

Since 2011, Shared Hope has laid the foundation for transformational policy, practice, and cultural change by supporting state legislators and stakeholders to identify gaps in the fabric of laws needed to address child sex trafficking. The Report Cards on Child & Youth Sex Trafficking build upon the progress already made, challenging states to take the next step in the fight against sex trafficking by focusing on the area where the largest gaps remain—victim protections. This report provides a thorough review of South Dakota’s laws related to both criminalization and victim protections while providing recommendations for addressing gaps in the law.<sup>1</sup>



## ISSUE 1: Criminal Provisions

**Policy Goal 1.1** The child sex trafficking law is expressly applicable to buyers of commercial sex with any minor under 18.

S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) expressly applies to buyers of commercial sex based on the term “purchase.” It states,

No person may recruit, harbor, transport, provide, receive, purchase, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude . . . . Any violation of this section constitutes the crime of human trafficking. If the victim is under eighteen years of age, the crime of human trafficking need not involve force, fraud, or coercion . . . .

Further, following federal precedent, S.D. Codified Laws § 22-49-1 could apply to buyers based on the term “obtains.”<sup>2</sup>

<sup>1</sup> Evaluations of state laws are based on legislation enacted as of August 1, 2022.

<sup>2</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit specifically addressed whether 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

When the victim is a minor, S.D. Codified Laws § 22-49-1 is punishable under S.D. Codified Laws § 22-49-2 (First degree human trafficking – Felony), which states,

If a person is guilty of human trafficking under § 22-49-1 [Human trafficking prohibited], and the act:

- (1) Involves committing or attempting to commit kidnapping;
- (2) Involves a victim under the age of eighteen years;
- (3) Involves prostitution or procurement for prostitution; or
- (4) Results in the death of a victim;

the person has committed human trafficking in the first degree . . . .

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

South Dakota’s CSEC laws do not criminalize purchasing or soliciting commercial sex with a minor.

- 1.2.1 Recommendation: Enact a CSEC law that specifically criminalizes purchasing or soliciting sex with any minor under 18.

**Policy Goal 1.3** Commercial sexual exploitation of children (CSEC) laws apply to traffickers and protect all minors under 18.

Trafficker conduct is criminalized under S.D. Codified Laws § 22-23-2 (Promotion of prostitution), which states,

Any person who:

- (1) Encourages, induces, procures, or otherwise purposely causes another to become or remain a prostitute;
  - (2) Promotes the prostitution of a minor; or
  - (3) Promotes the prostitution of his or her spouse, child, ward, or other dependent person;
- is guilty of promoting prostitution . . . .

**Policy Goal 1.4** Mistake of age is not an available defense under sex trafficking and commercial sexual exploitation of children (CSEC) laws.

South Dakota law expressly prohibits a mistake of age defense in certain prosecutions for child sex trafficking but not CSEC. Pursuant to S.D. Codified Laws § 22-29-2 (First degree human trafficking – Felony – Attempt against minor), “any mistake as to the minor’s age is not defense to a charge of violating this section.”

- 1.4.1 Recommendation: Prohibit a mistake of age defense in all cases involving CSEC.

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

**Policy Goal 1.5** Use of a law enforcement decoy is not an available defense in child sex trafficking cases.

Although the trafficking law does not expressly prohibit an offender from raising a defense based on the use of a law enforcement decoy posing as a minor, South Dakota’s criminal attempt statute, S.D. Codified Laws § 22-4-1 (Penalty where not otherwise specified), could provide prosecutors with an alternative avenue to prosecute those cases. S.D. Codified Laws § 22-4-1 states, “Unless specific provision is made by law, any person who attempts to commit a crime and, in the attempt, does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration of that crime, is punishable for such attempt . . . .” Accordingly, an offender could be found guilty of attempting to commit a child sex trafficking offense if the offender committed an act in furtherance of child sex trafficking but was prevented from perpetrating the offense since the intended victim was a law enforcement decoy rather than an actual minor.

**Policy Goal 1.6** The trafficking law expressly allows for business entity liability and establishes a business-specific penalty scheme.

South Dakota’s trafficking laws do not expressly allow for business entity liability.

- 1.6.1 Recommendation: Ensure business entities can be held liable under state trafficking laws and establish a business-specific penalty scheme.

**Policy Goal 1.7** State law mandates that financial penalties are levied on sex trafficking and CSEC offenders and are directed to a victim services fund.

Financial penalties, including criminal fines, fees, and asset forfeiture, paid by convicted trafficking and CSEC offenders are not required to be directed into a victim services fund.<sup>3</sup>

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<sup>3</sup> Regarding asset forfeiture, S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests – Distribution of seized assets) provides for forfeiture of the following property in trafficking and CSEC cases:

Any person who is convicted of an offense under . . . 22-49-1 to 22-49-3, inclusive [relating to human trafficking, first degree human trafficking, and second degree human trafficking], . . . and 22-23-2 [Promotion of prostitution] . . . , or under 18 U.S.C. . . . 1591 [Sex trafficking of children or by force, fraud, or coercion] . . . , as of January 1, 2016, shall forfeit to the state, pursuant to chapter 23A-49, the person’s interest in the following and no property right exists in them:

. . . .

- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate any activity proscribed under 22-49-1 to 22-49-3, inclusive . . . ;
- (5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of . . . 22-49-1 to 22-49-3, inclusive . . . ;
- (6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed by . . . 22-49-1 to 22-49-3, inclusive, . . . and 22-23-2 . . . ; and
- (7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed 22-49-1 to 22-49-3, inclusive, . . . and 22-23-2 . . . .

Any property described in subdivision (1) of this section shall be deemed contraband and shall be summarily forfeited to the state. Property described in subdivisions (2), (3), (5), (6), and (7) is subject to forfeiture under the terms of § 23A-49-14 [(Procedure for filing summons and complaint for forfeiture of property)], and property described in

- 1.7.1 Recommendation: Statutorily direct a percentage of financial penalties levied on trafficking and CSEC offenders into a victim services fund.

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subdivision (4) is subject to forfeiture under the terms of § 23A-49-15 [(Procedure for filing summons and complaint for forfeiture of property)].

Distribution of forfeited property is governed by S.D. Codified Laws § 23A-49-20(1), (2) (Rights of attorney general in regards to forfeited property), which states,

If property is forfeited under this chapter, the attorney general may:

- (1) Retain the property for official use;
- (2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, provided that the proceeds be disposed of for payment of all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. All money seized or remaining proceeds from the sale of any forfeited property shall be paid into the following funds:

....

- (b) If seized pursuant to a violation of chapters 22-24A . . . , proceeds shall be used to reimburse the actual costs of the criminal investigation and prosecution, and any amount over those costs shall be used to satisfy any civil judgments received by the victims. All remaining proceeds shall be paid to the South Dakota internet crimes against children fund . . . .

However, state asset forfeiture laws do not direct a percentage of a sex trafficking or CSEC offender's forfeited assets into a victim services fund.



## ISSUE 2: Identification of & Response to Victims

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**Policy Goal 2.1** The definition of child sex trafficking victim in the criminal code includes all commercially sexually exploited children without requiring third party control.

The definition of child sex trafficking victim includes all commercially sexually exploited children without requiring third party control. S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) expressly applies to buyers of commercial sex based on the term “purchase,”<sup>4</sup> meaning a buyer can be charged regardless of whether a trafficker is involved or identified. As such, third party control is not required to establish the crime of child sex trafficking or, consequently, to identify a commercially sexually exploited child as a trafficking victim.

**Policy Goal 2.2** State law provides policy guidance to facilitate access to services and assistance for trafficked foreign national children.

South Dakota law does not provide policy guidance that facilitates appropriate responses to foreign national child sex trafficking victims.

2.2.1 Recommendation: Statutorily provide policy guidance that facilitates access to services and assistance for trafficked foreign national children.

**Policy Goal 2.3** State law mandates child welfare agencies to conduct trauma-informed CSEC screening for children at risk of sex trafficking.

South Dakota law does not require child welfare to conduct trauma-informed CSEC screening of system-involved children and youth who are at risk of sex trafficking.

2.3.1 Recommendation: Enact a state law requiring child welfare to screen system-involved children and youth at risk of sex trafficking for experiences of commercial sexual exploitation.

**Policy Goal 2.4** State law mandates juvenile justice agencies to conduct trauma-informed CSEC screening of children at risk of sex trafficking.

South Dakota law does not require juvenile justice agencies to conduct trauma-informed CSEC screening of children and youth who are at risk of sex trafficking.

2.4.1 Recommendation: Enact a state law requiring juvenile justice agencies to screen children and youth who are at risk of sex trafficking for experiences of commercial sexual exploitation.

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<sup>4</sup> See *supra* Policy Goal 1.1 for a full discussion of buyer-applicability under S.D. Codified Laws § 22-49-1.

**Policy Goal 2.5** State law prohibits the criminalization of minors under 18 for prostitution offenses and establishes a services-referral protocol as an alternative to arrest.

South Dakota law does not prohibit the criminalization of minors for prostitution offenses, nor does it establish a protocol requiring law enforcement to refer impacted children to a direct services organization or child-serving agency in lieu of arrest.

Although the core prostitution law is inapplicable to minors, commercially sexually exploited minors are still subject to juvenile justice processes in response to their victimization. S.D. Codified Laws § 22-23-1 (Prostitution – Penalty) states, “A person who is eighteen years of age or older and who engages in or offers to engage in sexual activity for a fee or other compensation is guilty of prostitution, a Class 1 misdemeanor.” However, S.D. Codified Laws § 26-8B-2(6) (Child in need of supervision defined) defines children accused of status offenses to include child sex trafficking victims, stating, “For purposes of this chapter, a child in need of supervision is a child . . . [w]ho engages in prostitution by offering to engage in sexual activity for a fee or other compensation.”

Minors, including commercially sexually exploited children, who are adjudicated as a “child in need of supervision” may face a variety of punitive dispositions, including probation, participation in a supervised community service program, or commitment to the Department of Corrections. S.D. Codified Laws §§ 26-8B-2(6), 26-8B-6. Consequently, while minors may not be prosecuted for prostituted for prostitution offenses under S.D. Codified Laws § 22-23-1, child sex trafficking victims may still be subject to punitive processes and outcomes for conduct in violation of the prostitution law.

- 2.5.1 Recommendation: Strengthen existing law to prohibit the criminalization of all minors for prostitution offenses and establish a services-referral protocol in response to minors engaged in commercial sex.

**Policy Goal 2.6** State law prohibits the criminalization of child sex trafficking victims for status offenses, and misdemeanor and non-violent felony offenses committed as a result of their trafficking victimization.

South Dakota law does not prohibit the criminalization of child sex trafficking victims for status offenses nor does it prohibit charging victims with misdemeanors or non-violent felonies committed as a result of their trafficking victimization.

- 2.6.1 Recommendation: Enact a law that prohibits the criminalization of child sex trafficking victims for status offenses, and misdemeanors and non-violent felonies committed as a result of their trafficking victimization.

**Policy Goal 2.7** State law prohibits the criminalization of child sex trafficking victims for sex trafficking and commercial sexual exploitation offenses, including accomplice and co-conspirator liability, committed as a result of their trafficking victimization.

South Dakota law does not prohibit the criminalization of child sex trafficking victims for sex trafficking and commercial sexual exploitation offenses, including accomplice and co-conspirator liability, committed as a result of their trafficking victimization.

- 2.7.1 Recommendation: Enact a law that prohibits the criminalization of child sex trafficking victims for sex trafficking and commercial sexual exploitation offenses, including accomplice and co-conspirator liability, committed as a result of their trafficking victimization.

**Policy Goal 2.8** State law provides child sex trafficking victims with an affirmative defense to violent felonies committed as a result of their trafficking victimization.

South Dakota law does not provide child sex trafficking victims with an affirmative defense to violent felonies committed as a result of their trafficking victimization.

- 2.8.1 Recommendation: Enact a law that provides child sex trafficking victims with an affirmative defense to violent felonies committed as a result of their trafficking victimization.

**Policy Goal 2.9** Juvenile court jurisdiction aligns with international human rights standards.

South Dakota law does not provide age-appropriate juvenile court responses for all minors accused of engaging in juvenile or criminal conduct. While South Dakota law extends juvenile court jurisdiction to all minors under 18 years of age, governing state statute establishes a minimum age of 10 years for jurisdictional purposes, permits direct file for older minors charged with certain felony offenses, and fails to require courts to consider the impact of trauma or past victimization in making discretionary transfer determinations.

	Minimum Age of Juvenile Court Jurisdiction	Maximum Age for Charging Youth in Juvenile Court	Automatic Transfers or Direct File	Discretionary Transfers	Requirement for Court to Consider Trauma or Past Victimization
<b>Summary</b>	10; “Delinquent child” is defined as, “any child ten years of age or older . . . .”	17	Yes. Minors: (1) Previously transferred to criminal court; or (2) 16+ years of age charged with a Class A, B, C or Class 1 or 2 felony offense.	Yes. Minors charged with felony offenses.	No.
<b>Relevant Statute(s)</b>	S.D. Codified Laws § 26-8C-2 (Delinquent child defined)	S.D. Codified Laws § 26-7A-1(6) (Definitions); S.D. Codified Laws § 26-8C-2 (Delinquency child defined)	S.D. Codified Laws § 26-11-4 (Transfer hearing – Factors and evidence considered – Disposition); S.D. Codified Laws § 26-11-3.1	S.D. Codified Laws § 26-11-4 (Transfer hearing – Factors and evidence considered – Disposition)	S.D. Codified Laws § 26-11-4 (Transfer hearing – Factors and evidence considered – Disposition)

Consequently, some minors may still be subjected to age-inappropriate juvenile court responses due to state laws that: (1) fail to establish a minimum age for juvenile court jurisdiction that aligns with international human rights standards; (2) allow some juvenile cases to be subject to direct file; and (3) do not require the juvenile court to consider past trafficking victimization or trauma when making a transfer determination.

- 2.9.1 Recommendation: Enact comprehensive state laws requiring age-appropriate juvenile court responses for all children accused of engaging in juvenile or criminal conduct.

**Policy Goal 2.10** State law defines child abuse to include child sex trafficking for purposes of accessing child welfare services.

South Dakota law does not include child sex trafficking or commercial sexual exploitation of children in the definition of “abused or neglected child.” Pursuant to S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child), “the term, abused or neglected child, means a child . . . [w]ho is subject to sexual abuse, sexual molestation,” which are not defined in the child welfare code, “or sexual exploitation as defined in § 22-22-24.3 . . . ,” which is not defined to include child sex trafficking or commercial sexual exploitation of children.

- 2.10.1 Recommendation: Amend the definition of “abused or neglected child” to expressly include child sex trafficking.

**Policy Goal 2.11** State law allows for child welfare involvement in non-familial child sex trafficking cases without hinging involvement on caregiver fault and provides for an alternative, specialized investigation in those cases.

South Dakota’s child welfare code does not allow for a child welfare response in non-familial child sex trafficking cases regardless of caregiver fault. Pursuant to S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child), the definition of “abused or neglected child” is limited to acts committed “by the child’s parent, guardian, custodian, or any other person responsible for the child’s care.” Further, a specialized investigation is not statutorily required for children reported to child welfare due to trafficking victimization perpetrated by a non-familial trafficker.

- 2.11.1 Recommendation: Statutorily allow for child welfare involvement in child sex trafficking cases regardless of parent or caregiver fault and provide for a specialized investigation in those cases.



## ISSUE 3: Continuum of Care

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**Policy Goal 3.1** State law mandates a process for coordinating access to specialized services for child sex trafficking victims that does not require involvement in child-serving systems.

South Dakota law does not mandate a process for coordinating access to specialized, community-based services for child sex trafficking victims that does not require involvement in a child-serving system.

3.1.1 Recommendation: Statutorily mandate a process for coordinating access to specialized services for child sex trafficking victims that does not require involvement in child-serving systems.

**Policy Goal 3.2** State law provides for a survivor-centered multi-disciplinary team response to child sex trafficking cases.

Although child sex trafficking victims could receive a multi-disciplinary team (MDT) response through a general MDT, South Dakota law does not require an MDT response specific to child sex trafficking cases. Pursuant to S.D. Codified Laws § 23A-28C-15 (Interagency multidisciplinary teams. Sharing information),

[A] team shall consist of law enforcement personnel, a representative of the prosecuting attorney's office, licensed or certified medical professionals, and any victim advocate. Any interagency multidisciplinary team formed to investigate crimes involving child victims shall also include child advocacy center staff where such staff is available in the region, Department of Social Services child protection staff, and licensed or certified mental health professionals. The team may include additional members at the discretion of the team if the additional member would benefit the victim. Each multidisciplinary team shall have written procedures and guidelines. . . .

3.2.1 Recommendation: Statutorily require a multi-disciplinary team response specific to child sex trafficking victims.

**Policy Goal 3.3** State law requires child welfare to provide access to specialized services for identified sex trafficked children and youth.

South Dakota law does not require child welfare to provide access to services that are specialized to the unique needs of child sex trafficking victims.

3.3.1 Recommendation: Statutorily require child welfare to provide access to specialized services for child sex trafficking victims.

**Policy Goal 3.4** State law requires the juvenile justice system to provide access to specialized services for identified sex trafficked children and youth.

South Dakota law does not provide access to specialized services for identified sex trafficked children and youth in the juvenile justice system.

- 3.4.1 Recommendation: Statutorily require the juvenile justice system to provide access to specialized services for identified sex trafficked children and youth.

**Policy Goal 3.5** State law extends foster care services to older foster youth.

South Dakota law extends foster care services to youth under 21 years of age through a continued foster care provision. However, these services are not extended to youth under 23 years of age as permitted under federal law.<sup>5</sup> Specifically, S.D. Codified Laws § 26-6-6.1 (Continued foster care for persons over the age of majority) provides,

Notwithstanding the provisions of §§ 26-1-1 and 26-7A-101, any child welfare agency, including the department of social services, may continue to provide foster care for a person over the age of majority but less than twenty-one years of age if the person was in foster care immediately prior to reaching the age of majority and has not yet completed the twelfth grade of school or is in a continuing course of remedial treatment and if the person consents in writing to continued foster care.

- 3.5.1 Recommendation: Strengthen existing law to better support transition age youth by extending transitional foster care services to youth under 23 years of age.

**Policy Goal 3.6** State funding is appropriated to support specialized services and a continuum of care for sex trafficked children regardless of system involvement.

The South Dakota state legislature did not appropriate funds to support the development and provision of specialized, community-based services and care to child and youth survivors.

- 3.6.1 Recommendation: Appropriate state funds to support the development of and access to specialized, community-based services to child and youth survivors of sex trafficking.

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<sup>5</sup> For more information, see Shared Hope Int'l, *Issue Brief 3.5: Continuum of Care*, <https://reportcards.sharedhope.org/wp-content/uploads/2022/10/2022-Issue-Briefs-3.5.pdf> (discussing federal laws that allow for funded foster care services to be extended to youth under 23 years of age).



## ISSUE 4: Access to Justice for Trafficking Survivors

### Policy Goal 4.1 State law allows trafficking victims to seek emergency civil orders of protection.

While civil orders of protection exist under South Dakota law, this protection is not expressly available to victims of child sex trafficking and CSEC.

- 4.1.1 Recommendation: Enact legislation expressly allowing victims of trafficking and CSEC to obtain ex parte civil orders of protection against their exploiters.

### Policy Goal 4.2 Ineligibility factors for crime victims’ compensation do not prevent victims of child sex trafficking and commercial sexual exploitation of children (CSEC) from accessing compensation.

South Dakota’s crime victims’ compensation laws provide victims of child sex trafficking with an exception to ineligibility for contributory conduct; however, CSEC victims are not likewise protected, and other ineligibility factors may still prevent child sex trafficking victims from accessing an award.

For purposes of accessing crime victims’ compensation, S.D. Codified Laws § 23A-28B-1(12)(a) (Definition of terms) defines “victim” to include “any person who suffers personal injury<sup>6</sup> or death as a direct result of . . . [a] crime, including a federal crime occurring in this state . . . .” “Crime” is defined under S.D. Codified Laws § 23A-28B-1(3) as follows:

[C]onduct that occurs or is attempted in this state, including that arising from domestic violence, human trafficking, and acts of terrorism, as defined in 18 USC § 2331 as of January 1, 1997, which conduct results in personal injury or death and is punishable as a felony or misdemeanor, or would be so punishable except that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this state . . . .

Despite this broad definition, certain ineligibility factors may still limit a commercially sexually exploited child’s ability to seek crime victims’ compensation. Pursuant to S.D. Codified Laws § 23A-28B-25(1), (2) (Circumstances not permitting compensation),

No claim for compensation may be awarded:

- (1) Unless an application for compensation is filed with the department within one year after the date of the personal injury or death and the personal injury or death was the result of a crime which had been reported to a law enforcement officer or agency within five days of its occurrence or, if the crime could not reasonably have been reported within that period, within five days of the date when a report could reasonably have been made. The department may waive the one year application requirement for good cause shown;
- (2) If the victim:
  - . . . .
  - (b) Committed or otherwise participated in a crime which caused or contributed to the victim’s injury or death;
  - (c) Fails or refuses to cooperate fully with any appropriate law enforcement officer or agency or

<sup>6</sup> S.D. Codified Laws § 23A-28B-1(11) defines “personal injury” as “actual bodily harm or emotional distress.”

with the department in the administration of this chapter. If a claimant other than a victim fails or refuses to cooperate pursuant to this subsection, no compensation may be awarded to that claimant; or

Notably, South Dakota law carves out an exception to ineligibility for contributory conduct. Because the exception is offense-specific, however, only victims of trafficking, not CSEC, will be protected. Specifically, S.D. Codified Laws § 23A-28B-25(2)(a) (Circumstances not permitting compensation) states,

No claim for compensation may be awarded:

....

(2) If the victim:

(a) Engaged in conduct which substantially contributed to the infliction of the victim's injury or death or engaged in conduct which the victim should reasonably have foreseen could lead to the injury or death. However, this subsection does not apply to . . . any victim of . . . human trafficking under chapter 22-49 . . .

4.2.1 Recommendation: Statutorily exempt victims of child sex trafficking and CSEC from ineligibility factors for crime victims' compensation.

**Policy Goal 4.3** Sex trafficked children and youth may vacate delinquency adjudications and criminal convictions for any offense arising from trafficking victimization.

Although South Dakota law allows child sex trafficking victims to vacate delinquency adjudications, vacatur is unavailable for criminal convictions arising from trafficking victimization, leaving sex trafficked youth without access to this important form of relief. Pursuant to S.D. Codified Laws § 26-7A-115.1 (Victim of human trafficking or sexual exploitation – Expungement of delinquency record),

A victim of human trafficking may petition the court directly or through a parent, guardian, or guardian ad litem, for the expungement of a delinquency record that resulted from being a victim of human trafficking, as defined in § 22-49-1 [Human trafficking prohibited], or sexual exploitation, as defined in § 22-22-24.3 [Sexual exploitation of minor – Consent or mistake not a defense – Penalty]. An expungement under this section vacates the underlying delinquency proceeding.

4.3.1 Recommendation: Strengthen existing law by allowing trafficking victims to vacate criminal convictions for any offense arising from trafficking victimization.

**Policy Goal 4.4** State law mandates restitution for child sex trafficking and commercial sexual exploitation of children (CSEC) offenses.

Restitution is mandatory in cases involving child sex trafficking but not CSEC.<sup>7</sup> Pursuant to S.D. Codified Laws § 23A-28-12 (Minor Victim's Medical, Psychological or Psychiatric Treatment or Foster Care – Sentence Requiring Payment),

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<sup>7</sup> Notably, S.D. Codified Laws § 23A-28-1 (Policy of State – Enforcement) states,

It is the policy of this state that restitution shall be made by each violator of the criminal laws to the victims of the violator's criminal activities to the extent that the violator is reasonably able to do so. An order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

Anyone convicted under . . . subdivision 22-49-2(2) [First degree human trafficking] . . . shall be required as part of the sentence imposed by the court to pay all or part of the cost of any necessary medical, psychological, or psychiatric treatment, or foster care of the minor resulting from the act or acts for which the defendant is convicted.

Restitution is available more generally to victims of other crimes under S.D. Codified Laws § 23A-28-3 (Restitution – Present inability to pay – Absence of pecuniary damages – Condition of parole); however, restitution under S.D. Codified Laws § 23A-28-3 is discretionary. It states,

If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant, in cooperation with the court services officer assigned to the defendant, promptly prepare a plan of restitution, including the name and address of each victim,<sup>8</sup> a specific amount of restitution to each victim and a schedule of restitution payments . . . . If the sentencing court orders the defendant to the state penitentiary and does not suspend the sentence, the court shall set forth in the judgment the names and specific amount of restitution owed each victim . . . .

4.4.1 Recommendation: Statutorily mandate restitution in CSEC cases.

#### **Policy Goal 4.5** State law provides child sex trafficking victims with a trafficking-specific civil remedy.

South Dakota law allows victims of child sex trafficking to pursue civil remedies against their exploiters. Pursuant to S.D. Codified Laws § 20-9-46 (Civil cause of action for wrongful human trafficking), “A victim of human trafficking pursuant to chapter 22-49 [Human trafficking], or any federal human trafficking offense, may bring a civil cause of action for wrongful human trafficking.” Further, S.D. Codified Laws § 22-24A-8 (Civil liability for sexual offense – Offenses creating liability) states,

Any of the following persons may bring an action for damages caused by another person’s conduct as proscribed by §§ . . . 22-24B-1 [“Sex crime” defined],<sup>9</sup> . . . 22-49-1 to 22-49-3 [Human trafficking], inclusive . . . :

- (1) The child;
- (2) Any parent, legal guardian, or sibling of a victimized child;
- (3) Any medical facility, insurer, governmental entity, employer, or other entity that funds a treatment program or employee assistance program for the child or that otherwise expended money or provided services on behalf of the child;

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<sup>8</sup> S.D. Codified Laws § 23A-28-2(5) (Definitions) defines “victim” as “any person . . . who has suffered pecuniary damages as a result of the defendant’s criminal activities . . . .” “Pecuniary damages” is defined under S.D. Codified Laws § 23A-28-2(3) as “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium. Without limitation, the term includes damages for wrongful death.” Lastly, S.D. Codified Laws § 23A-28-2(2) defines “criminal activities” as “any crime for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted. However, the term does not include petty offenses.”

<sup>9</sup> S.D. Codified Laws § 22-24B-1(9), (21)–(22) (Sex crimes determined) defines “sex crime” to include the following offenses:

- (9) Promotion of prostitution of a minor as set forth in subdivision 22-23-2(2);
- . . . .
- (21) First degree human trafficking as set forth in § 22-49-2 if the victim is a minor;
- (22) Second degree human trafficking as set forth in § 22-49-3 involving the prostitution of a minor;

(4) Any person injured as a result of the willful, reckless, or negligent actions of a person who knowingly participated in conduct proscribed by §§ . . . 22-24B-1, 22-49-1 to 22-49-3, inclusive . . .

The following types of damages may be recovered under S.D. Codified Laws § 22-24A-10 (Civil liability for sexual offenses – Types of damages recoverable):

- (1) Economic damages, including the cost of treatment and rehabilitation, medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, support expenses, accidents or injury, and any other pecuniary loss proximately caused by the proscribed conduct;
- (2) Noneconomic damages, including physical and emotional pain, suffering, physical impairment, emotional distress, mental anguish, disfigurement, loss of enjoyment, loss of companionship, services, and consortium, and other nonpecuniary losses proximately caused by the proscribed conduct;
- (3) Exemplary damages;
- (4) Attorneys' fees; and
- (5) Disbursements.

### EXTRA CREDIT



South Dakota law provides sex trafficked youth with a trafficking-specific civil remedy under S.D. Codified Laws § 20-9-46 and S.D. Codified Laws § 22-24A-8, which apply broadly to all victims of North Dakota's sex trafficking offenses regardless of the victim's age.



South Dakota law provides child labor trafficking victims with a trafficking-specific civil remedy under remedy under S.D. Codified Laws § 20-9-46 and S.D. Codified Laws § 22-24A-8, which apply broadly to all victims of North Dakota's trafficking offenses, including both sex and labor trafficking.

**Policy Goal 4.6** Statutes of limitation for criminal and civil actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.

South Dakota law lengthens, but does not eliminate, the statute of limitation for filing trafficking-specific civil actions; however, the criminal statutes of limitation for trafficking and CSEC offenses are not lengthened or eliminated.

Regarding civil actions, S.D. Codified Laws § 22-24A-13 (Civil liability for sexual offense – Statute of limitations) states, “Any action for damages under §§ . . . 22-24B-1 [“Sex crime” defined],<sup>10</sup> 22-49-1 to 22-49-3 [Human trafficking], inclusive, . . . shall be commenced within six years of the time the plaintiff knew, or had reason to know, of any injury caused by violations of [these offenses].” In contrast, S.D. Codified Laws § 15-2-14(3) (Action for personal injury, and various other actions – Three-year limitation) establishes a 3-year statute of limitation for personal injury actions.

For most criminal actions, including prosecutions for child sex trafficking and CSEC, S.D. Codified Laws § 23A-42-2 (Seven-year limitations period for other prosecutions) establishes a 7-year statute of limitation; it states,

In all other prosecutions for a public offense and all proceedings of a quasi-criminal or penal nature, including the forfeiture of existing rights, the proceedings shall be commenced within seven years after the commission of the offense or crime which is the basis of the prosecution or proceedings, except as provided in § 23A-42-3 [Forgery or theft – Limitations period commencing upon discovery of crime].

- 4.6.1 Recommendation: Strengthen existing law to allow prosecutions for child sex trafficking and CSEC offenses to commence at any time and eliminate the statute of limitation for filing trafficking-specific civil actions.

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<sup>10</sup> S.D. Codified Laws § 22-24B-1(9), (21)–(22) (Sex crimes determined) defines “sex crime” to include the following offenses:

- (9) Promotion of prostitution of a minor as set forth in subdivision 22-23-2(2);
- . . . .
- (21) First degree human trafficking as set forth in § 22-49-2 if the victim is a minor;
- (22) Second degree human trafficking as set forth in § 22-49-3 involving the prostitution of a minor;



## ISSUE 5: Tools for a Victim-Centered Criminal Justice Response

**Policy Goal 5.1** State law provides a child sex trafficking-specific hearsay exception that applies to non-testimonial evidence to reduce reliance on victim testimony.

South Dakota law does not allow non-testimonial, out-of-court statements made by a commercially sexually exploited child to be admitted into evidence in lieu of, or for the purpose of corroborating, the child's testimony.

5.1.1 Recommendation: Enact a hearsay exception that applies to non-testimonial evidence in cases involving commercial sexual exploitation of children under 18 years of age.

**Policy Goal 5.2** State law provides child sex trafficking victims with alternatives to live, in-court testimony regardless of the prosecuted offense.

South Dakota law provides commercially sexually exploited children with alternatives to live, in-court testimony; however, these protections are only available to younger minors. Specifically, S.D. Codified Laws § 26-8A-30<sup>11</sup> (Testimony of child by closed circuit television – When permitted – Hearing) permits the court to order the testimony of a child under 16 years of age to be taken by closed circuit television (CCTV), stating,

In any proceeding in which a child under the age of sixteen . . . is describing any act of sexual contact or rape performed with or on the child by another, any act of physical abuse or neglect of the child by another, any act of physical abuse or neglect of another child, any act of human trafficking of the child by another, or any act constituting a crime of violence<sup>12</sup> as defined in § 22-1-2 committed against the child or another child, the court or any party may move to allow that the testimony of the child be taken in a room other than the courtroom and televised at the same time to the courtroom by closed circuit television equipment. Prior to allowing the child to testify under this section, the court shall hold a hearing outside the presence of the jury and make a finding on the record that testimony by the child in the courtroom will cause the child to suffer more than de minimis emotional distress and that testifying under the provisions of this section is necessary to protect the welfare of the child.<sup>13</sup>

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<sup>11</sup> The text of S.D. Codified Laws § 26-8A-30 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1099 during the 2022 Regular Session of the South Dakota state legislature (effective July 1, 2022).

<sup>12</sup> S.D. Codified Laws § 22-1-2(9) (Definitions) defines “crime of violence” to include the following:

[A]ny of the following crimes or an attempt to commit, or a conspiracy to commit, or a solicitation to commit any of the following crimes: murder, manslaughter, rape, aggravated assault, riot, robbery, burglary in the first degree, arson, kidnapping, felony sexual contact as defined in § 22-22-7, felony child abuse as defined in § 26-10-1, or any other felony in the commission of which the perpetrator used force, or was armed with a dangerous weapon, or used any explosive or destructive device.

<sup>13</sup> Pursuant to S.D. Codified Laws § 26-8A-31 (Testimony of child by closed circuit television – Persons permitted to be present – Presence of defendant),

Further, S.D. Codified Laws § 23A-12-9<sup>14</sup> (Videotape of young sex crime victim’s testimony at preliminary hearing or deposition) allows for admission of a videotaped deposition to be admitted in lieu of live testimony, stating,

If a victim is less than sixteen years of age at the time of a preliminary hearing or deposition, a prosecuting attorney or defense attorney may apply for an order that the victim’s testimony at the preliminary hearing or deposition, in addition to being stenographically recorded, be recorded and preserved on video, if a defendant has been charged with a violation of:

- (1) Subdivision 22-22-1(1) or (5) [Rape];
- (2) § 22-22-7 [Sexual contact with child under sixteen]; or
- (3) § 22-49-2 [First degree human trafficking – Felony].

. . . . If, at the time of trial, the court finds that the victim is otherwise unavailable within the meaning of subdivision 19-19-804(a) [Exceptions to rule against hearsay – When declarant unavailable as witness], or that such testimony would in the opinion of the court be substantially detrimental to the well-being of the victim, the court may admit the video of the victim’s testimony at the preliminary hearing or deposition as former testimony under subsection 19-19-804(b)(1).

As noted above, however, older minors are excluded from protection under both S.D. Codified Laws § 26-8A-30 and S.D. Codified Laws § 23A-12-9, increasing their risk of re-traumatization from testifying.

- 5.2.1 Recommendation: Strengthen existing protections to allow all commercially sexually exploited children to testify by an alternative method regardless of the child’s age.

**Policy Goal 5.3** Child sex trafficking victims have access to victim protections in the criminal justice system.

	<b>Child sex trafficking victims have the right to a victim advocate</b>	<b>Child sex trafficking victims testifying against their exploiter are provided supports in the courtroom</b>	<b>Child sex trafficking victims’ identifying information is protected from disclosure in court records</b>
<b>Summary</b>	A victim or witness assistant provides various supports to crime victims and may	Victims under the age of 18 have a right to request a	Not statutorily required.

At the taking of testimony pursuant to § 26-8A-30, the public shall be excluded from the room in which the witness is testifying. The persons permitted to be physically present shall be determined by the court. The court, in its discretion, may permit in the room a person whose presence would contribute to the well-being of the witness or the reduction of apprehension of the witness during the testimony. Attorneys for the parties may not be excluded.

If the court makes a specific finding, outside the presence of the jury, that the presence of the defendant, or in a civil case, the presence of the respondent, in the same room as the witness, will cause substantial emotional distress to the child and that such distress would impair the ability of the witness to communicate, upon such finding the court may exclude the defendant from the room in which the witness is testifying. However, if the defendant is excluded, the testimony of the witness shall be by two-way closed circuit television such that the testimony of the witness is televised in the courtroom and simultaneously thereto, a monitor in the room in which the witness is testifying displays a view of the courtroom which view shall include the defendant. The right to have the defendant’s image televised in the room in which the witness is testifying is a right of the defendant which the defendant may waive. If the defendant is excluded from the room in which the witness is testifying, the court shall provide for instantaneous communication between the defendant and defense counsel.

<sup>14</sup> The text of S.D. Codified Laws § 23A-12-9 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1100 during the 2022 Regular Session of the South Dakota state legislature (effective July 1, 2022).

	accompany a victim in any criminal proceeding. The board of county commissioners may appoint a victim witness assistant to assist victims of crimes.	therapy dog accompany them during testimony.	
<b>Relevant Statute(s)</b>	S.D. Codified Laws § 23A-28C-8(5) (Victim or Witness assistant); S.D. Codified Laws § 23A-28C-7 (Victim or Witness assistant – Appointment)	S.D. Codified Laws § 23A-24-10 (Certified therapeutic dogs – Definitions)	None.

- 5.3.1 Recommendation: Statutorily require that child sex trafficking victims’ identifying information is protected from disclosure in court records.

**Policy Goal 5.4** State law provides for privileged communications between caseworkers and child sex trafficking victims.

South Dakota law does not provide for privileged communications between caseworkers and child sex trafficking victims.

- 5.4.1 Recommendation: Enact a child sex trafficking-specific caseworker privilege law that protects a child sex trafficking victim’s communications with a caseworker from being disclosed.



## ISSUE 6: Prevention & Training

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**Policy Goal 6.1** State law mandates statewide training for child welfare agencies on identification and response to child sex trafficking.

South Dakota law does not mandate statewide training for child welfare agencies on identification and response to child sex trafficking.

6.1.1 Recommendation: Statutorily mandate statewide training for child welfare agencies on identification and response to child sex trafficking.

**Policy Goal 6.2** State law mandates statewide training for juvenile justice agencies on identification and response to child sex trafficking.

South Dakota law does not mandate statewide training for juvenile justice agencies on identification and response to child sex trafficking.

6.2.1 Recommendation: Statutorily mandate statewide training for juvenile justice agencies on identification and response to child sex trafficking.

**Policy Goal 6.3** State law mandates ongoing, trafficking-specific training on victim-centered investigations for law enforcement.

South Dakota law does not mandate ongoing, trafficking-specific training on victim-centered investigations for law enforcement.

6.3.1 Recommendation: Statutorily mandate ongoing, trafficking-specific training on victim-centered investigations for law enforcement.

**Policy Goal 6.4** State law mandates trafficking-specific training on victim-centered investigations and prosecutions for prosecutors.

South Dakota law does not mandate trafficking-specific training on victim-centered investigations and prosecutions for prosecutors.

6.4.1 Recommendation: Statutorily mandate trafficking-specific training on victim-centered investigations and prosecutions for prosecutors.

**Policy Goal 6.5** State law mandates child sex trafficking training for school personnel.

South Dakota law does not mandate training on child sex trafficking for school personnel.

6.5.1 Recommendation: Statutorily mandate trafficking-specific prevention education training for school personnel.

**Policy Goal 6.6** State law mandates child sex trafficking prevention education in schools.

South Dakota law does not mandate child sex trafficking prevention education in schools.

6.6.1 Recommendation: Statutorily mandate developmentally and age-appropriate child sex trafficking prevention education in schools.

## State Laws Addressing Child Sex Trafficking

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1. S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) states,

No person may recruit, harbor, transport, provide, receive, purchase,<sup>15</sup> or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude. No person may benefit financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section. Any violation of this section constitutes the crime of human trafficking. If the victim is under eighteen years of age, the crime of human trafficking need not involve force, fraud, or coercion . . . .

2. S.D. Codified Laws § 22-49-2 (First degree human trafficking – Felony) states,

If a person is guilty of human trafficking under § 22-49-1 [Human trafficking prohibited], and the act:

- (1) Involves committing or attempting to commit kidnapping;
- (2) Involves a victim under the age of eighteen years;
- (3) Involves prostitution or procurement for prostitution; or
- (4) Results in the death of a victim;

the person has committed human trafficking in the first degree. A violation of the provisions of this section is a Class 2 felony . . . . Notwithstanding the provisions of § 22-4-1, any attempt to commit a violation of this section against a victim who is a minor is punishable in the same manner as the completed violation.

A Class 2 felony is punishable by imprisonment for up to 25 years and a fine of \$50,000. S.D. Codified Laws § 22-6-1(5) (Felonies – Classification – Penalties).

3. S.D. Codified Laws § 22-49-3(2) (Second degree human trafficking – Felony) states,

A person is guilty of human trafficking in the second degree if that person:

. . . .

- (2) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section.

Human trafficking in the second degree is a Class 4 felony.

A Class 4 felony is punishable by imprisonment for up to 10 years and a fine of \$20,000. S.D. Codified Laws § 22-6-1(7) (Felonies – Classification – Penalties).

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<sup>15</sup> S.D. Codified Laws § 22-49-4 (Penalty for hiring or attempting to hire someone to engage in sexual activity for a fee) also criminalizes purchasing sex but applies to adult victims based on the “force” requirement; it states,

It is a Class 6 felony for a person to hire or attempt to hire another person for a fee to engage in sexual activity . . . if the person knew or should have known the other person was being forced to engage in the activity through human trafficking.

## State Laws Addressing Commercial Sexual Exploitation of Children (CSEC)

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1. S.D. Codified Laws § 22-23-2 (Promotion of prostitution) states,

Any person who:

- (1) Encourages, induces, procures, or otherwise purposely causes another to become or remain a prostitute;
  - (2) Promotes the prostitution of a minor; or
  - (3) Promotes the prostitution of his or her spouse, child, ward, or other dependant person;
- is guilty of promoting prostitution. Promoting prostitution is a Class 5 felony.

A Class 5 felony is punishable by imprisonment for up to 5 years and a fine of \$10,000. S.D. Codified Laws § 22-6-1(8) (Felonies – Classification – Penalties).