware of the victim's true age.

Additionally, under Utah Code Ann. § 76-2-304.5(5) (Mistake as to victim's age is not a defense) there is no mistake of age defense for patronizing a prostitute, aggravated exploitation of a prostitute, or sexual solicitation. Utah Code Ann. § 76-2-304.5(5) states,

It is not a defense to any of the following crimes that the actor mistakenly believed the victim to be 18 years of age or older at the time of the alleged offense or was unaware of the victim's true age:

- (a) patronizing a prostitute, a violation of Section 76-10-1303;
- (b) aggravated exploitation of a prostitute, a violation of Section 76-10-1306; or
- (c) sexual solicitation, a violation of Section 76-10-1313.

Furthermore, Utah Code Ann. § 76-2-304.5(4) states, “[i]t is not a defense to the crime of unlawful sexual activity with a minor, a violation of Subsection 76-5-401.2(2)(a)(ii) [Unlawful conduct with a 16 or 17 year old] that the actor mistakenly believed the victim to be 18 years of age or older at the time of the alleged offense or was unaware of the victim's true age.”<sup>43</sup> This statute only applies where the offender is at least 7 years older than the victim who is 16 or 17. Utah Code Ann. § 76-5-401.2.

Utah Code Ann. § 76-5b-302 (Lack of knowledge of age not a defense) states that “[i]t is not a defense to an offense described in this chapter [Utah Code Ann. § 76-5b-201 (Sexual exploitation of minor—Offenses)] that the accused did not know the age of the victim.”

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<sup>41</sup> The text of Utah Code Ann. § 76-2-304.5 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 105 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>42</sup> See *supra* note 2.

<sup>43</sup> *Id.* at § 76-2-304.5(4).

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

The penalties for Utah Code Ann. § 76-10-1303(4) (Patronizing a prostitute,), § 76-10-1313 (Sexual solicitation—Penalty), § 76-5-308.5<sup>44</sup> (Human trafficking of a child—Penalties), and § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties) are the same for all minors under 18 and not reduced for older minors.

Both Utah Code Ann. § 76-5-308.5 (Human trafficking of a child—Penalties) and § 76-5-310(2) (Aggravated human trafficking and aggravated human smuggling—Penalties) are both first degree felonies, punishable by 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-3-203(1), 76-3-301(1)(a), § 76-5-310.

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

A conviction under either § 76-5-308.5 (Human trafficking of a child—Penalties), Utah Code Ann. § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties), or § 76-5-308 (Human trafficking) is punishable by fines up to \$10,000.<sup>45</sup> Utah Code Ann. §§ 76-5-310(4)(a), 76-5-309(1), 76-3-203(1), 76-3-301(1)(a). Buyers prosecuted under Utah Code Ann. § 76-10-1313(4) (Sexual solicitation) or § 76-10-1303(4) (Patronizing a prostitute) face a possible fine not to exceed \$5,000.

Certain sexual offenses may apply to prosecute buyers in situations of commercial sexual exploitation. Buyers convicted under Utah Code Ann. § 76-5-404.1(2) (Sexual abuse of a child—Aggravated sexual abuse of a child) may be required to pay a fine not to exceed \$10,000. Utah Code Ann. §§ 76-5-404.1(2), (3), 76-3-301(1)(a).

Following any criminal action, the court has the discretion to order the buyer to make restitution to the victim pursuant to Utah Code Ann. § 77-38a-301 (Restitution—Convicted defendant may be required to pay), which authorizes the court to order “a convicted defendant to make restitution.” To the extent that a buyer causes a victim to suffer pecuniary damages,<sup>46</sup> restitution is mandatory. Utah Code Ann. § 77-38a-302(1) (Restitution criteria) states in part, “When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make

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<sup>44</sup> See *supra* note 2.

<sup>45</sup> See *supra* note 5.

<sup>46</sup> Pursuant to Utah Code Ann. § 77-38a-102(6), a victim’s pecuniary damages include

all demonstrable economic injury, whether or not yet incurred, including those which a person could recover in a civil action arising out of the facts or events constituting the defendant’s criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings, including those and other travel expenses reasonably incurred as a result of participation in criminal proceedings, and medical and other expenses, but excludes punitive or exemplary damages and pain and suffering.

The text of Utah Code Ann. § 77-38a-102 cited here and elsewhere in this report includes amendments made by the enactment of House) Bill 404 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

restitution to victims<sup>47</sup> of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition.”

Additionally, Utah’s general forfeiture law applies to property “used to facilitate the commission of a federal or state offense and any proceeds of criminal activity.” Utah Code Ann. § 24-4-102(1). Therefore, forfeiture provisions can be applied to offenses committed by buyers. The property subject to forfeiture under Utah Code Ann. § 24-4-102(1) includes:

- (a) real property, including things growing on, affixed to, and found in land; and
- (b) tangible and intangible personal property, including money, rights, privileges, interests, claims, and securities of any kind.<sup>48</sup>

## 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*

Utah Code Ann. § 76-5b-201(1)(a) (Sexual exploitation of a minor—Offenses) makes it a crime for a person to “knowingly . . . possess[] . . . child pornography; or [to] intentionally . . . view[] child pornography . . . .”<sup>49</sup> A conviction under Utah Code Ann. § 76-5b-201(1) is a second degree felony punishable by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5b-201(2), 76-3-203(2), 76-3-301(1)(a).

Additionally, a computer technician who, in the course of employment views a child pornographic image and does not report the image as mandated by Utah Code Ann. § 76-10-1204.5(2)(a)<sup>50</sup> (Reporting of child pornography by a computer technician), is guilty of a class B misdemeanor.

In comparison, a federal conviction for possession of child pornography<sup>51</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>52</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>53</sup>

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<sup>47</sup> “Victim” is defined as “any person whom the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities” and it “may not include a codefendant or accomplice.” Utah Code Ann. § 77-38a-102(14). *See supra* note 46.

<sup>48</sup> *See* Component 1.4 for additional analysis on possible fines for buyers.

<sup>49</sup> *See supra* note 10.

<sup>50</sup> The text of Utah Code Ann. § 76-10-1204.5 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 155 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>51</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>52</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>53</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme

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

Under Utah law, sex and kidnap offenders are required to register. Utah Code Ann. §§ 77-41-105<sup>54</sup> (Registration of offenders—Offender responsibilities), 77-41-102(11)<sup>55</sup> (Definitions). Utah Code Ann. § 77-41-102(17)(a) defines “sex offender” in part as

[A]ny person

(a) convicted in this state of:

(i) a felony or class A misdemeanor violation of Section 76-4-401, enticing a minor;

....

(iii) a felony violation of Section 76-5-401, unlawful sexual activity with a minor;

(iv) Section 76-5-401.1, sexual abuse of a minor;

(v) Section 76-5-401.2, unlawful sexual conduct with a 16 or 17 year old;

....

(vii) Section 76-5-402.1, rape of a child;

... (ix) Section 76-5-402.3, object rape of a child;

....

(xi) Section 76-5-403.1, sodomy on a child;

....

(xiii) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child;

....

(xv) Section 76-5-412, custodial sexual relations, when the person in custody is younger than 18 years of age, if the offense is committed on or after May 10, 2011;

(xvi) Section 76-5b-201, sexual exploitation of a minor;

....

(xxi) Section 76-9-702.5, lewdness involving a child;

....

(xxiii) Section 76-10-1306, aggravated exploitation of prostitution; or

(xxiv) attempting, soliciting, or conspiring to commit any felony offense listed in Subsection (16)(a);

....

Utah Code Ann. § 77-41-102(9)<sup>56</sup> (Definitions) defines “[k]idnap offender” in part as

[A]ny person other than a natural parent of the victim who:

(a) has been convicted in this state of a violation of:

(i) Subsection 76-5-301(1)(c) or (d), kidnapping;

(ii) Section 76-5-301.1, child kidnapping;

(iii) Section 76-5-302, aggravated kidnapping;

(iv) Section 76-5-310, aggravated human trafficking, on or after May 10, 2011; or

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for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>54</sup> The text of Utah Code Ann. § 77-41-105 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 16 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>55</sup> Pursuant to Utah Code Ann. § 77-41-102(11), “‘Offender’ means a kidnap offender as defined in Subsection (9) or a sex offender as defined in Subsection (16).”

<sup>56</sup> *See supra* note 55.

- (v) attempting, soliciting, or conspiring to commit any felony offense listed in Subsections (9)(a)(i) through (iv);
- (b) has been convicted of any crime, or an attempt, solicitation, or conspiracy to commit a crime in another jurisdiction, including any state, federal, or military court that is substantially equivalent to the offenses listed in Subsection (9)(a) . . . .

Under Utah Code Ann. § 77-41-105(3)(a) (Registration of offenders—Offender responsibilities), offenders must register for “the duration of the[ir] sentence and for 10 years after termination of [their] sentence.” However, pursuant to § 77-41-105(3)(c)(i), (ii), “An offender convicted as an adult of any of the offenses listed in Section 77-41-106 shall, for the offender's lifetime, register every year during the month of the offender's birth, during the month that is the sixth month after the offender's birth month, and also within three business days of every change of the offender's primary residence, any secondary residences, place of employment, vehicle information, or educational information required to be submitted under Subsection (8) . . . . This registration requirement is not subject to exemptions and may not be terminated or altered during the offender's lifetime, unless a petition is granted under Section 77-41-112.”

Utah Code Ann. § 77-41-106 (Registerable offenses) lists the offenses for which offenders must register for their lifetime, including

- (1) any offense listed in Subsection 77-41-102(9) or (17) [Definitions of “kidnap offender” and “sex offender”] if, at the time of the conviction, the offender has previously been convicted of an offense listed in Subsection 77-41-102(9) or (17) or has previously been required to register as a sex offender for an offense committed as a juvenile;
- (2) a conviction for any of the following offenses, including attempting, soliciting, or conspiring to commit any felony of:
  - (a) Section 76-5-301.1, child kidnapping, except if the offender is a natural parent of the victim; . . . .
  - (c) Section 76-5-402.1, rape of a child; . . . .
  - (e) Section 76-5-402.3, object rape of a child;
  - (f) Section 76-5-403.1, sodomy on a child;
  - (g) Subsection 76-5-404.1(4), aggravated sexual abuse of a child; or
  - (h) Section 76-5-405, aggravated sexual assault;
- (3) Section 76-4-401, a felony violation of enticing a minor over the Internet;
- (4) Section 76-5-302, aggravated kidnapping, except if the offender is a natural parent of the victim;
- (5) Section 76-5-403, forcible sodomy;
- (6) Section 76-5-404.1, sexual abuse of a child;
- (7) Section 76-5b-201, sexual exploitation of a minor; or
- (8) Section 76-10-1306, aggravated exploitation of prostitution, on or after May 10, 2011.

However, pursuant to Utah Code Ann. § 77-41-112<sup>57</sup> (Removal from registry—Requirements—Procedure) some offenders can be removed from the Sex Offender and Kidnap Offender Registry 5 years after the completion of their sentence, provided they were convicted under Utah Code Ann. § 76-5-301 (Kidnapping), § 76-5-304 (Unlawful detention), or Utah Code Ann. § 76-5-401 (Unlawful sexual activity with a minor) and were no more than 10 years older than the victim at the time of the offense, or they were convicted under Utah Code Ann. § 76-5-401.2 (Unlawful sexual conduct with a 16 or 17 year old) and were not more than 15 years

<sup>57</sup> The text of Utah Code Ann. § 77-41-112 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 16 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).



older than the victim at the time of the offense. Utah Code Ann. §§ 77-41-112 (2)(d)–(e) and 76-5-401.2 (Unlawful sexual conduct with a 16 or 17 year old).<sup>58</sup> Additionally, an offender is eligible to be removed from the Register under Utah Code Ann. § 77-41-112(b)–(d)<sup>59</sup>, so long as,

- (a) at least five years have passed since the completion of the offender’s sentence for the offense;
- (b) the offense is the only conviction for which the offender is required to register; and
- (c) the offender has not been convicted, subsequently to the offense for which the offender was placed on the registry, of a violation in:
  - (i) Subsection 77-41-102(9), which defines a kidnap offender; or
  - (ii) Subsection 77-41-102(17), which defines a sex offender.

Lastly, if a petition for removal from the registry is denied, pursuant to Utah Code Ann. § 77-41-112(7)(e), the offender is prohibited from submitting another petition for three years.

- 2.10.1 Recommendation: Include convictions of § 76-5-308.5 (Human trafficking of a child—Penalties) within the lists of convictions for which offenders must register pursuant to Utah Code Ann. § 77-41-106 (Registerable offenses), Utah Code Ann. § 77-41-102(17)(a) (Definitions [of sex offender]), and Utah Code Ann. § 77-41-102(9) (Definitions [of kidnap offender]).

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<sup>58</sup> Offenders, not more than 15 or more years older than victims, may petition removal from the sex offender registry. Previously under Utah Code Ann. § 77-41-112(2)(e) offenders could not be more than 10 years older than the victim to be considered eligible to petition removal from the sex offender registry.

<sup>59</sup> See *supra* note 57.

### ***Legal Components:***

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
  - 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*
  - 3.3 *Using the Internet or electronic communications to lure, entice, recruit or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
  - 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
  - 3.5 *Convicted traffickers are required to register as sex offenders.*
  - 3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or commercial sexual exploitation of children (CSEC) offenses in order to remove the children of traffickers from their control.*
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### ***Legal Analysis:***

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*<sup>60</sup>

A trafficker may be prosecuted under Utah Code Ann. § 76-5-308.5<sup>61</sup> (Human trafficking of a child—Penalties) which is a first degree felony punishable by 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5-308.5(4), 76-3-203(1), 76-3-301(1)(a). Under certain circumstances, a trafficker could be prosecuted pursuant to Utah Code Ann. § 76-5-310 (Aggravated human trafficking — Penalties),<sup>62</sup> which is also a first degree felony punishable by 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5-310(4)(a), 76-3-203(1), 76-3-301(1)(a).

Traffickers may also be prosecuted under Utah Code Ann. § 76-10-1306 (Aggravated exploitation of prostitution), which specifically references Utah Code Ann. § 76-5-308<sup>63</sup> (Human trafficking-human smuggling). Aggravated prostitution involving a child is a first degree felony punishable by 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-10-1306(3), 76-3-203(1), 76-3-301(1)(a). A trafficker may also be prosecuted under Utah Code Ann. § 76-5-310(4)(b) (Aggravated human smuggling), a second degree felony punishable by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-3-201(2), 76-3-301(1)(a). Traffickers prosecuted under Utah Code Ann. § 76-5b-201(1)(a) (Sexual exploitation of a minor—Offenses), a second degree felony, are subject to imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5b-201(2), 76-3-203(2), 76-5-301(1)(a).

Additionally, to the extent that a trafficker can be found to have “cause[d] a child to take indecent liberties” with another person, a trafficker may be prosecuted under Utah Code Ann. § 76-5-404.1(4)(i) (Sexual abuse of a child—Aggravated sexual abuse of a child), which states that

[a] person commits aggravated sexual abuse of a child when in conjunction with the offense [of sexual abuse under Utah Code Ann. § 76-5-404.1(2)]<sup>64</sup> . . . any of the following circumstances have been charged and admitted or found true in the action for the offense:

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<sup>60</sup> See discussion the statutory text of relevant provisions listed in this section *supra* Components 1.1 and 1.2.

<sup>61</sup> See *supra* note 2.

<sup>62</sup> See *supra* Component 1.1.

<sup>63</sup> See *supra* note 4.

<sup>64</sup> See *supra* note 7.

....

(i) the accused encouraged, aided, allowed, or benefited from acts of prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person.

A conviction under Utah Code Ann. § 76-5-404.1(4) is a first degree felony punishable by 15 years to life imprisonment, unless the defendant “caused serious bodily injury” during the commission of the crime or has a prior conviction for a “grievous sexual offense,” in which case a conviction is punishable by life imprisonment without the possibility of parole. Utah Code Ann. § 76-5-404.1(5). However, offenders who have not been previously convicted of a “grievous sexual offense,” even those who have “caused serious bodily injury” during the commission of aggravated sexual abuse of a child, are eligible to receive lesser sentences<sup>65</sup> if the court determines that it “is in the interests of justice” and states why on the record. Utah Code Ann. § 76-5-404.1(6). The defendant is also subject to a possible fine not to exceed \$10,000. Utah Code Ann. § 76-3-301(1)(a).

Utah Code Ann. § 76-5-302(1)(b)(vi) (Aggravated kidnapping) makes it a first degree felony for a trafficker to, among other things, “in the course of committing unlawful detention or kidnapping, . . . act[] with [the] intent . . . to commit a sexual offense as described in [Utah Code Ann. § 76-5-404.1(4) (Sexual abuse of a child—Aggravated sexual abuse of a child)].” Both kidnapping under Utah Code Ann. § 76-5-301(1) and unlawful detention under Utah Code Ann. § 76-5-304(1) must be committed “intentionally or knowingly, without authority of law, and against the will of the victim.” A conviction under Utah Code Ann. § 76-5-302(1) is punishable by 15 years to life imprisonment and a possible fine not to exceed \$10,000, unless the trafficker “caused serious bodily injury” in the commission of the offense or has a prior conviction for a “grievous sexual offense,” in which case the trafficker may receive life imprisonment without the possibility of parole. Utah Code Ann. §§ 76-5-302(3), 76-3-203(1), 76-3-301(1)(a). However, in instances where a convicted defendant caused “serious bodily injury,” or has no prior sex offense convictions, the court may imprison the defendant for a lesser term (either 10 years to life imprisonment or 6 years to life imprisonment) if “the interests of justice” so require and the court states the reasons why on the record. Utah Code Ann. § 76-5-302(4).

A trafficker may also face penalties under Utah Code Ann. § 76-10-1304(1) (Aiding prostitution) which states:

A person is guilty of aiding prostitution if the person:

- (a) (i) solicits a person to patronize a prostitute;
- (ii) procures or attempts to procure a prostitute for a patron; or
- (iii) leases or otherwise permits a place controlled by the actor, alone or in association with another, to be used for prostitution or the promotion of prostitution; or
- (iv) provides any service or commits any act that enables another person to commit a violation of this Subsection (1)(a) or facilitates another person's ability to commit any violation of this Subsection (1)(a); or
- (b) solicits, receives, or agrees to receive any benefit for committing any of the acts prohibited by Subsection (1)(a).

A first conviction under Utah Code Ann. § 76-10-1304(1) is punishable as a Class B misdemeanor by imprisonment for up to 6 months and a possible fine not to exceed \$1,000. Utah Code Ann. §§ 76-10-1304(2), 76-3-204(2), 76-3-301(1)(d). “However, a person who is convicted a second time, and on all subsequent convictions, under this section or under a local ordinance adopted in compliance with Section

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<sup>65</sup> See *supra* note 9.

76-10-1307 is guilty of a Class A misdemeanor,” punishable by imprisonment up to 1 year and a possible fine not to exceed \$2,500. Utah Code Ann. §§ 76-10-1304(2), 76-3-204(1), 76-3-301(1)(c).

Lastly, traffickers may face prosecution under Utah Code Ann. § 76-10-1903(1) (Money laundering), which states,

A person commits the offense of money laundering who:

- (a) transports, receives, or acquires the property which is in fact proceeds of the specified unlawful activity, knowing that the property involved represents the proceeds of some form of unlawful activity;
- (b) makes proceeds of unlawful activity available to another by transaction, transportation, or other means, knowing that the proceeds are intended to be used for the purpose of continuing or furthering the commission of specified unlawful activity;
- (c) conducts a transaction knowing the property involved in the transaction represents the proceeds of some form of unlawful activity with the intent:
  - (i) to promote the unlawful activity;
  - (ii) to conceal or disguise the nature, location, source, ownership, or control of the property; or
  - (iii) to avoid a transaction reporting requirement under this chapter or under federal law; or
- (d) knowingly accepts or receives property which is represented to be proceeds of unlawful activity.

“Specified unlawful activity” includes “an unlawful activity defined as an unlawful activity in Section 76-10-1602,” which includes violations of Utah Code Ann. § 76-5b-201 (Sexual exploitation of a minor—Offenses), § 76-5-308 (Human trafficking), § 76-5-309 (Human smuggling), § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties), § 76-10-1304 (Aiding prostitution), § 76-10-1305 (Exploiting prostitution), and § 76-10-1306 (Aggravated exploitation of prostitution). Utah Code Ann. §§ 76-10-1902(12), 76-10-1602(4)(n), (o), (eeee)–(gggg). A conviction under Utah Code Ann. § 76-10-1903(1)(a), (b), or (c) is punishable as a second degree felony by imprisonment for 1–15 years and a possible fine not to exceed \$10,000, while a conviction under Utah Code Ann. § 76-10-1903(1)(d) (Knowingly accepting or receiving property) is punishable as a third degree felony by imprisonment up to 5 years and a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-10-1904, 76-3-203(2), (3), 76-3-301(1)(a), (b).

Traffickers may also be subject to enhanced penalties for repeat offenses under certain circumstances. According to Utah’s habitual violent offender statute, buyers who have two prior violent felony convictions are subject to an enhanced penalty if convicted of a third violent felony.<sup>66</sup> Utah Code Ann. § 76-3-203.5(2) (Habitual violent offender—Definition—Procedure—Penalty) states,

If a person is convicted in this state of a violent felony by plea or by verdict and the trier of fact determines beyond a reasonable doubt that the person is a habitual violent offender under this section, the penalty for a:

- (a) third degree felony is as if the conviction were for a first degree felony;
- (b) second degree felony is as if the conviction were for a first degree felony; or
- (c) first degree felony remains the penalty for a first degree penalty except:
  - (i) the convicted person is not eligible for probation; and

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<sup>66</sup> Utah Code Ann. § 76-3-203.5(c)(i) defines a “violent felony” as “any of the following offenses, or any attempt, solicitation, or conspiracy to commit any of the following offenses punishable as a felony: . . . (W) aggravated sexual abuse of a child or sexual abuse of a child, Section 76-5-404.1; . . . (Y) sexual exploitation of a minor, Section 76-5b-201; . . . (LL) aggravated exploitation of prostitution under Subsection 76-10-1306(1)(a); . . .”

(ii) the Board of Pardons and Parole shall consider that the convicted person is a habitual violent offender as an aggravating factor in determining the length of incarceration.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA) for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>67</sup> against a minor. 18 U.S.C. § 3559(e)(1).

### 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*

Utah Code Ann. § 76-5b-201(1) (Sexual exploitation of a minor—Offenses) makes it a crime if a person “knowingly produces . . . or possesses with intent to distribute child pornography . . . [or] intentionally distributes child pornography.”<sup>68</sup> A conviction under this statute is punishable by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5b-201(2), 76-3-203(2), 76-3-301(1)(a).

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>69</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of child pornography<sup>70</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>71</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>72</sup>

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<sup>67</sup> See *supra* note 38 for the definition of “federal sex offense.”

<sup>68</sup> See *supra* note 10.

<sup>69</sup> See *supra* note 38 for the definition of “federal sex offense.”

<sup>70</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>71</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>72</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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.*

Although Utah Code Ann. § 76-4-401(2) (Enticing a minor—Elements—Penalties) is not expressly commercial in nature, it states,

- (a) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to solicit, seduce, lure, or entice a minor, or to attempt to solicit, seduce, lure, or entice a minor, or another person that the actor believes to be a minor to engage in any sexual activity which is a violation of state criminal law.
- (b) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to:
  - (i) initiate contact with a minor or a person the actor believes to be a minor; and
  - (ii) subsequently to the action under Subsection (2)(b)(i), by any electronic or written means, solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice the minor or a person the actor believes to be the minor to engage in any sexual activity which is a violation of state criminal law.

Penalties for convictions under Utah Code Ann. § 76-4-401(2) are determined by the severity of the crime the defendant enticed or attempted to entice. Utah Code Ann. § 76-4-401(4). Generally, a conviction is a felony one degree lower than the felony intended to be committed (e.g., a defendant who enticed a minor with the intent to commit a second degree felony will be convicted of a third degree felony, etc.). Utah Code Ann. § 76-4-401(4). However, in instances of enticement of a first degree felony when the defendant has a prior conviction under this statute, the defendant will be guilty of a first degree felony punishable by imprisonment for 3 years to life. Utah Code Ann. § 76-4-401(4).

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

Financial penalties for traffickers include fines, asset forfeiture, and victim restitution. Specifically, traffickers convicted under Utah Code Ann. § 76-5-308.5<sup>73</sup> (Human trafficking of a child—Penalties), § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties), § 76-10-1306 (Aggravated exploitation of prostitution), § 76-5b-201 (Sexual exploitation of a minor—Offenses), § 76-5-404.1(4) (Sexual abuse of a child—Aggravated sexual abuse of a child), § 76-5-302 (Aggravated kidnapping), § 76-10-1603(1) (Unlawful acts), or § 76-10-1903(1)(a)–(c) (Money laundering) are subject to a possible fine not to exceed \$10,000.<sup>74</sup> Utah Code Ann. § 76-3-301(1)(a).

A trafficker convicted under Utah Code Ann. § 76-10-1903(1)(d) (Money laundering), a third degree felony, is subject to a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-10-1904(2), 76-3-301(1)(b). A trafficker convicted under Utah Code Ann. § 76-10-1304(1) (Aiding prostitution), a Class B misdemeanor, is subject to a possible fine not to exceed \$1,000. Utah Code Ann. §§ 76-10-1304(2), 76-3-301(1)(d).

In addition to the fines listed above, traffickers can be subjected to Utah’s general forfeiture law, Utah Code Ann. § 24-1-101 through § 24-4-118. These forfeiture provisions cover property “used to facilitate

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

<sup>74</sup> These statutes are either first or second degree felonies and, pursuant to Utah Code Ann. § 76-3-301(a), are subject to a possible fine not to exceed \$10,000. Utah Code Ann. § 76-5-308.5. Utah Code Ann. §§ 76-5-310(4)(a), 76-10-1306(3), 76-5b-201(2), 76-5-404.1(5), 76-5-302(3), 76-10-1603.5(1), 76-10-1904(1).

the commission of a federal or state offense and any proceeds of criminal activity.” Utah Code Ann. § 24-4-102(1). The property subject to forfeiture under Utah Code Ann. § 24-4-102(1) includes:

- (a) real property, including things growing on, affixed to, and found in land; and
- (b) tangible and intangible personal property, including money, rights, privileges, interests, claims, and securities of any kind.

A court may also order traffickers to pay restitution. Utah Code Ann. § 77-38a-301 (Restitution—Convicted defendant may be required to pay), authorizes the court to order “a convicted defendant to make restitution.” Convicted defendants, including traffickers, whose criminal activity results in pecuniary damages are subject to mandatory restitution. Utah Code Ann. § 77-38a-302(1) (Restitution criteria), states in part,

When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims<sup>75</sup> of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition.

In determining restitution, the court shall determine “court-ordered restitution,”<sup>76</sup> and “complete restitution”<sup>77</sup> using the criteria provided in subsection (5). Utah Code Ann. § 77-38a-302(1), (2).

Pursuant to Utah Code Ann. § 77-38a-302(5)(b),

In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (iii) the cost of necessary physical and occupational therapy and rehabilitation;
- (iv) the income lost by the victim as a result of the offense if the offense;

. . . .

In determining court-ordered restitution, pursuant to Utah Code Ann. § 77-38a-302(5)(c), the court must consider the factors listed above in Utah Code Ann. § 77-38a-302(5)(b), as well as the following factors:

- (i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
- (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

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<sup>75</sup> “Victim” is defined as “any person whom the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities” and it “may not include a codefendant or accomplice.” Utah Code Ann. § 77-38a-102(14). *See supra* note 46.

<sup>76</sup> Utah Code Ann. § 77-38a-302(2)(b) defines “court-ordered restitution” as “the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence.” The text of Utah Code Ann. § 77-38a-302(2)(b) cited here and elsewhere in this report includes amendments made by the enactment of House Bill 404 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>77</sup> Utah Code Ann. § 77-38a-302(2)(a) defines “complete restitution” as the “restitution necessary to compensate a victim for all losses caused by the defendant.”

- (iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
- (iv) other circumstances which the court determines may make restitution inappropriate.

If a trafficker disobeys an order to make restitution, and the “victim . . . elects to pursue collection of the order by civil process, the victim shall be entitled to recover collection and attorney’s fees.” Utah Code Ann. § 77-38a-401(3).

In addition, any property that is part of the “net proceeds”<sup>78</sup> of a trafficker’s conviction under Utah Code Ann. § 76-10-1903 (Money laundering), may also be seized and forfeited.

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

Under Utah law, sex and kidnap offenders are required to register. Utah Code Ann. §§ 77-41-105<sup>79</sup> (Registration of offenders—Offender responsibilities), 77-41-102(11) (Definitions).<sup>80</sup> Utah Code Ann. § 77-41-102(17) (Sex and kidnap offender registry—Definitions) defines “sex offender” in part as

[A]ny person:

(a) convicted in this state of:

(i) a felony or class A misdemeanor violation of Section 76-4-401, enticing a minor;

....

(iv) Section 76-5-401.1, sexual abuse of a minor;

....

(xiii) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child;

....

(xvi) Section 76-5b-201, sexual exploitation of a minor;

...

(xxi) Section 76-9-702.5, lewdness involving a child;

....

(xxiii) Section 76-10-1306, aggravated exploitation of prostitution; or

(xxiv) attempting, soliciting, or conspiring to commit any felony offense listed in Subsection (16)(a);

....

Traffickers convicted of certain trafficking crimes are also required to register as a “kidnap offender.” Utah Code Ann. § 77-41-105(1). Utah Code Ann. § 77-41-102(9) (Sex and kidnap offender registry—Definitions) defines “kidnap offender” in part as

[A]ny person other than the natural parent of the child who:

(a) has been convicted in this state of a violation of:

(i) Subsection 76-5-301(1)(c) or (d), kidnapping;

(ii) Section 76-5-301.1, child kidnapping;

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<sup>78</sup> For purposes of Utah Code Ann. § 76-10-1603.5(5) “net proceeds” is defined as “property acquired as a result of the violation minus the direct costs of acquiring the property.”

<sup>79</sup> See *supra* note 54.

<sup>80</sup> See *supra* note 55.



- (iii) Section 76-5-302, aggravated kidnapping;
- (iv) Section 76-5-310, aggravated human trafficking, on or after May 10, 2011; or
- (v) attempting, soliciting, or conspiring to commit any felony offense listed in Subsections (9)(a)(i) through (iv);
- ....

Under Utah Code Ann. § 77-41-105(3)(a), offenders must register for “the duration of the[ir] sentence and for 10 years after termination of [their] sentence.” However, pursuant to § 77-41-105(3)(c)(i), offenders convicted of offenses listed in Utah Code Ann. § 77-41-106 must register for their entire lives, including

- (1) any offense listed in Subsection 77-41-102(9) or (17) [Definitions of “kidnap offender” and “sex offender”] if, at the time of the conviction, the offender has previously been convicted of an offense listed in Subsection 77-41-102(9) or (17) or has previously been required to register as a sex offender for an offense committed as a juvenile;
- (2) a conviction for any of the following offenses, including attempting, soliciting, or conspiring to commit any felony of:
  - (a) Section 76-5-301.1, child kidnapping, except if the offender is a natural parent of the victim;
  - ....
  - (c) Section 76-5-402.1, rape of a child;
  - ....
  - (e) Section 76-5-402.3, object rape of a child;
  - (f) Section 76-5-403.1, sodomy on a child;
  - (g) Subsection 76-5-404.1(4), aggravated sexual abuse of a child; or
  - (h) Section 76-5-405, aggravated sexual assault;
- (3) Section 76-4-401, a felony violation of enticing a minor over the Internet;
- (4) Section 76-5-302, aggravated kidnapping, except if the offender is a natural parent of the victim;
- (5) Section 76-5-403, forcible sodomy;
- (6) Section 76-5-404.1, sexual abuse of a child;
- (7) Section 76-5b-201, sexual exploitation of a minor; or
- (8) Section 76-10-1306, aggravated exploitation of prostitution, on or after May 10, 2011.

However, pursuant to Utah Code Ann. § 77-41-112<sup>81</sup> (Removal from registry—Requirements—Procedure), some offenders can be removed from the Sex Offender and Kidnap Offender Registry 5 years after the completion of their sentence, provided they were convicted under Utah Code Ann. § 76-5-301 (Kidnapping), § 76-5-304 (Unlawful detention), or Utah Code Ann. § 76-5-401 (Unlawful sexual activity with a minor) and were not more than 10 years older than the victim at the time of the offense, or they were convicted under Utah Code Ann. § 76-5-401.2 (unlawful sexual conduct with a 16 or 17 year old) and was not more than 15 years older than the victim. Utah Code Ann. § 77-41-112(1)(a)(iv). Additionally, to qualify for removal under Utah Code Ann. § 77-41-112(c)–(d), it must be demonstrated that “the offense is the only conviction for which the offender is required to register; and the offender has not been convicted, subsequently to the offense for which the offender was placed on the register, of a violation listed in: (i) Subsection 77-41-102(9), which defines a kidnap offender; or (ii) Subsection 77-41-102(17), which defines a sex offender. Lastly, if a petition for removal from the registry is denied, pursuant to Utah Code Ann. § 77-41-112(7)(e), the offender is prohibited from submitting another petition for three years.

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<sup>81</sup> See *supra* note 57.

- 3.5.1 Recommendation: Include convictions of § 76-5-308.5 (Human trafficking of a child—Penalties) within the lists of convictions for which offenders must register pursuant to Utah Code Ann. § 77-41-106 (Registerable offenses), Utah Code Ann. § 77-41-102(17)(a) (Definitions [of sex offender]), and Utah Code Ann. § 77-41-102(9) (Definitions [of kidnap offender]).

3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or commercial sexual exploitation of children (CSEC) offenses in order to remove the children of traffickers from their control.*

Utah’s statutes relating to the termination of parental rights expressly permit the termination of parental rights for convictions under Utah Code Ann. § 76-5-308.5<sup>82</sup> (Human trafficking of a child—Penalties) or § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties).<sup>83</sup> Utah Code Ann. § 78A-6-507 (Grounds for termination of parental rights—Findings regarding reasonable efforts) and Utah Code Ann. § 62A-4a-203.5 (Mandatory petition for termination of parental rights) provide the potential grounds that may be used to petition for termination of parental rights of a convicted trafficker.

Utah Code Ann. § 78A-6-507(1)(b), (c) provides that the court may terminate parental rights if it finds “that the parent has neglected or abused the child” or “that the parent is unfit or incompetent.” For purposes of Utah’s Juvenile Court Act of 1996, both commercial sexual exploitation and human trafficking are expressly identified as types of child abuse. Specifically, Utah Code Ann. § 78A-6-105(1)(a)<sup>84</sup> (Definitions) defines “abuse” as

- (i) nonaccidental harm<sup>85</sup> of a child;
  - (ii) threatened harm of a child;
  - (iii) sexual exploitation;
  - (iv) sexual abuse; or
  - (v) human trafficking of a child in violation of Section 76-5-308.5
- ....

Utah Code Ann. § 78A-6-105(40) defines “sexual exploitation” as knowingly:

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<sup>82</sup> See *supra* note 2.

<sup>83</sup> Utah Code Ann. § 62A-4a-203.5(2)(b) (Mandatory petition for termination of parental rights) requires the Division of Child and Family Services to file a petition seeking the termination of parental rights when a child’s parent has, among other things,

- (ii) committed manslaughter of another child of that parent;
- (iii) aided, abetted, attempted, conspired, or solicited to commit murder, child abuse homicide, or manslaughter against another child of that parent; or
- (iv) committed a felony assault or abuse that has resulted in serious physical injury to another child of that parent, or to the other parent of that child.

<sup>84</sup> The text of Utah Code Ann. § 78A-6-105 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 158 and House Bill 206 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>85</sup> Utah Code Ann. § 78A-6-105 (Definitions) defines “harm” as

- (19)(a) physical or developmental injury or damage;
- (b) emotional damage that results in a serious impairment of the child’s growth, development, behavior, or psychological functioning;
- (c) sexual abuse; or
- (d) sexual exploitation.

- (a) employing, using, persuading, inducing, enticing, or coercing any child to:
  - (i) pose in the nude for the purpose of sexual arousal of any person; or
  - (ii) engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording, or displaying in any way sexual or simulated sexual conduct;
- (b) displaying, distributing, possessing for the purpose of distribution, or selling material depicting a child:
  - (i) in the nude, for the purpose of sexual arousal of any person; or
  - (ii) engaging in sexual or simulated sexual conduct; or
- (c) engaging in any conduct that would constitute an offense under Section 76-5b-201, Sexual Exploitation of a Minor, regardless of whether the person who engages in the conduct is actually charged with, or convicted of, the offense.

A person commits an offense under Utah Code Ann. § 76-5-308.5(2)<sup>86</sup> (Human trafficking of a child – penalties) when, “[T]he actor recruits, harbors, transports obtains, patronizes, or solicits a child for sexual exploitation or forced labor.”

Additionally, Utah Code Ann. § 78A-6-508(2) (Evidence of grounds for termination) lists circumstances that a court must examine in order to determine whether a parent is unfit or neglected a child, including, “conduct toward a child of a physically, emotionally, or sexually cruel or abusive in nature”, “whether the parent is incarcerated as a result of conviction of a felony, and the sentence is of such length that the child will be deprived of a normal home for more than one year”, and “whether the parent has exposed the child to pornography or material harmful to a minor, as defined in Section 76-10-1201.” Utah Code Ann. § 78A-6-508(2)(b), (e), (g). Furthermore, Utah Code Ann. § 78A-6-508(6)(a) provides that “sexual abuse, sexual exploitation, injury, or death of a sibling of the child, or of any child, due to known or substantiated abuse or neglect by the parent or parents” is “prima facie evidence of unfitness.”

Lastly, under Utah Code Ann. § 78A-6-302(3)(a)<sup>87</sup> (Court-ordered protective custody of a child following petition filing–grounds), the court is mandated to “consider the division’s safety and risk assessments described in Section 62A-4a-203<sup>88</sup> to determine whether a child should be removed from the custody of the child’s parent or guardian or should otherwise be taken into protective custody.” Furthermore, under Utah Code Ann. § 78A-6-302(3)(b), “The division shall make a diligent effort to provide the safety and risk assessment described in Section 62A-4a-203 to the court, guardian ad litem, and counsel for the parent or guardian, as soon as practicable before the shelter hearing described in Section 78A-6-306.”

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<sup>86</sup> See *supra* note 2.

<sup>87</sup> The text of Utah Code Ann. § 78A-6-302(3) cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 82 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>88</sup> The safety and risk assessment pursuant to Utah Code Ann. § 62A-4a-203.1 includes an assessment of the,

- (a) threat to the child’s safety;
- (b) protective capabilities of a parent or guardian, including the parent or guardian’s readiness, willingness, and ability to plan for the child’s safety;
- (c) a child’s particular vulnerabilities;
- (d) interventions required to protect a child; and
- (e) likelihood of future harm to a child.

The text of Utah Code Ann. § 62A-4a-203.1 cited here and elsewhere in this report include amendments made by the enactment of Senate Bill 82 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

### *Legal Components:*

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*
  - 4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*
  - 4.3 *Promoting and selling child sex tourism is illegal.*
  - 4.4 *Promoting and selling child pornography is illegal.*
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### *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.*<sup>89</sup>

Multiple provisions with Utah's human trafficking law could apply to facilitators. A facilitator who "recruits, harbors, transports, obtains, patronizes, or solicits a child for sexual exploitation . . ." could be held liable under Utah Code Ann. § 76-5-308.<sup>90</sup> (Human trafficking of a child—Penalties), a violation of which is a first degree felony, punishable by 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-3-203(1), 76-3-301(1)(a).

A facilitator who "recruits, harbors, transports, obtains, patronizes, or solicits a person through the use of force, fraud, or coercion" could also be held accountable under Utah Code Ann. § 76-5-308<sup>91</sup> (Human trafficking—Human Smuggling). Utah Code § 76-5-309(4) (Human trafficking and human smuggling—Penalties) addresses facilitators' conduct; it states,

[u]nder circumstances not amounting to aggravated sexual abuse of a child, a violation of Subsection (4)(h), a person who benefits, receives, or exchanges anything of value from knowing participation in: (a) human trafficking for forced labor or for forced sexual exploitation in violation of Section 76-5-308 is guilty of a second degree felony . . . .

A violation of Utah Code § 76-5-309 is a second degree felony punishable by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5-309(4)(a), 76-3-203(2), 76-3-301(1)(a).

Also, under Utah Code Ann. § 76-10-1306 (Aggravated exploitation of prostitution) a facilitator who commits the act of exploiting prostitution<sup>92</sup> will be guilty of aggravated exploitation if "the person procured transported, or persuaded . . . is a child." Aggravated exploitation of prostitution involving a child<sup>93</sup> is a first degree felony punishable by 5 years to life imprisonment and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-10-1306(3), 76-3-203(1), 76-3-301(1)(a).

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<sup>89</sup> See *supra* Components 1.1, 1.2 for a discussion of the relevant statutory provisions discussed in this section.

<sup>90</sup> See *supra* note 2.

<sup>91</sup> See *supra* note 4.

<sup>92</sup> See *supra* note 6.

<sup>93</sup> Utah Code Ann. § 76-10-1306 (Aggravated exploitation of prostitution) states,

A facilitator also may face penalties under Utah Code Ann. § 76-10-1304(1) (Aiding prostitution) which states:

A person is guilty of aiding prostitution if the person:

- (a) (i) solicits a person to patronize a prostitute; (ii) procures or attempts to procure a prostitute for a patron; or (iii) leases or otherwise permits a place controlled by the actor, alone or in association with another, to be used for prostitution or the promotion of prostitution; or (iv) provides any service or commits any act that enables another person to commit a violation of this Subsection (1)(a) or facilitates another person's ability to commit any violation of this Subsection (1)(a); or
- (b) solicits, receives, or agrees to receive any benefit for committing any of the acts prohibited by Subsection (1)(a).

Lastly, facilitators may face prosecution under Utah Code Ann. § 76-10-1903(1) (Money laundering), which states,

A person commits the offense of money laundering who:

- (a) transports, receives, or acquires the property which is in fact proceeds of the specified unlawful activity, knowing that the property involved represents the proceeds of some form of unlawful activity;
- (b) makes proceeds of unlawful activity available to another by transaction, transportation, or other means, knowing that the proceeds are intended to be used for the purpose of continuing or furthering the commission of specified unlawful activity;
- (c) conducts a transaction knowing the property involved in the transaction represents the proceeds of some form of unlawful activity with the intent:
  - (i) to promote the unlawful activity;
  - (ii) to conceal or disguise the nature, location, source, ownership, or control of the property; or
  - (iii) to avoid a transaction reporting requirement under this chapter or under federal law; or
- (d) knowingly accepts or receives property which is represented to be proceeds of unlawful activity.<sup>94</sup>

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(1) A person is guilty of aggravated exploitation if:

- (a) in committing an act of exploiting prostitution, as defined in Section 76-10-1305, the person uses any force, threat, or fear against any person;
  - (b) the person procured, transported, or persuaded or with whom the person shares the proceeds of prostitution is a child or is the spouse of the actor; or
  - (c) in the course of committing exploitation of prostitution, a violation of Section 76-10-1305, the person commits human trafficking or human smuggling, a violation of Section 76-5-308.
- (2) Aggravated exploitation of prostitution is a second degree felony ~~of the second degree~~, except under Subsection (3).
- (3) Aggravated exploitation of prostitution involving a child is a first degree felony.

<sup>94</sup> “Specified unlawful activity” includes “any unlawful activity defined as an unlawful activity in Section 76-10-1602,” which includes violations of Utah Code Ann. § 76-5b-201 (Sexual exploitation of a minor—Offenses), § 76-10-1304 (Aiding prostitution), § 76-10-1305 (Exploiting prostitution), and § 76-10-1306 (Aggravated exploitation of prostitution). Utah Code Ann. § 76-10-1902(12).

A conviction under Utah Code Ann. § 76-10-1903(1)(a), (b), or (c) is a second degree felony punishable by imprisonment for 1–15 years and a possible fine not to exceed \$10,000, while a conviction under Utah Code Ann. § 76-10-1903(1)(d) (Knowingly accepting or receiving property) is a third degree felony punishable by imprisonment up to 5 years and a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-10-1904, 76-3-203(2), (3), 76-3-301(1)(a), (b).

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.*

Convicted facilitators are subject to fines ranging from \$1,000 to \$10,000. Specifically, facilitators convicted under Utah Code Ann. § 76-5-309(4)(a) (Human trafficking and human smuggling—Penalties), § 76-10-1306 (Aggravated exploitation of prostitution), § 76-5b-201 (Sexual exploitation of a minor—Offenses), or § 76-10-1903(1)(a)–(c) (Money laundering) are subject to a possible fine not to exceed \$10,000.<sup>95</sup> Utah Code Ann. § 76-3-301(a).

Facilitators can be subjected to Utah’s general forfeiture law, Utah Code Ann. § 24-1-101 through § 24-4-118. Pursuant to Utah Code Ann. § 24-4-102(1), property “used to facilitate the commission of a federal or state offense and any proceeds of criminal activity” will be subject to forfeiture. Property subject to forfeiture under Utah Code Ann. § 24-4-102(1) includes:

- (a) real property, including things growing on, affixed to, and found in land; and
- (b) tangible and intangible personal property, including money, rights, privileges, interests, claims, and securities of any kind.

In addition to asset forfeiture, facilitators convicted under Utah Code Ann. § 76-10-1304(1) (Aiding prostitution) are guilty of a Class B misdemeanor, which is punishable by imprisonment for up to 6 months and a possible fine not to exceed \$1,000. Utah Code Ann. §§ 76-10-1304(2), 76-3-204(2), 76-3-301(1)(d). “However, a person who is convicted a second time, and on all subsequent convictions, under this section or under a local ordinance adopted in compliance with Section 76-10-1307 is guilty of a Class A misdemeanor,” punishable by imprisonment up to 1 year and a possible fine not to exceed \$2,500. Utah Code Ann. §§ 76-10-1304(2), 76-3-204(1), 76-3-301(1)(c).

A facilitator convicted under Utah Code Ann. § 76-10-1903(1)(d) (Money laundering), a third degree felony, is subject to a possible fine not to exceed \$5,000. Utah Code Ann. §§ 76-10-1904(2); 76-3-301(1)(b). A facilitator convicted under Utah Code Ann. § 76-10-1304(1) (Aiding prostitution), a Class B misdemeanor, is subject to a possible fine not to exceed \$1,000. Utah Code Ann. §§ 76-10-1304(2), 76-3-301(1)(d).

In addition to possible fines, a court may order facilitators to pay restitution. Utah Code Ann. § 77-38a-301 (Restitution—Convicted defendant may be required to pay) authorizes the court to order “a convicted defendant to make restitution.” Convicted defendants, including facilitators, whose criminal activity results in pecuniary damages are subject to mandatory restitution. Utah Code Ann. § 77-38a-302(1) (Restitution criteria), states in part, “When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to

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<sup>95</sup> These statutes are either first or second degree felonies and, pursuant to Utah Code Ann. § 76-3-301(a), are subject to a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-10-1306(3), 76-5b-201(2), 76-10-1603.5(1), 76-10-1904(1).

victims<sup>96</sup> of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition.” In determining restitution, the court shall determine “court-ordered restitution,”<sup>97</sup> and “complete restitution”<sup>98</sup> using the criteria provided in subsection (5). Utah Code Ann. § 77-38a-302(1), (2).

Pursuant to Utah Code Ann. § 77-38a-302(5)(b),

In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (iii) the cost of necessary physical and occupational therapy and rehabilitation;
- (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim as a result of the offense;

....

In determining court-ordered restitution, pursuant to Utah Code Ann. § 77-38a-302(5)(c), the court must consider the factors listed above in Utah Code Ann. § 77-38a-302(5)(b), as well as the following factors:

- (i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
- (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
- (iv) other circumstances which the court determines may make restitution inappropriate.

If a facilitator disobeys an order to make restitution, and the “victim . . . elects to pursue collection of the order by civil process, the victim shall be entitled to recover collection and attorney’s fees.” Utah Code Ann. § 77-38a-401(3).

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

There is no specific provision in Utah law criminalizing the promotion or selling of child sex tourism.

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

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<sup>96</sup> “Victim” is defined as “any person whom the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities” and it “may not include a codefendant or accomplice.” Utah Code Ann. § 77-38a-102(14). *See supra* note 46.

<sup>97</sup> Utah Code Ann. § 77-38a-302(2)(b) defines “court-ordered restitution” as “the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence.” *See supra* note 76.

<sup>98</sup> Utah Code Ann. § 77-38a-302(2)(a) defines “complete restitution” as the “restitution necessary to compensate a victim for all losses caused by the defendant.”

#### 4.4 *Promoting and selling child pornography is illegal.*

Utah Code Ann. § 76-5b-201(1) (Sexual exploitation of a minor—Offenses) states, “A person is guilty of sexual exploitation of a minor: (a) when the person: (i) knowingly produces, possesses, or possesses with intent to distribute child pornography; or (ii) intentionally distributes or views child pornography.”<sup>99</sup> A conviction under this statute is a second degree felony punishable by imprisonment for 1–15 years and a possible fine not to exceed \$10,000. Utah Code Ann. §§ 76-5b-201(2), 76-3-203(2), 76-3-301(1)(a).

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<sup>99</sup> *See supra* note 10.



**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 upon 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 (CSEC).*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 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 sufficiently 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>100</sup>

Utah’s core sex trafficking statute, Utah Code Ann. § 76-5-308.5<sup>101</sup> (Human trafficking of a child—penalties) includes all commercially sexually exploited children. Under Utah Code Ann. § 76-5-308.5, when the victim is a minor, the means of force, fraud, or coercion are not required.<sup>102</sup> Additionally, the child human trafficking law applies to buyers; thus, buying commercial sex with a person who is under the age of eighteen constitutes human trafficking.<sup>103</sup> Utah Code Ann. § 76-5-308.5. Finally, the offense of human trafficking under Utah Code Ann. § 76-5-308.5 does not require that a trafficker or controlling third party be identified. Resultantly, Utah’s child human trafficking offense includes any child who is bought for sex, regardless of whether force, fraud, or coercion is used, regardless of whether a buyer exploited the youth without a trafficker’s involvement, and regardless of whether the victim identifies a trafficker. Utah Code Ann. § 76-5-308.5.

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<sup>100</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 and explaining negative impact on victims and victim-identification when buyers are excluded as sex trafficking offenders).

<sup>101</sup> See *supra* note 2.

<sup>102</sup> See *supra* discussion in Component 1.1.

<sup>103</sup> See *supra* discussion of buyer applicability in Component 2.1.

5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based upon the willingness of a minor under 18 to engage in the commercial sex act.*

Utah Code Ann. § 76-5-308.5<sup>104</sup> (Human trafficking of a child—Penalties), Utah Code Ann. § 76-05-310 (Aggravated human trafficking and aggravated human smuggling—Penalties), and § 76-10-1306(1)(b) and (3) (Aggravated exploitation of prostitution) do not expressly provide that the consent of a minor to a commercial sex act is immaterial to the crime. While not directly related to the victim’s consent for Utah Code Ann. § 76-5-308.5 (Human trafficking of a child—Penalties), § 76-5-309 (Human trafficking and human smuggling—Penalties), and § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties), it is a defense under Utah Code Ann. § 76-5-305(2) (Defenses), when the victim is under 18, that the defendant “was acting under the reasonable belief that the custodian, guardian, legal guardian, custodial parent, or person acting in loco parentis to the victim would, if present, have consented to the actor’s conduct.”

In contrast, Utah Code Ann. § 76-5b-102(c) (Legislative determinations—Purpose of this chapter) expresses, as part of the Utah Legislature’s determination and purpose of Utah’s Sexual Exploitation Act,<sup>105</sup> that “a minor cannot intelligently and knowingly consent to sexual exploitation.”

- 5.2.1 Recommendation: Amend Utah Code Ann. § 76-5-305 (Defenses) to clarify that consent is not a defense to Utah Code Ann. § 76-5-308.5 (Human trafficking of a child—Penalties). Amend Utah Code Ann. § 76-10-1306(1)(b) and (3) (Aggravated exploitation of prostitution) to clearly prohibit the use of the defense of consent when the victim is a minor under 18 years of age.

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>106</sup>

Utah state law is age-neutral and does not prohibit the criminalization of minors for prostitution-related offense; however, Utah Code Ann. § 76-10-1302(3)(b)<sup>107</sup> (Prostitution) creates an alternative to prosecution following the arrest of a minor for prostitution or sexual solicitation offenses.

Utah’s prostitution offence, Utah Code Ann. § 76-10-1302(1) does not distinguish between minors and adults engaging in commercial sex acts, stating that

An individual is guilty of prostitution when the individual:

- (a) engages in any sexual activity<sup>108</sup> with another individual for a fee, or the functional equivalent of a fee;
- (b) is an inmate<sup>109</sup> of a house of prostitution;<sup>110</sup> or

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<sup>104</sup> See *supra* note 2.

<sup>105</sup> Utah Code Ann. § 76-5b-201 *et seq.*

<sup>106</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>107</sup> See *supra* note 23.

<sup>108</sup> For purposes of this statute, “sexual activity” is defined as “acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.” Utah Code Ann. § 76-10-1301(5).

<sup>109</sup> For purposes of this statute, “inmate” is defined as “a person who engages in prostitution in or through the agency of a house of prostitution.” Utah Code Ann. § 76-10-1301(3).

<sup>110</sup> For purposes of this statute, “house of prostitution” is defined as “a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.” Utah Code Ann. § 76-10-1301(2).

(c) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

However, pursuant to Utah Code Ann. § 76-10-1302(3)(b)–(c), a law enforcement officer is afforded several avenues to refer a child engaged in prostitution or commercial sexual solicitation to the care, services, and protection of the Division of Child and Family Services under Utah Code Ann. § 62A-4a-103. Utah Code Ann. § 76-10-1302(b)–(c) states,

(b) Upon encountering a child engaged in prostitution or sexual solicitation, a law enforcement officer shall:

- (i) conduct an investigation;
- (ii) refer the child to the division;
- (iii) if an arrest is made, bring the child to a receiving center, if available; and
- (iv) contact the child's parent or guardian, if practicable.

(c) When law enforcement has referred the child to the division under Subsection (3)(b)(ii):

- (i) the division shall provide services to the child under Title 62A, Chapter 4a, Child and Family Services; and
- (ii) the child may not be subjected to delinquency proceedings under Title 6A, Chapter 7, Juvenile Services, and Section 78A-6-601 through 78A-6-704.

Thus, while a child may be arrested for prostitution-related offenses, the child will not face prosecution for such offenses and, instead, will receive protective services pursuant to Utah Code Ann. § 76-10-1302(3)(c)(i)–(ii).

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

##### **Child Identified as Abused/Neglected**

Pursuant to Utah Code Ann. § 78A-6-105(1)<sup>111</sup> (Definitions), a sexually exploited or trafficked child is likely to be identified as abused or neglected. Utah does not specifically use the term “caregiver” in its child welfare statutes, and if a child is identified as abused or neglected under Utah Code Ann. § 78A-6-105(1), the definition of the person responsible for the child under Utah Code Ann. § 78A-6-105 and § 62A-4a-101<sup>112</sup> is not sufficiently broad to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker.

Utah provides some protective provisions to commercially sexually exploited children. Under Utah Code Ann. § 76-10-1302(3)(b)(ii), law enforcement are mandated to report cases of children engaged in commercial sex acts to child welfare. Additionally, Utah laws allow both Child Protective Services and law enforcement to immediately remove children from abusive situations which may affect commercially sexually exploited children. Upon such findings, pursuant to Utah Code Ann. § 62A-4a-105(1)(b)(x), “The division shall . . . provide . . . services for minors who are victims of human trafficking . . . or who have engaged in prostitution or sexual solicitation . . .” Children referred to child welfare as a result of commercial sexual exploitation and trafficking should not be subjected to delinquency proceedings for prostitution offenses. Utah Code Ann. § 76-10-1302(3)(c).

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<sup>111</sup> See *infra* Component 5.5 for a full analysis of the definition of “abuse” as it relates to identification of sexually exploited children. See *supra* note 84..

<sup>112</sup> See *infra* Component 5.6 for a full analysis of the definition of “caregiver.”

## *I. Initial custody*

### *a. Authority for initial custody*

If initially identified as abused or neglected, a minor may be taken into protective custody under the Juvenile Court Act of 1996, Utah Code Ann. § 78A-6-106(2) (Search warrants and subpoenas—Authority to issue—Protective custody—Expedited hearing) which states,

A peace officer or child welfare worker may not enter the home of a child who is not under the jurisdiction of the court, remove a child from the child's home or school, or take a child into protective custody unless:

- (a) there exist exigent circumstances sufficient to relieve the peace officer or child welfare worker of the requirement to obtain a warrant;
- (b) the peace officer or child welfare worker obtains a search warrant under Subsection (3);
- (c) the peace officer or child welfare worker obtains a court order after the parent or guardian of the child is given notice and an opportunity to be heard; or
- (d) the peace officer or child welfare worker obtains the consent of the child's parent or guardian.

Under the Utah Human Services Code, Child and Family Services Chapter, Utah Code Ann. § 62A-4a-202.1(1) (Entering home of a child—Taking a child into protective custody—Caseworker accompanied by peace officer—Preventive services—Shelter facility or emergency placement) states,

A peace officer or child welfare worker may not:

- (a) enter the home of a child who is not under the jurisdiction of the court, remove a child from the child's home or school, or take a child into protective custody<sup>113</sup> unless authorized under Subsection 78A-6-106(2)[Search warrants and subpoenas—Authority to issue—Protective custody—Expedited hearing]; or
- (b) remove a child from the child's home or take a child into custody under this section solely on the basis of educational neglect, truancy, or failure to comply with a court order to attend school.

A minor victim who is suspected of committing a prostitution offense may also be taken into custody by law enforcement and delivered to the Department of Child and Family Services. Pursuant to Utah Code Ann. § 76-10-1302(3)(b)(ii),<sup>114</sup> "Upon encountering a child engaged in prostitution or sexual solicitation, a law enforcement officer shall . . . refer the child to the division." Pursuant to Utah Code Ann. § 76-10-1302(3)(c), "When a law enforcement officer has referred the child to the division under Subsection (3)(b)(ii), the division shall provide services to the child under Title 62A, Chapter 4a, Child and Family Services and (ii) the child may not be subjected to delinquency proceedings under Title 62A, Chapter 7, Juvenile Justice Services and Section 78A-6-601 through Section 78A-6-704.

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<sup>113</sup> Utah Code Ann. § 62A-4a-101(20) defines "protective custody" as "the shelter of a child by the [Division of Child and Family Services] from the time the child is removed from the child's home until the earlier of: (a) the shelter hearing; or (b) the child's return home."

<sup>114</sup> See *supra* note 23.

b. Placement

A child taken into custody under Utah Code Ann. § 62A-4a-202.1 “may not be placed or kept in a secure detention facility pending court proceedings unless the child is detainable based on guidelines promulgated by the Division of Juvenile Justice Services.” Utah Code Ann. § 62A-4a-202.1(4)(a). Additionally, unless the child requires physical restriction, a child who is removed from the custody of a parent or guardian must be “given temporary care in:

- (i) a shelter facility;<sup>115</sup>
- (ii) an emergency placement in accordance with Section 62A-4a-209 [Emergency placement].” Utah Code Ann. § 62A-4a-202.1(4)(b).

In determining where to place a child under Utah Code Ann. § 62A-4a-202.1(4)(b), “a noncustodial parent, relative, or friend, in accordance with Section 62A-4a-209 [Emergency Placement]” will receive priority. Utah Code Ann. § 62A-4a-202.1(4)(c).

*II. Process following initial custody*

After taking a child into protective custody under Utah Code Ann. § 62A-4a-202.1, § 78A-6-106, or § 78A-6-302 (Court-ordered protective custody of a child following petition filing—Grounds), the Division of Child and Family Services (“DCFS”) must “immediately initiate an investigation of the: (a) circumstances of the child; and (b) grounds upon which the decision to place the child into protective custody was made.” Utah Code Ann. § 62A-4a-202.3(1). If appropriate, in any case involving sexual abuse, the DCFS must provide the child a medical examination within 24 hours of taking the child into custody. Utah Code Ann. § 62A-4a-202.3(2)(g).

Additionally, pursuant to Utah Code Ann. § 62A-4a-203.1<sup>116</sup> (Safety and Risk Assessments), child welfare caseworkers are required to use “evidence-informed and evidence-based safety and risks assessments to guide decisions concerning a child throughout a child protection investigation or proceeding.” In particular, under Utah Code Ann. § 62A-4a-203.1(2), the assessment must include the following,

- (a) threat to a child’s safety;
- (b) protective capabilities of a parent or guardian, including the parent or guardian’s readiness, willingness, and ability to plan for the child’s safety;
- (c) a child’s particular vulnerabilities;
- (d) interventions required to protect a child; and
- (e) likelihood of future harm to a child.

Under Utah Code Ann. § 78A-6-302(3)(a)<sup>117</sup> (Court-ordered protective custody of a child following petition filing—grounds), the court is also required to,

- (a) [C]onsider the division’s safety and risk assessments described in Section 62A-4a-203.1<sup>118</sup> to determine whether a child should be removed from the custody of the child’s parent or guardian or should otherwise be taken into protective custody.

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<sup>115</sup> “Shelter care” is defined as “the temporary care of a minor in a nonsecure facility.” Utah Code Ann. § 62A-4a-101(26).

<sup>116</sup> See *supra* note 88.

<sup>117</sup> See *supra* note 87.

(b) The division shall make a diligent effort to provide the safety and risk assessments described in Section 62A-4a-203.1 to the court, guardian ad litem, and counsel for the parent or guardian, as on as practicable before the shelter hearing described in Section 78A-6-306.

### *III. Placement process pending adjudication/investigation*

The court is required to hold a shelter hearing within 72 hours of, among other things, the division taking a child into protective custody or removing a child or “emergency place under [Utah Code Ann. § 62A-4a-202.1(4)].” Utah Code Ann. § 78A-6-306(1)(a)–(c) (Shelter hearing). At the shelter hearing, the DCFS must tell the court, among other things, why the child “was removed from the parent’s or guardian’s custody . . . [and] the need, if any, for continued shelter.” Utah Code Ann. § 78A-6-306(6)(a), (c). After the shelter hearing, pursuant to Utah Code Ann. § 78A-6-306(9)(a), the court must release the child from protective custody unless the court finds by a preponderance of the evidence any of the following:

- (i) subject to Subsection (9)(b)(i), there is a serious danger to the physical health or safety of the child and the child’s physical health or safety may not be protected without removing the child from the custody of the child’s parent;
- (ii) (A) the child is suffering emotional damage that results in a serious impairment in the child’s growth, development, behavior, or psychological functioning;  
(B) the parent or guardian is unwilling or unable to make reasonable changes that would sufficiently prevent future damage; and  
(C) there are no reasonable means available by which the child’s emotional health may be protected without removing the child from the custody of the child’s parent or guardian;
- (iii) there is a substantial risk that the child will suffer abuse or neglect if the child is not removed from the custody of the child’s parent or guardian;
- (iv) subject to Subsection (9)(b)(ii), the child or a minor residing in the same household has been, or is considered to be at substantial risk of being, physically abused, sexually abused, or sexually exploited by a:
  - (A) parent or guardian;
  - (B) member of the parent’s household or the guardian’s household; or
  - (C) person known to the parent or guardian;
- ....
- (xiii) the child’s welfare is substantially endangered . . . .

Utah Code Ann. § 78A-6-306(12) provides that “[i]n cases where actual sexual abuse, sexual exploitation, . . . [or] severe abuse . . . are involved, neither the [DCFS] nor the court has any duty to make ‘reasonable efforts’ or to . . . attempt to maintain a child in the child’s home, return a child to the child’s home, provide reunification services, or attempt to rehabilitate the offending parent or parents.” Furthermore, Utah Code Ann. § 78A-6-306(15) states,

If the court finds that continued removal and temporary custody are necessary for the protection of a child pursuant to section 9(a), the court shall order continued removal regardless of:

- (a) any error in the initial removal of the child;
- (b) the failure of a party to comply with notice provisions; or
- (c) any other procedural requirement of this chapter or Title 62A, Chapter 4a, Child and Family Services.

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<sup>118</sup> See *supra* note 88.

Pursuant to Utah Code Ann. § 78A-6-307(2) Shelter hearing—Placement—DCFS custody), the court will make reasonable efforts at a shelter hearing to place the child with the child’s parent. However, Utah Code Ann. § 78A-6-307(7) states,

If, at the time of the shelter hearing, a child is removed from the custody of the child’s parent and is not placed in the custody of the child’s other parent, the court:

(a) shall, at that time, determine whether, subject to Subsections (18)(c) through (e), there is a relative of the child or a friend of a parent of the child who is able and willing to care for the child; [and]

....

(d) may order that the child be placed in the custody of the division pending the determination under Subsection (7)(a).

#### *IV. Adjudication*

At a dispositional hearing, the court may order any disposition stated in Utah Code Ann. § 78A-6-117(2) (Adjudication of jurisdiction of juvenile court—Disposition of cases—Enumeration of possible court orders—Considerations of court—Obtaining DNA sample). Utah Code Ann. § 78A-6-312 (Dispositional hearings—reunification services—exceptions). Pursuant to Utah Code Ann. § 78A-6-117(2), “[u]pon adjudication the court may make” any of the listed dispositions, including “place the minor in state supervision . . . under the legal custody of: (A) the minor’s parent or guardian; (B) the Division of Juvenile Services; or (C) the Division of Child and Family Services.” Utah Code Ann. § 78A-6-117(2)(a)(ii).

Furthermore, “[t]he court may: (A) vest legal custody of the minor in the Division of Child and Family Services, Division of Juvenile Justice Services, or the Division of Substance Abuse and Mental Health; and (B) order the Department of Human Services to provide dispositional recommendations and services.” Utah Code Ann. § 78A-6-117(2)(c)(i).

#### *V. Outcomes*

Pursuant to Utah Code Ann. § 78A-6-312(1) the court can may also enter any of the following alternative orders at a dispositional hearing:

(b) place the minor in the custody or guardianship of any:

(i) individual; or

(ii) public or private entity or agency; or

(c) order:

(i) protective supervision;

(ii) family preservation;

(iii) subject to Subsections 12(b), § 78A-6-105(27)(d) [Definitions], and 78A-6-117(2)(n)

[Adjudication of jurisdiction of juvenile court—Disposition of cases—Enumeration of possible court orders—Considerations of court—Obtaining DNA sample], and Section § 78A-6-301.5 [Second medical opinion], medical or mental health treatment; or

(iv) other services.

Furthermore, if at the dispositional hearing the court determines that continued removal is in the best interest of the minor, it must “(a) establish a primary permanency goal for the minor; and (b) determine whether, in view of the primary permanency goal, reunification services are appropriate for the minor and the minor’s family . . . .” Utah Code Ann. § 78A-6-312(2). However, “[i]n cases where obvious sexual abuse, sexual exploitation, abandonment, severe abuse, or severe neglect are involved, neither the [DCFS] nor the court has any duty to

make ‘reasonable efforts’ or to, in any other way, attempt to provide reunification services, or to attempt to rehabilitate the offending parent or parents.” Utah Code Ann. § 78A-6-312(4).

If the court does not order reunification services at the dispositional hearing, a permanency hearing must be held within 30 days after the day on which the dispositional hearing ends. Utah Code Ann. § 78A-6-314(1)(b) (Permanency hearing—Final plan—Petition for termination of parental rights filed—Hearing on termination of parental rights).

### **Child Identified as Delinquent**

A child suspected of committing a prostitution offense may receive a protective response and access to services through child welfare. While minors may be arrested for prostitution offenses under Utah Code Ann. § 76-10-1302(3)<sup>119</sup>, they are not subject to delinquency proceedings and, instead, will be referred to the Division of Child and Family Services by a law enforcement officer. Provision of services in lieu of delinquency proceedings is mandatory for all minors identified as a child engaged in prostitution or sexual solicitation, as defined in Utah Code Ann. § 76-10-1302(3)(a)(ii)–(iii).

To the extent a minor victim is identified as having committed an offense other than prostitution or a status offense arising from the child’s exploitation, it is possible for the minor to be taken into custody and detained.

#### *I. Initial custody*

##### *a. Authority for initial custody*

A child suspected of prostitution may be arrested for prostitution, but must be referred to the Division of Child and Family Services. Pursuant to Utah Code Ann. § 76-10-1302(3)(b), (c),<sup>120</sup>

(b) Upon encountering a child engaged in prostitution or sexual solicitation, a law enforcement officer shall:

- (i) conduct an investigation;
- (ii) refer the child to the division;
- (iii) if an arrest is made, bring the child to a receiving center, if available; and
- (iv) contact the child's parent or guardian, if practicable.

(c) When law enforcement has referred the child to the division under Subsection (3)(b)(ii):

- (i) the division shall provide services to the child under Title 62A, Chapter 4a, Child and Family Services; and
- (ii) the child may not be subjected to delinquency proceedings under Title 62A, Chapter 7, Juvenile Justice Services, and Section 78A-6-601 through Section 78A-6-704.

If identified as committing an offense other than prostitution or a status offense, Utah Code Ann. § 78A-6-112(1) (Minor taken into custody by peace officer, private citizen, or probation officer—Grounds—Notice requirements—Release or detention—Grounds for peace officer to take adult into custody) provides,

A minor may be taken into custody by a peace officer without order of the court if:

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<sup>119</sup> See *supra* note 23.

<sup>120</sup> See *supra* note 23.



(a) in the presence of the officer the minor has violated a state law, federal law, local law, or municipal ordinance;

....

(d) there are reasonable grounds to believe the minor has run away or escaped from the minor's parents, guardian, or custodian; or

(e) there is reason to believe that the minor is:

(i) subject to the state's compulsory education law; and

(ii) absent from school without legitimate or valid excuse, subject to Section 53A-11-105

[Taking custody of a person believed to be a truant minor—Disposition—Receiving centers—Reports—Immunity from liability).

b. Placement

A child engaged in prostitution or sexual solicitation, who has been arrested by a law enforcement officer, shall be brought to a receiving center, if available. Utah Code Ann. § 76-10-1302(3)(b). Pursuant to Utah Code Ann. § 76-10-1302(3)(c)<sup>121</sup>,

When law enforcement officer has referred the child to the division under Subsection (3)(b)(ii):

(i) the division shall provide services to the child under Title 62A, Chapter 4a, Child and Family Services; and

(ii) the child may not be subjected to delinquency proceedings under Title 62A, Chapter 7, Juvenile Justice Services, and Section 78A-6-601 through Section 78A-6-704.

Otherwise, upon arrival at the youth corrections facility, a staff member must immediately determine “whether to admit the minor to secure detention,<sup>122</sup> admit the minor to home detention, place the minor in a placement other than detention, or return the minor home.” Utah Code Ann. § 78A-6-112(5)(b)(i). Pursuant to Utah Code Ann. § 78A-6-113(1) (Placement of minor in detention or shelter facility—Grounds—Detention hearings—Period of detention—Notice—Confinement for criminal proceedings—Bail laws applicable—Exception),

(a) A minor may not be placed or kept in a secure detention facility pending court proceedings unless it is unsafe for the public to leave the minor with the minor's parents, guardian, or custodian and the minor is detainable based on guidelines promulgated by the Division of Juvenile Justice Services.

(b) A child who must be taken from the child's home but who does not require physical restriction shall be given temporary care in a shelter facility and may not be placed in a detention facility.

(c) A child may not be placed or kept in a shelter facility pending court proceedings unless it is unsafe to leave the child with the child's parents, guardian, or custodian.

Additionally, “[a] child under 16 years of age may not be held in jail, lockup, or other place for adult detention except as provided by Section 62A-7-201 [Definitions] or unless certified as an adult pursuant to Section 78A-6-703 [Certification hearings—Juvenile court to hold preliminary hearing —Factors considered by juvenile court for waiver of jurisdiction to district court].” Utah Code Ann. § 78A-6-113(8)(a).

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<sup>121</sup> See *supra* note 23.

<sup>122</sup> Although Utah Code Ann. § 78A-6-105 (Definitions) does not define “secure detention,” it defines “secure facility” as “any facility operated by or under contract with the Division of Juvenile Justice Services, that provides 24-hour supervision and confinement for youth offenders committed to the division for custody and rehabilitation.” Utah Code Ann. § 78A-6-105(36). Utah Code Ann. § 62A-7-101(19), however, defines “secure detention” as “predisposition placement in a facility operated by or under contract with the division, for conduct by a child who is alleged to have committed a delinquent act.”

## *II. Process following initial custody*

When a child is arrested for committing a Class B misdemeanor<sup>123</sup> or below, the arresting officer must prepare a citation and submit it to the juvenile court within 5 days. Utah Code Ann. § 78A-6-603. Such citation shall require the juvenile to appear in court. Utah Code Ann. § 78A-6-603(10). When a child is arrested for committing a Class A misdemeanor or a felony, the arresting officer must file a formal referral with the juvenile court within 10 days of the child's arrest, unless the arrested child was taken to a detention facility, in which case, the arresting officer must file within 72 hours. Utah Code Ann. § 78A-6-602(2)(a).

Pursuant to Utah Code Ann. § 76-10-1302(3)(c)<sup>124</sup>, which applies to instances where a law officer encounters a child engaged in prostitution or sexual solicitation,

When law enforcement officer has referred the child to the division under Subsection (3)(b)(ii):

- (i) the division shall provide services to the child under Title 62A, Chapter 4a, Child and Family Services; and
- (ii) the child may not be subjected to delinquency proceedings under Title 62A, Chapter 7, Juvenile Justice Services, and Section 78A-6-601 through Section 78A-6-704.

## *III. Placement process pending adjudication*

In instances where a child is subject to delinquency proceedings and is detained on those charges, “a minor may not be held in a detention facility longer than 48 hours prior to a detention hearing, excluding weekends and holidays, unless the court has entered an order for continued detention.” Utah Code Ann. § 78A-6-113(4)(a). If at the detention hearing the court determines that it would be unsafe to release the minor, the minor may continue to be held in that facility or a more appropriate facility. Utah Code Ann. § 78A-6-113(4)(d).

## *IV. Adjudication*

After the detention hearing has been conducted, only the court has the authority to release the minor. Utah Code Ann. § 78A-6-113(4)(e)(i). Once a dispositional order has been entered, the minor may not be held in non-secure substitute care<sup>125</sup> or community-based placement for longer than 72 hours, unless the court determines that it is in the best interest of the minor that the period of detention be extended. Utah Code Ann. § 78A-6-113(5).

## *V. Outcomes*

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<sup>123</sup> Prostitution is a Class B misdemeanor. Utah Code Ann. § 76-10-1302. *See supra* Component 5.3.

<sup>124</sup> *See supra* note 23.

<sup>125</sup> “Substitute care” is defined in Utah Code Ann. § 78A-6-113(5) by referring to Utah Code Ann. § 62A-4a-101(32), which defines the term as

- (a) the placement of a minor in a family home, group care facility, or other placement outside the minor's own home, either at the request of a parent or other responsible relative, or upon court order, when it is determined that continuation of care in the minor's own home would be contrary to the minor's welfare;
- (b) services provided for a minor awaiting placement; and
- (c) the licensing and supervision of a substitute care facility.

While minors are liable under Utah Code Ann. § 76-10-1302(3), they are not subject to delinquency proceedings. Provision of services in lieu of delinquency proceedings is mandatory. Utah Code Ann. § 76-10-1302(3)(d). Pursuant to § 76-10-1302(3)(c),<sup>126</sup> “When a law enforcement has referred the child to the division under Subsection (3)(b)(ii) . . . the child may not be subjected to delinquency proceedings under Title 161 62A, Chapter 7 and Section 78A-6-601 through Section 78A-6-704.

Upon adjudication, Utah Code Ann. § 78A-6-117(2) (Adjudication of jurisdiction of juvenile court—Disposition of cases—Enumeration of possible court orders—Considerations of court—Obtaining DNA samples) allows the court to enter certain adjudicatory decrees, including placing the child on probation in the child’s home; “place the minor in the legal custody of a relative or other suitable person, with or without probation or protective supervision;” “commit a minor to the Division of Juvenile Justice Services for secure confinement;” or “vest legal custody of an abused, neglected, or dependent minor in the Division of Child and Family Services or any other appropriate person in accordance with the requirements and procedures of Title 78A, Chapter 6, Part 3, Abuse, Neglect, and Dependency Proceedings.”

The “court may commit a minor to the Division of Juvenile Justice Services for secure confinement” pursuant to Utah Code Ann. § 78A-6-117(2)(d)(i), but not if the minor is only under the jurisdiction of the court for “abuse, neglect or dependency.” Utah Code Ann. § 78A-6-117(2)(d)(ii). Minors under the jurisdiction of the court for committing an act “which if committed by an adult would be a criminal offense” may be placed in “detention or an alternative to detention” for no more than 30 days. Utah Code Ann. § 78A-6-117(2)(f)(i), (2)(f)(ii).

#### 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>127</sup>

For purposes of Utah’s Juvenile Court Act of 1996, and for Utah’s “Child and Family Services” chapter, which refers back to the Juvenile Court Act definition, commercial sexual exploitation and sex trafficking are expressly identified as a type of abuse.<sup>128</sup>

Specifically, Utah Code Ann. § 78A-6-105(1)(a)<sup>129</sup> (Definitions) defines “abuse” as

“Abuse” means:

- (i) nonaccidental harm<sup>130</sup> of a child;
- (ii) threatened harm of a child;
- (iii) sexual exploitation;
- (iv) sexual abuse; or
- (v) human trafficking of a child in violation of Section 76-5-308.5

Utah Code Ann. § 78A-6-105(40), defines “sexual exploitation” as knowingly:

- (a) employing, using, persuading, inducing, enticing, or coercing any child to:
  - (i) pose in the nude for the purpose of sexual arousal of any person; or
  - (ii) engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording, or displaying in any way sexual or simulated sexual conduct;

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<sup>126</sup> See *supra* note 23.

<sup>127</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>128</sup> Utah Code Ann. § 78A-6-105 (Definitions) provides that a “Dependent child” includes a child who is homeless or without proper care through no fault of the child’s parent, guardian, or custodian.

<sup>129</sup> See *supra* note 84.

<sup>130</sup> See *supra* note 85.

- (b) displaying, distributing, possessing for the purpose of distribution, or selling material depicting a child:
  - (i) in the nude, for the purpose of sexual arousal of any person; or
  - (ii) engaging in sexual or simulated sexual conduct; or
- (c) engaging in any conduct that would constitute an offense under Section 76-5b-201 [Sexual exploitation of a minor—Offenses], regardless of whether the person who engages in the conduct is actually charged with, or convicted of, the offense.

Additionally, human trafficking of a child occurs under Utah Code Ann. § 76-5-308.5(2) when, “the actor recruits, harbors, transports, obtains, patronizes, or solicits a child for sexual exploitation or forced labor.” Furthermore, “human trafficking of a child for sexual exploitation” includes all forms of commercial sexual activity with a child, including sexual explicit performance, prostitution, participation in the production of pornography, performance in a strip club, an exotic dancing or display.” Utah Code Ann. § 76-5-308.5(2)(b).

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.*

Utah’s child protective statutes do not use the term “caregiver.” Although, Utah’s child protective statutes frequently refer to a child’s parent, guardian, or custodian, these terms are not defined in Utah Code Ann. § 78A-6-105(21)<sup>131</sup> (Definitions) of the Juvenile Court Act of 1996 or § 62A-4a-101 (Definitions) of the Utah Human Services Code. However, jurisdictional statutes appear to provide the Division broad authority to provide services to minor victims of sex trafficking and commercial sexual exploitation.<sup>132</sup> Pursuant to Utah Code Ann. § 62A-4a-105(1) (Division responsibilities),

The division shall:

....

(b) provide the following services:

....

(x) services for minors who are victims of human trafficking or human smuggling as described in Sections 76-5-308 through 76-5-310 or who have engaged in prostitution or sexual solicitation as defined in Section 76-10-1302; and

(xi) training for staff and providers involved in the administration and delivery of services offered by the division in accordance with this chapter . . . .

Therefore, child victims of commercial sexual exploitation are eligible to receive child welfare protection and services irrespective of the perpetrator of the abuse.

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

The Utah Crime Victim Reparations and Assistance Board may award reparations to victims of criminally injurious conduct that occurred in Utah, or, if the claimant is a Utah resident, for criminally injurious conduct<sup>133</sup>

<sup>131</sup> See *supra* note 84.

<sup>132</sup> Utah Code Ann. § 78A-6-105 (Definitions) provides that a "Dependent child" includes a child who is homeless or without proper care through no fault of the child's parent, guardian, or custodian.

<sup>133</sup> Pursuant Utah Code Ann. § 63M-7-502(9)(a) (Definitions), “criminally injurious conduct” is defined as conduct that:

that occurred outside of Utah if the location where the conduct occurred “does not provide a crime victims’ compensation program.” Utah Code Ann. §§ 63M-7-509(1)(a), (2), 63M-7-506(1)(h). For purposes of awarding victim reparations, a “victim” includes “a person who suffers bodily or psychological injury or death as a direct result of criminally injurious conduct or of the production of pornography in violation of Section 76-5b-201 [Sexual exploitation of a minor—Offenses] if the person is a minor.” Utah Code Ann. § 63M-7-502(35)(a).

The requirement under Utah Code Ann. § 63M-7-502(9)(a)(iii) that the criminal conduct must “cause[], or pose[] a substantial threat of causing, bodily injury or death” to the victim, could prevent some domestic minor sex trafficking victims from being eligible to receive a reparations award.

Additionally, under Utah Code Ann. § 63M-7-509(4), (5)(a) (Grounds for eligibility), to be eligible to receive a reparations award, a victim must report the criminally injurious conduct to “law enforcement, or other federal or state investigative agencies,” and “cooperate with the appropriate law enforcement agencies and prosecuting attorneys in their efforts to apprehend or convict the perpetrator of the alleged offense.”

Even when a domestic minor sex trafficking victim qualifies as a victim under Utah Code Ann. § 63M-7-502(35)(a), (b) and meets the eligibility requirements of Utah Code Ann. § 63M-7-509, several other requirements in Utah Code Ann. § 63M-7-510 (Ineligible persons—Fraudulent claims—Penalties) and Utah Code Ann. § 63M-7-512(1) (Reparations reduction) could present difficulties for domestic minor sex trafficking victims. Utah Code Ann. § 63M-7-510(1)(f) provides that “any convicted offender serving a sentence of imprisonment in any prison or jail or residing in any other correctional facility” is ineligible to receive a reparations award. Consequently, to the extent a domestic minor sex trafficking victim has been sentenced for a crime in connection with his or her exploitation, that victim may be ineligible to receive a reparations award. Similarly, under Utah Code Ann. § 63M-7-512(1), even an eligible victim’s reparations award can be reduced or denied if:

- (a) the economic loss upon which the claim is based has been or could be recouped from other persons, including collateral sources;
- (b) the reparations officer considers the claim unreasonable because of the misconduct of the claimant or of a victim through whom the claimant claims;
- ....

No provision of Utah’s laws regarding reparation awards provides guidance as to when the reparations officer may consider a victim’s claim “unreasonable” or exempt commercially sexually exploited child victims from the eligibility requirements or the award reduction factors. Moreover, under Utah Code Ann. § 63M-7-511.5(1)(a) (Limitations of awards), most reparations awards cannot exceed \$25,000. In contrast, “claims involving homicide, attempted homicide, aggravated assault, or DUI offenses,” provide victim reparation awards up to \$50,000. Utah Code Ann. § 63M-7-511.5(1)(b).

- 5.7.1 Recommendation: Amend Utah Code Ann. § 63M-7-509 (Grounds for eligibility) to specify that victims of Utah Code Ann. § 76-5-308.5 (Human trafficking of a child—Penalties) and § 76-5-310 (Aggravated human trafficking and human smuggling—Penalties) are eligible victims. Amend

- 
- (i) is or would be subject to prosecution in this state under section 76-1-201;
  - (ii) occurs or is attempted;
  - (iii) causes or poses a substantial threat of causing bodily injury or death;
  - (iv) is punishable by fine, imprisonment, or death if the person engaging in the conduct possessed the capacity to commit the conduct; and
  - ....

Utah Code Ann. § 63M-7-510 (Ineligible persons—Fraudulent claims—Penalties) and § 63M-7-512(1) (Reparations reduction) to expressly exempt commercially sexually exploited children from the listed ineligibility and award reduction factors with a good cause exception from the requirement to cooperate with law enforcement.

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

Utah Code Ann. § 77-37-3 (Bill of rights) affords victims and witnesses in criminal justice proceedings several rights, including the following:

(a) Victims and witnesses have a right to be informed as to the level of protection from intimidation and harm available to them, and from what sources, as they participate in criminal justice proceedings as designated by Section 76-8-508, regarding witness tampering, and Section 76-8-509, regarding threats against a victim. Law enforcement, prosecution, and corrections personnel have the duty to timely provide this information in a form which is useful to the victim.

....

(d) Victims and witnesses should have a secure waiting area that does not require them to be in close proximity to defendants or the family and friends of defendants.

(e) Victims may seek restitution or reparations . . . .

(f) Victims and witnesses have a right to have any personal property returned . . . . Criminal justice agencies shall expeditiously return the property . . . .

....

(h) Victims and witnesses, particularly children, should have a speedy disposition of the entire criminal justice process. All involved public agencies shall establish policies and procedures to encourage speedy disposition of criminal cases.

....

Additionally, Utah Code Ann. § 77-37-4 (Additional rights—Children) affords additional rights to child<sup>134</sup> victims<sup>135</sup> and witnesses, specifically stating,

(1) Children have the right to protection from physical and emotional abuse during their involvement with the criminal justice process.

(2) Children are not responsible for inappropriate behavior adults commit against them and have the right not to be questioned, in any manner, nor to have allegations made implying this responsibility. Those who interview children have the responsibility to consider the interests of the child in this regard.

(3) Child victims and witnesses have the right to have interviews relating to criminal procedure kept to a minimum. All agencies shall coordinate interviews and ensure that they are conducted by persons sensitive to the needs of children.

(4) Child victims have the right to be informed of available community resources that might assist them and how to gain access to those resources. Law enforcement and prosecutors have the duty to ensure that child victims are informed of community resources, including counseling prior to the court proceeding, and have those services available throughout the criminal justice process.

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<sup>134</sup> Utah Code Ann. § 77-37-2(1) defines “child” as “a person who is younger than 18 years of age, unless otherwise specified in statute. The rights to information as extended in this chapter also apply to the parents, custodian, or legal guardians of children.”

<sup>135</sup> Utah Code Ann. § 77-37-2(3) defines “victim” as “a person against whom a crime has allegedly been committed, or against whom an act has allegedly been committed by a juvenile or incompetent adult, which would have been a crime if committed by a competent adult.”

(5) Child victims have the right, once an investigation has been initiated by law enforcement or the Division of Child and Family Services, to have their investigative interviews that are conducted at a Children’s Justice Center, including both video and audio recordings, protected. Except as provided . . . [within Utah Code Ann. § 77-37-4 (5)(b), (c)], interviews may not be distributed, released, or displayed to anyone without a court order.

. . . .

Additionally, Utah Code Ann. § 77-38-8(13) provides that when a defendant is charged with a felony offense involving kidnapping, human trafficking or human smuggling, sexual offenses, or aggravated exploitation of prostitution, the court may issue a no contact order as specified. A violation of this no contact order is a third degree felony.

(a) When a defendant is charged with a felony crime under Sections 76-5-301 through 76-5-310 regarding kidnapping, human trafficking, and human smuggling; Sections 76-5-401 through 76-5-413 regarding sexual offenses; or Section 76-10-1306 regarding aggravated exploitation of prostitution, the court may, during any court hearing where the defendant is present, issue a pretrial criminal no contact order:

. . . .

(b) Violation of a pretrial criminal no contact order issued pursuant to this section is a third degree felony. Utah Code Ann. § 77-38-8(13)(a)–(b).

Furthermore, “in any criminal proceeding or juvenile court proceeding,” the court may appoint an advisor to witnesses under the age of 14 to assist the witness “in understanding questions asked by counsel.” Utah Code Ann. § 77-38-8(1), (2)(a). Utah Code Ann. § 77-38-8(1) also states that the person examining or cross-examining the child witness shall use “age-appropriate language.”

Utah law does not, however, expressly authorize the court to appoint a guardian ad litem for a child victim or witness in a criminal proceeding. However, for purposes of the Juvenile Court Act of 1996,<sup>136</sup> the court “may appoint an attorney guardian ad litem to represent the best interest of a minor involved in any case before the court.” Utah Code Ann. § 78A-6-902(1)(a)(i).

Children who are under the age of 14 and are victim witnesses in criminal prosecutions involving sexual or physical abuse may be allowed to give testimony outside the courtroom. Utah R. Crim. P. 15.5(a), (b). In cases of child abuse or a sexual offense against a child, Utah R. Crim. P. 15.5(a) (Out of court statement and testimony of child victims or child witnesses of sexual or physical abuse—Conditions of admissibility) allows out of court oral statements of victims or witnesses under the age of 14 that were “recorded prior to the filing of an information or indictment” to be admitted as evidence in court if certain requirements are met.<sup>137</sup>

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<sup>136</sup> Utah Code Ann. § 78A-6-101 *et seq.*

<sup>137</sup> Pursuant to Utah R. Crim. P. 15.5(a), a child’s recorded out of court oral statement may be admissible in court if

- (1) the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant’s rights of confrontation are not violated;
- (2) no attorney for either party is in the child’s presence when the statement is recorded;
- (3) the recording is visual and aural and is recorded on film, videotape or other electronic means;
- (4) the recording is accurate and has not been altered;
- (5) each voice in the recording is identified;

Additionally, in cases involving child abuse or a sexual offense against a child (e.g., Utah Code Ann. § 76-5-404.1(4) (Sexual abuse of a child—Aggravated sexual abuse of a child)), but not involving Utah Code Ann. § 76-5-308.5<sup>138</sup> (Human trafficking of a child—Penalties) or Utah’s other CSEC laws,<sup>139</sup> the court may order the testimony of a child under “14 years of age to be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room.” Utah R. Crim. P. Rule 15.5(b). Pursuant to Utah R. Crim. P. 15.5(b)(1), when a child under 14 years of age provides testimony via closed-circuit television,

- (1) Only the judge, attorneys for each party and the testifying child (if any), persons needed to operate the recording equipment and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be in the room during the child’s testimony. A defendant who consents to be hidden from the child’s view may also be present unless the court determines that the child will suffer serious emotional or mental strain if required to testify in the defendant’s presence, or that the child’s testimony will be inherently unreliable if required to testify in the defendant’s presence. If the court makes that determination, or if the defendant consents:
  - (A) the defendant may not be present during the child’s testimony;
  - (B) the court shall ensure that the child cannot hear or see the defendant;
  - (C) the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child’s testimony;
  - (D) the defendant shall be permitted to observe and hear the child’s testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child’s testimony; and
  - (E) the conditions of a normal court proceeding shall be approximated as nearly as possible.

While not limited in application to child victims, Utah R. Evid. 412(a), (b) (Admissibility of alleged victim’s sexual behavior or alleged sexual predisposition) applies in “any criminal proceeding involving alleged sexual misconduct” and prohibits the admission of evidence “offered to prove that any alleged victim engaged in other sexual behavior” or “offered to prove any alleged victim’s sexual predisposition,” except,

The following evidence is admissible, if otherwise admissible under these rules:

- (1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of the semen, injury, or other physical evidence;
- (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered:
  - (A) by the accused to prove consent; or
  - (B) by the prosecution; and
- (3) evidence the exclusion of which would violate the constitutional rights of the defendant.

- 
- (6) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;
  - (7) the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury; and
  - (8) the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

<sup>138</sup> See *supra* note 2.

<sup>139</sup> See *supra* Component 1.2 for Utah’s statutes.



5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*

Utah Code Ann. § 78A-6-1105(1)(a) (Expungement of juvenile court record—Petition—Procedure) allows a person adjudicated under the Juvenile Court Act of 1996 to

petition the court for the expungement of the person’s juvenile court record and any related records in the custody of a state agency, if:

- (i) the person has reached the age of 18 years of age; and
- (ii) one year has elapsed from the date of termination of the continuing jurisdiction of the juvenile court, or if the person was committed to a secure youth corrections facility, one year from the date of the person’s unconditional release from the custody of the Division of Juvenile Justice Services.

However, the court may waive either of these requirements when it deems it appropriate. Utah Code Ann. § 78A-6-1105(1)(b). A hearing is held upon request and, pursuant to Utah Code Ann. § 78A-6-1105(2)(c),

The court may order sealed all petitioner’s records under the control of juvenile court of any of petitioner’s records under the control of any other agency or official pertaining to the petitioner’s adjudicated juvenile court cases, including relevant related records contained in the Management Information System created by Section 62A-4a-1003 [Management information system—Requirements—Contents—Purpose—Access] and the Licensing Information System created by Section 62A-4a-1005 [Supported finding of a severe type of child abuse or neglect], if the court finds that:

- (i) the petitioner has not, since the termination of the court’s jurisdiction or the petitioner’s unconditional release from the Division of Juvenile Justice Services, been convicted of a:
  - (A) felony; or
  - (B) misdemeanor involving moral turpitude;
- (ii) no proceeding involving a felony or misdemeanor is pending or being instituted against the petitioner; and
- (iii) a judgment for restitution entered by the court on the conviction for which the expungement is sought has been satisfied.

If however, the petitioner’s juvenile court records consist “solely of nonjudicial adjustments as provided in Section 78A-6-602 [Petition—Preliminary inquiry—Nonjudicial adjustments—Formal referral—Citation—Failure to appear],” the juvenile may only petition the court for expungement after turning 18 years old and only if they have “completed the conditions of the nonjudicial adjustments” in which case the court shall, without a hearing, order the records relating to the petitioner’s nonjudicial adjustments to be sealed. Utah Code Ann. § 78A-6-1105(6).

Once the court orders the person’s records sealed, the person’s case will “be considered never to have occurred and the petitioner may properly reply accordingly upon any inquiry in the matter. Inspection of the records may thereafter only be permitted by the court upon petition by the person who is the subject of the records, and only to persons named in the petition.” Utah Code Ann. § 78A-6-1105(4).

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

Victims of crimes in Utah may be eligible to receive restitution from their offender pursuant to Utah’s Crime Victims Restitution Act. Specifically, Utah Code Ann. § 77-38a-301 (Restitution—Convicted defendant may be required to pay) authorizes the court to order “a convicted defendant to make restitution.” Convicted offenders

who caused pecuniary damages are subject to mandatory restitution. Utah Code Ann. § 77-38a-302(1) (Restitution criteria), states in part, “When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims<sup>140</sup> of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition.” In determining restitution, the court shall determine “court-ordered restitution,”<sup>141</sup> and “complete restitution”<sup>142</sup> using the criteria provided in subsection (5). Utah Code Ann. § 77-38a-302(1), (2).

Restitution is also provided under Utah Code Ann. § 24-3-103(1)(a), which states,

When the prosecuting attorney determines that property no longer needs to be held as evidence, the prosecuting attorney may:

- (a) petition the court to apply any property that is money towards restitution, fines, fees, or monetary judgments owed by the owner of the property;

For purposes of the Crime Victims Restitution Act, a “victim” is defined as “any person whom the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities,” who is not “a codefendant or accomplice.” Utah Code Ann. § 77-38a-102(14)<sup>143</sup>. Pursuant to Utah Code Ann. § 77-38a-102(6), a victim’s pecuniary damages include

all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant’s criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.

Pursuant to Utah Code Ann. § 77-38a-302(5)(b), the court considers a number of factors in determining the amount of complete restitution, several of which are as follows:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (iii) the cost of necessary physical and occupational therapy and rehabilitation;
- (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim as a result of the offense;
- ....

In determining court-ordered restitution, pursuant to Utah Code Ann. § 77-38a-302(5)(c), the court shall consider the factors listed in Utah Code Ann. § 77-38a-302(5)(b), as well as the following factors:

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<sup>140</sup> “Victim” is defined as “any person whom the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities” and it “may not include a codefendant or accomplice.” Utah Code Ann. § 77-38a-102(14). *See supra* note 46.

<sup>141</sup> Utah Code Ann. § 77-38a-302(2)(b) defines “court-ordered restitution” as “the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence.” *See supra* note 76.

<sup>142</sup> Utah Code Ann. § 77-38a-302(2)(a) defines “complete restitution” as the “restitution necessary to compensate a victim for all losses caused by the defendant.”

<sup>143</sup> *See supra* note 46.

- (i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
- (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
- (iv) other circumstances which the court determines may make restitution inappropriate.

Victims of the offense of Utah Code Ann. § 76-5-308.5<sup>144</sup> (Human trafficking of a child—Penalties) are not expressly afforded a private cause of action. In contrast, victims of human trafficking, aggravated human trafficking, human smuggling and aggravated human smuggling may file a civil action against the offender under Utah Code Ann. § 77-38-15(1) (Civil action against human traffickers and human smugglers). In making a finding for the victim, the court has the discrepancy of awarding different types of damages. Utah Code Ann. § 77-38-15 states,

- ....
- (2) (a) The court may award actual damages, compensatory damages, punitive damages, injunctive relief, or any other appropriate relief.
  - (b) The court may award treble damages on proof of actual damages if the court finds that the person's acts were willful and malicious.
  - (3) In an action under this section, the court shall award a prevailing victim reasonable attorney fees and costs.
- ....
- (6) The court shall offset damages awarded to the victim under this section by any restitution paid to the victim under Title 77, Chapter 38a, Crime Victims Restitution Act.
- ....
- (9) This section does not preclude any other remedy available to the victim under the laws of this state or under federal law.

Victims who are injured under Utah Code Ann. § 76-10-1603<sup>145</sup> (Unlawful acts) are expressly afforded the right to “sue . . . and recover twice the damages [that the victim] sustains.” Utah Code Ann. § 76-10-1605(1). Evidence that the defendant has been ordered to pay or has paid restitution based on a criminal court ruling is inadmissible in any civil action based on the same facts or events. Utah Code Ann. § 77-38a-403(1).

*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 sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Although under Utah Code Ann. § 76-1-301(2)(n), (o), (r), and (s) (Offenses for which prosecution may be commenced at any time), offenses including the “sexual abuse of a child; aggravated sexual abuse of a child; . . . aggravated human trafficking or aggravated human smuggling in violation of Utah Code Ann. § 76-5-310; and aggravated exploitation of prostitution involving a child, under Utah Code Ann. § 76-10-1306” may be brought at any time, Utah Code Ann. § 76-5-308.5<sup>146</sup> (Human trafficking of a child—Penalties) is not listed. Prosecutions of most other felonies must be commenced within 4 years of the commission of the crime. Utah

<sup>144</sup> See *supra* note 2.

<sup>145</sup> See *supra* Component 3.1 for the substantive provisions of Utah Code Ann. § 76-10-1603.

<sup>146</sup> See *supra* note 2.

Code Ann. § 76-1-302(1)(a). Prosecutions for misdemeanors generally must commence within 2 years of the commission of the crime. Utah Code Ann. § 76-1-302(1)(b).

For civil actions arising out of the sexual abuse of a child, Utah Code Ann. § 78B-2-308(3), (6)<sup>147</sup> (Civil actions for sexual abuse of a child) specifies,

- (3) (a) A victim may file a civil action against a perpetrator for intentional or negligent sexual abuse<sup>148</sup> suffered as a child at any time.<sup>149</sup>
- (b) A victim may file a civil action against a non-perpetrator for intentional or negligent sexual abuse suffered as a child:
  - (i) within four years after the person attains the age of 18 years; or
  - (ii) if a victim discovers sexual abuse only after attaining the age of 18 years, that person may bring a civil action for such sexual abuse within four years after discovery of the sexual abuse, whichever period expires later.
- ....
- (6) A civil action may be brought only against a living person who:
  - (a) intentionally perpetrated the sexual abuse;
  - (b) would be criminally responsible for sexual abuse in accordance with Section 76-2-202; or
  - (c) negligently permitted the sexual abuse to occur.

Pursuant to Utah Code Ann. § 78B-2-308(7),<sup>150</sup> “A civil action against a person listed in Subsection (6)(a) or (b) for sexual abuse that was time barred as of July 1, 2016, may be brought within 35 years of the victim’s 18<sup>th</sup> birthday, or within 3 years of the effective date of this subsection (7), whichever is longer.

However, until the child attains the age of majority, all statutes of limitations for civil causes of actions, “other than for the recovery of real property may not run.” Utah Code Ann. § 78B-2-108. A 3 year statute of limitations applies to victims seeking to bring damages claims for violations of Utah Code Ann. § 76-10-1603 (Unlawful acts). Utah Code Ann. § 76-10-1605(9) (Remedies of person injured by a pattern of unlawful activity—Double damages—Costs, including attorney fees—Arbitration—Agency—Burden of proof—Actions by attorney general or county attorney—Dismissal—Statute of limitations—Authorized orders of district court).

Concerning the offenses of human trafficking, aggravated human trafficking, human smuggling and aggravated human smuggling, a 10 year statute of limitations applies to filing a civil action against the offender under Utah Code Ann. § 77-38-15(4). Utah Code Ann. § 77-38-15 specifies,

- ....
- (4) An action under this section shall be commenced no later than 10 years after the latter of:
  - (a) the day on which the victim was freed from the human trafficking or human smuggling situation;
  - (b) the day on which the victim attains 18 years of age; or
  - (c) if the victim was unable to bring an action due to a disability, the day on which the victim's disability ends.

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<sup>147</sup> The text of Utah Code Ann. § 78B-2-308 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 279 during the 2016 General Session of the Utah Legislature (effective May 10, 2016).

<sup>148</sup> “Sexual Abuse” is defined as “acts or attempted acts of sexual intercourse, sodomy, or molestation directed towards a child.” Utah Code Ann. § 78B-2-308(2)(g). *See supra* note 147

<sup>149</sup> A “child” includes any person under the age of 18. Utah Code Ann. § 78B-2-308(2)(a). *See supra* note 147.

<sup>150</sup> *See supra* note 147.

(5) The time period described in Subsection (4) is tolled during a period of time when the victim fails to bring an action due to the person:

- (a) inducing the victim to delay filing the action;
- (b) preventing the victim from filing the action; or
- (c) threatening and causing duress upon the victim in order to prevent the victim from filing the action.

***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.*
  - 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 *Law enforcement agencies are mandated to promptly report missing and recovered 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.*

While Utah's Peace Officer Training and Certification Act<sup>151</sup> requires law enforcement officers in Utah to complete a basic training course and authorizes individual municipalities to adopt higher minimum training standards, nothing expressly authorizes law enforcement in Utah to complete training on human trafficking or domestic minor sex trafficking. Utah Code Ann. §§ 53-6-205(1), 53-6-207.

- 6.1.1 Recommendation: Enact a law mandating or authorizing training or development of training materials for law enforcement officers on domestic minor sex trafficking.

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

Single-party consent to audiotaping is permissible under Utah Code Ann. § 77-23a-4(7)(a)–(b) (Offenses—Criminal and civil—Lawful interception):

- (a) A person acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception.
  - (b) A person not acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws.

- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*

Pursuant to Utah Code Ann. § 77-23a-8 (Court order to authorize or approve interception–procedure), Utah law allows wiretapping to investigate the commission of several human trafficking and exploitation offenses. Utah Code Ann. § 77-23a-8p permits a judge to authorize the use of wiretapping when “the interception sought may

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<sup>151</sup> Utah Code Ann. § 53-6-201 *et seq.*

provide or has provided evidence of the commission of: Utah Code Ann. § 76-5-307 (Human trafficking or human smuggling), Utah Code Ann. § 76-5-310 (Aggravated human trafficking or aggravated human smuggling), . . . Utah Code Ann. § 76-10-1306 (Exploiting prostitution), Utah Code Ann. § 76-10-1306 (Aggravated exploitation of prostitution) . . .” However, Utah Code Ann. § 76-1-308.5<sup>152</sup> (Human trafficking of a child—Penalties) is not one of the offenses for which wiretapping may be authorized under Utah Code Ann. § 77-23a-

Resultantly, while cases of domestic minor sex trafficking may fall within the bounds of Utah Code Ann. § 76-5-307 (Human trafficking or human smuggling), which would permit the use of wiretapping, the offense of child sex trafficking alone does not permit the use of the investigative tool.

*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.*

Utah’s human trafficking and CSEC laws do not expressly prohibit a defense as to the use of a law enforcement decoy in an investigation for buying and sexing of sex acts with a child. Thus, a defendant may be able to assert a defense based on a law enforcement decoy posing as a minor to investigate buyer-applicable offenses through reverse sting operations, which are the most likely situations in which a defendant would try to use such a defense.

- 6.4.1 Recommendation: Amend Utah Code Ann. § 76-5-308.5 (Human trafficking of a child—Penalties), § 76-5-308<sup>153</sup> (Human trafficking), § 76-5-309 (Human trafficking and human smuggling—Penalties), § 76-5-310 (Aggravated human trafficking and aggravated human smuggling—Penalties), and CSEC laws to expressly prohibit a defense based on the use of a decoy to investigate minor sex trafficking and CSEC related crimes.

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

The use of the Internet or electronic communications to investigate buyers and traffickers appears to be a permissible investigative technique under Utah law. Utah Code Ann. § 76-4-401(2) (Enticing a minor—Elements—Penalties) states,

- (a) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to solicit, seduce, lure, or entice a minor, or to attempt to solicit, seduce, lure, or entice a minor, or another person that the actor believes to be a minor to engage in any sexual activity which is a violation of state criminal law.
- (b) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to:
  - (i) initiate contact with a minor or a person the actor believes to be a minor; and
  - (ii) subsequently to the action under Subsection (2)(b)(i), by any electronic or written means, solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice the minor or a person the actor believes to be the minor to engage in any sexual activity which is a violation of state criminal law.

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<sup>152</sup> See *supra* note 2.

<sup>153</sup> See *supra* note 4.

Utah Code Ann. § 76-4-401(3) further provides that “it is not a defense to the crime of enticing a minor . . . or an attempt to commit this offense, that a law enforcement officer or undercover operative who is working with law enforcement agency was involved in the detection or investigation of the offense.” Furthermore, the use of the phrase “or another person the actor believes to be a minor,” implies that under Utah law it is permissible for officers to pose as minors to investigate buyers and traffickers of commercial sex act with minors.

#### 6.6 *Law enforcement agencies are mandated to promptly report missing and recovered children.*

Utah Code Ann. § 53-10-203 (Missing persons—Reports—Notification) provides a series of steps that must be taken when law enforcement receives a report of a missing person. First, each law enforcement agency involved in the investigation of a missing person<sup>154</sup> must inform the division<sup>155</sup> about the missing person. Utah Code Ann. § 53-10-203(1). The division then must inform the state registrar of Vital Statistics and the FBI National Crime Information Center of the missing persons report and provide the state registrar with “information concerning the identity of the missing person.” Utah Code Ann. § 53-10-203(2). Once the missing person is discovered, the division must notify the “state registrar and any school that it has previously informed of the person’s disappearance.” Utah Code Ann. § 53-10-203(4). Lastly, the division is required to immediately notify law enforcement “[u]pon notification by the state registrar or school personnel that a request for a birth certificate, school record, or other information concerning a missing person has been made, or that an investigation is needed in accordance with Section 53A-11-503 . . . .” Utah Code Ann. § 53-10-203(6).

Furthermore, Utah Code Ann. § 26-2-27(2) (Identifying birth certificates of missing persons—Procedures) provides,

- (a) In accordance with Section 53-10-203, upon the state registrar’s notification by the division that a person who was born in this state is missing, the state and local registrars shall flag the registered birth certificate of that person so that when a copy of the registered birth certificate or information regarding the birth record is requested, the state and local registrars are alerted to the fact the registered birth certificate is that of a missing person.
- (b) Upon notification by the division the missing person has been recovered, the state and local registrars shall remove the flag from that person’s registered birth certificate.

Similarly, Utah Code Ann. § 53A-11-502 (Identifying records—Reporting requirements) provides,

- (1) Upon notification by the division of a missing child<sup>156</sup> in accordance with Section 53-10-203, a school in which that child is currently or was previously enrolled shall flag the record of that child in a manner that whenever a copy of or information regarding the record is requested, the school is alerted to the fact that the record is that of a missing child.
- (2) The school shall immediately report any request concerning flagged records or knowledge as to the whereabouts of any missing child to the division.

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<sup>154</sup> Utah Code Ann. § 53-10-102(15) (Definitions), defines “missing child” as “any person under the age of 18 years who is missing from the person’s home environment or a temporary placement facility for any reason and whose location cannot be determined by the person responsible for the child’s care.”

<sup>155</sup> Utah Code Ann. § 53-10-102(12) (Definitions), defines “division” as the Criminal Investigations and Technical Services Division of the Department of Public Safety, established in Section 53-10-103 [Division—Creation—Director appointment and qualifications].

<sup>156</sup> Utah Code Ann. § 53A-11-501(2) defines “missing child” by referring to Utah Code Ann. § 26-2-27, which defines the term as “a person younger than 18 years of age who is missing from the person’s home environment or a temporary placement facility for any reason, and whose whereabouts cannot be determined by the person responsible for the child’s care.”



(3) Upon notification by the division that a missing child has been recovered, the school shall remove the flag from that child's record.

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