
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 1322 **Hearing Date:** April 19, 2016
Author: Mitchell
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Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Commercial Sex Acts: Minors*

HISTORY

Source: Author

Prior Legislation: None Known

Support: American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Alliance; Child Abuse Prevention Center; Children Now; National Association of Social Workers; National Center for Youth Law

Opposition: Alameda County District Attorney; California District Attorneys Association

PURPOSE

The purpose of this bill is to 1) provide that a minor engaged in commercial sexual activity will not be arrested for a prostitution offense; 2) direct a law enforcement officer who comes upon a minor engaged in a commercial sexual act to report the conduct or situation to county social services as abuse or neglect; and 3) provide that a commercially exploited child (CSEC) may be adjudged a dependent child of the juvenile court and taken into temporary custody to protect the minor's health or safety.

Sex Crimes Against Minors

Existing law defines "unlawful sexual intercourse" as an act of sexual intercourse accomplished with a person under the age of 18 years, when no other aggravating elements – such as force or duress – are present. (Pen. Code § 261.5, subd. (a).) Existing law provides the following penalties for unlawful sexual intercourse:

- Where the defendant is not more than three years older or three years younger than the minor, the offense is a misdemeanor.
- Where the defendant is more than three years older than the minor, the offense is an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to \$1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up to \$10,000.
- Where the defendant is at least 21 years of age and the minor is under the age of 16, the offense is an alternate felony-misdemeanor, punishable by a jail term of up to one year, a

fine of up to \$1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up to \$10,000. (Pen. Code § 261.5, subd (b)-(d).)

Existing law provides that in the absence of aggravating elements each crime of sodomy, oral copulation or penetration with a foreign or unknown object with a minor is punishable as follows:

- Where the defendant is over 21 and the minor under 16 years of age, the offense is a felony, with a prison term of 16 months, 2 years or 3 years.
- In other cases sodomy with a minor is a wobbler, with a felony prison term of 16 months, 2 years or 3 years. (Pen. Code §§ 286, subd. (b), 288a, subd. (b), 289, subd. (h).)

Existing law provides that where each crime of sodomy, oral copulation or penetration with a foreign or unknown object with a minor who is under 14 and the perpetrator is more than 10 years older than the minor, the offense is a felony, punishable by a prison term of 3, 6 or 8 years. (Pen. Code §§ 286, subd. (c)(1), 288a, subd. (c)(1), 289, subd. (j).)

Existing law provides that any person who engages in lewd conduct – any sexually motivated touching or a defined sex act – with a child under the age of 14 is guilty of a felony, punishable by a prison term of 3, 6 or 8 years. Where the offense involves force or coercion, the prison term is 5, 8 or 10 years. (Pen. Code § 288, subd. (b).)

Existing law provides that where any person who engages in lewd conduct with a child who is 14 or 15 years old, and the person is at least 10 years older than the child, the person is guilty of an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to \$1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up to \$10,000. (Pen. Code § 288, subd. (c)(1).)

Commercial Sex Crimes Involving Minors

Existing law includes numerous crimes concerning sexual exploitation of minors for commercial purposes. These crimes include:

- Pimping: Deriving income from the earnings of a prostitute, deriving income from a place of prostitution, or receiving compensation for soliciting a prostitute. Where the victim is a minor under the age of 16, the crime is punishable by a prison term of three, six or eight years. (Pen. Code § 266h, subds. (a)-(b).)
- Pandering: Procuring another for prostitution, inducing another to become a prostitute, procuring another person to be placed in a house of prostitution, persuading a person to remain in a house of prostitution, procuring another for prostitution by fraud, duress or abuse of authority, and commercial exchange for procurement. (Pen. Code § 266i, subd. (a).)
- Procurement: Transporting or providing a child under 16 to another person for purposes of any lewd or lascivious act. The crime is punishable by a prison term of three, six, or eight years, and by a fine not to exceed \$15,000. (Pen. Code § 266j.)
- Taking a minor from her or his parents or guardian for purposes of prostitution. This is a felony punishable by a prison term of 16 months, two years, or three years and a fine of up to \$2,000. (Pen. Code § 267.)

Existing law provides that where a person is convicted of pimping or pandering involving a minor the court may order the defendant to pay an additional fine of up to \$5,000. In setting the fine, the court shall consider the seriousness and circumstances of the offense, the illicit gain realized by the defendant and the harm suffered by the victim. The proceeds of this fine shall be deposited in the Victim-Witness Assistance Fund and made available to fund programs for prevention of child sexual abuse and treatment of victims. (Pen. Code § 266k, subd. (a).)

Existing law provides that where a defendant is convicted of taking a minor under the age 16 from his or her parents to provide to others for prostitution (Pen. Code § 267) or transporting or providing a child under the age of 16 for purposes of any lewd or lascivious act (Pen. Code § 266j), the court may impose an additional fine of up to \$20,000. (Pen. Code § 266k, subd. (b).)

Existing law provides that where a defendant is convicted of taking a minor (under the age of 18) from his or her parents for purposes of prostitution (Pen. Code § 267), or transporting or providing a child under the age of 16 for purposes of any lewd or lascivious act (266j), the court, if it decides to impose a specified additional fine, the fine must be no less than \$5,000, but no more than \$20,000. (Pen. Code § 266k, subd. (b).)

Existing law provides that any person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than five hundred thousand dollars (\$500,000). (Penal Code Section 236.1, subd. (a).)

Existing law states that any person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to affect or maintain a violation of specified sex crimes is guilty of human trafficking. A violation of this subdivision is punishable by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than five hundred thousand dollars (\$500,000) or fifteen years to life and a fine of not more than five hundred thousand dollars (\$500,000) when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Penal Code Section 236.1, subd. (c).)

Existing law provides that in determining whether a minor was caused, induced, or persuaded to engage in a commercial sex act, the totality of the circumstances, including the age of the victim, his or her relationship to the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be considered. (Penal Code § 236.1, subd. (d).)

Existing law provides that if the person solicited in a prostitution offense was a minor, and the defendant knew or should have known that the person who was solicited was a minor, the violation is punishable by imprisonment in a county jail for not less than two days and not more than one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both that fine and imprisonment.

- The court may, in unusual cases, when the interests of justice are best served, reduce or eliminate the mandatory two days of imprisonment in a county jail required by this subdivision

- If the court reduces or eliminates the mandatory two days' imprisonment, the court shall specify the reason on the record. (Pen. Code § 647, subds. (b) and (m)(1)-(2).)

Existing law includes the Commercially Sexually Exploited Children Program, (CSECP) as administered by DSS, to serve children who have been sexually exploited. Specifically, CSECP does the following:

- Requires DSS, in consultation with the County Welfare Directors Association of California, to develop an allocation methodology to distribute funding for the program.
- Authorizes the use of these funds by counties electing to participate in the program for prevention and intervention activities and services to children who are victims, or at risk of becoming victims, of commercial sexual exploitation.
- Requires DSS to contract for training for county children's services workers to identify, intervene, and provide case management services to children who are victims of commercial sexual exploitation, and for the training of foster caregivers for the prevention and identification of potential victims.
- Requires DSS, no later than April 1, 2017, to provide to the Legislature, information regarding the implementation of the program.
- Require each county, electing to receive funds, to develop an interagency protocol to be utilized in serving sexually exploited children who have been adjudged to be a dependent child of the juvenile court.
- Requires the county interagency protocol to be developed by a team led by a representative of the county human services department and to include representatives from specified county agencies and the juvenile court. This bill makes these provisions operative on January 1, 2015.
- Specifies that nothing precludes a county from providing a supplemental rate to serve commercially exploited foster children.
- Provides that, to the extent federal financial participation is available, federal funds should be utilized. (Welf. & Inst. Code §§ 16524.6-16524.11.)

This bill provides that a minor who engages in conduct that would constitute a prostitution offense shall not be arrested for a criminal offense.

This bill provides that a peace officer who encounters a minor engaged in a commercial sex act shall report these circumstances as abuse or neglect of a minor to the county child welfare agency in accordance with the Commercially Sexually Exploited Children Program, as defined in Welfare and Institutions Code Sections 16524.6-16524.11.)

This bill provides that a commercially sexually exploited child may be adjudged a dependent child of the juvenile court.

This bill provides that a commercially sexually exploited child may be taken into temporary custody "if the minor has an immediate need for medical care, or ... is in immediate danger of physical or sexual abuse, or the physical environment" or the child's unattended status "poses an immediate threat to the child's health or safety."

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

The author states:

In the state of California a person under the age of 18 years old is a minor and cannot legally consent to sexual intercourse. Any person who engages in sex with a minor victim, knowingly or not, has committed the crime of unlawful sexual intercourse.”

California currently allows for criminalization of Commercial Sexual Exploitation of Children (CSEC) victims by charging them with crimes committed while being victimized. Under current law a victim can be detained in juvenile hall and prosecuted for prostitution. This is not an effective or ethical response to this growing epidemic.

SB 1322 will stop the criminalization of CSEC victims by decriminalizing prostitution charges for minors. If it is determined that the person suspected of soliciting prostitution is under the age of 18, law enforcement shall immediately report any allegation of commercial sexual exploitation to the county child welfare department.

2. Sex Crimes Against Minors Related to Prostitution

This bill concerns “CSEC” - sexually exploited children. Sexual conduct with a minor constitutes a felony in most instances, regardless of whether anything of value was offered or exchanged for the sexual acts. Arguably, the exchange of money could be an aggravating factor in the underlying sex crime, as it could be seen as an improper attempt to normalize the behavior or coerce the victim. If the minor involved in a commercial sex of was under the age of 14, the defendant has committed the felony of lewd conduct, with a prison term of three, six or eight years. (Pen. Code § 288, subd. (a).) The crime is punishable by a term of 5, 8 or 10 years if the defendant used force, threats, duress or coercion. Solicitation of an act of prostitution from a minor under the age of 14 could likely be prosecuted as attempted lewd conduct – the intention to commit the crime and a direct step towards its commission. The prison or jail term of an attempt is generally one-half the punishment for the completed crime. Where the defendant solicited or employed a minor who was 14 or 15 years old, and the defendant was at least 10 years older than the minor, the defendant has committed an alternate felony-misdemeanor.

Any defined sex act – sodomy, sexual penetration, oral copulation or sexual intercourse – with a minor is a crime. The penalties depend on the relative ages of the defendant and the minor and whether the crime involved some form of force, coercion or improper advantage. A defendant charged with a prostitution-related offense involving a minor could also be charged and convicted of a sex crime in the same case. Generally, because the defined sex crime and the sexual commerce offense would involve a single transaction or act, the defendant could only be punished for one offense – the offense carrying the greatest penalty. (Pen. Code § 654.)

3. Sex Trafficking of Minors – Estimated Prevalence and Available Data

General Trafficking Prevalence Estimates and Data; 2007 California Data

There appears to be general agreement that sex trafficking of children is increasing and profitable. However, the 2007 Final Report of the California Alliance to Combat Trafficking and Slavery Task Force noted that California lacked comprehensive statistics on human trafficking. Thus, many statistics on human trafficking in general, and sex trafficking of children in particular, are estimates. The 2007 report did cite statistics from various sources, including a study finding that 80% of documented cases in California occurred in urban areas and the majority of victims were non-citizens. A U.S. State Department report of global trafficking estimated that minors constituted 50% of trafficking victims. (2007Alliance to Combat Trafficking, Final Report, pp. 33-39.) The State Department also noted that 14,500 to 17,500 persons are trafficked into the United States from other countries.

The Federal Bureau of Investigation (FBI) conducts 24 Innocence Lost child sexual exploitation task forces and working groups across the country. Through 2007, 365 cases were opened and 281 child victims were located. The Shared Hope International non-profit organization has reported that approximately 100,000 domestic minors are sexually trafficked each year. Numerous examples of trafficking cases were summarized in the California Alliance Report. In 2001, a Berkeley man was prosecuted for smuggling 15 girls from India for labor and sexual exploitation. In 2000, a man was prosecuted for bringing women and girls from Mexico and forcing them to work as prostitutes in Long Beach. (2007 Alliance to Combat Trafficking, Final Report, p. 18.)

2012 Report of the California Attorney General on Human Trafficking

The California Attorney General’s “Human Trafficking in California 2012” report stated that human trafficking investigations and prosecutions have become more comprehensive and organized. There are nine human trafficking task forces in California, composed of local, state and federal law enforcement and prosecutors.

Data on human trafficking has improved, although the data still does not reflect the actual extent and range of human trafficking. Data from 2010 through 2012 collected by the California task forces are set out in the following chart:

Investigations	2,552
Victims Identified	1,277
Arrests Made	1,798

Trafficking by Category

Sex Trafficking	56%
Labor Trafficking	23%
Unclassified or Insufficient Information	21%

4. John Jay College of Criminal Justice Study Found That Most Commercially Exploited Children in New York City Were Introduced to Commercial Sex by Peers

Recent years have seen a great increase in awareness of and concerns about minors – most often girls - engaged in commercial sex activities. Organized, coerced trafficking has received the most attention. Sex trafficking has been described as sexual slavery. Trafficked minors are isolated, controlled by and made dependent on their exploiters, and can even be perversely loyal because of the manufactured dependency.

However, a detailed 2008 study by the Center for Court Innovation and John Jay College of Criminal Justice found that most of the minors engaging in commercial sex in New York City are homeless, runaway minors who engage in “survival sex” to obtain small amounts of money for food and other necessities. A significant number of these CSEC – commercially sexually exploited children – are gay, lesbian and transgender youth who left unsupportive families and communities. The study authors were surprised to find that most CSEC were recruited or initiated into survival sex by their peers, with no involvement by adult pimps. The John Jay study also reported that many CSEC were simply approached on the street by would-be customers, without any solicitation by the CSEC. Also surprising, there were as many male CSEC as female CSEC in New York City.

Rachel Aviv’s December 2012 profile of homeless young people in the New Yorker magazine noted the results of the John Jay study and then carefully documented the daily lives of a number of homeless young people on the New York City streets. They often formed informal communities or street families for support. They sometimes shared repeat customers and money earned from commercial sex, technically acting as pimps for each other. Adults who purchase sex from CSEC are certainly aware that they are taking advantage of these children. Some men use violence against the homeless young people.

Aviv’s profile documented that living on the streets and engaging in survival sex is extremely perilous. The rate of HIV among homeless youth is triple that of the general population. Hunger and illness are common and many show symptoms of psychiatric disorders. Many face the frightening prospect of becoming chronically or permanently homeless. Aviv wrote: “Samantha and Ryan were both terrified of becoming ‘lifers.’ They saw the signs in their friends, who stopped trying to get job interviews, missed appointments with caseworkers, and cycled in and out of psychiatric hospitals or rehab centers, becoming accustomed to people telling them what to do and when.”

5. Programs for Minors Engaged in Prostitution

The New Yorker profile noted above described a patchwork of services that are not coordinated or comprehensive. As the CSEC understood, they are constantly in danger of becoming lifers on the street, with the attendant harms of that life. The John Jay study may not reflect the populations of CSEC in cities and areas other than New York. However, the study does indicate that approaches that rely mostly on enforcement of criminal laws against human trafficking and pimping will not likely solve many of the problems of young people who are exploited for commercial sex.

There has been a growing awareness of the value of special social welfare and juvenile court programs for girls found to be involved in commercial sex. It has been argued that treating

juvenile's engaged in prostitution as criminal offenders does little or nothing to address the underlying circumstances - homelessness, physical and sexual abuse, and drug and alcohol dependency - that bring minors to engage in commercial sex. Special collaborative courts can organize and monitor supervision and treatment of CSEC girls. Special STAR (Succeeding through Achievement and Resilience) courts have been implemented in Los Angeles as a pilot project that is reportedly being expanded. Alameda County has an established a Girls Court. New York has created a network of 11 Human Trafficking Intervention Courts for juveniles who are at least 16 years old.

This bill would create a model for more direct services provided to CSEC through the juvenile dependency and treatment process, rather than relying on the juvenile delinquency court system to intervene. SB 1110 (Hancock) would create three projects of Law Enforcement Assisted Diversion (LEAD) in which police take low level drug and prostitution offenders directly to a case manager for services and treatment. LEAD completely bypasses the criminal court system. Charges are not deferred or placed aside while the LEAD participant or client engages in the program. In Seattle, LEAD has been remarkably successful on multiple fronts. Recidivism over three years' time was nearly 60% lower for LEAD participants than for similar persons in the criminal justice system. The lives of LEAD participants are more stable and productive and LEAD areas safer. Providing services to sexually exploited minors more quickly and directly than under current practice may be effective.

6. Related Legislation Pending in the Assembly

There are two related bills pending in the Assembly - AB 1675 (Stone) and AB 1760 (Santiago). Hearing of AB 1760 in Assembly Public Health was postponed at the request of the author. AB 1675 was approved in Assembly Public Safety and has been referred to Assembly Appropriations.

The Assembly Public Safety Committee analysis of AB 1675 summarizes the bill as follows:

Requires a probation officer, in a case in which a minor is alleged to have committed the crime of solicitation, prostitution, or loitering with the intent to commit prostitution, to provide informal supervision for the minor, instead of requesting that the prosecutor file a petition declaring the minor to be a ward of the juvenile court.

Requires the probation officer to delineate a specific program of supervision for the minor.

The Assembly Public Safety Committee analysis of AB 1760 summarizes the bill as follows:

Directs a peace officer who determines that a minor is a victim of human trafficking to report such abuse, consult with a child welfare worker about a safe placement for the minor, and transport the minor to such placement, unless the minor is otherwise arrested. Specifies that the officer should provide information that the minor has committed crimes as a direct result of being a human trafficking victim to the district attorney's office for independent evaluation.