



Legal Update

January 3, 2012

An Act Relative to the Commercial Exploitation of People

On November 21, 2011 Governor Patrick signed “*An Act Relative to the Commercial Exploitation of People*,” also known as the “Human Trafficking Law.”¹ This comprehensive legislation addresses the exploitation of children and adults for purposes of sexual servitude, forced labor and organ trafficking. It creates a host of new offenses and increases penalties for existing crimes. It expands reporting obligations, mandates inter-agency cooperation to provide services to victims and establishes a Victims of Human Trafficking Fund to help fund those services. It also authorizes the forfeiture of offender assets and civil actions by victims.

This legal update focuses on the provisions that involve investigations and prosecutions. For the complete text of the law, please see Chapter 178 of the Acts of 2011, which can be found at <http://www.malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter178>

NEW CRIMINAL OFFENSES

1. Enticement of a Child by Means of Electronic Communications, G.L. c. 265, § 26D

Definitions:

- “Entice” – to lure, induce, persuade, tempt, incite, solicit, coax or invite.
- “Electronic Communication” – shall include, but not be limited to: any transfer of signs, signals, writings, images, sounds, data, or intelligence transmitted by wire, radio, electromagnetic, photo-electronic or photo-optical system.

Text:

Whoever, by electronic communication, knowingly entices a child under the age of 18 years, to engage in prostitution in violation of section 50 or section 53A of chapter 272,

¹ Effective in 90 days. Note that the emergency preamble found on the Legislature’s link to Chapter 178 of the Acts of 2011 does *not* pertain to An Act Relative to the Commercial Exploitation of People.

human trafficking in violation of section 50, 51, 52 or 53 or commercial sexual activity as defined in section 49, or attempts to do so, shall be punished . . .

Punishment: House of Correction for not more than 2 ½ years or state prison for not more than 5 years, or by a fine of not less than \$2,500, or both fine and imprisonment.

Second/subsequent offense: State prison for not less than 5 years and a fine of not less than \$10,000. Sentence cannot be reduced to less than 5 years, or suspended, nor eligible for parole, probation, work release or furlough until after 5 years are served.

2. Trafficking Persons for Sexual Servitude, G.L. c. 265, § 50

Definitions (found in G.L. c. 265, § 49; apply also to G.L. c. 265, § 51, below):

- “Commercial sexual activity” – any sex act where anything of value is given, promised, or received by any person.
- “Financial harm” – a detrimental position relative to wealth, property or other monetary benefits that occurs as a result of another person’s illegal act.
- “Forced services” – services performed or provided by a person that are obtained or maintained by another person who:
 - Causes or threatens serious harm;
 - Physically restrains or threatens to do so;
 - Abuses or threatens to abuse the law or legal process;
 - Knowingly destroys, conceals, removes, confiscates or possesses a passport, immigration document or government-issued identification card;
 - Engages in extortion;
 - Causes or threatens to cause financial harm to any person.
- “Services” – acts performed by a person under the supervision of or for the benefit of another.
- “Sexually-explicit performance” – an unlawful live or public show intended to arouse or satisfy sexual desires.

Text:

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude . . .

Punishment: State prison for not less than 5 years but not more than 20 years, and fine of not more than \$25,000. If victim is under 18, punishment in state prison for life or any term of years, but not less than 5 years.

- Sentence cannot be reduced to less than 5 years, or suspended.
- No eligibility for probation, parole, work release, furlough, or any deduction for good conduct until at least 5 years of sentence is served.
- No continued without a finding or placed on file.
- A business entity shall be punished by a fine of not more than \$1,000,000.

Second/subsequent offense (also applies to G.L. c. 265, § 51, below): Imprisonment in state prison for life or for any term of years, but not less than 10 years. Sentence shall not be reduced to less than 10 years, or suspended, nor shall any convicted person be eligible for probation, parole, work release, furlough, or receive any deduction from his sentence for good conduct until 10 years are served. No continuance without a finding or place on file.

- Prima facie evidence of a valid prior adjudication, conviction or finding of sufficient facts shall be demonstrated by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from probation, jail or corrections documents. The commonwealth shall not be required to introduce any additional corroborating evidence or live witness testimony to establish the prior violation.

3. Trafficking Persons for Forced Services, G.L. c. 265, § 51

Definitions: same as section 50, above.

Text:

Whoever knowingly: (i) subjects, or attempts to subject, another person to forced services, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person, intending or knowing that such person will be subjected to forced services; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of trafficking of persons for forced services . . .

Punishment: same as section 50, above.

Second/subsequent offense: same as Section 50, above.

4. Organ Trafficking, G.L. c. 265, § 53

Text:

Whoever: (i) recruits, entices, harbors, transports, delivers or obtains by any means, another person, intending or knowing that an organ, tissue or other body part of such

person will be removed for sale, against such person's will; or (ii) knowingly receives anything of value, directly or indirectly as a result of a violation of clause (i) shall be guilty of organ trafficking . . .

Punishment: State prison for not more than 15 years, or by a fine of not more than \$50,000, or both imprisonment and fine. When the victim is under the age of 18, punishment shall be imprisonment in state prison for 5 years.

INCREASED PENALTIES

5. Penalty for Solicitation of a Prostitute

Increases the penalty for this crime, found in G.L. c. 272, § 8, to imprisonment in the House of Correction for not more than 2 ½ years, or a fine of not less than \$1,000 and not more than \$5,000, or both imprisonment and fine.

6. Penalties for Engaging in Sexual Conduct for a Fee

Strikes G. L. c. 272, § 53A, and replaces it with the following:

Section 53A(a) – whoever *engages, agrees to engage or offers to engage in sexual conduct in return for a fee* shall be punished by imprisonment in House of Correction for not more than 1 year, or by fine of not more than \$500, or both imprisonment and fine, regardless of whether sexual conduct occurs.

Section 53A(b) – whoever *pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person*, shall be punished by imprisonment in House of Correction for not more than 2 ½ years, or by a fine of not less than \$1,000 and not more than \$5,000, or by both imprisonment and fine, regardless of whether sexual conduct occurs.

Section 53A(c) – whoever *pays agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18*, shall be punished by imprisonment in state prison for not more than 10 years, or in the House of Correction for not more than 2 ½ years, and by a fine of not less than \$3,000 and not more than \$10,000, or by imprisonment and fine, regardless of whether sexual conduct occurs. Prosecutions under this section shall not be continued without a finding or placed on file.

ASSET FORFEITURE

7. Victims of Human Trafficking Trust Fund

The legislation creates a “Victims of Human Trafficking Trust Fund” under G.L. c. 10, § 66A. This fund shall consist of proceeds of assets seized and forfeited pursuant to G.L. c. 265, §§ 55, 56 and fines and assessments collected pursuant to G.L. c. 265, §§ 50, 51, 54. The funds shall be transferred to the Victim and Witness Assistance Board for distribution to public, non-profit and community-based programs that provide services to victims of offenses under G.L. c. 265, §§ 50, 51.

- All money furnished or intended to be furnished in exchange for forced labor, sexual servitude or to facilitate any violation of sections 50 or 51 shall be subject to forfeiture and shall be made available by the court to any victim ordered restitution pursuant to G.L. c. 258B, § 3.
- The following property shall be subject to forfeiture, and shall, upon motion by the Attorney General or District Attorney, be declared forfeit by any court having jurisdiction over said property or having final jurisdiction over any related criminal proceeding:
 - All conveyances, aircraft, vehicles or vessels used, or intended for use, to transport, conceal or facilitate a violation of section 50 or 51;
 - All books, records, research, microfilms, tapes and data used, or intended for use, in violation of section 50 or 51;
 - All negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for forced labor or sexual servitude, all proceeds traceable to such an exchange, including real estate and any other thing of value, and all negotiable instruments and securities used or intended to be used to facilitate any violation of section 50 or 51;
 - All real property, including any right, title and interest in the whole of any lot or tract of land and any appurtenances or improvements thereto, which is used in any manner or part to commit or facilitate any violation of section 50 or 51.

MANDATED REPORTING AND INVESTIGATION OF CHILD ABUSE

8. Modifications to G.L. c. 119, § 21 (Definitions)

The legislation adds to the definitions section as follows:

- Defines “advocate” as a person trained to work and advocate for the needs of sexually exploited children.
- Defines “appropriate services” as the assessment, planning and care (including food, clothing, medical care, counseling and crisis intervention) provided by an entity that has expertise in providing services to sexually exploited children.

Such appropriate services shall be provided in accordance with DCF regulations and policies.

- Defines “sexually exploited child” as any person under the age of 18 who has been subjected to sexual servitude, sex trafficking, engaging in sex in exchange for a fee, food, shelter, clothing, education or care, inducing a minor into prostitution or engaging in common night walking or streetwalking.
- Amends the definition of “children in need of services” to include a sexually exploited child.

9. Mandated 51A reports of sexually exploited or trafficked children

This legislation amends G.L. c. 119, § 51A to mandate reports to DCF of sexually exploited children or children who are otherwise human trafficking victims, and amends section 51B to require DCF to immediately report such cases to the District Attorney.

10. Multi-disciplinary Service Teams, G.L. c. 119, § 51D

When a 51A report specifically involves a sexually exploited child or a child human trafficking victim, the multi-disciplinary service team may consist of a team of professionals trained or otherwise experienced and qualified to assess the needs of sexually exploited children or children who are otherwise human trafficking victims, including:

1. Police officer, or other person designated by the police chief,
2. DCF employee,
3. Representative of the appropriate District Attorney,
4. Social service provider,
5. Medical professional or mental health professional.

The Multi-disciplinary team members shall determine whether the child has been sexually exploited and recommend a service plan.

11. Safe Harbor Provisions

The legislation adds two new sections to G.L. c. 119, §§ 39K, 39L:

Section 39K: This section requires DCF to provide services for sexually exploited children and those reasonably believed to be sexually exploited. DCF or any person may file a care and protection petition when a child declines services or is unable or unwilling to participate in services. The child shall have access to an advocate, as defined in G.L. c. 119, section 21. The advocate or a member of the multi-disciplinary team established under section 51 shall accompany the child to all court appearances.

Section 39L: When a sexually exploited child is charged in juvenile or criminal court with common nightwalking/streetwalking, G.L. c. 272, section 53 or with engaging in sexual conduct for a fee, G.L. c. 272, section 53A(a), there shall be a presumption that a

petition for care and protection or child in need of services will be filed before or after arraignment .

- Any person, including the juvenile, may file the care and protection petition, including a petition for emergency commitment under G.L. c. 272, § 24.
- A parent or police officer may file a child in need of services petition under G.L. c. 272, § 39E.
- The court may appoint a guardian ad litem and shall hold a hearing, and may allow a reasonable delay in the proceedings, including arraignment, to consider the petition. The court shall issue written findings of fact to become part of the court record.
- If the court finds that the child is in need of services or care and protection and arraignment has not yet occurred, and unless the District Attorney or Attorney General object, the court shall indefinitely stay the arraignment for DCF to provide services. If arraignment has occurred, and absent an objection by the District Attorney or Attorney General, the court shall sentence the child to pretrial probation under G.L. ch. 276, section 87. If the child fails to substantially comply with services, the court may restore the proceedings to the court docket.

EVIDENTIARY ISSUES

12. Confidential Communications with Human Trafficking Caseworker

The legislation creates a new section 20M under G.L. ch. 233 to protect communications between trafficking victims as caseworkers, as follows:

- It defines a “confidential communication” as information transmitted in confidence by and between a victim and a caseworker by a means which does not disclose the information to a person other than a person present to benefit the victim, or to those to whom disclosure is reasonably necessary to counsel and assist the victim.
- Confidential communication shall include all information received by a victim’s caseworker while counseling and assisting the victim, including, but not limited to, reports, records, working papers or memoranda.
- A caseworker shall not disclose any confidential communication without the prior written consent of the victim or the victim’s guardian.
- Such confidential communications shall not be subject to discovery in any civil, legislative or administrative proceeding without the prior written consent of the victim or the victim’s guardian.
- In criminal actions, such confidential communications shall be subject to discovery and shall be admissible as evidence but only to the extent that information is exculpatory in relation to the defendant; provided, however, that the court shall first determine whether or not such exculpatory information exists before allowing the discovery or introduction of such evidence.

- At the initial meeting, the caseworker must inform the victim of the confidentiality rights and the limitations.

13. Reputation Evidence

The legislation amends G.L. c. 233, § 21B by adding the new human trafficking crimes (G.L. c. 265, §§ 50, 51) to the current rape shield law. Therefore, evidence of the reputation of a victim's sexual conduct shall not be admissible in an investigation or proceeding before a grand jury or a court for a violation of these statutes.

MISCELLANEOUS

14. Statute of Limitations

The legislation amends the statute of limitations for sexual abuse of minors, G.L. c. 260, § 4C, to include human trafficking offenses, thereby creating a three year window, which is tolled for a child until the age of 18. The statute also amends G.L. c. 277, § 63 by adding human trafficking crimes to the current criminal statute of limitations tolling periods.

15. Victim's Name; Confidentiality

The statute amends G.L. c. 265, § 24C to protect the confidentiality of a human trafficking victim's name from release by a court, police department or state agency.

16. Child Witness Testimony; Videotaping or Simultaneous Electronic Transfer

The statute amends G.L. c. 278, § 16D to extend its protections to victims and witnesses under the age of 15 in prosecutions under G.L. c. 265, §§ 50, 51.

17. Affirmative Defense to Common Night Walking and Streetwalking (G.L. c. 272, § 53) and Engaging in Sexual Conduct for a Fee (G.L. c. 272, § 53A)

The statute creates an affirmative defense for a human trafficking victim involved in a prosecution or juvenile delinquency proceeding that, while a victim, such person was under duress or coerced into committing the offenses.

18. Sex Offender Registration

The statute amends the definition section of the sex offender registration and community notification act, G.L. c. 6, § 178C, by adding the following crimes to the definitions of "sex offense," "sex offense involving a child," and "sexually violent offense:"

- Enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under G.L. c. 265, § 26D;
- Trafficking of persons for sexual servitude under G.L. c. 265, § 50;
- Second and subsequent violation of human trafficking or sexual servitude under G.L. c. 265, § 52.

19. Civil Actions

A victim of G.L. c. 265, §§ 50, 51 may bring a civil action. Any legal guardian, family member, representative or court appointee may represent the victim's rights. The court may award:

- Actual damages
- Compensatory damages
- Punitive damages
- Injunctive relief
- Any other appropriate relief

A prevailing plaintiff shall be awarded attorney's fees and costs.

A civil action shall be commenced within 3 years of the date on which the victim was freed, or, if the victim was a child, within 3 years after the date the victim turns 18.

20. Address Confidentiality Program

Amends the definition of "sexual assault" in G.L. c. 9A, § 1, by adding the following crimes to those eligible for the address confidentiality program with the Secretary of State's Office:

- Enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under G.L. c. 265, § 26D;
- Trafficking of persons for sexual servitude under G.L. c. 265, § 50.

21. Interagency Task Force on Human Trafficking

The Attorney General shall chair a task force to address all aspects of human trafficking. The task force includes numerous representatives, including a representative of MDAA.