

## CRIMINAL PROVISIONS

### **POLICY GOAL:** Commercial sexual exploitation of children (CSEC) laws apply to traffickers and protect all minors under 18.

**Federal anti-trafficking laws provide criminal penalties for traffickers who commit commercial sexual exploitation of children (CSEC) offenses.** In addition to considering all children who experience commercial sexual exploitation to be victims of sex trafficking, federal law also outlines additional CSEC offenses under which a trafficker could be charged, including procuring, pandering, and transporting a minor intending for the minor to engage in commercial sex.<sup>1</sup> Child sex trafficking cases are complicated to investigate and prosecute, making it imperative for law enforcement and prosecutors to have a variety of crimes, covering an array of exploitive conduct, available to ensure offenders can be held accountable.

In alignment with federal law, states should ensure that traffickers are subject to CSEC laws in addition to laws prohibiting trafficking. By including CSEC offenses within the types of crimes for which traffickers can be charged, criminal justice stakeholders would be better equipped to identify, investigate, and prosecute human trafficking offenses within their jurisdictions as they would not have to rely solely on prostitution-related offenses or other general sex crimes that may not carry as heavy penalties or provide access to the relief available specifically for CSEC victims.<sup>2</sup> Having CSEC offenses as an additional tool for prosecutors to use in charging traffickers could have the additional benefit of enhancing and clarifying data collected on human trafficking cases from the enforcement perspective. It bears emphasizing that CSEC offenses should be charged *in addition* to sex trafficking offenses, where possible.<sup>3</sup>

Further, state CSEC laws must protect all persons under the age of 18. This would not only align with federal

anti-trafficking law that recognizes all persons under 18 as victims, but also other laws that offer recognition of the vulnerability of children under 18 and the incomplete maturation of their brains; such laws include prohibitions on cigarette and alcohol sales, execution of legally binding contracts, and military enlistment. Widely recognized is the fact that a teenager's brain is not yet fully developed, which impacts decision-making, impulsivity, risk-taking, and vulnerability; however, it is equally important to understand that a developing brain is more severely impacted and damaged by trauma, such as sexual violence, than an adult brain.<sup>4</sup> Damage to brain matter caused by trauma at a young age can further exacerbate impulsivity and increase the chances of substance abuse and depression, which can increase vulnerability to revictimization.<sup>5</sup> Traffickers often recognize these vulnerabilities and may specifically target those under 18, which underscores the importance of recognizing the vulnerability of all children under 18 years of age. State CSEC laws must, therefore, include all minors in the definition of "victim" without limiting applicability by requiring an additional actus reus (e.g., use of computer to solicit the minor, transporting the minor).

Notably, commercial sexual exploitation and sex trafficking victims may engage in conduct that violates CSEC laws for reasons such as coercion or duress, a coping/survival technique, or as a crisis reaction to trauma.<sup>6</sup> While this is a complex issue, states should consider addressing victim-offender intersectionality (VOI) within CSEC laws to avoid unfair criminalization of victims. This may include guidance on assessing for VOI as well as legal and practical alternatives to traditional criminal justice responses when VOI is identified.<sup>7</sup>

The effective prosecution of a survivor's trafficker(s) is an essential element to the survivor's access to justice and their perception of the criminal justice system.<sup>8</sup> Many child sex trafficking victims face the false perception in society that they are willingly engaged in prostitution, especially those who seem to be self-promoting online or those considered

victim-offenders.<sup>9</sup> Accordingly, trafficker-applicable CSEC offenses not only enhance the tools available to prosecutors as they seek justice for victims, but also ensure access to services for all victims of commercial sexual exploitation, dispelling misperceptions related to victimhood.<sup>10</sup>

## **DRAFTING CONSIDERATIONS:** *To accomplish this policy goal, state law should...*

- ▶ Ensure CSEC laws specifically address trafficker conduct.
- ▶ Ensure CSEC laws protect all minors under the age of 18.
- ▶ Ensure CSEC laws are not restricted by additional requirements, including use of a computer, transportation of the child, etc.
- ▶ Ensure CSEC laws include additional considerations on using a victim-centered approach to addressing victim-offender intersectionality.

## **RELATED ISSUES:**

- 1.2** Commercial sexual exploitation of children (CSEC) laws specifically criminalize purchasing or soliciting commercial sex with any minor under 18.

## **SUPPORTING RESOURCES:**

- ▶ [The National Report on Domestic Minor Sex Trafficking](#)
- ▶ [The U.S. Mid-Term Review on the Commercial Sexual Exploitation of Children in America](#)
- ▶ [A Legislative Framework for Combatting Domestic Minor Sex Trafficking](#)

<sup>1</sup> 18 U.S.C. §§ 1591, 2251(A), 2251, 2423(a).

<sup>2</sup> See SARAH GODOY, ET AL., *SHEDDING LIGHT ON SEX TRAFFICKING: RESEARCH, DATA, AND TECHNOLOGIES WITH THE GREATEST IMPACT* 29 (2016) (explaining how statutory misinterpretation and unfamiliarity with human trafficking can lead to under-investigation by law enforcement).

<sup>3</sup> See Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. LEGIS. 17, 71 (2017) (highlighting a federal case where a trafficker paid to have sex with a 14-year-old and had engaged in sex trafficking before, but prosecutors only charged him under the Mann Act rather than additionally charging him under the federal trafficking law).

<sup>4</sup> *Serving Teen Survivors: A Manual for Advocates*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER (2018), <https://www.nsvrc.org/sites/default/files/publications/2018-12/Serving%20Teen%20Survivors%20A%20Manual%20for%20Advocates.txt>. (last visited Nov. 11, 2020); Leonard Holmes, *How Childhood Abuse Changes the Brain*. VERY WILL MIND (2020) <https://www.verywellmind.com/childhood-abuse-changes-the-brain-2330401> (last visited Nov. 11, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> See SHARED HOPE INT'L, *RESPONDING TO SEX TRAFFICKING: VICTIM OFFENDER INTERSECTIONALITY* (2020).

<sup>7</sup> *Id.*

<sup>8</sup> INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL, *CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES* 146-149 (The National Academies Press 2013).

<sup>9</sup> *Myth and Facts About Trafficking for Legal and Illegal Prostitution*, Elijah Rising (2009) <https://www.elijahrising.org/resources/myth>.

<sup>10</sup> Farrell, A. PhD et al., *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, NAT'L INST. OF JUST. 144-154 (2012).